

FBI OVERSIGHT

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-FOURTH CONGRESS
FIRST AND SECOND SESSIONS
ON
FBI OVERSIGHT

**CIRCUMSTANCES SURROUNDING DESTRUCTION OF THE
LEE HARVEY OSWALD NOTE—ATTORNEY GENERAL'S
GUIDELINES FOR FBI ACTIVITIES AND ADDITIONAL
LEGISLATIVE PROPOSALS—FREEDOM OF INFORMATION
ACT COMPLIANCE BY THE FBI AND PLAN TO ELIMINATE
BACKLOG—PRELIMINARY GAO REPORT ON FBI ACCOM-
PLISHMENTS AND STATISTICS**

**OCTOBER 21, DECEMBER 11, 12, 1975; FEBRUARY 11, MAY 13, 20, 27,
JUNE 10, JULY 20, SEPTEMBER 16, 29, 1976**

Serial No. 2

Part 3



Printed for the use of the Committee on the Judiciary

**U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1976**

R2-629

4521-9

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FBI OVERSIGHT

Circumstances Surrounding Destruction of the Lee Harvey Oswald Note

TUESDAY, OCTOBER 21, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m., in room 2226, Rayburn House Office Building, the Honorable Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, Badillo, Dodd, Butler, and Kindness.

Also present: Alan A. Parker, counsel; Thomas P. Breen, assistant counsel; and Kenneth N. Klee, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today, we continue this subcommittee's—

Mr. DRINAN. Mr. Chairman, if I may, I move that the Subcommittee on Civil and Constitutional Rights permit coverage of this hearing in full or in part by television broadcast, radio broadcast, or still photography or any such methods of coverage pursuant to Committee Rule V.

Mr. EDWARDS. Those in favor signify by saying aye.

[Ayes].

Mr. EDWARDS. Contrary?

[No response].

Mr. EDWARDS. The motion is carried.

Today, we continue this subcommittee's hearings on FBI oversight. Our most recent hearing involved the presentation of the General Accounting Office of their interim report on the domestic intelligence operations of the FBI. The final report and further hearings will be held later in November.

Today we have asked the Federal Bureau of Investigation to report to us on four areas of interest.

One. Allegations concerning a letter allegedly written by Lee Harvey Oswald several days before the assassination of President John F. Kennedy containing threats which was received by the Dallas office of the FBI and subsequently destroyed;

Two. Allegations indicating that Jack Ruby was a paid informer of the FBI;

Three. Allegation by William Walter regarding a telex received by the New Orleans field office warning the Bureau's southern field offices that there would be an assassination attempt;

Four. Allegations that all information available to the FBI was not fully disclosed to the Warren Commission.

It is for the benefit of the public and the Government agencies involved that these issues be clarified so that if legislation is needed, we will have the adequate background to deal with it intelligently.

If the personnel of the FBI violated their own rules or Federal statutes, then we must be sure that appropriate remedies for such actions exist within the Bureau and that the legal machinery exists within the Department of Justice to evaluate and prosecute if necessary.

We are happy to have with us today, representing the Federal Bureau of Investigation, James B. Adams, Deputy Associate Director.

Mr. Adams, who is your colleague?

Mr. ADAMS. Harold Bassett, Assistant Director in Charge of Inspection.

Mr. EDWARDS. Will you both rise and raise your right hands.

Do you solemnly swear that the testimony you are about to give this committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ADAMS. I do.

Mr. BASSETT. I do.

Mr. EDWARDS. Mr. Adams, you may proceed.

**TESTIMONY OF JAMES B. ADAMS, DEPUTY ASSOCIATE DIRECTOR,
FEDERAL BUREAU OF INVESTIGATION; ACCOMPANIED BY
HAROLD BASSETT, ASSISTANT DIRECTOR IN CHARGE OF
INSPECTION**

Mr. ADAMS. Mr. Chairman, I genuinely appreciate this opportunity to appear before your committee.

My purpose in being here is to be as helpful as I can in your efforts to resolve serious questions that have been raised about the FBI—questions arising from one of the gravest tragedies of our time, the assassination of President John F. Kennedy at Dallas, Tex., on November 22, 1963.

We welcome this opportunity because we sincerely believe in the integrity of the FBI, and that integrity requires an honest and complete statement of the facts for the American people.

We hope, as well, that these proceedings will help assuage at least some of the rumors and conjecture and doubts that have multiplied and spread so rapidly in this 12th year following President Kennedy's death.

Mr. EDWARDS. I wonder if the people in the back can hear Mr. Adams. Can they? Fine. Very good. You may proceed.

Mr. ADAMS. The first area in which you have expressed interest is that involving the alleged visit of Lee Harvey Oswald to the Dallas FBI Office prior to the assassination of President Kennedy.

We have just completed an exhaustive internal inquiry which leaves no doubt that Lee Harvey Oswald visited our Dallas Office some days prior to the assassination of President Kennedy and he left a hand-written note there for the special agent who was conducting our subversive activities investigation of him.

Director Kelley and I first learned of these occurrences on July 7, 1975, when an official of the Dallas Times-Herald met with us here in Washington. This newspaper official advised that an individual, whose identity he could not reveal, had told him that Oswald had visited the FBI office in Dallas sometime prior to the assassination; that Oswald left a note—allegedly threatening in nature—for the agent who had been handling our investigation of him; and that neither Oswald's visit nor the note was reported prior to or following the assassination of President Kennedy.

Having no knowledge of this event, the newspaperman was advised that we would inquire into the matter and furnish him an official response.

Mr. Kelley immediately personally informed Attorney General Edward Levi of these allegations. He also told the Attorney General that we were initiating an inquiry to determine the truth of these allegations; and he ordered the Assistant Director of our Inspection Division to personally take charge of this matter.

The first step in our inquiry was to conduct an extensive review of all file references to Oswald at our Washington headquarters and in the Dallas field office to determine if they contained any information concerning the alleged visit by Oswald and/or the threatening note.

They did not.

The second step was to identify, locate, and interview those persons within and without the FBI who logically might be able to shed light on this matter.

Since July 1975, nearly 80 interviews, including reinterviews of some persons, have been conducted.

The purpose and the thrust of those interviews was to determine the answers to these important questions:

One. Did Lee Harvey Oswald, in fact, visit the Dallas FBI office prior to the assassination?

Two. If so, did he leave a note—and what were its contents?

Three. What action was taken regarding the note?

Four. Was the note destroyed; and if so, by whom and at whose instruction?

Five. What were the motives behind the note's destruction?

The results of our inquiry convince us that the answer to the first question is an unequivocal "yes." We don't know the exact date or time, but we are confident that Lee Harvey Oswald did visit our Dallas field office in November 1963.

The testimony of Marina Oswald and Ruth Hyde Paine before the Warren Commission refers to the possibility of this visit. In response to a question concerning the FBI, Mrs. Oswald testified as follows:

Lee had told me that supposedly he had visited their office or their building. But I didn't believe him.

Mrs. Paine told the Warren Commission that Oswald "told me that he had stopped at the downtown office of the FBI and tried to see the agents and left a note. And my impression of it is that this notice irritated * * * that he left the note saying what he thought."

Mrs. Paine also testified that she "learned only a few weeks ago that he never did go into the FBI office."

Interviews that we have conducted in our Dallas office support the conclusion that Oswald visited the office prior to the assassination.

The employee who was serving as receptionist in that office in November 1963, stated that to her recollection about a week or 10 days before the assassination an individual appeared at the reception desk and asked to see one specific agent by name. Upon being told that the agent was out of the office, this individual left an envelope for the agent.

According to the receptionist, the envelope contained a note which she read and believed was signed "Lee Harvey Oswald."

She stated that she recognized the person who had called at the office as Oswald when she saw pictures of Oswald in the newspapers following the assassination.

Another person who was employed at the Dallas FBI office in November 1963, recalled that while entering the office about midday sometime before the assassination she saw a slender, dark-haired young man whom she later could assume was Oswald with the receptionist.

A third employee was alleged to have seen Oswald at the office, however, upon interview, denied that she did.

As to the wording of the note that was left at the Dallas office, accounts vary. The receptionist recalled its contents to be somewhat as follows:

Let this be a warning. I will blow up the FBI and the Dallas Police Department if you don't stop bothering my wife.

She recalls taking the note to the assistant special agent in charge. It was her recollection that he also read the note, commented that it was from a "nut," and told her to give it to the agent to whom it was addressed.

The assistant special agent in charge to whom the receptionist said she handed the note denied having any knowledge of it.

In addition, she expressed the belief that she also showed the note to three other employees of the Dallas office. These three employees were interviewed, and each denied having seen it.

The agent for whom the note was intended recalled its wording as,

If you have anything you want to learn about me, come talk to me directly. If you don't cease bothering my wife I will take appropriate action and report this to proper authorities.

This agent's supervisor, who claimed to have seen the note, said that he seemed to recall it contained some kind of threat but could not remember specifics.

Aside from these three persons—the receptionist, the agent, and the agent's supervisor—no one else who was interviewed admitted having seen the note. Some indicated they understood that the note contained a threat; however, this was hearsay knowledge, having come primarily from conversations they had had with the receptionist.

All who saw or heard the note agree there was no mention of President Kennedy or anything which would have forewarned of the assassination of the President.

In attempting to determine what action was taken regarding the note, we learned that the agent for whom the note was intended took no action other than to place it in his workbox—where it continued to reside on the day of the assassination.

This agent said that he participated in an interview of Oswald at the Dallas Police Department on the day of the assassination and returned to the field office about an hour later, where he went to the office of the special agent in charge.

He said that his supervisor was in the office with the special agent in charge. According to the agent, one of them displayed the threatening note and asked him to explain its contents.

By his account, he told them he had interviewed Marina Oswald and Mrs. Paine on November 1, 1963; and that when he participated in the interview of Oswald that day at the Dallas Police Department, Oswald, upon learning the agent's name, commented that he was the one who was talking to and bothering his wife—that if the agent wanted to know something about Oswald he should have come and talked to Oswald himself.

At this point, the agent claims, the special agent in charge ordered him to prepare a memorandum setting forth the information regarding the note and his interview with Marina Oswald and Mrs. Paine. He stated that he did prepare such a memorandum, three or four pages in length, and delivered it to the special agent in charge on the evening of November 22, 1963.

The secretary to whom the agent said he dictated this memorandum was interviewed. She said she had no recollection of the memorandum.

The agent's supervisor said that it was he who found the note in the agent's workbox very soon after the assassination of President Kennedy. He stated he took the note to the office of the special agent in charge but had no recollection where the note may have gone or who may have had it thereafter.

The agent involved, however, stated that approximately 2 hours after Oswald had been pronounced dead on November 24, his supervisor told him that the special agent in charge wanted to see him. He claimed that upon arriving in the special agent in charge's office, he was instructed by the special agent in charge to destroy both the note and the memorandum regarding it that he had given the special agent in charge on the night of November 22.

The agent has told us that he complied with these instructions and destroyed the note and the memorandum.

The supervisor has told us that he had no knowledge of the disposition of the note.

The special agent in charge, who retired prior to the receipt of the allegations in this matter, has denied having any knowledge of Oswald's visit to the Dallas office or of Oswald's leaving a note there. He maintains that he did not issue any orders to destroy the note. In fact, he claimed to have no knowledge of this entire matter until July 1975.

The personnel who were assigned to the Dallas office in November 1963, and who have admitted personal knowledge of the Oswald visit and the note, have denied having any knowledge that the facts of this matter had been brought to the attention of FBI Headquarters.

One employee did state, however, that she heard from an unrecalled source that a meeting was held one evening to decide what to do with the Oswald note. She named the purported participants, including an inspector from Washington. She qualified this information by saying that she had no firsthand information, that it was hearsay, and that

she did not desire it included in her sworn statement. That inspector, now retired, as well as the other alleged participants in this meeting, unequivocally denied having any knowledge of the Oswald visit, including the note and its destruction.

One former FBI official, who was an assistant director at the time of the assassination, has stated that he discussed the Oswald case many times with the special agent in charge of the Dallas office. According to this former official, the special agent in charge mentioned on one occasion that he had an internal problem involving one of his agents who had received a threatening message from Oswald because the agent was investigating Oswald.

The former official maintains that the special agent in charge seemed disinclined to discuss the matter other than to say he was handling it as a personnel problem with another individual who then held the rank of assistant to the director. This latter individual has denied under oath any such knowledge or action.

The same former Assistant Director said he thought it was common knowledge at FBI headquarters that a threatening message had been received from Oswald. When asked specifically who at our headquarters might have knowledge regarding this, he stated it probably would be people who were concerned with the supervision of the Lee Harvey Oswald case and the assassination. After searching his memory for the identities of agents who had such supervisory responsibilities, he named two such agents—both being in the headquarters division which he had headed at the time of the assassination. He commented that he had no direct knowledge that these agent-supervisors did, in fact, have this information, but felt it was possible they might because of their intimate involvement with the supervision of the ramifications involving Oswald.

Both of these agent-supervisors have been interviewed and denied such knowledge.

Our inquiry into this matter has included interviews with a large number of present and former FBI officials, including the entire still-living chain of command of the two investigative divisions at our headquarters which supervised the Kennedy assassination case. With the exception of the above-mentioned former assistant director, all have furnished statements denying any knowledge in this matter.

Whatever thoughts or fears may have motivated the concealment of Lee Harvey Oswald's visit to our Dallas office, as well as the concealment and subsequent destruction of the note he left there, the action was wrong. It was, in fact, a violation of firm rules that continue to exist in the FBI today—rules which required that the fact of Oswald's visit and the text of his note be recorded in the files of the Dallas office and that they be reported to our headquarters to be furnished thereafter to the Warren Commission.

The facts disclosed by our inquiry have been reported in full to the Department of Justice. The Department has concluded that this is not an appropriate case for criminal prosecution at this time.

We are at this very moment making our own assessment of the facts with a view toward initiating appropriate administrative action.

The committee has also expressed interest in allegations indicating that Jack Ruby was a paid informant of the FBI.

The best answer to such assertions is to quote from letters which Director Hoover sent to the Honorable J. Lee Rankin, the General Counsel of the Warren Commission in 1964.

In one such letter, dated February 27, 1964, Mr. Hoover called attention to background information contained on pages 155 through 159 of a report dated November 30, 1963, prepared by our Dallas office in the Kennedy assassination case. He told Mr. Rankin,

This information was obtained through a search of all files in the Dallas office wherein reference to Jack L. Ruby appeared. All available information concerning Jack Ruby contained in the Dallas files is set forth in the report.

Mr. Hoover's letter continued:

For your information, Ruby was contacted by an agent of the Dallas office on March 11, 1969, in view of his position as a night club operator who might have knowledge of the criminal element in Dallas. He was advised of the Bureau's jurisdiction in criminal matters, and he expressed a willingness to furnish information along these lines. He was subsequently contacted on eight occasions between March 11, 1969, and October 2, 1969, but he furnished no information whatever and further contacts with him were discontinued. Ruby was never paid any money, and he was never at any time an informant of this Bureau.

In another letter to Mr. Rankin dated April 7, 1964, Mr. Hoover again called attention to the fact that information on Jack Ruby had been furnished to the Commission in the Dallas office's report of November 30, 1963. This letter stated, "Copies of all of the records located wherein mention is made of Ruby prior to November 23, 1963, have been prepared and are being forwarded to you."

There was nothing in these Bureau records indicating that Ruby furnished information to the FBI as an informant or was ever paid any money.

As you can tell, this question was thoroughly explored by the Commission, and nothing to the contrary was developed.

You have also inquired concerning reports that Jack Ruby was involved in a union killing in 1939, which fact allegedly had now been furnished the Warren Commission.

Contrary to a misconception that has arisen, there is no evidence that Jack Ruby was involved as a participant in the shooting of a union official in Chicago, Ill., in December 1939. Nor did the FBI attempt to conceal information concerning Ruby's alleged involvement in this crime from the Warren Commission.

The truth of the matter is that the facts of this shooting incident were not known to the FBI at the time of the assassination of President Kennedy.

A check of the records of the Chicago Police Department disclosed no information concerning this shooting. However, on November 25, 1963—3 days after the assassination—our Chicago office found in the morgue of the Chicago Tribune information pertaining to the fatal shooting of a union official in 1939 in which mention of Jack Ruby, as "Jack Rubenstein," was made. Ruby was an employee of the union. He was a friend of the deceased union official, and according to the news account, was in no way implicated in the shooting.

This information was, in fact, furnished to the Warren Commission. It appears in the Commission's published report.

In addition, you have inquired about the much-publicized report concerning an alleged teletype message from FBI headquarters that was allegedly received in our New Orleans office on November 17, 1963.

The teletype purportedly warned that a militant revolutionary group might attempt to assassinate President Kennedy during his November 22 visit in Dallas.

This story emanates from a former FBI clerical employee. He worked in our New Orleans field office for about 4½ years ending in 1966. During November 1963, he was assigned to the early morning shift—12:15 to 8:15 a.m.—in that office as a security patrol clerk.

His story about the teletype first came to light early in 1968 when the then-District Attorney of New Orleans stated on a television program that the former FBI clerk had been interviewed by an attorney and had told the attorney of the teletype.

On February 1, 1968, the former clerk, who then was in Jacksonville, Fla., contacted our office there to deny this televised story. He admitted having been in contact with the attorney involved; stated that the attorney wanted him to furnish information concerning a teletype from FBI headquarters on November 17, 1963, reporting a threat to President Kennedy in Dallas; and told the special agent in charge of our Jacksonville office that he had never received or seen a teletype or other message containing the information which the attorney sought.

The following day, the former clerical employee also contacted our New Orleans office to advise of an additional contact he had had with the attorney involved. Our former employee claimed that he told the attorney he did not approve of what the attorney and his associates were doing—and that the information attributed to him on the television program was totally false.

The following month, however, he contacted the U.S. Attorney in New Orleans and told him and two associates that there was, in fact, such a teletype message. The teletype, he maintained, was received while he was on duty as a security patrol clerk in the New Orleans office on November 17, 1963—and that he called the special agent in charge of the office to advise him of its contents. This, the former employee claimed, caused the special agent in charge to instruct that he call certain agents and tell them to maintain contact with various informants.

At this point—in March 1968—an extensive inquiry was launched. It included a thorough check of the files at our headquarters and in the New Orleans and Dallas field offices. No record of a teletype or any other kind of communication reporting that there would be an attempt to assassinate President Kennedy in Texas could be found.

We additionally determined that only one communication was dispatched from FBI headquarters to the New Orleans office on November 17, 1963, which was a Sunday. This was a letter enclosing a translation of a document in conjunction with a trial in a totally unrelated fraud against the Government case. Since the former clerk had worked the 12:15 to 8:15 a.m. shift on November 17, 1963, a check was also made of communications dispatched to the New Orleans office on Saturday, November 16, 1963. There were only three, those being, first, a teletype in a fugitive case; second, a communication in a stolen motor vehicle investigation; and third, a communication concerning a military deserter. None of these communications made mention of President Kennedy.

More than 50 employees of the New Orleans office were interviewed—employees who had been assigned to that office since at least

November of 1963. All stated that they had no knowledge of any such teletype.

The special agent in charge whom the former clerical employee said he telephoned on the morning of November 17, 1963, also said he knew nothing whatever about the alleged teletype.

We also interviewed the former clerical employee involved. This time, he insisted that a teletype reporting a possible assassination attempt on the President was, in fact, received at the New Orleans office while he was on duty there November 17, 1963. He claimed that other clerical employees of the New Orleans office knew of the receipt of this teletype, but he refused to furnish their names.

When specifically questioned as to whether he had a copy of this or any other Government documents, he gave an emphatic denial and also denied ever having made copies of Government documents.

At that time—in 1968—we fully advised the Department of Justice of the allegations which the former clerical employee had made, and of the results of our extensive inquiry regarding them.

Now, more than 7 years later, the story of the phantom teletype has surfaced again. This time it has a new twist.

One of the newsmen who contacted us last month stated that our former clerical employee made available to him the text of the alleged teletype, claiming that he had an actual copy of the teletype but was afraid to furnish it for fear of being prosecuted.

In an effort to obtain the document which this former employee claims to have so that it can be examined for authenticity, the Department of Justice granted him immunity from prosecution for purloining, possessing, or not having produced the alleged document. The former employee was advised of this action on September 23, 1975. Even under a grant of immunity, he would not agree to make such document available to us, stating that he was not claiming he had any such document.

The following day we contacted the former employee's attorney. He informed us that his client had typed a precise copy of the alleged teletype when he had access to it in our New Orleans field office.

Other sources have furnished us with the text of the alleged replica that our former employee possesses. It has been carefully reviewed and compared with the format and wording of investigative and communications procedures in existence in 1963. Several variances have been detected.

This individual's story has caused newsmen and others to ask whether such a teletype was, in fact, sent from our Headquarters on November 17, 1963, and whether all copies of it subsequently were destroyed.

Since the information regarding the "phantom teletype" has now been expanded to include the text of the teletype, as well as its purported transmission to all FBI field offices—which incidentally was not the initial allegation of the former clerk in 1968—we contacted all 59 of our field offices and instructed that each conduct a thorough and detailed search of records and files in an effort to determine if such a teletype had in fact existed. Each of our 59 field offices uniformly advised based on the penetrative searches made that there was no evidence to indicate or corroborate the existence of such a teletype.

There is no doubt in my mind regarding the answer to this allegation. A teletype or other message of this nature sent to all of our offices simply could not and would not disappear. In the first place, FBI rules and regulations would prohibit its destruction. In the second place, the fact of its existence could not be wiped from the minds of the many employees at our headquarters and in each of our field offices who would have been involved in its preparation, approval, transmission, receipt, and the action taken thereafter.

These then are the facts developed concerning recent charges that have been made about the FBI's performance of duty in the John F. Kennedy assassination case.

In some instances, the facts are explicit and answer the allegations. In others, the passage of time and inconsistencies in the interviews prevent a more definite statement of truth.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Adams.

Let's refer to the Oswald letter, which I believe you would agree is a very serious matter.

Mr. ADAMS. Yes.

Mr. EDWARDS. Now, it was reported in the newspapers that Washington did learn of the Oswald letter delivered to the Dallas field office and that Mr. Hoover sent out letters of censure to 17 agents because of the incident, and that Mr. Hosty, the agent involved, was suspended without pay for 30 days and transferred.

Is there any truth to any of those statements?

Mr. ADAMS. You mean because of this letter in question?

Mr. EDWARDS. Yes.

Mr. ADAMS. There is no truth to that. There is nothing in our files, prior to this inquiry, that in any way has referred to Oswald's visit to the office, leaving a note, which was subsequently destroyed.

Mr. EDWARDS. Well, were some agents punished in the Dallas office?

Mr. ADAMS. Yes.

Mr. EDWARDS. After?

Mr. ADAMS. Yes, there was disciplinary action taken against a number of personnel in connection with the FBI investigation of Oswald, but not in connection with his visit to the office, leaving a note and—

Mr. EDWARDS. Well, on November 1—and incidentally, we are not going to try to get into names here, except where it is absolutely necessary or where a name or two has already appeared in the press—

Mr. Hosty visited the Paine residence in an attempt to locate Oswald. When the FBI reported to the Warren Commission the contents of Oswald's notebook, the FBI did not say, did not report to the Warren Commission, that in his address book was the following notation: "November 1, 1963. FBI Agent" and so forth. It gave "James P. Hosty and the address of the field office in Dallas." Why didn't the FBI report to the Warren Commission that this entry appeared in Oswald's address book?

Mr. ADAMS. I am advised that the first report was a summary and it did not appear in that, but it later did appear in information furnished to the Commission. I can verify that and give you that at a later date.

Mr. EDWARDS. Yes, would you, please?

Mr. ADAMS. I can give something for the record on it.

[See response to question 1 of the letter dated October 29, 1975, which is included in the appendix.]

Mr. EDWARDS. Because this happened to be the same agent that the note was addressed to—that is the missing note that was destroyed—we are interested.

Mr. ADAMS. Right. Yes.

Mr. EDWARDS. Mr. Butler?

Mr. BUTLER. Thank you, Mr. Chairman.

On page 3 of your statement, and on page 4, you tell us that you had interviews and reinterviews. Did the reinterviews indicate any inconsistencies from your original interviews with reference to your agents concerning this particular inquiry, that is, the Oswald note?

Mr. ADAMS. Yes, some of the reinterviews were occasioned by the fact we would conduct one interview and we would get the particular story. We had already interviewed someone else and perhaps some additional information would come up and then we would go back and reinterview that person. It also resulted in elaboration on the part of some who had been originally interviewed.

Mr. BUTLER. My question is directed to this. Do you have agents who gave different stories in 1963 from what they now tell us in 1975 with reference to this matter?

Mr. ADAMS. No; because actually we have nothing in the files—in other words, we have nothing in our files concerning this visit. This was a completely new issue which came out in July of 1975.

Mr. BUTLER. Well, those people who had some knowledge of this in 1963 and did not, in the course of their interviews in 1963, reveal knowledge of this, are they now telling you their knowledge?

Mr. ADAMS. That is right. It is inconsistent in the fact that this matter was not properly reported as it should have been in 1963 and now individuals are telling us that it did, in fact, occur. There is your inconsistency.

Mr. BUTLER. Yes, but you don't consider it was the responsibility of these agents to have volunteered that information?

Mr. ADAMS. Yes, I do.

Mr. BUTLER. What discipline have you taken with reference to them?

Mr. ADAMS. Well, we haven't because we have been waiting for the Department to decide as to whether any criminal action might flow from these events. We received their final opinion yesterday on that. Now, we are in the process of reviewing the matter from an internal administrative action standpoint because of the fact that you have individuals who had knowledge this took place and they did not report it at the time; individuals who had knowledge that that note was actually destroyed.

Mr. BUTLER. Do you find any indication that there was collusion with reference to the failure to volunteer this information, I mean, collusion at any level?

Mr. ADAMS. Only collusion from the standpoint that we do have an individual admitting that he did have the note and he makes the statement that he destroyed it upon instructions of his agent in charge. If that statement is correct, there would be collusion between the two. The agent in charge denies having issued such instructions and denies having any knowledge of it. You have individuals, a number of indi-

viduals, in the Dallas office who had knowledge of the fact that Oswald had visited the office and had left a note of some sort.

Mr. BUTLER. I understand this is generally shared information?

Mr. ADAMS. That is right.

Mr. BUTLER. And was not volunteered by anyone?

Mr. ADAMS. That is right.

Mr. BUTLER. Now was that because nobody was willing to take the initiative in this regard, or was there some general consensus, after discussion, among these people that maybe this is one of the things we wouldn't volunteer?

Mr. ADAMS. During Mr. Bassett's inquiries, we were unable to come up with any evidence of a meeting actually having taken place where a decision was made "Let's do all of this." This is one of the problems we have.

Mr. BUTLER. Well, it is one of the questions you really haven't answered, it seems to me.

Mr. ADAMS. That is true that—

Mr. BUTLER. Now, you also speculate the purpose of your inquiry was what the motives were behind the note's destruction. I see no answer to this. What conclusion did you come to with reference to that?

Mr. ADAMS. Well, that was another area that we were unable to satisfactorily answer. The one individual, the individual who actually destroyed the note, indicated that the motive was embarrassment to the Bureau and embarrassment to himself personally; that that was to avoid the embarrassment of having the fact known that Oswald had been in the office and no action had been taken concerning his visit to the office.

Did you come up with any other facts?

Mr. BASSETT. No, I did not.

Mr. ADAMS. That was the only—

Mr. BUTLER. That was protection to the individual's reputation within the Bureau?

Mr. ADAMS. That is right. And protection to the Bureau. His motive was he felt it would be embarrassing to the Bureau and embarrassing to him personally.

Mr. BUTLER. Yet, you are satisfied that the destruction of vital evidence and information of this sort does not involve a violation of any statute? Is that a crime?

Mr. ADAMS. Well, the matter was referred to the Department. The results of our investigation were referred to the Department for consideration of potential violations, but there is also a lapse of 12 years and the Department would have to answer—well, I can read you, if you would like, their letter which explains the declination. If you would like for me to—

Mr. BUTLER. No, I think not. The staff will share that with you later.

Mr. ADAMS. All right.

Mr. BUTLER. I would think that rather than going into executive session or anything of that nature, if you could share that with our staff, I think that would be sufficient for our purposes.

Mr. ADAMS. I would be glad to.

Mr. BUTLER. One other question which I have here deals with the clerical employee who has gotten us involved in the "phantom teletype."

Mr. ADAMS. Yes, sir.

Mr. BUTLER. Are his reports to you, in response to your inquiries under oath?

Mr. ADAMS. No, sir. Originally, he was interviewed, back in 1968. During the current resurrection of the teletype issue, I was personally in contact with him to advise him of the fact that the Deputy Attorney General had authorized immunity from prosecution if he would make this teletype available, which he claimed to have. He then claimed he didn't have it. And I asked him if he would be willing to be interviewed under oath concerning his allegations and also furnish me the names of these people that he now claims had knowledge of it, since he originally had refused to furnish them. And he said that he would agree to be interviewed under oath once he received the results of our 1968 investigation, which he had requested under the Freedom of Information Act. We have furnished him that. His attorney contacted him and he advised that he would still reserve the right to decide whether he will be interviewed under oath after he reviews the results. And he has not contacted me to date, concerning his willingness to be interviewed.

Mr. BUTLER. One more question, if I may, Mr. Chairman? Is the grant of immunity still alive, or has that been withdrawn, or does that have any present vitality?

Mr. ADAMS. I would have to consult with the Department. There was no condition attached to it. It was basically, if he would make it available promptly. Now, I don't know how long they are willing to leave it open.

But as far as I am personally concerned, I feel the only way this could ever be put to rest—when an individual claims something existed but had been destroyed, you have an uphill battle ever proving it never existed—is to give him immunity if he has an actual copy, which he originally claimed, any time he is willing to produce it, in order to get this matter authenticated or denied. I don't believe it exists. I was told he had a copy and that he was considering destroying it because of his concern over prosecution. And I went right to the Department to get authority for immunity. Then I am told he is not claiming he has such a copy.

Mr. BUTLER. Thank you, Mr. Adams, my time has expired.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Adams, the FBI did not give us this document until this morning, contrary to the Rules of the House, and Harold Tyler of the Department of Justice also broke that rule and apologized. So, if I am bringing embarrassment to the Bureau, I think that might be a good policy in some cases.

I think the key question here is the motives behind the destruction of the note. You skirt around that, and you state:

Whatever thoughts and fears may be motivated the concealment of Oswald's visit and the concealment and subsequent destruction of the note are unknown.

Well, the agent in charge said that he did this to avoid embarrassment to the Bureau. What kind of rules do you give to these people to avoid embarrassment to the Bureau at any cost? What embarrassment could have come to the Bureau?

Mr. ADAMS. Well, we don't give them any—first, let me apologize—

Mr. DRINAN. Why did he think that way then?

Mr. ADAMS. First, let me apologize for not giving you copies of this in advance. I was waiting for the Department to decide the criminal issues involved, which would have limited my testimony here today if further action was being considered. And I didn't get that until yesterday afternoon.

Mr. DRINAN. It severely hampers our power to inquire.

Mr. ADAMS. I realize that, and I try to comply every time in this regard. I have to apologize in this instance.

But, we don't have any rule concerning embarrassment of the Bureau. I think what happened—

Mr. DRINAN. Well, he had rules, sir. He had rules. And the only motive you have given as to this action is—

Mr. BUTLER. Mr. Chairman, I must object. Can the witness be entitled to complete his answer before he is interrupted. If that would be a ruling of the Chair, I would appreciate it.

Mr. EDWARDS. The time is Mr. Drinan's.

Mr. DRINAN. Mr. Adams?

Mr. ADAMS. Yes, I would like to explain that agents who work for the FBI, both agents and clerical employees, have a tremendous respect and love for the organization. I don't think you have to have an official promulgate rules saying that we should all be embarrassed if we make a mistake. I think we are embarrassed when we make a mistake. I am embarrassed over this incident where people failed to carry out their responsibilities in this regard. But, there isn't any order that you must conceal facts to avoid embarrassing the Bureau.

I just think that frequently it comes to a person's mind that "I hate to embarrass the Bureau by my actions." I think that is what he meant.

Mr. DRINAN. Am I right in concluding that you are suggesting that the only possible motivation—

Mr. ADAMS. No, sir, I am not.

Mr. DRINAN. All right, what is the other possible motivation?

Mr. ADAMS. I have been unable to arrive at motivations as to why this action was taken, because we have been unable to determine, for one thing, Mr. Drinan, the actual contents of the note. Had we been able to determine, with certainty, the contents of the note, then perhaps we would have been able to shed some light on the motivation as to why the action was taken to destroy the note.

Mr. DRINAN. I think you have a fairly good consensus as to what the note said.

Now, there are three people involved, and I suppose the question is whom will we believe, will we believe the agent? He destroyed the note because his supervisor or the special agent in charge told him to. Will we believe the agent's superior? He found the note in the agent's workbox shortly after President Kennedy's assassination, and he says he had never heard of it since. The special agent now says that he doesn't even recall the note being delivered, and yet there is a consensus that the note was, in fact, delivered. So the special agent's credibility is somewhat open to question. You are asking us to believe one of these individuals, however, you can't believe them all. That gets us down to the question of motivation. Unless you have some other motivation to offer, then we have to conclude that it is the rule of the FBI, and they drill it into the agents to never embarrass the Bureau, and this is what caused the unfortunate violation of the rules.

Mr. ADAMS. I think that would be a most unfair assumption and I can't agree with it. I can't see any basis for it.

Mr. DRINAN. Well, sir, I am looking for a motivation. Motivation is the key question here. Why did this particular agent do what he did? I can't find any other motivation.

From all that I have seen, he had no personal stake in this other than the fact that he didn't want it to come out to the Nation that the FBI had, in fact, been investigating Lee Harvey Oswald, that Lee Harvey Oswald had visited the Dallas office and left this note, and then this thing came up. So he destroyed it, thinking this was the best way out. It seems to me the burden is on you, sir, to suggest some other possible motivation.

Mr. ADAMS. I don't feel the burden is on me to do that. I can speculate. I could say, one, he has indicated personal embarrassment. He had received the note. Admittedly, he had received the note from Oswald. He said it did not contain any threat. If that is true, then there would have been no embarrassment, perhaps, in the fact that Oswald had visited the office afterwards. If the note did contain a threat, on the other hand, and he failed to take appropriate action, that would be a motive for destroying the note.

Mr. DRINAN. Could the embarrassment have come about in the irregularity of receipt of that note? I assume that whenever a letter is received that it is recorded somehow. We have no record that this was, in fact, recorded, and the date that it was received. Could that have been the reason that he didn't want to bring this out because the rules had been violated?

Mr. ADAMS. No, I don't think that the note would have necessarily been recorded until such time as he took action on it and included it in the official files of the FBI. In other words, the receptionist would not record the note when she received it. She delivered it to the agent and he would normally include it in a communication, or he would send it to the chief clerk's office, where it would be serialized into the files.

I wish we could arrive at a motivation. I wish we could completely answer, satisfactorily, what the note said, and who ordered its destruction. We have a conflict in sworn statements in this regard.

All that we were able to do was conduct a thorough investigation. And we are never satisfied when we don't get all the answers but, as you know, this isn't always possible.

Mr. DRINAN. My time has expired. Thank you, sir.

Mr. EDWARDS. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

First, I would like to clarify a question that has come up on several occasions in this subcommittee, and I have never been able to find the rule about which we are arguing. We have been talking so much about rules here this morning, I think we'd better get our own rules straight—112(g)(4) of the House rules states: Each committee shall, insofar as is practicable, require each witness who is to appear before it to file with the committee in advance of his or her appearance a written statement.

There is nothing that has been done by the Judiciary Committee in its rules to further supplement that action and there is nothing that has been done by the subcommittee. I am tired of seeing witnesses appear before this subcommittee and be embarrassed by the talk about

48 hours in advance furnishing their statements, when we don't have any such rule.

I appreciate the fact that the witness is dealing with the problem of proving a negative in some degree and it is also appreciated that a good deal of patience has been displayed here.

I thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Badillo: Have you finished?

Mr. KINDNESS. Yes.

Mr. EDWARDS. Mr. Badillo.

Mr. BADILLO. Thank you, Mr. Chairman.

You said, in the beginning, flatly, that you had just completed your exhaustive inquiry and that there is no doubt that Lee Harvey Oswald visited the Dallas field office some days prior to the assassination of President Kennedy and that he left a handwritten note. You stated that you and Director Kelley first learned of these occurrences on July 7, 1975. Is that correct?

Mr. ADAMS. Yes, sir.

Mr. BADILLO. That is a very narrow list. Can you say under oath that other people in the Washington Bureau did not know of these occurrences until July 7, 1975?

Mr. ADAMS. No, I can't, because included in my statement is the statement by one former Assistant Director who said that he apparently had some—

Mr. BADILLO. What I mean is, is there any evidence that Mr. Hoover—I mean, have you tried to determine whether Mr. Hoover knew about this?

Mr. ADAMS. No, we found no evidence Mr. Hoover knew.

Mr. BADILLO. Or the predecessor to Mr. Kelley?

Mr. ADAMS. Right. We have tried to find any record or any knowledge on the part of anyone concerning FBI headquarter's involvement in this issue. The only thing we have come up with is the statement by this former Assistant Director, who seems to think that possibly two agents in his division might have known about it. They have denied any knowledge of it. The former Assistant Director also says that he has no specific knowledge of any individual in headquarters knowing of this. He just thinks it was probably common knowledge down in this particular section that such a note existed. We don't know when that common knowledge might have arisen, in say, months or years after, when someone was transferred to headquarters from Dallas and—

Mr. BADILLO. But there is no file at central headquarters?

Mr. ADAMS. We had no record in our files of—

Mr. BADILLO. Where is this receptionist now?

Mr. ADAMS. She is in the Dallas office.

Mr. BADILLO. Where is the agent for whom the note was intended now?

Mr. ADAMS. He is in Kansas City.

Mr. BADILLO. And what is his title at the present time?

Mr. ADAMS. Special agent.

Mr. BADILLO. Still the same title?

Mr. ADAMS. Yes.

Mr. BADILLO. Where is the agent's supervisor?

Mr. ADAMS. The special agent's supervisor is in San Diego.

Mr. BADILLO. What is his title?

Mr. ADAMS. Special agent. He is still a special agent.

Mr. BADILLO. Where is the special agent in charge now?

Mr. ADAMS. He is retired.

Mr. BADILLO. Mr. Chairman, I think that in view of the fact that the letter from the Justice Department indicates the basic reason for nonprosecution is the statute of limitations and that the particular people who saw the note and who have testified allegedly as to the contents of the note are there, that this committee has the responsibility to bring these people before us and have the opportunity to interrogate them by ourselves, rather than just getting a secondhand report. They are there. This is a crucial issue. According to the testimony, they remember having seen the note and they remember that it contained some indication of violence; and I think it is important that we get direct evidence where the direct evidence is readily available.

Now, isn't there a rule that provides that where there is evidence of violence on the part of an individual, and where the President is going to be coming to town, that the FBI notifies the Secret Service?

Mr. ADAMS. At this time, in 1963, our guidelines were rather narrow in this regard. They provided basically for notifying the Secret Service of any threat against the President, against his family, or the Vice President.

Immediately following the assassination, Mr. Hoover ordered an inquiry be conducted by former Assistant Director Gale, who was in charge of the Inspection Division, and it was immediately recommended and also approved that our criteria for disseminating information to the Secret Service be broadened. And that recommendation and those criteria were subsequently incorporated into an agreement between the FBI and the Secret Service. We have such an agreement today. I can furnish the committee the guidelines by which we do today furnish information to the Secret Service.

[See response to question 2 of the letter dated October 29, 1975, which is included in the appendix.]

Mr. BADILLO. According to the testimony that you made here, the contents of the note were of a threatening nature that is; according to the testimony of the receptionist and the agent. Is that correct?

Mr. ADAMS. The receptionist felt it was threatening in nature and——

Mr. BADILLO. Well, the words are——

Mr. ADAMS. And it contained a——

Mr. BADILLO. Well, the words are:

Let this be a warning. I will blow up the FBI and the Dallas Police Department if you don't stop bothering my wife.

Is that threatening?

Mr. ADAMS. That is right, and I am not arguing with you. I am saying the receptionist did state it contained that. The agent, however, says it contained no threat. This was the agent to whom the note was delivered.

Mr. BADILLO. Excuse me, my time is running out, let me just conclude. Agent Hosty testified before the Warren Commission that he saw no reason to inform the Secret Service of Oswald's presence in Dallas, because Oswald had never been shown to have made any kind of violent statement.

Mr. ADAMS. That is correct.

Mr. BADILLO. Now, if this testimony is true, isn't that a contradiction of what Agent Hosty testified to?

Mr. ADAMS. Well, Mr. Hosty is the one who claims to date that the note contained no threats. He testified—

Mr. BADILLO. Who is Mr. Hosty in this sequence of events?

Mr. ADAMS. I feel that Mr. Hosty has been publicly identified and we discussed this before the meeting. Mr. Hosty is the case agent.

Mr. BADILLO. The agent in charge?

Mr. ADAMS. No, the case agent in this matter, to whom the note was delivered.

Mr. BADILLO. I see.

Mr. ADAMS. And Mr. Hosty testified before the Warren Commission that, since he was the case agent on the Oswald investigation, and he had no knowledge of any violent propensities on the part of Oswald. In his current statement, Mr. Hosty continues to state that the note which was given to him contained absolutely no threats. So there is no inconsistency in his statement. There is an inconsistency between what he said and what the receptionist said. The receptionist said it did contain a threat.

Mr. BADILLO. My time has expired.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Thank you.

Mr. ADAMS, on May 4, 1964, Mr. Hoover, the former Director of the FBI, transmitted a letter to Mr. Rankin, General Counsel of the Warren Commission, along with a list specifying 69 documents contained in FBI Headquarters files concerning Lee Harvey Oswald. Of those 69 documents, only 23 were reviewed by the Warren Commission. Did the FBI turn over the complete file of Lee Harvey Oswald of 69 documents to the Warren Commission?

Mr. ADAMS. As far as I know, I have not addressed myself to that specific issue, but let me check that.

I would have to check on that, Mr. Dodd.

Mr. DODD. I would like to make a request, Mr. Chairman, at this point that that file of 69 documents be turned over to the committee or whatever procedure is in order so that the file may be reviewed. I think it is an established fact that only 23 of the 69 documents were reviewed by the Warren Commission.

Mr. ADAMS. At their decision!

Mr. DODD. I don't know. That is the point I was trying to get. I would like to know whose decision it was. I am not sure you have the answer today, but—

Mr. ADAMS. No, but I will be glad to submit afterwards for the record a statement concerning that.

Mr. EDWARDS. Very good. We will communicate with you on that subject.

[See response to question 3 of the letter dated October 29, 1975, which is included in the appendix.]

Mr. DODD. According to a transcript of the January 22, 1964, meeting of the Warren Commission, Lee Rankin, General Counsel, reported that he had just received a call from Texas Attorney General Waggoner Carr reporting that "Oswald was acting as an FBI undercover agent." This report was also corroborated by the district attorney.

ney, Henry Wade. Rankin also reported that Carr told him that Oswald's badge number was 179 and that Oswald had been paid \$200 a month salary for his role as an FBI informant.

Was Lee Harvey Oswald ever an FBI informant?

Mr. ADAMS. Absolutely not. This was thoroughly covered by the Warren Commission and was included in the conclusions: The fact that he was not an informant.

Mr. DODD. Going back to a question raised earlier by the chairman, Lee Harvey Oswald had an address book of the names of various people. It has been reported that a page of that address book, containing the name of the agent in question regarding this particular letter that was destroyed, was in that address book and that that page was torn out. Do you have any information as to whether or not that is a fact?

Mr. ADAMS. No; I don't. Again, I will be glad to submit that, because, as you can understand, during the assassination investigation, we transferred 80 additional agents into Dallas, and we conducted 25,000 interviews and it is just not possible for me to have at the tip of my fingers—

Mr. DODD. You can see the thrust of my question. This gets back to the questions raised by Father Drinan earlier regarding why or what would motivate that particular agent to destroy that letter. I can understand that one particular agent may get concerned about something that may embarrass him, but in fact, the address book—but in fact the summary of names—the name of Mr. Hosty was deleted as being in Lee Harvey Oswald's address book. Now that was a decision by someone else other than Mr. Hosty, obviously, when you consider who was holding the evidence. That would indicate there was a motivation which went beyond the individual motivation of a particular agent, but rather a decision made at higher levels.

Mr. ADAMS. Well, Mr. Dodd, all I can say is subsequent to the assassination there have been many, many allegations. Each time one arises, we have continued to look into them. And I am sure this allegation, like the one that Oswald was an informant or like the one that keeps coming up that Ruby was a paid informant of the FBI—well, all I can do is take your inquiry and I will be glad to respond to it after review of the files.

Mr. DODD. But you don't have any information or any knowledge as to the exclusion of Mr. Hosty as being one of the names in that address book, as to why that was deleted from that summary?

Mr. ADAMS. I don't even know that it was deleted. I am just not familiar with that particular allegation.

Mr. DODD. What type of precautions would the FBI normally take if they had knowledge that a particular individual was capable of killing the President? We have seen a couple of instances just in the past month or so. What steps would be taken or what is your policy if they had information or if an agent was aware that someone was capable of that kind of activity; what steps or precautions would be taken?

Mr. ADAMS. If he was capable of it, if it fits our criteria for information requested of us, we would disseminate it to the Secret Service. The Secret Service has a protective responsibility and we have an intelligence responsibility of providing information to them accord-

ing to criteria they establish for the types of information they want to have in order to carry out their protective responsibilities.

Mr. DODD. Was that procedure followed, as far as you know, in the case of Lee Harvey Oswald?

Mr. ADAMS. Yes. As you probably recall, the FBI was criticized at the time although the action taken fit the criteria—I mean, we did not have any threat against the President—but the Warren Commission was critical of the fact that these criteria were too narrowly drawn. As a result, they have been broadened considerably concerning the types of information that we now furnish to the Secret Service. That was one of the points of criticism by the Warren Commission.

Mr. DODD. You mentioned that there is a letter from the former Director of the FBI to Mr. Rankin apparently regarding an inquiry surrounding Mr. Ruby. You pointed out in your testimony that there were eight occasions between March 11, 1959, and October 2, 1959, when Mr. Ruby was investigated or talked to by the FBI. Now, that is once a month or rather less than once a month during that period of time. Is it normal procedure to talk to someone once a month over a period of time such as that and then have no information or results that were obtained? Is that common practice?

Mr. ADAMS. Well, he was contacted originally because it was felt that he was an individual who would be able to provide criminal information to the FBI because of his employment as a night club operator. These contacts are standard to determine if he is going to be able to become an informant for the FBI. Once these contacts prove negative, although he indicated a willingness to cooperate, but he never furnished any information, then the file was closed. But this would be a normal developmental process of regular contacts with a person who may be in a position to furnish information.

Mr. DODD. But it is your statement that Jack Ruby, as well, was not a paid informant for the FBI at any time?

Mr. ADAMS. That is right. I saw a news item on it yesterday, where one of the Senators had made a statement again on it. And I checked with the Senate committee to find out if they know of anything in this regard that I don't know, and I haven't gotten any response in that regard indicating that there is anything to that effect. And I also called down to Dallas last night, to have them review the file again, just to make sure that I could testify today that there is nothing in that file indicating that Ruby was ever a paid informant or ever furnished any information, and I was assured that is the case.

Mr. DODD. My time has expired. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Adams, continuing along the lines of questioning pursued by Mr. Dodd, the letter that Mr. Hoover wrote to the Commission stating that Ruby was an informant and contacted on eight occasions, that letter or that information did not become a part of the Warren Commission Report. Is that correct?

Mr. ADAMS. It was submitted to the Warren Commission. I am not sure whether it was in the published report. I don't believe it was.

Mr. EDWARDS. Now, don't-you think that was most significant information and should have been in the Warren Commission Report? I know you didn't write it.

Mr. ADAMS. No, I have no idea what might have motivated them.

Mr. EDWARDS. It is curious, though. Also, when did this letter come to light to the public? I believe very recently. Is that correct?

Mr. ADAMS. I think this allegation has come up over the years. Last December was the first time——

Mr. EDWARDS. In December of 1974?

Mr. ADAMS. Yes.

Mr. EDWARDS. Can you think of any reason why this letter should have been suppressed all of this time?

Mr. ADAMS. No; I think that the Warren Commission probably had a lot of information which they considered basically work papers to go into their final report. Now, as these work papers are probably becoming more available to researchers, there will be other questions raised in the future. But I don't have any idea.

Mr. EDWARDS. Well, it is rather shocking when you think about it that you find out 12 years later that both the Warren Commission and the FBI knew that Jack Ruby had been reporting to the FBI and yet we have to wait all that time to find it out. It is the kind of disclosure coming about very late that adds to any paranoia that might be taking place in this country. Wouldn't you agree?

Mr. ADAMS. Well, on reporting, I would have to be a little picky over that word because in these contacts, because all of them were absolutely negative. He furnished no information of value. So he was not an informant of the FBI. He was being contacted to determine whether he would become an informant by furnishing us information.

Mr. EDWARDS. Yes, but this is the man who killed the man who allegedly killed the President of the United States.

Mr. ADAMS. That is right.

Mr. EDWARDS. Yet the people find out 11 or 12 years later that he was an FBI informant on at least eight different occasions.

Mr. ADAMS. Well——

Mr. EDWARDS. OK.

Mr. BUTLER. Mr. Chairman, may I? It is correct, is it not, that these contacts with Mr. Ruby were in each instance instituted or initiated by the FBI?

Mr. ADAMS. Yes.

Mr. BUTLER. And done in an effort to solicit information from him?

Mr. ADAMS. That is right.

Mr. BUTLER. And you got a negative response in each instance?

Mr. ADAMS. That is right.

Mr. EDWARDS. Yes; I agree. We should have been told about it. The public should have, somewhere along the line, been told.

Now, Mr. Adams, we were talking earlier about the Oswald letter and the fact that a number of agents were disciplined in the Dallas office as a result of some things that happened or did not happen in the investigation. How many agents were disciplined?

Mr. ADAMS. I really couldn't answer that. I am not prepared on that point. I do know that, after the assassination, Mr. Hoover asked that the matter be inquired into. And, of course, as a result of it, every little item was covered as to the handling of the investigation. I know that agents in Dallas were disciplined and I know that agents in Washington were disciplined.

Mr. EDWARDS. For what type of misconduct?

Mr. ADAMS. No misconduct as such; for failing to perhaps include Oswald on the security index; for delays of a few days in handling communications; for just a review of the case as to whether it represented the professional workmanship which would normally be expected, and I think the Commission in its report was critical along the same areas, that is, that the investigation of Oswald could have been more vigorous.

Mr. EDWARDS. Mr. Hosty was one of those disciplined?

Mr. ADAMS. Yes, sir.

Mr. EDWARDS. Now, Mr. Hosty also interviewed Oswald in the Dallas jail? Is that correct?

Mr. ADAMS. Yes, sir.

Mr. EDWARDS. Was he with the police for the entire time, I believe 17 hours, that Oswald was interviewed? Did you have an FBI agent there the entire time that Oswald was interviewed in the Dallas jail?

Mr. ADAMS. I don't know the answer to that, but I rather doubt it.

Mr. EDWARDS. Did Mr. Hosty write a report of the interview?

Mr. ADAMS. Yes.

Mr. EDWARDS. Is there a transcription of all of the interviews of Oswald in the Dallas jail by the Dallas police and the FBI?

Mr. ADAMS. I know the Dallas police submitted a lengthy report on their handling of Oswald after his arrest and I would assume that all of this material is in the Commission's files.

Mr. EDWARDS. Mr. Butler?

Mr. BUTLER. Thank you, Mr. Chairman.

With reference to the discipline of the agents, the discipline dealt with shortcomings in reference to the investigation and not what preceded the assassination. Is that correct?

Mr. ADAMS. Well, it was what preceded the assassination; in other words, the handling of the investigation of Oswald prior to the assassination.

Mr. BUTLER. That is the basis for the discipline?

Mr. ADAMS. Yes, sir.

Mr. BUTLER. Now, were there any extraordinary advancements following this? What has been the subsequent history, for example, of the special agent in charge? I know, I understand now he is retired, but what is the history of this man's record within the FBI following—

Mr. ADAMS. He was in that Dallas office continuously since the termination of the investigation from 1963 on up to his retirement, his recent retirement.

Mr. BUTLER. So, there was no advancement with reference to him in grade?

Mr. ADAMS. No.

Mr. BUTLER. Unless it was salary advancement?

Mr. ADAMS. No promotion.

Mr. BUTLER. The same is true of the other people who are involved in the inquiry with reference to the disposition of the note?

Mr. ADAMS. As far as the disposition of the note—

Mr. BUTLER. I mean, you have answered the question several times that these people remain special agents until their retirement or until present time. Well, did any of them—well, does the record indicate that any of them advanced rather rapidly?

Mr. ADAMS. No.

Mr. BUTLER. Or received preference in any way?

Mr. ADAMS. No.

Mr. BUTLER. And there is a way to determine whether there has been preference as a result of this?

Mr. ADAMS. That is right.

Mr. BUTLER. And none of that appears?

Mr. ADAMS. No.

Mr. BUTLER. I have no further questions, Mr. Chairman.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Could you tell us more about the highest official that you have interviewed in the FBI? You say on page 10 that he was an Assistant Director at the time of the assassination. How many Assistant Directors were there, roughly, at that time?

Mr. ADAMS. I would say 8 or 10.

Mr. DRINAN. So he is one of the highest officials of the FBI.

Mr. ADAMS. Yes, sir.

Mr. DRINAN. He stated that he discussed the Oswald case many times with the special agent in charge in Dallas, and that furthermore, this very high official, one of the top 8 or 10 in the entire FBI, stated that it was common knowledge at FBI headquarters that a threatening message had been received from Oswald, but that the special agent in charge seemed disinclined to discuss the threatening letter.

Now, can you elaborate on that? If he thought that it was common knowledge at the FBI headquarters, and I have no reason to doubt his veracity, then at what time was it common knowledge that this threatening letter had been received? Can we draw the inference that somebody in headquarters, knowing of this, spoke to the special agent in charge and maybe that is the reason he was disinclined to discuss it?

I mean, going back to what I said before, unless you give a motivation, people are going to infer motives that may not be correct, but they have to infer some motives. Now what would you say about the Assistant Director? Can his veracity be questioned?

Mr. ADAMS. Well, his veracity could be questioned by virtue of the fact that he says it was common knowledge, but yet we interviewed everyone in the chain of command of the two divisions supervising the investigation and they all deny having any knowledge of it. I don't think it is a question of veracity. I think it is—well, I don't know what it is. I don't know at what point he may have learned of this. Where he says he talked to the SAC many, many times, but this Assistant Director was supervising the Oswald aspect of the investigation, so he was on the phone frequently with the SAC in Dallas, so—

Mr. DRINAN. Was this before the assassination when he discussed the *Oswald* case?

Mr. ADAMS. No.

Mr. DRINAN. This was afterward?

Mr. ADAMS. Yes.

Mr. DRINAN. Obviously, that individual knew there had been a threatening letter received.

Mr. ADAMS. He says a message. He said a message and the SAC in Dallas indicated to him that he was disinclined to discuss it because he was handling it with the assistant to the Director.

Mr. DRINAN. Now, did he, one of the highest people in the FBI, know at that time that the message from Oswald had been destroyed?

Mr. ADAMS. No. He had no knowledge or claimed to have no knowledge regarding the destruction of the note.

Mr. DRINAN. Well, that doesn't quite add up because, according to this former official, the special agent in charge mentioned on one occasion he had an internal problem involving one of his agents who had received a threatening message from Oswald.

So, the Assistant Director did know in 1963 that a threatening message from Oswald had been received.

Mr. ADAMS. Right.

Mr. DRINAN. But he didn't know it had been destroyed?

Mr. ADAMS. No.

Mr. DRINAN. Why didn't he ask to see that?

Mr. ADAMS. Well, that is a good question.

Mr. DRINAN. Thank you.

Mr. ADAMS. And we asked that same question. And he indicated that after the assassination, there were rumors galore floating all around the place; there were all kinds of rumors as to what was going on and what didn't go on. And he pointed out how busy he was and how busy the agent in charge in Dallas was. And he said that during the course of his reporting on it that it never entered his mind concerning the fact that he had heard something about the fact that Oswald maybe left a threatening message at the office. But he just indicated that it didn't cross his mind.

Mr. DRINAN. With all due respect, sir, that doesn't quite add up, because he recalls all the other details about the threatening letter: about how this man was disinclined to discuss the matter, saying it was just a personnel problem. So how could he not have requested the threatening letter? You had this great national crisis and he didn't even ask to have the threatening message. It just doesn't add up. Questions added upon questions and—

Mr. ADAMS. Well, he said that it was being handled by the assistant to the Director over on the personnel-administrative side, and that he felt that it was just being handled.

Mr. DRINAN. He says that now?

Mr. ADAMS. No, I think that is in the statement, that is, that the SAC told him it was being handled—that is, he was disinclined to discuss it because it was being handled by an assistant to the Director, who would have been over on the administrative side, and he felt that the matter was being handled.

Mr. DRINAN. You add, as a bottom line, on page 12:

We are, at this very moment, making our own assessment of the facts with a view towards instituting appropriate administrative action.

I assume you have given us here all the facts you have. On the basis of these facts, sir, how do you make an assessment?

Mr. ADAMS. It is pretty difficult, but here are considerations. You have individuals who have admitted they had knowledge that Oswald had visited the office and left a note—and they failed to insure that it was properly reported to the Bureau and to the Warren Commission. So you do have an admission of wrongdoing on their part. Where the analysis gets difficult is that during the inquiry these people have

been truthful and owned up to the fact that they had such guilty knowledge—if you want to term it such, so do you now, 12 years later, discipline them for that, which some would say would be disciplining them for being honest. Also, Mr. Drinan, where you have a split of testimony, you can't take action because you really can't pass judgment. You also have a situation where over the years the FBI has expected employees to report misconduct on the part of other employees, although we have been criticized for this practice by some, and there is a question of whether you should still go in and take action to let them know that there is no statute of limitations for misconduct and that such wrongdoing will never be tolerated. And these are the considerations that Mr. Kelley will have to resolve and that we will have to have considerable discussions on to make sure that we are fair to the employees and at the same time make sure the system is such that we hopefully can prevent a recurrence.

Mr. DRINAN. I am constrained to ask: Will the principle of "don't embarrass the Bureau" be operational?

Mr. ADAMS. I hesitate to even answer that, because I think I have made it very clear that we have tried; that Mr. Kelley has established his credibility, that we have testified on matters that are embarrassing to anyone that is a part of the FBI. And I think the fact that we have made an open disclosure would bely any comment that we are overburdened with a great sense of "don't embarrass the Bureau."

Mr. DRINAN. My time has expired. Thank you, sir.

Mr. EDWARDS. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

To what extent do the FBI rules or any statutes of the United States require FBI personnel to report any misconduct on the part of FBI personnel?

Mr. ADAMS. It is an internal rule. It is in our rules and regulations.

Mr. KINDNESS. Is that rule available. Might that rule be made available to the subcommittee?

Mr. ADAMS. Yes, sir.

Mr. KINDNESS. I would appreciate it if that would be made a part of the record, Mr. Chairman.

Mr. EDWARDS. So ordered.

[See response to question 4 of the letter dated October 29, 1975, which is included in the appendix.]

Mr. KINDNESS. What is the sanction, ordinarily, under that rule for failure to report a violation or misconduct by another employee of the Federal Bureau of Investigation?

Mr. ADAMS. There is no sanction set out by specific penalties. It would depend largely on the type of misconduct that was involved, and whether failure to report permitted it to continue. It could depend on whether you were in a position to have prevented this or to have brought past misconduct to the Bureau's attention.

Mr. KINDNESS. In fact, it would be very difficult to apply such a rule in many cases, would it not be?

Mr. ADAMS. It would be, but we have, on a number of occasions in the past, censured employees by writing them a letter telling them that they are reprimanded because they had knowledge that certain activities were going on and that they should have properly reported it.

Mr. KINDNESS. In the course of investigations of matters even of

great national import, is it not ordinarily the experience that you find memories become a little cloudy after 12 years?

Mr. ADAMS. I can give you a good example of that, and that is in connection with Mrs. Paine's testimony. When she was contacted recently, she couldn't even remember first having testified to this statement. And here is a person directly connected with the facts of the matter. It required jogging of her memory. And it is just not unusual after 12 years, considering the hectic nature of the time, 80 extra agents transferred into the office and a short deadline, what with the President insisting that the FBI conduct a thorough and exhaustive investigation—I mean these situations are panic situations. And so the passage of time undoubtedly had a lot to do with the inability to come up with absolute facts.

Mr. KINDNESS. If you were confronted today with the information that a certain individual anywhere in the United States was upset with or mad at an FBI agent in any FBI office in a city where the President of the United States might be visiting in the near future, would you be inclined to connect that necessarily with the President's impending visit?

Mr. ADAMS. It would depend on the nature of the threat. The criteria we have are very broad at the present time and we apply them liberally. If someone, for instance, threatened a public official, that is the type of threat that we would immediately furnish to the Secret Service, because this person is obviously directing threats against public officials. So, under our current criteria, that would undoubtedly be disseminated.

Mr. KINDNESS. Had that occurred in 1963 in the case of Lee Harvey Oswald, could you explain to the subcommittee what action might have been taken by the Secret Service?

Mr. ADAMS. Well, had we notified the Secret Service—and the criterion then would not have provided for it—but, I am not familiar with the precautions that they would have taken then or even that they would take now. This is a matter that we have testified on before Senator Montoya's committee, because it is a very troublesome area. We have 400,000 persons a year arrested for crimes of violence in the United States. We have over 100,000 people released from penitentiaries each year in the United States. We have 400,000 people released from mental institutions, which should mean they are cured, but does indicate that a substantial number of our citizens do have psychological or emotional problems. And we have people that engage in protest and demonstrations against government officials. Well, that could represent a person who, if you attached it to emotional instability or criminal capability, that could represent or pose a threat. And all of these things to date mean that there is a large segment of the American public which could constitute a threat to the President at any given time. And it is the Secret Service's responsibility, in considering all of this wealth of information, Mr. Kindness, to try to apply the best judgment possible to weed out those that require the closest attention. So, I really don't know what they would have done under the circumstances, had we advised them of Oswald.

Mr. KINDNESS. Thank you, sir. My time is up.

Mr. EDWARDS. Mr. Badillo.

Mr. BADILLO. Who else, what other people were disciplined, aside from the Mr. Hosty?

Mr. ADAMS. Investigators?

Mr. BADILLO. Of these that you mentioned, were any of the other people? Was the Supervisor disciplined, or the Special Agent in Charge?

Mr. ADAMS. I believe the Agent in Charge was for some aspect; I believe the Supervisor mentioned here was; I believe the agent involved was; and I am sure that some of the others that we interviewed during the course of the investigation may have been.

Mr. BADILLO. Of these that were disciplined, they were specifically involved with the Oswald appearance and note. Now, would these actions, this discipline, be taken after a hearing?

Mr. ADAMS. After a hearing?

Mr. BADILLO. Yes.

Mr. ADAMS. No.

Mr. BADILLO. They just received a letter that told them they were disciplined? Did someone investigate? Was there a written report?

Mr. ADAMS. Yes, under our disciplinary procedures we obtain an explanation from an employee. And that explanation coupled with the Agent in Charge's recommendation, that is reviewed back at FBI headquarters and memorandums are prepared recommending appropriate action.

Mr. BADILLO. Discipline then comes from the headquarters in Washington?

Mr. ADAMS. Yes.

Mr. BADILLO. Was the Attorney General and the FBI Director at that time aware of these disciplinary actions?

Mr. ADAMS. The Attorney General would not be, because the FBI generally has been delegated the authority to manage its internal personnel matters.

Mr. BADILLO. Mr. Chairman, could we get copies of the report indicating the reasons for discipline? I ask that because it may contradict some of the testimony the witnesses made here. But it was a report around that time, and I think it is better evidence of what actually has taken place.

Mr. EDWARDS. Well, we will discuss that with the Bureau in the days to come.

Mr. BADILLO. Now, you say that Mr. Ruby was interviewed nine times from March 11, 1959, and eight other times. Since you are very precise about the times, or rather the letter from Mr. Hoover, was very precise, I assume you have records of those interviews?

Mr. ADAMS. Yes.

Mr. BADILLO. Mr. Chairman, I think we should get the 302 reports, as I believe they are called.

Mr. ADAMS. Not in this case.

Mr. BADILLO. What were they?

Mr. ADAMS. There would be just a notation as to the dates and a negative contact in this case.

Mr. BADILLO. Meaning no report was made?

Mr. ADAMS. No information; in other words, it was a negative contact. He was contacted for the purpose of obtaining information and—

Mr. BADILLO. Could we get copies of that, Mr. Chairman, just so we could see what other notations may have been made?

[See response to question 6 of the letter dated October 29, 1975, which is included in the appendix.]

You make a report only when you get positive information and not when you get negative information?

Mr. ADAMS. Well, no. If an informant gives us positive and negative information—I mean, once he has established a pattern of furnishing us worthwhile and substantial information, then he is actually called an informant and converted to an informant's status.

Mr. BADILLO. So he didn't get an informant's status?

Mr. ADAMS. Because he never furnished any information.

Mr. BADILLO. You mentioned on page 14:

A check of the records of the Chicago Police Department disclosed no information concerning this shooting.

You have no information concerning a shooting in December of 1939, but the Chicago Tribune has a front-page story on it. It has a picture of Jack Ruby and says:

Leon Cook left; a lawyer and former secretary of the Scrap Handlers and Junk Handlers Union was shot before the union offices and Jack Rubenstein, the present secretary, was seized for questioning.

Mr. ADAMS. Well, we did come up with the newspaper articles concerning it, and the articles that we had, they indicated that the information that came on the shooting came from him, because he was a friend of either the deceased or a friend of the individual who actually committed the shooting.

Mr. BADILLO. Yes, but it says that he was seized for questioning by the police department. You say the Chicago Police Department hasn't any record at all of the shooting?

Mr. ADAMS. That is right.

Mr. BADILLO. Or the people who were interviewed for questioning?

Mr. ADAMS. Well, this was back in 1939, I believe.

Mr. BADILLO. You mean that the records are not available?

Mr. ADAMS. The records today—I mean a check of the records at the time of the assassination failed to reveal any record of it in the Chicago Police Department, and that is why they had to go to the newspaper morgue to see, in view of the allegation, was there some publicity concerning this. And there was. And that is in the Commission's report.

Mr. BADILLO. Is that the normal procedure of police departments that they don't keep records beyond a certain time?

Mr. ADAMS. I am not familiar with the Chicago Police Department.

Mr. BADILLO. But I say other than the Chicago Police Department?

Mr. ADAMS. Some of them do have a practice of destroying records after a period of time if no charges are filed. And in this case I don't recall that there were actually charges against him, or charges were placed and dismissed.

Mr. BADILLO. My time has expired.

Mr. EDWARDS. I will yield to you in just a minute, Mr. Dodd.

Will you check and advise us, Mr. Adams, if there is in the Chicago Police Department a police report numbered 55513 for an offense dated December 9, 1939, and a detective report dated December 8, 1939. This, according to our information, is the file that Mr. Badillo referred to. It has been reported to the committee that there is a tickler

on the file that says that the FBI "is to be notified if anyone asks to examine that file." We would appreciate your advising us if the file does exist and if that tickler is there.

Mr. ADAMS. Yes.

[See response to question 7 of the letter dated October 29, 1975, which is included in the appendix.]

Mr. DODD. Thank you, Mr. Chairman.

Mr. ADAMS. My first question to you is regarding the letter to Mr. Rankin from Mr. Hoover outlining some 69 documents that the FBI had in its files concerning Lee Harvey Oswald. Among those documents was apparently a letter or a memorandum of one kind or another informing the FBI offices that the—I am referring to a letter specifically, which was one of the items not turned over to the Commission, a letter from the New Orleans Office to the Bureau, dated November 19, 1963, changing the office of origin of Lee Harvey Oswald's investigation from New Orleans to Dallas. Now, that is 2 days after this allegation of a telex coming across.

There has been a response in defense of the fact that there was not a telex to the effect that a warning of an assassination was transmitted on November 22, presumably after the assassination took place. Is that a fact? Was there a telex on November 22, after the assassination took place, warning of the assassination in Dallas?

Mr. ADAMS. No, what I think you may be referring to is in trying to analyze what could have caused this former clerk to have this impression, sir, we were looking for communications which he might have seen which might have caused him to confuse it with this.

Mr. DODD. Correct.

Mr. ADAMS. And there was a teletype that went out November 22 to all of our offices using somewhat the same terminology. This was after the President was assassinated. It said:

Assassination of President John F. Kennedy. All offices immediately contact all informants—security, racial, and criminal—as well as other sources for information bearing on the assassination of President Kennedy. All offices should immediately establish whereabouts of bombing suspects, all known Klan and hate group members, all known racial extremists, and any other individuals who, on the basis of information available in your files, may possibly have been involved.

Mr. DODD. This was after the assassination?

Mr. ADAMS. Right. And this uses similar terminology to what he claims was in the telex, which we can't find.

Mr. DODD. As a matter of operating procedure, would it be a common practice to send a telex to one office or to two offices? In other words, would a warning go out saying: "Beware" to Los Angeles or to San Francisco, "Beware, there may be an assassination attempt," and it not be sent to other offices? Is that possible?

Mr. ADAMS. Yes. For instance, on President Kennedy's travel, I think we had one once in Tampa, Fla., or Miami, where a threat was in that area where a Klansman was suspected of—

Mr. DODD. But you wouldn't warn Seattle, Wash., for instance?

Mr. ADAMS. No, this was directed at a particular threat.

In this particular situation, though, sir, the communication which he claims went out, was allegedly directed to "All SAC's" and among the inconsistencies in it was that in listing people to be contacted, the supposed teletype said: "Militant revolutionary group may attempt to assassinate President Kennedy on his proposed trip to Dallas, Texas."

But, it did not say: "Contact security informants." This would be the first group you would contact concerning militant groups.

Mr. DODD. I understand that, and I understand you wanted to check the other 59 offices, just to make sure something hadn't been sent out. But, in all likelihood—and I am just assuming here—if a message were sent warning of a potential assassination in Dallas, you really wouldn't be sending it to all of your offices throughout the country.

Mr. ADAMS. Yes, we would. In this case, based on his terminology, it indicated an unknown militant group. Therefore you would check informants in every office that might be able to come up with any information having a bearing on it, because militant groups travel all over the country.

Now, if he had said: "a militant group in Dallas is attempting to" and had a specific group, that would have gone to Dallas. But, with the broad terminology that was in his supposed teletype, that would have gone to all. In fact, the copy he has made available, the precise copy he claims he saw, is directed to all SAC's.

Mr. DODD. You mentioned in the questioning a few moments ago that Mr. Hosty was one of the people who interrogated Lee Harvey Oswald after his apprehension. I understand there were seven other FBI agents who interviewed him for more than 5 hours. I wonder if you have notes or copies of those interviews or were they tape recordings of those interviews?

Mr. ADAMS. I am sure every interview that was conducted would have been included in what we call a 302, a report of interview form.

Mr. DODD. Do you know if you have any of these or not?

Mr. ADAMS. I am sure we do.

Mr. DODD. Mr. Chairman, could I request that that information be submitted to the committee for inspection?

Mr. EDWARDS. We will discuss it with the Bureau in the days ahead. We have some problems with security and sometimes we have to go over there.

Mr. DODD. Well, whatever. My time has expired.

Mr. EDWARDS. Mr. Butler?

Mr. BUTLER. No questions.

Mr. EDWARDS. Mr. Badillo.

Mr. BADILLO. No further questions.

Mr. EDWARDS. Mr. Parker?

Mr. PARKER. Thank you. Mr. Adams, one matter pertaining to Mr. William Walter that was not covered in your prepared statement and which there have been allegations in the press that Mr. Walter was the subject of a polygraph examination. Did the Bureau give the polygraph examination to him?

Mr. ADAMS. No, sir. The Dallas Times Herald, the newspaper that he originally contacted upon the resurrection of this story did afford him a polygraph examination. According to the Dallas Times Herald, the polygraph examination was limited in the questions that he could answer because of an agreement between Mr. Walter and the polygraph examiner. And based on the result of that, there were indications of deception on the part of Mr. Walter. However, the examiner concluded the results were inconclusive because of the limited number of questions that could be asked.

Mr. PARKER. Is this your information due to the results of that examination having been supplied to the FBI?

Mr. ADAMS. It was in the Dallas Times Herald newspaper article that their investigative reporters prepared on it. We do not have the actual examiner's report.

Mr. PARKER. Mr. Adams, we have prepared a list of questions with regard to the procedures relating to the handling of material which is delivered to FBI offices; some questions in terms of your internal investigation; and some matters concerning FBI rules which are fairly extensive and thorough and which I will not have time to ask you at this point. There are questions also regarding some legal issues with respect to the violation of FBI rules. I would like to submit these questions to you and have them answered, either by affidavit or the continuation of the oath which you are now under. Also, we would like to have furnished to the subcommittee the names of all the individuals and their titles to whom you alluded in your statement. Also, in addition, we would like a copy of the Bureau's report and summary which was given to the Department of Justice concerning your investigation of the Oswald letter incident. All of that material, Mr. Chairman, I would suggest be turned over to the subcommittee. In order to facilitate its being turned over, and also to protect the individuals involved, I would request that it be deemed executive committee material.

Mr. EDWARDS. So ordered.

Mr. ADAMS. As far as the names are concerned, we will make those available in executive session or under executive protection. As far as the results of our investigation is concerned, this would be a decision decided upon by the Attorney General under his procedures. We will, upon receipt of your request, convey it to him.

Mr. EDWARDS. Mr. Klee.

Mr. KLEE. Thank you, Mr. Chairman.

Mr. ADAMS, to your knowledge, have any other papers, materials, or documents given to the FBI ever been destroyed?

Mr. ADAMS. That is a rather broad question. We do destroy material under our records destruction procedures. We do obtain information that is never actually made a matter of record in the FBI, which is destroyed, like informal notes, routing slips, papers like that. It is very difficult for me to zero in on a specific answer to your question.

Mr. KLEE. Well, in the context of the Oswald investigation or anything having to do with Jack Ruby, are there any other papers, material or documents that have been destroyed?

Mr. ADAMS. Not that I know of.

Mr. KLEE. OK. With respect to the papers, materials, or records that are not made a part of the FBI files or not made a part of the actual records, were there any papers in connection with the Oswald investigation or the Ruby case that were destroyed, to your knowledge? Were there any informal materials or papers?

Mr. ADAMS. Not that I know of. When agents conduct interviews, they make notes. Then when they dictate the results of those interviews, they destroy those notes. I don't know of any documents that were improperly destroyed.

Mr. KLEE. Either documents that are not made a part of the FBI records or files that are other than these insignificant and unsubstantial

type of routing slips? I am referring to another context, to perhaps some of the "do not file" types of instructions.

Mr. ADAMS. In years past there was a system where we had pink memoranda and blue memoranda which were to signify that the information included in the memoranda was for informational purposes only and was not to be made a part of the official records of the FBI. It would be like—it wasn't anything sinister—it would be like a training commitment, individuals' property records, or it could be background information going up on an action memorandum. It was for information only. But it wasn't necessary to include it as a matter of permanent record and—

Mr. KLEE. Are there such memoranda pertaining to the Oswald and Ruby cases?

Mr. ADAMS. Not that I know of; not that I know of personally.

Mr. KLEE. Thank you very much. Mr. Chairman, I have no further questions.

Mr. EDWARDS. Mr. Adams, I will refer once more to the address book that Oswald had at his boarding house, and in it was Mr. Hosty's name and the address and phone number and the license number of the FBI car that Mr. Hosty was driving. I refer you to a meeting of the Warren Commission on February 24, 1964, where Mr. Rankin says:

As you recall, we informed you before that the address and telephone number book of Lee Harvey Oswald had in it the name of James Hosty, the FBI agent, his telephone number; his license; and that it wasn't in the transcription of that information which was furnished to us by the FBI. We have written to the FBI to ask in an official inquiry how this could happen and for them to furnish us all the information concerning that occurrence. We have not received a reply yet.

Later Mr. Hoover did answer to the best of his knowledge as to why it was not included in the information. But we have that, and we have this very perplexing matter of the Oswald note; and then we have developed this morning again that the Jack Ruby information, which for 10 years was really kept secret from the American people, that he was an informer for the FBI and had been reporting to the FBI on at least seven or eight occasions. We have also the fact, which is new to me, and I am sure to most people, that there were a number of agents disciplined after the assassination investigation.

Now, in all the FBI files relating to Lee Harvey Oswald, is there any information whatsoever that he might have been some sort of a Government agent or paid by any other governmental agency, such as the CIA?

Mr. ADAMS. To my knowledge, no. I have not reviewed the entire assassination file. All I can go on is the fact that this allegation was made during the Commission hearings and the Commission specifically addressed itself to that, and in their conclusions they concluded that there was no evidence whatsoever of Oswald ever being an informant or agent of the FBI or CIA or any other governmental agency.

Mr. Dobb. Mr. Chairman, could I pursue one point?

Mr. EDWARDS. Yes.

Mr. Dobb. You know the Warren Commission--looking over the record of the Warren Commission--and the transcript is alive, fortunately--but the transcript indicates that an effort was made to purge the record of any mention of the fact that Lee Harvey Oswald was a

paid informant. I am sure you are familiar with what I am talking about in the record itself.

Mr. ADAMS. No.

Mr. DODD. Well, there is an effort to exclude that information from the transcript and to exclude raising the allegation of the fact that Mr. Oswald was an informant.

Mr. ADAMS. No, I am not familiar with that. I would have to review it specifically, to see what the issue is. All I am familiar with is the conclusion, which I had occasion to read this morning. I have not read the material submitted to the Commission on this issue.

Mr. DODD. Thank you, Mr. Chairman.

Mr. EDWARDS. Are there any further questions? Thank you, then, Mr. Adams.

Mr. DODD. Mr. Chairman, let me just read to you the following. Mr. Dulles, on page 244 of the record says: "I think the record ought to be destroyed. Do you think we need a record of this?" This dialogue just goes back and forth. You are not familiar with that at all?

Mr. ADAMS. No, I am not. The fact that I am not doesn't mean that I have read it and forgotten it. This investigation took place quite a few years before I took over my present responsibilities and I hadn't had any specific responsibilities in connection with the investigation until last year. And I don't think anyone has gone back and reviewed the entire scope of it.

We take allegations from time to time that come up, such as the one, for instance, bums in a boxcar could be the individuals involved. Then when they come up, we investigate them, and we furnish the results to the Department or, in that case, to the Rockefeller Commission that was going into the CIA and—

Mr. DODD. I appreciate all that, Mr. Adams. It seems to me that this is a tremendously significant revelation, that is, the fact that there were eight or nine occasions that Mr. Ruby was interviewed by the FBI; of the fact that the revelations of the letter warning that FBI agent in Dallas of some extremely hostile activity in the part of Mr. Oswald was destroyed, and so on. These are significant revelations, and they involve, as you pointed out in your opening sentence, one of the most tragic incidents in the history of this country. Then we see a record where again efforts are made to purge or not allow certain information to be included in the Warren Commission Report.

These are tremendously significant points, and I might add, they are painful to the American public. I don't know anyone who is dying to see revelations regarding involvement by any governmental agency; but, I think the facts should be made known.

Mr. ADAMS. Well, what I have offered to do—that is to say, I didn't come here prepared to discuss that, because I couldn't possibly come prepared to discuss every aspect of the assassination. But, I will be glad to take your question. I am sure if the issue has been raised before, we have inquired into it and conducted appropriate inquiries. If not, we should conduct one now. I will be glad to inquire into it and furnish you the results.

Mr. DODD. Thank you.

Mr. EDWARDS. Thank you, Mr. Adams and Mr. Bassett.

[Whereupon, at 11:30 a.m., the subcommittee recessed, subject to the call of the Chair.]



FBI OVERSIGHT

Circumstances Surrounding Destruction of the Lee Harvey Oswald Note

THURSDAY, DECEMBER 11, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2226, Rayburn House Office Building, the Honorable Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Seiberling, Drinan, Badillo, Dodd, Butler, and Kindness.

Also present: Alan A. Parker, counsel; Thomas P. Breen, and Catherine LeRoy, assistant counsel; and Kenneth N. Klee, associate counsel.

Mr. EDWARDS. The committee will come to order.

Mr. DRINAN. Mr. Chairman, if I may. I move that the Subcommittee on Civil and Constitutional Rights permit coverage of this hearing in full or in part by television broadcast, radio broadcast and still photography or by any such methods of coverage pursuant to committee rule V.

Mr. EDWARDS. Without objection, the resolution is adopted.

Early in July 1975, Tom Johnson, who was publisher of the Dallas Times Herald stated that somebody called him about a letter or note that Lee Harvey Oswald delivered to the Dallas field office in November 1963, shortly before the assassination of President Kennedy, and although the wording of the note was in dispute, I think that it is generally agreed it was threatening. But President Kennedy was not mentioned in it.

On October 21, 1975, Mr. James B. Adams, who is the Deputy Associate Director of the Federal Bureau of Investigation, came to this subcommittee and testified, under oath, about the FBI's inquiry into the subject of the Oswald letter.

The thrust of the FBI's inquiry, according to Mr. Adams, was: Did the incident take place? If so, what were the contents of the note, was it destroyed, and if it was destroyed, who destroyed it, by whose instructions, and lastly, what were the motives behind the destruction of the note?

Mr. Adams stated that the FBI had concluded that, yes, Oswald did visit the FBI headquarters. He left the note, and the note was destroyed after the assassination.

The subcommittee wants to hear directly from those involved, under oath, what did happen. We are going to have that opportunity today and tomorrow.

I might point out that the FBI has fully cooperated in making arrangements for the witnesses who are still employed by the FBI, and we appreciate their cooperation for this important inquiry.

Our first witness will be Mrs. Nanny Lee Fenner, who was the receptionist at the Dallas field office in November 1963, and who, I understand, was the first person who saw and read the Oswald note.

Mrs. Fenner, would you please take the witness chair?

**TESTIMONY OF NANNY LEE FENNER, RECEPTIONIST. DALLAS
FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATION**

Mr. EDWARDS. Do you solemnly swear the testimony that you are about to give to this subcommittee will be the truth, the whole truth and nothing but the truth, so help you God?

Mrs. FENNER. I do.

Mr. EDWARDS. Mrs. Fenner, the subcommittee has provided you with a portion of Rule XI of the House rules and a copy of the rules of the House Committee on the Judiciary. It is my understanding that you appear unrepresented by counsel here today, and I want you to know that you are entitled to be represented by counsel, if you so desire.

Are there any opening statements by any members?

[No response.]

Mr. EDWARDS. If not, it is the opinion of the Chair, that the best procedure to be followed since Mrs. Fenner does not have a statement is to permit our counsel, Mr. Parker, to ask a number of questions to set the scene.

Is there any objection to that procedure?

[No response.]

Mr. EDWARDS. Mr. Parker, you are recognized.

Mr. PARKER. Thank you.

Mr. KINDNESS. I thought Mrs. Fenner was going to say something in response to your—

Mr. EDWARDS. I am sorry.

Mrs. FENNER. I am happy in not being represented by counsel.

Mr. EDWARDS. Thank you, Mrs. Fenner.

Mr. Parker.

Mr. PARKER. First, Mrs. Fenner, I think it might be helpful if you will hold the microphone a little closer to you because I had a little trouble hearing you just now. We want to make sure that we can hear you, and that everyone does hear and understand you.

Would you state your full name and present address for the record, please?

Mrs. FENNER. Nanny Lee Fenner.

Mr. PARKER. And your address?

Mrs. FENNER. 7021 Chantilly Lane, Dallas, Texas.

Mr. PARKER. How long have you been employed by the Federal Bureau of Investigation?

Mrs. FENNER. Since May 25, 1942.

Mr. PARKER. Were you employed in the Dallas field office in November 1963?

Mrs. FENNER. Yes.

Mr. PARKER. What was your position at the Dallas field office on that day?

Mrs. FENNER. I was a receptionist.

Mr. PARKER. What were your duties as the receptionist?

Mrs. FENNER. I did dictaphone work and greeted the public.

Mr. PARKER. What did you say? I did not hear you.

Mrs. FENNER. I did dictaphone work and greeted the public.

Mr. PARKER. When and under what circumstances did Lee Harvey Oswald first come to your attention?

Mrs. FENNER. He came to my attention first in name only when he brought the letter to the Dallas office.

Mr. PARKER. What did Lee Harvey Oswald do or say when you first saw him?

Mrs. FENNER. He came to my desk and asked for S. A. Hosty.

Mr. PARKER. In exactly those words?

Mrs. FENNER. In exactly those words.

Mr. PARKER. Did Lee Harvey Oswald leave anything with you?

Mrs. FENNER. Yes.

Mr. PARKER. What was that?

Mrs. FENNER. He not only left but he threw on my desk a letter out of an envelope and said, "give it to him".

Mr. PARKER. Would you describe in as much detail as you can, the incident itself from the beginning to the end?

Mrs. FENNER. I—

Mr. EDWARDS. Mrs. Fenner, put the microphone a little closer.

Mrs. FENNER. A little closer? I am sorry. I do not have a strong voice.

Mr. EDWARDS. You are doing fine.

Mrs. FENNER. Mr. Oswald got off the elevator. From my desk I could see him clearly. My desk was right in the aisleway. He came to my desk and he said, "S. A. Hosty, please." And he had a wild look in his eye, and he was awfully fidgety, and he had a 3x5 envelope in his hand. It was not sealed, and in it was a piece of paper approximately this size [indicating], and it was folded, and the bottom portion of the letter was visible the whole time he was standing there waiting to see if S. A. Hosty was there. Because I called a secretary. She had to call downstairs to see if he was in.

During this time, he kept taking the letter in and out of the envelope. When I informed him S. A. Hosty was not in the office, he threw it like that [indicating] on my desk, and said, "well get this to him" and turned and walked back to the elevator.

As the bottom portion of the letter was visible, I could not help but read the last two lines. The last two lines stated, "I will either blow up the Dallas Police Department or the FBI office."

Well, with that there, I considered it a threat so I then took the letter in my hand to see what was above that. I don't remember the exact words, but it was something about speaking to his wife and what he was going to do if they didn't stop.

So, I immediately left my desk and took it into our assistant agent in charge, who was Mr. Kyle Clark. I walked back to my desk in order to keep an eye on the person who had delivered the letter, because as I said, he acted strange.

Mr. Clark brought the letter back and said, "forget it, give it to Hosty." So I put it back, began to put it back, and one of the girls in the stenographic pool came back to my desk to go back through the office to go to the steno pool. She wanted to know who the creep was in the hall, and I said, "well, according to this, it is Lee Harvey Oswald," because his name was signed on the letter. The name meant nothing to me.

She read the letter and walked on to her duties, and I presume I put the letter back in his envelope, put a routing slip on it, and put Hosty's name on it, and put it to the side.

Shortly thereafter, Mr. Hosty came to my desk and got the letter, and I have not seen it since.

Mr. PARKER. Mrs. Fenner. To your personal knowledge, who else saw or read that note?

Mrs. FENNER. Well, there were only two other people who saw it, and to my knowledge, in my presence, no one else read the note, except us three.

Mr. PARKER. Us three would be?

Mrs. FENNER. Mr. Clark, Helen May and myself in my presence, and Hosty read the letter in my presence.

Mr. PARKER. Mr. Kyle Clark was the assistant agent in charge of the Dallas field office?

Mrs. FENNER. Yes.

Mr. PARKER. And who else?

Mrs. FENNER. Helen May.

Mr. PARKER. What was her—

Mrs. FENNER. She was a secretary, and she and Mr. Hosty and Mr. Clark were the only ones who read the letter to the best of my knowledge. She was a steno.

Mr. PARKER. Who else, to your knowledge, knew of the note?

Mrs. FENNER. Joe Pearce, a clerk at that point in the investigative branch, and a mail clerk, James White, but they did not, to my knowledge, read the letter. They only saw it on my desk.

Mr. PARKER. Can you recall anyone else who either read or saw the letter?

Mrs. FENNER. No.

Mr. PARKER. Go back and describe a little more fully for me Lee Harvey Oswald's manner at the time of the delivery of the note.

Mrs. FENNER. Well, he had a very strange look in his eyes, and he was very nervous. And to me, I would classify him as having a dangerous look from his appearance and his actions. That is why I got up as I did and took the note to Mr. Clark.

Mr. PARKER. Were you at all personally in fear, at the time, of him?

Mrs. FENNER. No.

Mr. PARKER. Have you had any similar experiences in your job as a receptionist with the FBI with the delivery of any material to you at the front desk?

Mrs. FENNER. Oh, I have had people come in and lay pistols and knives and stuff on my desk, and it didn't alarm me.

Mr. PARKER. Do you recall, and can you describe the handwriting on the note?

Mrs. FENNER. I would say it was equal to a fourth or fifth grade child's writing, and it was very uneven on the paper.

Mr. PARKER. When did you first personally read the note?

Mrs. FENNER. When he threw it on my desk.

Mr. PARKER. You picked it up and read it?

Mrs. FENNER. I could not help but see the last two lines.

Mr. PARKER. You unfolded the piece of paper?

Mrs. FENNER. It was already flipped down. You could not help but read it.

Mr. PARKER. Have you ever discussed it with anyone else inside the Bureau?

Mrs. FENNER. Not until after Mr. Schott wrote his book.

Mr. PARKER. Mr. Schott?

Mrs. FENNER. Yes; an ex-agent of the Bureau.

Mr. PARKER. Mr. Joseph L. Schott?

Mrs. FENNER. Yes.

Mr. PARKER. What is that book you refer to?

Mrs. FENNER. "No Left Turns."

Mr. PARKER. He was an agent at the Dallas field office?

Mrs. FENNER. Right.

Mr. PARKER. He is now retired?

Mrs. FENNER. Yes; he is.

Mr. PARKER. Who did you discuss it with inside the Bureau after that time?

Mrs. FENNER. There was one agent in particular who brought it up, and that was Mr. Ural Horton, now retired.

Mr. PARKER. He brought the matter up to you?

Mrs. FENNER. Yes.

Mr. PARKER. What was that discussion about it?

Mrs. FENNER. I was on my way from my office to the water fountain to get a drink. He stopped me as I got to the fountain and wanted to know if I was going to kiss him goodbye. I said, "Well, I don't know why I should."

"Well," he said, "I won't be here when you come back from vacation."

I said, "Well, that's all right. I haven't made it a policy in the past to kiss anybody goodbye, and I don't know why I should start with you." And I went ahead and drank my water.

I was getting me another glass to take back to my office. He said, "Well, just for that, I will tell you something I haven't told anybody else."

I said, "what's that?"

"Well," he said, "when the boss and I"—the boss he was referring to was Mr. Shanklin—"and I were going to Abilene to a former agent's retirement party, he said—I mentioned to him about the Oswald note, and he said—I thought he was going to jump out the car window."

Mr. PARKER. When was this discussion you had with Mr. Horton?

Mrs. FENNER. That was in April before I went on vacation, a day or two before I went on vacation.

Mr. PARKER. This year?

Mrs. FENNER. This year.

Mr. PARKER. The discussion with Mr. Horton—he was describing—did he tell you when that took place?

Mrs. FENNER. He said when they went to Mabray's retirement party. I don't know who that was.

Mr. PARKER. You do not have any idea what time that was?

Mrs. FENNER. No.

Mr. PARKER. Can you try to pin it within a recent year or two?

Mrs. FENNER. I don't know because Mr. Mabray had been retired a year.

Mr. PARKER. What was the name of the agent who was retiring?

Mrs. FENNER. Coleman Mabray. M-a-b-r-a-y.

Mr. PARKER. Was that the extent of your discussion with anyone within the Bureau?

Mrs. FENNER. I would say he is the only one I can directly say it was discussed with. A number of people wanted to know why Schott didn't put it in his book, but as far as discussion with Horton at that time, I was not aware that anyone in the office knew about it.

Well, he said everyone knew about it, but I had no knowledge they knew about it. That is strictly from what he said the morning he was leaving.

Mr. PARKER. Have you ever discussed the note or its contents with anyone outside the Bureau?

Mrs. FENNER. No.

Mr. PARKER. When did Special Agent Hosty receive the note?

Mrs. FENNER. Shortly after Oswald left it there, the noon hour that day.

Mr. PARKER. Do you have any idea, personally, what he did with it?

Mrs. FENNER. No, sir.

Mr. PARKER. Do you know what action was taken by any FBI personnel regarding that note?

Mrs. FENNER. No.

Mr. PARKER. Did anyone ever tell you or suggest to you that you were not supposed to disclose Lee Harvey Oswald's visit to the FBI Dallas office or the note?

Mrs. FENNER. No.

Mr. PARKER. Have you ever discussed this matter or given any other statement under oath?

Mrs. FENNER. Only to Mr. Bassett with the Bureau. He came down in July.

Mr. PARKER. July 1975?

Mrs. FENNER. 1975.

Mr. PARKER. Do you remember the date?

Mrs. FENNER. I think it was the 8th of July. I was home in bed at the time.

Mr. PARKER. How can you recall the exact date you discussed this with Mr. Bassett?

Mrs. FENNER. I was just out of the hospital.

Mr. PARKER. What date were you in the hospital?

Mrs. FENNER. I was in the hospital in May, the latter part of May. I don't know the exact date. I had surgery. I was recuperating and had to go back before leaving, and then they decided it wasn't the bleeding causing my trouble but my allergies. So I was home taking—

I got medication, and I was taking allergy tests, and I had to be in bed.

Mr. PARKER. This is what, through the months of June and July?

Mrs. FENNER. Yes, off and on.

Mr. PARKER. How do you pinpoint the date exactly when you were visited by Mr. Bassett?

Mrs. FENNER. Because that was the day the doctor thought he was going to have to rehospitalize me.

Mr. PARKER. Do you remember—

Mrs. FENNER. It was a Tuesday.

Mr. PARKER. A Tuesday?

Mrs. FENNER. Yes.

Mr. PARKER. Can you identify Mr. Bassett for me?

Mrs. FENNER. He is a small man.

Mr. PARKER. I mean who is he?

Mrs. FENNER. All I know is he is with the investigative department, with the inspection staff of the Bureau.

Mr. PARKER. What was the purpose of his visit?

Mrs. FENNER. To see if I knew, or was I the person who received the note.

Mr. PARKER. You gave a statement under oath to Mr. Bassett?

Mrs. FENNER. Right.

Mr. PARKER. How many times did he interview you, and how many statements—how many times were you interviewed?

Mrs. FENNER. Twice.

Mr. PARKER. Twice?

Mrs. FENNER. He came back later in August and interviewed the whole office who was there at the time.

Mr. PARKER. Thank you.

Mr. EDWARDS. Thank you.

Mr. Seiberling?

Mr. SEIBERLING. Thank you, Mr. Chairman.

Mrs. Fenner, at any time in the conversations you had with the FBI people about this matter, did anyone comment upon the fact that it was strange that a person who a few days later attempted and succeeded in assassinating the President, would have come to the FBI for any reason?

Did anyone discuss this?

Mrs. FENNER. No, No, sir. And I do not know myself the exact date that he came to our office. It could have been in November. It could have been before that. I could not pinpoint the date.

Mr. SEIBERLING. The date, if there is any way the date could be pinpointed, it seems to me it is very, very important.

Mrs. FENNER. I have racked my brain up one side and down the other, and I cannot come up with the date.

Mr. SEIBERLING. Well, thank you.

I have no further questions, Mr. Chairman.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. Just a few questions. With reference to this exchange with Mr. Horton in April 1975 by the water fountain—

Mrs. FENNER. Right.

Mr. BUTLER [continuing]. You mentioned the conversation with Mr. Shanklin with reference to the note.

Mrs. FENNER. Right.

Mr. BUTLER. Could you recount for us the full extent of what Mr. Horton had to say at that time?

Mrs. FENNER. He said he was going to tell me something he never told me before, and he said when he was going out to Mr. Mabray's retirement party, he mentioned it to Mr. Shanklin about the Oswald note, and he said, "He almost jumped out the car window."

Mr. BUTLER. Is that the extent of it?

Mrs. FENNER. That is the extent.

Mr. BUTLER. How did Mr. Horton get information about that?

Mrs. FENNER. I don't know.

Mr. BUTLER. You made no further inquiry of him at that time?

Mrs. FENNER. I could have cared less because to me, the note meant nothing to me after Mr. Clark told me he was a nut, and Mr. Hosty told me he was a nut. I had forgot about the letter. I did not associate it with anyone until the morning they brought Oswald out of the county jail or city jail to transfer him to the other jail. I was in my home. I was with my husband, and my husband said I jumped about 10 feet when they brought him out, and I said, "Oh my God, that's the man who brought the letter to the office." That was my first recollection it was the individual who had been in the office. That was the first recollection, and that was the first time my husband knew someone had been there with a note.

Mr. BUTLER. Following that for identification, did you go and in the next succeeding days, have a conversation with Mr. Hosty or Mr. Clark with reference to that?

Mrs. FENNER. [Shook head in the negative.]

Mr. BUTLER. You made no effort to see?

Mrs. FENNER. I didn't mention it to anybody, and on Sunday—

Mr. BUTLER. You and Helen May didn't chat about it?

Mrs. FENNER. No.

Mr. BUTLER. What were you going to say about Sunday?

Mrs. FENNER. On Sunday, we were called back to work. I don't remember the exact time, but it seems to me like it was midday. I went back to my desk and some time during the course of the time I got there and before it was dark, Mr. Clark came out of his office and he said, "You can forget about the Oswald note." That's all he said. I don't know why he said it.

Mr. BUTLER. Now, wait just a minute. Mr. Clark—this is within the 3 or 4 days—

Mrs. FENNER. That was the day after Oswald was shot.

Mr. BUTLER. And he said you could forget it. Did you take that as an instruction not to discuss it with anyone?

Mrs. FENNER. No, he just told me to forget it, and I had already forgotten it so why forget it again?

Mr. BUTLER. I share your curiosity on that.

Mrs. FENNER. Because it meant nothing to me.

Mr. BUTLER. That is your only conversation with anybody in the immediate time period following the assassination?

Mrs. FENNER. Up until that date.

Mr. BUTLER. With reference to this note?

Mrs. FENNER. Uh-huh.

Mr. BUTLER. Now you tell us that is the only person you discussed it with until very recently?

Mrs. FENNER. There was one more time.

Mr. BUTLER. When was that?

Mrs. FENNER. It was sometime during—I did not work on the assassination report. I did help assemble some of the reports. Now which one we were assembling, I did not know, but I remember we were on the floor below, on the 11th floor of our office, because we were on the 12th floor, and we had expanded and taken over part of the 11th floor, and the agents' room was on the eleventh floor. We were down there one Saturday, I believe. It was a hot day, and we were numbering pages in a room, an agents' room, and everybody had a report. How many copies of the report, I do not know, but there was a man on a loud-speaker calling out the numbers, and we were numbering the pages by hand. And Hosty was at my table. The one who had been calling out the numbers, I don't know who he was, stopped for a drink of water. And during that period, I asked Hosty myself, I said, "Hosty, what happened to the Oswald letter?" He said, "what letter?" [Indicating.]

Mr. BUTLER. So you did not pursue that any further?

Mrs. FENNER. No, because the man came back, and we started numbering pages, and after that, I went home.

Mr. BUTLER. No further questions.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mrs. Fenner, would you tell us more about Mr. Clark's comment, "you can forget about the Oswald note"?

Mrs. FENNER. That's all he said.

Mr. DRINAN. What prompted him to comment on that?

Mrs. FENNER. I don't know.

Mr. DRINAN. Did he say anything else?

Mrs. FENNER. No, sir.

Mr. DRINAN. Do you think it was strange he came out expressly, the agent in charge, the principal person the evening of Oswald's killing, was it?

Mrs. FENNER. No, this was the day after that.

Mr. DRINAN. The day after that?

Mrs. FENNER. No, wait, it was on Sunday. It was on Sunday, the day he was shot, that evening.

Mr. DRINAN. In other words, word of his killing had just come out a few hours before?

Mrs. FENNER. Uh huh.

Mr. DRINAN. Mr. Clark, who was the agent in charge—

Mrs. FENNER. No, he is the assistant agent in charge.

Mr. DRINAN. The assistant agent in charge made a trip to see the receptionist, and the only thing he said was, quote, unquote, "You can forget about the Oswald note."

Mrs. FENNER. It only takes about 10 steps to go to my desk.

Mr. DRINAN. That was the only—

Mrs. FENNER. That was the only remark he made. I don't know why he made it, and I didn't ask him.

Mr. DRINAN. Will you tell us more about why you brought up the question of the Oswald letter at a moment some weeks later when you asked Mr. Hosty about the Oswald letter? What prompted that?

Mrs. FENNER. I imagine I had gone back and racked my brain. When

I asked Hosty that, I believe it was out of curiosity more than anything else. I don't know actually what happened to it.

Mr. DRINAN. In other words, you felt it was strange Mr. Clark came and said, quote, unquote, "You can forget about the Oswald note."

Mrs. FENNER. I didn't think so much about Mr. Clark saying it, but the fact that Hosty said, "No letter, I don't know what letter"——

Mr. DRINAN. Prior to that, in other words, you had a doubt in your mind for several weeks about the whereabouts of the note and the impact of the words Mr. Clark said to you? You found them strange, and you were raising the question again?

Mrs. FENNER. I guess, but I really don't know.

Mr. DRINAN. When did you first learn the note had been destroyed?

Mrs. FENNER. I don't know that it has. I never did know until all this began in the paper. That was my first—because after it left my desk, I haven't seen it, and I don't work with the agents who handled it. I have no contact with the agents, so I don't know.

Mr. DRINAN. Did you know Mr. Clark—you must have known Mr. Clark knew about the note.

Mrs. FENNER. I gave it to him. I knew he knew about it.

Mr. DRINAN. You never mentioned it before or after?

Mrs. FENNER. No, sir.

Mr. DRINAN. Was this on the same day that you learned of the death of Lee Harvey Oswald?

Mrs. FENNER. Yes, sir.

Mr. DRINAN. And that morning, you identified him?

Mrs. FENNER. [Nodded head in affirmative.]

Mr. DRINAN. It was that afternoon or that evening?

Mrs. FENNER. That evening. It was just before Mr. Malley, I believe, came down from Washington and was to come to the office, and he came out and told me about it. And why he came, I don't know.

Mr. DRINAN. Tell us again about Mr. Malley. He was sent from Washington right after the assassination?

Mrs. FENNER. Right. He came down. Why he came down I don't know. I never did ask him why he came down.

Mr. DRINAN. He was sent from headquarters in Washington, D.C.?

Mrs. FENNER. Right.

Mr. DRINAN. You had contact with Mr. Malley?

Mrs. FENNER. Right, because I had to let him in.

Mr. DRINAN. Did Mr. Malley make reference to the note or letter?

Mrs. FENNER. No, sir.

Mr. DRINAN. We have previous testimony that apparently, allegedly, it was well known in Washington that this note did exist, that it had come in. Did you have any knowledge from Mr. Malley or anyone that Washington knew about this note?

Mrs. FENNER. No, sir. None whatsoever.

Mr. DRINAN. In retrospect, do you think it was strange the note disappeared or was destroyed? Have you ever heard of such a thing in any other connection?

Mrs. FENNER. Well, being in the position I was in and not working in the criminal field, I never heard we destroyed anything.

Mr. DRINAN. You never heard it on any other occasion that they ever destroyed a document?

Mrs. FENNER. I don't know what they did with it.

Mr. DRINAN. Mrs. Fenner, I am sorry. I do not have the sequence of events with Mr. Horton and those events. He spoke to you in April 1975, and apparently he was going to Abilene?

Mrs. FENNER. He had already been to Abilene.

Mr. DRINAN. Very well. Will you tell us what he mentioned to you?

Mrs. FENNER. He mentioned he was going to tell me something he had never told me before.

Mr. DRINAN. What did he tell you?

Mrs. FENNER. That he had mentioned to Mr. Shanklin on the way to Abilene about the note that Oswald had brought to the office, and Mr. Shanklin almost jumped out the car window. That's all he said.

Mr. DRINAN. Why did Mr. Horton bring it up to you?

Mrs. FENNER. I don't know. Well, I guess I shouldn't say I don't know. We had been discussing Mr. Schott's book, "No Left Turns." They were wondering why he had not put that in his book. I said, "Well, maybe he didn't know about it."

Mr. DRINAN. Tell us what motivated Mr. Shanklin to almost jump out of the window.

Mrs. FENNER. I don't know. I wasn't there.

Mr. DRINAN. What did he mean by that?

Mrs. FENNER. I didn't ask him that. I didn't care.

Mr. DRINAN. Did Mr. Horton tell Mr. Shanklin about the presence of the note?

Mrs. FENNER. I don't know. I am just telling you what he told me.

Mr. DRINAN. I am sorry to press you on this, but would you, Mrs. Fenner—I think it is very important just to take it once again, the entire interview Mr. Horton had with you in April 1975.

Mrs. FENNER. Start again?

Mr. DRINAN. Well, Mr. Horton told you or said to you something he had never said to anybody else.

Mrs. FENNER. He said, "Well, I'll tell you something I never said to anybody else." When he was going to Mr. Mabray's retirement party in Abilene, he mentioned to Mr. Shanklin about the letter that Oswald had brought to the office. He said, "He nearly jumped out the car window." That's all he said. I didn't press the issue because I wasn't interested.

Mr. DRINAN. Mr. Horton knew that you had received the letter, that you had transmitted the letter. That was assumed, right?

Mrs. FENNER. Apparently so, but I never discussed it with anyone because to me, it was common knowledge the letter was in the office.

Mr. DRINAN. Let us go back to the author of the book, "No Left Turns," and you spoke with him and others?

Mrs. FENNER. I never—since Mr. Schott left the Bureau.

Mr. DRINAN. Once again, tell us, you had some dealings with Mr. Joseph L. Schott, didn't you?

Mrs. FENNER. No, sir.

Mr. DRINAN. The author of the book?

Mrs. FENNER. No, sir. I have a copy of the book, but it hasn't been autographed yet.

Mr. DRINAN. Tell us why there was a discussion as to the question why Mr. Schott had not incorporated that into his book. Who raised that and why?

Mrs. FENNER. I don't remember. I am trying to recall. Just give me a minute.

He was in the office. I think there was a copy of the book lying on the corner of somebody's desk. I had not read the book at that time because I was saving it to read while I was in the hospital. I presume that is why he raised it. I don't know.

Mr. DRINAN. Who raised the question?

Mrs. FENNER. Mr. Horton.

Mr. DRINAN. Mr. Horton, in April of this year?

Mrs. FENNER. Right. I was taking my vacation early because they wanted to do the surgery in May before the pollen became so potent.

Mr. DRINAN. When Mr. Horton raised this question with you, were you alone?

Mrs. FENNER. There were some other agents in the room. They did not hear the conversation.

Mr. DRINAN. Was there any resolution of the issue or did he just raise the question?

Mrs. FENNER. He just raised the question, and that is where it stayed.

Mr. DRINAN. No one discussed it with you?

Mrs. FENNER. No.

Mr. DRINAN. You made no—

Mrs. FENNER. No.

Mr. DRINAN. Did you think it was strange Mr. Horton raised that question at that time?

Mrs. FENNER. No.

Mr. DRINAN. Did anyone else ever raise that question?

Mrs. FENNER. Not in my presence.

Mr. DRINAN. Thank you very much.

Mrs. FENNER. Because I do not mingle in the office very much with the agents. I am in a different category, and I have no contact except with two agents in the office or three.

Mr. DRINAN. Have you seen the stenographic report of your two conversations with Mr. Bassett?

Mrs. FENNER. Yes.

Mr. DRINAN. Did you mention Mr. Horton?

Mrs. FENNER. Yes.

Mr. DRINAN. Did you mention all of this?

Mrs. FENNER. Yes.

Mr. DRINAN. Is there anything else, Mrs. Fenner, in the conversation with Mr. Bassett that has not come out this morning?

Mrs. FENNER. If there is, I don't know what it could be.

Mr. DRINAN. I am just giving you the opportunity to add anything you like.

Mrs. FENNER. I am thinking. Perhaps I left something out, but I can't recall that I have.

Mr. DRINAN. Thank you very much.

Mr. EDWARDS. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

Mrs. Fenner, when you first told about the note that Mr. Oswald left on your desk or threw on your desk, you used a gesture to describe the size of the enclosure. For the record, could you indicate approximately the size of that piece of paper that was included in the envelope?

Mrs. FENNER. I am sure all of you have seen these little tablets that have an inch at the top and have a few lines and is about a 5x7 pad you write little notes on.

Mr. KINDNESS. Five by seven?

Mrs. FENNER. It was on that kind of paper. It was only one sheet.

Mr. KINDNESS. It was one sheet of paper, and could you tell us a little bit more about the writing. Was the writing small in size or large in size?

Mrs. FENNER. I would say it was large in size because the bottom portion of it, which was folded about like this [indicating], you could read, "Blow up the Dallas Police Department"—I do not know which line was first. Those few words covered the whole bottom portion of the paper.

Mr. KINDNESS. When you read the whole note, did you notice or did you remember where there was a return address on the envelope?

Mrs. FENNER. No. There was not.

Mr. KINDNESS. Was there a date on it you can recall?

Mrs. FENNER. Not that I recall.

Mr. KINDNESS. Was there a salutation?

Mrs. FENNER. It was signed Lee Harvey Oswald.

Mr. KINDNESS. It was signed with all three names?

Mrs. FENNER. It was—I would classify it very illegible.

Mr. KINDNESS. It did include all three names?

Mrs. FENNER. Yes, sir.

Mr. KINDNESS. Lee, Harvey, and Oswald?

Mrs. FENNER. Yes, and on the envelope it had S. A. Hosty.

Mr. KINDNESS. It did have that on the envelope?

Mrs. FENNER. Yes.

Mr. KINDNESS. But not on the inside?

Mrs. FENNER. To the best of my recollection, it did, yes. In another sense, I have looked back—I think it just said "Hosty" on the inside.

Mr. KINDNESS. It was just like a letter?

Mrs. FENNER. I do not remember verbatim what was above, but there was some gesture about talking to his wife, and if it didn't cease or stop, he was going to blow up the FBI and Dallas police station.

Mr. KINDNESS. Thank you.

Coming to another subject, when you had the conversation with Mr. Horton in April 1975, that sounded to me, from your earlier description of it, as though it was sort of a light-hearted, joking encounter.

Mrs. FENNER. It was. He was more or less teasing. I am a big tease, and I teased back.

Mr. KINDNESS. Do you think there is any chance what Mr. Horton said to you about the note and the trip to Abilene and Mr. Shanklin, that he might have been kidding?

Mrs. FENNER. It could possibly have been. He was a great kidder, and I always kidded back.

Mr. KINDNESS. It was a friendly relationship?

Mrs. FENNER. Right.

Mr. KINDNESS. Let us go back again to when Mr. Oswald was in the office and when he threw the note on your desk. Did he then immediately leave your presence?

Mrs. FENNER. He walked from my desk back to the elevator bank which was a short distance, and he looked over his back toward me. The reason I returned to my desk—I went into Mr. Clark's desk and came back to keep an eye on him in case Mr. Clark said to detain him.

Mr. KINDNESS. You read the letter in the envelope after it fell out of the envelope or opened more or less in Mr. Oswald's presence?

Mrs. FENNER. Right, he knew I had seen it and was looking at it.

Mr. KINDNESS. Then you left your desk, you went to Mr. Clark's office, and returned?

Mrs. FENNER. It was just a sec. It was from here to that window to Mr. Clark's office. [Indicating.]

Mr. KINDNESS. That was a very short period of time you were away from your desk and Mr. Oswald was still there?

Mrs. FENNER. Yes, because the elevators in that building were sleeping. They went up and down when they got ready.

Mr. KINDNESS. By the time Mr. Clark turned his attention to that note on that occasion, it was extremely limited?

Mrs. FENNER. Right.

Mr. KINDNESS. He told you at that time to give it to Mr. Hosty?

Mrs. FENNER. Right.

Mr. KINDNESS. I think I have no further questions. Thank you.

Mr. EDWARDS. Mr. Badillo.

Mr. BADILLO. Mrs. Fenner, you were the receptionist at that time in the outer office?

Mrs. FENNER. Right.

Mr. BADILLO. Were you instructed or did you keep records of people who worked or came to the office in that period of time?

Mrs. FENNER. No.

Mr. BADILLO. No records were ever kept at all?

Mrs. FENNER. No.

Mr. BADILLO. You said on other occasions, people would come in and drop pistols and knives on your desk?

Mrs. FENNER. They have done that on a couple of occasions. More than a couple.

Mr. BADILLO. What have you done in those cases?

Mrs. FENNER. Well, I just picked up the phone and said, "send an agent up front."

Mr. BADILLO. And the person stood by?

Mrs. FENNER. They were just sitting still.

Mr. BADILLO. What happened when the agent came?

Mrs. FENNER. The agent came up right away.

Mr. BADILLO. In this case, when you saw the note that said, "I'll either blow up the Dallas Police Department or the FBI office," Oswald was right in front of you?

Mrs. FENNER. Uh-huh. But now he had gone back toward the elevator.

Mr. BADILLO. He left by then?

Mrs. FENNER. He had not left the floor, no. He had left my desk.

Mr. BADILLO. That's a dangerous statement to make, isn't it?

Mrs. FENNER. That's why I took it to Mr. Clark.

Mr. BADILLO. You didn't pick up the phone and call an agent while he was still standing there?

Mrs. FENNER. It was during the lunch hour, and there weren't many, if any, agents in the office except the supervisors and that is why I took it to Mr. Clark. He was the nearest person near me who was an agent.

Mr. BADILLO. When you took it to Mr. Clark, was Oswald still within the building?

Mrs. FENNER. Yes, that's why I went to my desk, to see if they wanted to retain him.

Mr. BADILLO. Yes, Mr. Drinan.

Mr. DRINAN. If it had not been lunchtime, could you have called an agent immediately?

Mrs. FENNER. Yes.

Mr. DRINAN. You felt threatened by this individual?

Mrs. FENNER. I did. I thought it was a very threatening letter.

Mr. BADILLO. When you told Mr. Clark this fellow had a note and showed him the note, he said he was a "nut"? Is that what he said?

Mrs. FENNER. That's what he said. He said, "he's a nut, forget it."

Mr. BADILLO. Isn't it precisely the nuts the FBI is supposed to worry about?

Mrs. FENNER. I don't know.

Mr. BADILLO. They are specialists when someone says they are going to blow up a building.

Mrs. FENNER. Well, that I don't know again.

Mr. BADILLO. You saw the note and sat down?

Mrs. FENNER. Yes. I know, to me, it was a threat. To me. I left it up to the discretion of a higher official than myself to make a decision. That is why I took it to Mr. Clark.

Mr. BADILLO. Have you ever received training as a receptionist, were you ever given any instructions as to what to do if someone delivers a threat to you?

Mrs. FENNER. No. They just said if you feel you need to, hit the buzzer. I could hit it very easily, and I have only had to hit it twice during my time as a receptionist. I am not a receptionist now. I haven't been for years. But I only hit it twice in my tenure when I was a receptionist. In neither of those times did they threaten me. There was just a small railing between my desk and the outer hall. The one time I rang the buzzer was when a man jumped over it. An agent had already been up to talk to him and said he could not help; it was not in our jurisdiction. He walked back to the elevator and then came back and jumped over the railing. The door was locked; I had locked it with the buzzer. He jumped over it.

Another time—oh, it goes back years—we were in the Mercantile Bank Building. A man of unsound mind came in. I knew he was of unsound mind. He had been there before. And I hit the buzzer, and agents came and got him.

Those are the only two times that I actually hit the buzzer because I wasn't afraid. Never been afraid.

Mr. BADILLO. Was there a notice sent around in November or thereafter, December 1963, or during that period of investigation, asking the employees in the office for any recollection they may have had of any visit of Lee Harvey Oswald?

Mrs. FENNER. Not to my knowledge. I didn't get a copy.

Mr. BADILLO. No one asked you anything during that period?

Mrs. FENNER. No, sir.

Mr. BADILLO. And——

Mrs. FENNER. There would be no reason for them to ask me because I didn't work in the criminal work.

Mr. BADILLO. They did have a file on Oswald in the office. You knew about that?

Mrs. FENNER. I did not know about that until it came out in the papers that they did.

Mr. BADILLO. You knew that Agent Hosty had been seeing Oswald, didn't you?

Mrs. FENNER. I did after reading about it, but at that time, I didn't.

Mr. BADILLO. When you read the note, you knew Hosty had been seeing Oswald. That was before the assassination?

Mrs. FENNER. Right.

Mr. BADILLO. And you gave it to Hosty?

Mrs. FENNER. He said he was just a nut, and he walked off.

Mr. BADILLO. But he certainly indicated that he knew who he was. Right?

Mrs. FENNER. Right.

Mr. BADILLO. Therefore, it means there was some knowledge of Oswald before?

Mrs. FENNER. Right.

Mr. BADILLO. Therefore, it means it must be in the file in your office. Ordinarily it would be, right?

Mrs. FENNER. I would not know, sir. I don't know what they make files of and what they don't make files of. I only know what I make up. I don't know what they make up.

Mr. BADILLO. You were not required to make any list of the people who come to your office?

Mrs. FENNER. No, sir. I did not.

Mr. SEIBERLING. Will the gentleman yield?

Mr. BADILLO. Yes.

Mr. SEIBERLING. Mrs. Fenner, when you took the note in to Mr. Clark, you read it—is that right?

Mrs. FENNER. Right.

Mr. SEIBERLING. He said to give it to the appropriate special agent?

Mrs. FENNER. He brought it back to my desk.

Mr. SEIBERLING. Then tell us again exactly what you did with it.

Mrs. FENNER. I put it in his envelope.

Mr. SEIBERLING. Mr. Hosty's envelope?

Mrs. FENNER. In the envelope addressed to Mr. Hosty, put a routing slip on it, and put Hosty's name on it, and put it in the box to go. The clerks would pick it up and take it back in to route it.

Mr. SEIBERLING. How long after your conversation with Mr. Clark would you say you did that?

Mrs. FENNER. Ten or 15 minutes. But Mr. Hosty came in and picked it up himself.

Mr. SEIBERLING. Now, at any time, have you heard from anyone in the FBI that there were any conversations or contacts by FBI personnel with Mr. Oswald between that time and the time he was arrested for assassinating President Kennedy?

Mrs. FENNER. Only when I read it in the papers. No one discussed it in my presence in the office.

Mr. SEIBERLING. I am not referring to whether you heard anything before, between then and the assassination. But if at any time thereafter, whether you heard of any conversations?

Mrs. FENNER. No. I did not.

Mr. SEIBERLING. Thank you.

Mr. EDWARDS. Now, Mr. Badillo?

Mr. BADILLO. No further questions.

Mr. EDWARDS. Mrs. Fenner, you are still in the Dallas field office?

Mrs. FENNER. Right.

Mr. EDWARDS. When did you first find out this story, that there was a 12-year cover-up, that this matter was covered up?

Mrs. FENNER. Right.

Mr. EDWARDS. When did you first find out about it?

Mrs. FENNER. When Mr. Bassett and Mr. Gunderson came to my home when I was ill in bed.

Mr. EDWARDS. You did not see the newspapers and the reports in the newspapers?

Mrs. FENNER. I had not been able to read. I couldn't wear my glasses.

Mr. EDWARDS. What did they say to you?

Mrs. FENNER. It was rather odd, to be exact. And I racked my brain. I don't know how or who or why they came to me first. They came, and Mr. Gunderson had called me and said, "Ma'am, where were you?" or something like that. And I said, "I am not very well."

He said, "I notice you are on the AL instead of SL," which meant annual leave instead of sick leave. I said, "Yes, that is due to the fact I am going to be losing annual leave this year if I don't take it. And since I am going to be off quite a bit, I wanted to take annual leave instead of sick leave."

He said, "Do you feel up to me coming out to see you?"

I said, "It's all right with me if you don't mind the circumstances that exist."

I had been told before Mr. Gunderson, before he arrived as our agent in charge, that he had a tendency to check on individuals, employees, who were on sick leave.

Of course, he was not there when I had my major surgery. So I thought he was just checking on me to see if I was actually ill, so I said, "Sure, come on out." I said, "I'll have someone leave the door open or unlatched because when I am ill, I am not allowed out of my bed because I am not allowed to think, and I had instructions not to leave the bed. Everything I needed or would need was at my fingertips. I have a hospital bed in which I sleep, and I was elevated just like the doctor had instructed me to be elevated.

Well, I heard the car coming up the driveway. I heard a door slam, and I heard the second door slam. He did not tell me he was bringing a second individual. I thought, "Well, knowing that I am in bed, he no doubt is bringing one of the girls from the office," but then when he opened the door and called my name, I said, "Come on, I am in the back bedroom." I said, "Come on down the hall and to your left," which he did.

I think he realized he should not have come. He did not see a pretty sight, I know, but since he was there—he had Mr. Bassett with him. He and Mr. Bassett introduced themselves.

Mr. EDWARDS. Who was Mr. Bassett?

Mrs. FENNER. The inspector from the Bureau in Washington. And Mr. Bassett said, "I understand you are the best collator we have," and I said, "well, I do my best. I never missed a deadline."

He said, "Well, that's not the reason we're here."

I said, "Oh?"

He said, "No." He said, "I am hesitant to bring this up." He said, "Do you feel up to talking?"

I said, "Well, you can start, and if I feel that I am getting weak, I will tell you."

So, Mr. Gunderson got me a glass of water, and he asked me—he said, "The Bureau is in receipt of a letter"—he didn't say where it came from or anything—"stating that the Dallas office, prior to the assassination of President Kennedy, received a letter from Oswald and it was handed to the receptionist or a secretary, and the letter stated that they did not believe the employee was still employed, that she had either retired or returned to the New England area."

He said, "Now, we have gone through quite an extent of investigation and going through personnel files at the Bureau here, in Dallas at that time. You are the only individual that we can come up with who has any ties in the New England area. No one has retired or returned to the New England area." He said, "Your connections are through your husband's family." He said, "I believe they live in Wellesley Hills, Springfield."

I said, "My sister-in-law lives in Wellesley Hills. She has moved to New Hampshire this year."

And then he looked over in his little Benjamin Franklin glasses, and said, "Do you know anything about the note?"

I hesitated. I know he noticed my hesitation, and I said, "Well, do you want me to lie or do you want me to tell the truth?" And before he could answer, I said, "Well, let me put it this way, I didn't come into this organization to lie, and I am not going out lying. I'll tell the truth. I received the letter."

Mr. EDWARDS. Why would you have said that? Why would you have asked them whether or not you should tell the truth or not?

Mrs. FENNER. Well, I don't know how you Congressmen hold meetings, but I know that in our office, as well as other offices, they will get up, the main man will get up and say, "Well, I just don't want this to leave these four walls. If you are asked about it at a later date, you can say you didn't hear it." They don't tell you not to say—they say, "I don't want it to leave these four walls." And the Oswald letter had never been mentioned publicly.

Mr. EDWARDS. Would you have expected that someone high in the FBI would have asked you to not tell the truth about the Oswald letter?

Mrs. FENNER. I hope they would not have because I would have told the truth anyway.

Mr. EDWARDS. Do you know of any instances where employees of the FBI in the Dallas Field Office and elsewhere, have been asked not to tell the truth?

Mrs. FENNER. My knowledge, no.

Mr. EDWARDS. When did they put you under oath?

Mrs. FENNER. Then.

Mr. EDWARDS. Right then and there?

Mrs. FENNER. Then, after I said I was the one. He said, "Well, I will have to put you under oath. Can you raise your right hand," and I did.

Mr. EDWARDS. Isn't it kind of strange this event took place and then for 12 years it was covered up and not made a part of the public record and then, all of a sudden it came out one day. Why do you think it came out?

Mrs. FENNER. I never knew it was not in the public record until it came out that it wasn't. I had never read the Oswald Report. I never read the Warren Report, because I wasn't interested in it.

Mr. EDWARDS. Mrs. Fenner, your testimony is that Kyle Clark and Helen May and Mr. Hosty all had possession at one time and read the letter?

Mrs. FENNER. Right. Now, Helen May is an individual, I might add, who lives from day to day and what she heard today she is not going to remember tomorrow.

Mr. EDWARDS. Apparently she does not, but also Mr. Clark denies he ever read it. How do you account for that?

Mrs. FENNER. I don't know.

Mr. EDWARDS. My time is almost up. How do you account for the fact we are going to get so many stories and from so many people are going to deny the note ever existed. How do you account for that?

Mrs. FENNER. I don't know very many people, to my knowledge. I don't know anyone other than those I named, saw that letter. After it left my desk, I don't know anything.

Mr. EDWARDS. When you saw on television, Oswald being shot by Jack Ruby, and recognizing Oswald as the man who delivered the note, did you say anything to your husband?

Mrs. FENNER. I said, "Oh, my God. That is the man who brought the letter to the office." That is the first time he ever knew he had been to the office.

Mr. EDWARDS. Then when you went to work the next morning.

Mrs. FENNER. No, the very same day.

Mr. EDWARDS. The very—the same day. When you walked in the FBI field office, who did you contact with high excitement?

Mrs. FENNER. Nobody. I just went to my desk and sat down and went to work.

Mr. EDWARDS. Didn't you say to anybody, "My God, the guy who left the letter threatening the field office of the FBI and the police department just got shot."

Mrs. FENNER. There was no one for me to talk to.

Mr. EDWARDS. If you had to do it over again, would you have done something different?

Mrs. FENNER. I doubt it. To me, what I didn't know was none of my business.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. I have no questions, Mr. Chairman.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Adams testified here on October 21 that the agent involved, Mr. Hosty, stated that approximately 2 hours after Oswald had been pronounced dead on November 24, his supervisor, Mr. Howe, said that Mr. Shanklin wanted to see him. And, Mr. Hosty went to see Mr. Shanklin, who was the special agent in charge and he was instructed by Mr. Shanklin to destroy the note.

You indicated on that very night 2 hours or shortly after Oswald was dead, Mr. Kyle Clark, the assistant special agent in charge, came to you and said, "Forget about the note." That corroborates with what we have here from Mr. Adams.

Do you recall, was Mr. Shanklin in the office at that time?

Mrs. FENNER. I didn't see him.

Mr. DRINAN. Would you assume, since Mr. Kyle Clark said this to you, he was reflecting the views of his superior, Mr. Shanklin?

Mrs. FENNER. No, I cannot say that, truthfully. I have no knowledge to my personal knowledge about Mr. Shanklin. I did not show him the letter. I have no knowledge he ever saw it.

Mr. DRINAN. But you obviously know Mr. Kyle Clark saw it?

Mrs. FENNER. I know he did, because I gave it to him.

Mr. DRINAN. Therefore, you can assume Mr. Shanklin knew it, too.

Mrs. FENNER. No, I cannot assume that.

Mr. DRINAN. Thank you very much.

Mr. EDWARDS. Mr. Parker.

Mr. PARKER. Mrs. Fenner, do you consider yourself a person of average, below average, or better than average memory?

Mrs. FENNER. Everybody says that I have a better than average memory.

Mr. PARKER. It was on the 8th of July, you feel, you were interviewed by Mr. Bassett of the FBI?

Mrs. FENNER. I feel it was. As I told you yesterday, I am pretty sure I know I worked on Monday. I told my immediate supervisor I would not be in the next day, I would be on annual leave, but I thought I might come in, providing the doctor would let me. I had a violent reaction to the medication. I passed out in the car. I was not able to go back. My husband called him and told him. I am pretty sure it was a Tuesday.

Mr. PARKER. A Tuesday?

Mrs. FENNER. Right.

Mr. PARKER. You believe it was the 8th of July?

Mrs. FENNER. I believe it was the 8th.

Mr. PARKER. Earlier this morning I asked you a question about what Mr. Hosty did when he got the note. In response to that question you told me he had picked it up and you hadn't yet put a routing slip on it.

Mr. Seiberling, when he asked you that question a while ago, you indicated what you had done with that letter was that you put a routing slip on it and put it in a box.

Mrs. FENNER. I put a routing slip on it and Mr. Hosty picked it up.

Mr. PARKER. The correct version of the story is you did put a—

Mrs. FENNER. It had a routing slip with his name on it or otherwise it would not—I would not have had it on that corner of the desk.

Mr. PARKER. Is it possible you were interviewed on the first or 15th of July rather than the 8th?

Mrs. FENNER. No. I do not know what date the first was on, but—

Mr. PARKER. Would it help to refresh your recollection if I told you the interview the FBI has from Mr. Bassett, is dated the 15th of July?

Mrs. FENNER. Well, as I said, I could be wrong. I know that I was—well, I don't—it could possibly have been. I know I was under doctor's care both weeks, and it was on a Tuesday.

Mr. PARKER. But if you are in error on that date, which occurred earlier this year, is it possible any of the elements of this story that you have told us this morning that happened 12 years ago, may not quite be accurate?

Mrs. FENNER. There might be a little discrepancy, but I do not know where it would be—

Mr. PARKER. You would stand on the bulk of the testimony you have given here this morning?

Mrs. FENNER. I know I got the letter. I know I gave it to Mr. Clark. He brought it back and said he was a nut. Helen May was coming through and she read the note before I got it back in the envelope.

Mr. PARKER. You recall clearly the words of the note?

Mrs. FENNER. I do.

Mr. PARKER. Thank you.

Mr. SEIBERLING. May I ask.

Mr. EDWARDS. Yes.

Mr. SEIBERLING. Can you think of any ways we would be able to pinpoint the date when Mr. Oswald came and gave you that note?

Mrs. FENNER. I wish I could give you the date.

Mr. SEIBERLING. I know you can't, but are there any—

Mrs. FENNER. I have racked my brain and I cannot.

Mr. SEIBERLING. I suppose from Mr. Clark or Mr. Hosty, we will try to get their recollection. Would any other people that would know, have some way of recollecting when you got that note?

Mrs. FENNER. It came out in the Warren Report, I believe, that in a diary they found he was in the Dallas office, I think on the 8th of November, but as I said, I believe it was before then that he was in the office.

Mr. SEIBERLING. So, it is conceivable, to be consistent with your testimony, he could have been in the office twice if you take the diary, plus the date he gave you the note.

Mrs. FENNER. The reason I said it was before that, his—somehow or another I connected with the State Fair of Texas being on at the time Oswald brought that letter to the Dallas office.

Now, why I don't know, unless it was due to the fact we had so many, many people come to the office during the fair season.

Mr. SEIBERLING. Do you recall what period the fair was on?

Mrs. FENNER. The first part of October, either the second week and it lasts for 2 weeks. It would be the middle 2 weeks of the month. To me, I have pinpointed in that area, but I could be entirely wrong. That is the period of time I personally feel that he was there. As I say, again, that is my pinpointing and it could be so wrong.

Mr. SEIBERLING. How many people ordinarily would you see coming into the office in a day at that particular time?

Mrs. FENNER. During the fair time, I would say 15 or 20, maybe more.

Mr. SEIBERLING. How about in November of that year?

Mrs. FENNER. It would depend upon the direction of the Moon.

Mr. SEIBERLING. After a period of time, I suppose your memory of a

face would become blurred. Was there something with all the other faces you see, that happens to me?

Mrs. FENNER. Right.

Mr. SEIBERLING. I just wonder if there was any particular thing, the contents of the note or something that made Mr. Oswald's face stand out in your memory?

Mrs. FENNER. It was his eyes. His eyes and facial expression, even on TV, I remember specifically. It was just a wild look like an animal that was wild, that had been tied and turned loose.

Mr. SEIBERLING. That was true when you saw him in person?

Mrs. FENNER. Right. Right.

Mr. SEIBERLING. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Klee.

Mr. KLEE. Mrs. Fenner, when you received the envelope, were there any markings on it other than S. A. Hosty?

Mrs. FENNER. Not to my knowledge.

Mr. KLEE. For the record, would you please describe whether the way in which the letter was folded was the first crease had the middle portion of the letter folded up to the top and the second crease had the last portion of the letter toward the bottom so it was exposed; is that correct?

Mrs. FENNER. Right. As you fold the letter, it was like this. [Indicating.]

Mr. KLEE. In all your experience as a receptionist, was it your function to open envelopes with the mail?

Mrs. FENNER. I didn't open anything. I can't help if it was thrown on my desk open.

Mr. KLEE. Otherwise, you never opened envelopes?

Mrs. FENNER. Never.

Mr. KLEE. As a receptionist?

Mrs. FENNER. Never, unless it was addressed to me.

Mr. KLEE. In all of your experience opening envelopes addressed to you, has it been your experience letters are normally folded so no part of the letter is exposed?

Mrs. FENNER. Right.

Mr. KLEE. So, the bottom part is folded in.

Mrs. FENNER. Right.

Mr. KLEE. This letter was irregularly folded?

Mrs. FENNER. Right.

Mr. KLEE. When you took the letter to Mr. Kyle G. Clark, what were his instructions to you?

Mrs. FENNER. He just brought it back and said, "He is a nut. Give it to Hosty."

Mr. KLEE. Then you put a routing slip on it?

Mrs. FENNER. I was going to put it back as—that is when Helen May came back and I was in the process of getting it folded. She asked me who was the creep in the hall. I had to admit he did look like a creep. That is when I said, "He is the one who brought in this letter."

Mr. KLEE. Then you put it—

Mrs. FENNER. In the envelope.

Mr. KLEE. Then you put a routing slip on it with Hosty's name on it and put it by your desk?

Mrs. FENNER. I put it by my desk for the clerk to pick up to take to route it. I left a note with the switchboard for Hosty to see me when he came in in case he came in before the mail was picked up.

Mr. KLEE. He came to your desk and he picked up the letter. He didn't come to your desk and ask you what you wanted? He just came to your desk and picked up the letter?

Mrs. FENNER. He said, "I hear you have something for me." I handed him the letter.

Mr. KLEE. Your message to the switchboard didn't say anything about having anything for him?

Mrs. FENNER. It just said for him to see me.

Mr. KLEE. When Mr. Bassett interviewed you in July of this year and asked about the note, how did you know which note he was referring to?

Mrs. FENNER. It was the only note that I knew about.

Mr. KLEE. In all your experience with the FBI, you have only handled one note?

Mrs. FENNER. From Oswald. He asked me about the Oswald note.

Mr. KLEE. Oh, he asked you about the Oswald note?

Mrs. FENNER. [Nodded her head affirmatively.]

Mr. KLEE. What medication were you under at the time that Bassett interviewed you?

Mrs. FENNER. I really don't know. It was an injectable. I had just completed sinus--whatever you want to call it. They had removed my sinuses. I was practically numb from the eyeballs down.

Mr. KLEE. In your normal instructions from the FBI, when things were delivered to you at the desk, were you under instructions to read materials or not to read materials that were incoming?

Mrs. FENNER. They just said to route them, see they get where they are going, and I did.

Mr. KLEE. When you read the Oswald note, were you disobeying any department orders or directives?

Mrs. FENNER. No.

Mr. KLEE. When you read the bottom part of the note, was it proper procedure for you to open up and read the entire letter?

Mrs. FENNER. I do not know whether it was proper or not. I could not help but read it when it was flat. By that time it was visible.

Mr. KLEE. The bottom of the letter was visible?

Mrs. FENNER. When he threw it out the bottom part stood up about like this [indicating]. When I picked it up, it was very--it was just about six or seven lines on the paper.

Mr. KLEE. So, you read the letter from the top down?

Mrs. FENNER. Right.

Mr. KLEE. You didn't read the bottom part first.

Mrs. FENNER. I read the bottom part first. That is when I realized it was a threat.

Mr. KLEE. Were there any office regulations or procedure that regulated your showing the letter to Helen May in the hall?

Mrs. FENNER. No.

Mr. KLEE. I--

Mrs. FENNER. I would not say it was in the hall; it was in my office.

Mr. KLEE. In your office.

Mrs. FENNER. Yes.

Mr. KLEE. It was normal for Helen May to return from the restroom to wherever she was going through your office?

Mrs. FENNER. They had to get through there to get into our office space.

Mr. KLEE. When you left Kyle Clark's office, did you take the letter back to your desk? You said you returned to your desk because you thought you might have to detain Oswald.

Mrs. FENNER. See, I left the office of Mr. Clark. I did not take it to my desk. I took it to Mr. Clark. I went back emptyhanded. He brought the letter back to me, to my desk.

Mr. KLEE. He did. You went back to your desk to possibly detain Oswald?

Mrs. FENNER. Right. In case he told me from his desk, have that young gentleman to come in then I would have called him back, but he didn't.

Mr. KLEE. I see. I have just one final question. It concerns the policy of the Dallas office in having agents in the office during lunch. Is it standard procedure for all the agents in the office to take their lunch at the same time?

Mrs. FENNER. Not now.

Mr. KLEE. Was it at the time of the Oswald note?

Mrs. FENNER. We didn't have as many agents then as we did now.

Mr. KLEE. How many did you have?

Mrs. FENNER. I don't really know, but I know we doubled or tripled in size since then.

Mr. KLEE. Were all the agents taking their lunch hour at the same time?

Mrs. FENNER. See, I don't know how many agents. I was not where I could see where there was anyone but Mr. Clark, who was there. He was the only agent I could see. The agents are on another floor in the back of the office which I could not see. So, I don't know if any agents were back there, or not.

Mr. KLEE. Thank you.

I have no more questions, Mr. Chairman.

Mr. EDWARDS. The last 12 years since you remained in the Dallas Field Office, I am sure there have been discussions between you and other personnel about FBI activities over coffee?

Mrs. FENNER. No, sir. I do not go to the coffee room. I do not have time. I am at my desk. I have water sitting at my desk. I only get up at lunchtime and when I go home at night.

Mr. EDWARDS. Has there been any discussion of the assassination the last 12 years you have been in the Dallas office?

Mrs. FENNER. No, sir.

Mr. EDWARDS. None whatsoever?

Mrs. FENNER. Not in my presence. I have very, very little contact with the agents as a whole. I only have two agents who do my work and the supervisor who signs it.

Mr. EDWARDS. No further questions.

Mr. DRINAN. Mr. Chairman.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. In view of your testimony, we are faced with the situation Mr. Adams stated here. I quote, "Whatever thoughts or fears might have motivated the concealment of Lee Harvey Oswald's visit

to our Dallas office, and of the concealment and subsequent destruction of the note he left there, the action was wrong."

We are left with the situation where Kyle Clark who knew about the note, who gave him the note, he came and said, "Don't worry about it any more. Forget about it," the night Oswald was killed.

Now we have the testimony of the agent in charge who said that he has absolutely no recollection of hearing of Oswald's visit or read the note until July 1975.

You are the first one to indicate now that there was knowledge given to him prior to July 1975, and apparently it was given by the gentleman on the way to Abilene.

Mrs. FENNER. That is what the agent told me. That is what Mr. Horton told me.

Mr. DRINAN. Has that thought occurred to you that there is a contradiction?

Mrs. FENNER. Well, in a way it has and a way it hasn't. Because I do not know whether Mr. Horton could have been joking or whether he was serious.

Mr. DRINAN. One final question. It was concealed, it was destroyed, and Mr. Adams has said, fears or the apprehensions or thoughts that motivated that were wrong.

Would you finally suggest to me thoughts or fears that might have prompted this action which did occur?

Mrs. FENNER. No, because I had no fear after it left my desk. Out of sight, out of mind.

Mr. DRINAN. Thank you very much.

I yield back, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Mrs. Fenner for your helpful testimony.

Our next witness is Mr. J. Gordon Shanklin, who was the special agent in charge of the Dallas office, in November 1963.

Mr. Shanklin, the subcommittee has provided you with a portion of rule XI, of the House Rules, and a copy of the Rules of the House Committee on the Judiciary.

It is my understanding you are here with counsel today. Would you please introduce the lawyer with you.

Mr. SHANKLIN. Mr. Hollabaugh with the firm of Foley, Lardner, Hollabaugh, and Jacobs.

Mr. EDWARDS. Thank you.

Mr. Shanklin is appearing voluntarily at the subcommittee's request. Will you raise your right hand, Mr. Shanklin. Do you solemnly swear the testimony that you are about to give to this subcommittee will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. SHANKLIN. I do.

Mr. EDWARDS. You may proceed with your statement.

TESTIMONY OF J. GORDON SHANKLIN, FORMER SPECIAL AGENT IN CHARGE, DALLAS FIELD OFFICE

Mr. SHANKLIN. Mr. Chairman and members of the subcommittee, in response to a letter request from Chairman Edwards, I have met with the subcommittee staff and have, to the best of my ability, and

recollection, answered the questions put to me relative to the tragic events of November 1963.

Since I am now aware of this subcommittee's area of interest, and for the purpose of expediting your proceedings, I have prepared a brief opening statement. I am pleased to cooperate, and I hope that my testimony will be of assistance to you.

My career in the Federal Bureau of Investigation began in May of 1943. As is the case with most agents, I have served the Bureau in many different capacities and in many different places.

I have been special agent in charge of five of the Bureau's field offices, and I worked in the Bureau's Inspection Division in Washington, D.C. From April of 1963, until my retirement on June 27, of this year, I was the special agent in charge of the Dallas Field Office.

I think you are all familiar with the tragic events of Friday, November 22, 1963. On that day, I arrived in my office at about 20 minutes after 7 o'clock, the usual time for me.

I knew that President Kennedy would arrive in Dallas that morning, was going to be in a motorcade, and I directed two clerical employees to monitor his progress on the police radio frequency.

As a result, I was informed that the President had been shot very shortly after it had happened. I immediately informed and contacted Director Hoover, advising him.

One of his first questions to me was---was there any statutory basis for the Bureau to assert jurisdiction. I replied in the negative since, until the congressional enactment in 1963, the assassination of the President was not a Federal violation.

He instructed me to provide the Dallas police, the Secret Service, and all other law enforcement agencies involved with all possible cooperation and assistance.

Later in that day, on November 22, I was ordered, confirmed by teletype, some time later that night, to conduct an investigation to determine who was responsible for the killing of the President.

The events occurring on November 22, and thereafter moved with great rapidity and no one, let alone myself, can, some 12 years later, remember or reconstruct all of those events with absolute accuracy. Who was the assassin or the assassins? What motivated the act? Where could the evidence be found which would lead to apprehension and conviction of the individual.

We faced numerous other undeveloped leads and problems.

I think that you will recall, the Warren Report certainly shows it, that the murder weapon was found in the School Book Depository Building.

The first major task was to try to trace that weapon. From the beginning I was under a great deal of pressure, both from my headquarters, to have this done as well as to get the physical evidence from the police, Dallas Police Department, in order that the Bureau's Washington Crime Laboratory could examine it on Saturday morning.

Above all, we were ordered to attempt to discover, as quickly as possible, whether Oswald had---who was at that time in custody, or later on in the afternoon in custody, was the one who was responsible for the shooting and the other basic problem, had he acted alone.

Now, the problems of this investigation become further complicated, and the leads certainly magnified, after the murder of Oswald on Sunday.

Director Hoover sent additional agents and clerical employees to Dallas on Friday and Saturday to assist. Still an additional number of agents and clerks were dispatched to Dallas on Sunday to aid in the civil rights investigation arising out of Ruby's killing of Oswald.

By Monday morning, there were approximately 100 agents, which included 50 from other offices and about 50 from the Dallas Division, as well as 40 to 50 clerical employees working on these matters.

As Special Agent in charge of the Dallas office, I shared the responsibility, for some 9 days, of directing and supervising the activities of all of these agents with Inspector James Mulley, whom Director Hoover had sent down from Washington to assist me, for the time being.

I personally remained on duty until about 4 o'clock Monday afternoon. During this period of almost 80 hours, I got no sleep at all.

After Inspector Malley's arrival, he was in charge of the office when I was sleeping and vice versa.

While I hope and pray that no other President, or anyone else, is ever the victim of another assassin, I am proud of the job that my colleagues did during those difficult days, who were working on special, as well as those assigned to the Dallas division, did during these very difficult days. I take personal pride in having had an opportunity to make some contribution to their efforts.

A liaison arrangement had been established with the Dallas Police Department and with the Secret Service and others.

Shortly after Oswald was arrested for killing Officer J. D. Tippett, I was advised of Oswald's name and description.

A search of our indices disclosed the existence of a file showing that the Dallas Office had an investigative file on Oswald.

The reason now for the existence of this file, and the nature of its content, is fully explained in the Warren Commission Report.

I have nothing to add to what is contained in the Warren Report. Insofar as I know, there is nothing to be added to that report.

To the best of my recollection, I have never heard of Lee Harvey Oswald prior to his arrest.

I have read a transcript of the testimony of Deputy Associate Director James B. Adams before this committee.

According to Mr. Adams, it has recently been discovered that Oswald visited the Dallas Field Office some time in November 1963. Oswald is supposed to have asked to see Special Agent James P. Hosty. Unable to do so, he is supposed to have left a note addressed to Agent Hosty with Mrs. Fenner, who just testified.

In July, after I had retired, Mr. Thomas Johnson, publisher of the Dallas Times Herald, advised me that he had learned, through a source which he would not identify, of Oswald's visit to the FBI offices and the note left with the receptionist.

I suggested that he supply whatever information he had directly to Associate Director Adams or Director Kelley, and I believe he did so shortly after that. I was no longer in the Bureau. I was retired. If I did something that at that time it would look like at that time I was

maybe trying to have some influence. I thought they know about it first.

I have no recollection of hearing of Oswald's visit to the Dallas Office or of the note prior to hearing of them from Mr. Johnson.

I have no recollection of ever seeing the note. In short, I do not remember discussing the note on Oswald's visit with anyone at any time prior to last July.

I understand that Agents Hosty and Howe have stated that the Oswald visit and note were brought to my attention during the period immediately following the assassination of the President.

Since, at that particular time, I was overwhelmed with innumerable major problems and duties, it is, of course, conceivable that their recollection is correct. I simply do not remember anything like that.

I would, however, like to offer the following observations. I understand that there is a discrepancy in what Mrs. Fenner says about what was in the note, and what Mr. Hosty says. In Mrs. Fenner's version, there is a threat to blow up the Dallas Office and the Dallas Field Office. Had I ever been shown such a note, I would assure you, I would have remembered it for the following reasons:

The U.S. Attorney and the head of the Criminal Division of the Department of Justice were searching immediately after the assassination, and for some 2 to 3 days thereafter, searching for some basis upon which to predicate Federal jurisdiction.

The existence of a threat from Oswald to blow up or bomb the FBI office certainly would have provided the break that we would have had a Federal violation and under those circumstances, I am certain that I would have notified the Department of Justice of the discovery of such a note. And, of course, I would have notified the police department.

Now a bomb threat to a law enforcement officer is the equivalent of a red flag in front of a bull. I would never be indifferent to threats against the lives of my associates in the office or to myself.

After many hours of reflection and searching my memory, I have concluded that, had the note contained threats of violence and had I known of it at the time, I would remember it to this day. The fact that I do not remember the note may therefore be of some significance to your investigation.

Finally, I understand that, in one version of the story, I am supposed to have ordered the destruction of the note. I can state here and now that I gave no such order. I would never have, and certainly did not, order the destruction of the note.

I hope that these remarks will be of some help to you, gentlemen in framing any questions you have for me. I will be pleased to answer all of your questions to the best of my ability.

Mr. EDWARDS. Thank you, Mr. Shanklin.

Mr. Parker.

Mr. PARKER. Thank you.

Mr. Shanklin, would you please describe your own duties and responsibilities as a Special Agent in charge of the Dallas Office.

Mr. SHANKLIN. Well, the Dallas Office encompasses some 132 counties in the northern and eastern Federal Judicial District of Texas.

As the agent in charge, I was responsible for the overall direction

of investigations that were conducted as well as you might say the overall supervisor as far as personnel was concerned.

Now, obviously, I was not familiar with each and every case. I made it a practice and had continued to supervise any major case, you might say, or any case where you had kidnaping, you had a victim, you had a dangerous subject that had to be apprehended. You had hijackings of airplanes, things along that line, I supervised personally.

It would have been humanly impossible for me to know every case that was in the Dallas Office. So, you had supervisors.

Mr. PARKER. How many agents were there operating out of the Dallas Office?

Mr. SHANKLIN. I would say we had about 70. I think, at that time.

Mr. PARKER. How many supervisory agents did you have?

Mr. SHANKLIN. We had four desks as such. The agent in charge desk, the assistant agent in charge, and one general, you might say criminal desk and one security desk.

Mr. PARKER. How frequently and on what basis would you have contact with the other supervisory personnel?

Mr. SHANKLIN. Well, we are all right there together. We had generally, what you would term two official conferences, along with some of the relief supervisors, twice a week, but I—when I was in the office, I had to be out of the office a great deal of time because we had some special cases and one particular extortion case I was out on in late October for about 10 days, but I saw them every day, I mean as a matter of fact.

Mr. PARKER. Approximately how many cases did each individual agent handle?

Mr. SHANKLIN. I would think—you know, this I wouldn't—I don't have a definite knowledge. I would say 25 to 30, would be the usual at that time.

Mr. PARKER. Did you carry a case load of your own at that time?

Mr. SHANKLIN. No. I have no case load. I did not have any cases assigned to me. I would take individual supervision of any major case, any case involving the possible loss of life or something along that line.

Mr. PARKER. Would you ordinarily be involved in or be aware of any of the day-to-day investigations of say a routine case?

Mr. SHANKLIN. No, sir; I would not, because it would be up to the—the agent could come to me and talk to me. My door was always open, but certainly I wouldn't have had time to discuss all those.

Mr. PARKER. Prior to November 22, 1963, did you have any contact with or knowledge of Lee Harvey Oswald?

Mr. SHANKLIN. I never heard of him before.

Mr. PARKER. Prior to November 22, 1963, were you aware, personally aware that the FBI had a file on Lee Harvey Oswald and that one of your agents was handling an investigation?

Mr. SHANKLIN. No, sir; I did not.

Mr. PARKER. Before that date, November 22, 1963, would the Lee Harvey Oswald case have been considered a routine security investigation?

Mr. SHANKLIN. Yes, sir.

Mr. PARKER. When did you first learn that the FBI had a file on Lee Harvey Oswald?

Mr. SHANKLIN. I had an agent up there at the Dallas Police Department in a liaison capacity. He called in and said that they had brought in a Lee Harvey Oswald for killing Officer Tippett. I had the indices checked at that time, I am sure and that is when I found out we had a file.

Mr. PARKER. Did you at any time after you learned about the existence of the file, did you review it yourself or have it reviewed at your direction, by anyone else?

Mr. SHANKLIN. Well, again, this is hard to answer. I never had time to review the file. Put it that way.

Mr. PARKER. I am talking specifically, Mr. Shanklin, about after you learned about Mr. Oswald being brought into—

Mr. SHANKLIN. Even then I know that I probably had Mr. Howe, I think, he would have been the normal one to review it with the idea of telling our headquarters that I had to talk with them on it, exactly what their problem was and what they had. You see what I am talking about?

So, I had somebody review it. There is no argument about that, I am sure.

Mr. PARKER. You have no recollection of personally reviewing the Oswald file yourself?

Mr. SHANKLIN. I don't ever recall personally reviewing it, at all. I know I did see some of the reports that later went out.

Mr. PARKER. At what time did you learn about the note that Lee Harvey Oswald delivered to the Dallas office?

Mr. SHANKLIN. It was I believe July 5 of this year, from Mr. Tom Johnson.

Mr. PARKER. July 5, 1975.

Mr. SHANKLIN. Right.

Mr. PARKER. When and under what circumstances did you learn about the note?

Mr. SHANKLIN. Well, as I recall, I was attending a Bar Convention. I called my wife—being as I was in the habit of having to call in so much, in the FBI, and she said Tom Johnson the publisher of the Times Herald called my home and wanted me to call him.

So, I called him some time that morning. He said, "Let's get together for coffee," and I went down, because I didn't have an office at that time, so I said, "I will stop by there." That is when he mentioned—you know—

Mr. PARKER. Then the information was given to you in person and not over the telephone?

Mr. SHANKLIN. Yes, sir, it was given to me personally.

Mr. PARKER. Then what ensued was in your prepared statement?

Mr. SHANKLIN. Yes, sir.

Mr. PARKER. What—prior to that telephone call or that visit then, you had no knowledge of the note or its destruction?

Mr. SHANKLIN. None whatsoever.

Mr. PARKER. What were the Bureau's procedures and policies regarding the handling of notes of that sort delivered by Lee Harvey Oswald to the Dallas office in terms of recording it, copying it or entering it into the file system?

Mr. SHANKLIN. Well, it would have to—you would have to determine as far as I am concerned, the type of note. Now if it had been one

threatening bombing, I think definitely it would have been a possible Federal violation. You would have immediately presented the thing to the appropriate United States Attorney, and possibly open the file.

If there had been a definite threat against Mr. Hosty, that could be a threat of assault or kill the Federal officer which would have been covered. That would have been presented.

If, as I understand it said as Hosty says, if all it said you have been out talking to my wife. If you want to see me get in touch with me or I will take it up with appropriate authorities. I mean something similar to that, why I think it would have been just routed to him. I don't know.

Now certainly if you had a file you would have in some manner eventually put it in the file. I think the action of just giving it to him if that was what it was, would have been what you would expect to include in a subsequent report.

Mr. PARKER. Is there any rule or procedure with regard to a serialization or being marked as an exhibit within the Bureau?

Mr. SHANKLIN. Any what?

Mr. PARKER. Any rule or procedure within the Bureau for the serialization or marking that as an exhibit?

Mr. SHANKLIN. Well, yes. You could make it an exhibit and probably if you were going to do anything as far as possible prosecution, that is what it would be.

It would be placed as we refer to as a 1A jacket, as evidence, and be identified on the big brown envelope, and then inside it would be put in the envelope and you would save it for the purpose of eventually presenting it in court.

Mr. PARKER. If such procedures would have been followed in the case of the Lee Harvey Oswald note, who would have been responsible for seeing to it that those procedures were followed?

Mr. SHANKLIN. Well generally, something like that, the agent would be the one who would instruct the clerk's office as to how to handle it.

Mr. PARKER. The agent in charge of the case?

Mr. SHANKLIN. Yes, sir.

Mr. PARKER. In this case, who would this have been?

Mr. SHANKLIN. Well, I think it was assigned to Mr. Hosty.

Mr. PARKER. What other actions would ordinarily be taken after the receipt of such a note, apart from filing it or putting it into a file or opening a new file?

Mr. SHANKLIN. Well, I think—you are talking now about the second type of note?

Mr. PARKER. No, let's assume it was the first type of note.

Mr. SHANKLIN. Well, the first type of note, I think it would open the case and present it.

Mr. PARKER. Would that have been brought to your attention?

Mr. SHANKLIN. No, I don't know that—well, I think a bombing, if it had been a threat to bomb the office, I definitely feel there would have.

Mr. PARKER. Assuming that the note was threatening and that was the threat, what precautions would have been taken?

Mr. SHANKLIN. Well, we would have immediately talked to the U.S. Attorney and gone out and interviewed him, and see what to do.

You would try to put a stop to it, to see if there was any basis. If he brought it to the office, certainly you would want to take some action.

Mr. PARKER. Returning to the time then immediately after President Kennedy was shot, would you characterize your overall and subsequent investigation as being in charge of it?

Mr. SHANKLIN. I was, yes. As I say, I had—Inspector Malley came down on Sunday, after Oswald was killed and he helped me for about 9 days.

Mr. PARKER. Would you identify Inspector Malley, for us, what his role is, who he is?

Mr. SHANKLIN. Well, he is Inspector James R. Malley. He at that time was the No. 1 man in the Investigative Division under Mr. Alex Rosen, who was Assistant Director.

Mr. PARKER. He had been sent to Dallas by whom?

Mr. SHANKLIN. Well, I presume by Mr. Hoover.

Mr. PARKER. Can you recall your first encounter with Special Agent Hosty, after the shooting of President Kennedy?

Mr. SHANKLIN. I have no recollection at all. I do know that in talking to somebody back at the Bureau, I told them I had one man up there with Oswald who was a criminal investigator and they said they would send the case agent up.

I presume I got in touch with Mr. Howe, Mr. Hosty and told him to go up.

Mr. PARKER. Did Mr. Hosty report to you at any time regarding his prior investigation of Lee Harvey Oswald?

Mr. SHANKLIN. I don't recall. As I say, I know that somebody found and reviewed the file.

Mr. PARKER. Did he report to you at all regarding his interview with Lee Harvey Oswald to the Dallas Police Department?

Mr. SHANKLIN. Well, I would know the results of that in some manner whether it was Mr. Hosty. I know that when he first went in, somebody told me, Oswald, when he was interviewed he said "Oh, so you are Hosty." I remember that because of some subsequent developments.

Mr. PARKER. My question was, whether Special Agent Hosty reported to you directly about the results of his interview?

Mr. SHANKLIN. I don't remember. There was a thousand other interviews being conducted. I just do not recall. I know that somebody must have, either he, Mr. Howe or somebody.

Mr. PARKER. What was the nature of your contact with Special Agent Howe then, during this period?

Mr. SHANKLIN. Well, as I recall, he was the supervisor of the case. I recall my instructions would obviously have been to get the file and find out what is in it and give me some sort of a summary so I can tell my headquarters.

Mr. PARKER. Did he ever report to you on the—

Mr. SHANKLIN. I seem to remember that Mr. Howe, did, yes.

Mr. PARKER. What instructions did you give either of them, either Mr. Howe and Mr. Hosty, regarding Lee Harvey Oswald and the assassination investigation?

Mr. SHANKLIN. Well, of course, they were primarily working as I recall, on the case file we had, getting that for me. Now, we were trying to determine, you see, Lee Harvey Oswald had been in the

School Book Depository Building. That was determined. There was a rifle found there.

One of the problems that became very important was an attempt to determine where this rifle came from, who owned it, because you have a lot of other employees in the School Book Depository Building. That became quite a problem. Then of course, the next thing was getting all the evidence to the laboratory.

I must have—we were following up leads that went all over. We were getting all the background, calling other offices, getting all of the background we could on Oswald, as well as the other facts about the assassination.

Mr. PARKER. Following word of Lee Harvey Oswald's death, at the hands of Jack Ruby, do you recall any meetings or any other contact with Special Agents Hosty and Howe on November 24, 1963?

Mr. SHANKLIN. I have no recollection of talking to either one of them on that date.

Mr. PARKER. Do you recall where you were when you heard about Oswald's death?

Mr. SHANKLIN. I was in my office. At that time, I did not have time to watch television. They were moving Oswald. They were supposed to move him at 10 o'clock and they didn't move him until later, but at any rate, I had one agent, as I recall, over at KRLD television station watching the thing, and he called me and said they just shot Oswald. I didn't believe it, but—

Mr. PARKER. Do you know where either Special Agent Hosty or Howe were at the time?

Mr. SHANKLIN. I have no idea, no.

Mr. PARKER. Did you give them any other or new instructions regarding their roles in the investigation following Oswald's death?

Mr. SHANKLIN. I don't recall of any whatsoever. I mean, we were investigating to determine, of course, at that time whether he was the assassin and whether there was anyone connected with him. We even had a special squad primarily set up for that.

Mr. PARKER. Were you in contact with the FBI Headquarters in Washington, D.C., during all these periods?

Mr. SHANKLIN. Numerous times, yes sir.

Mr. PARKER. Did you receive instructions from headquarters?

Mr. SHANKLIN. Well, of course, the general instructions there, they would call and they would say we want this done or that done and caused us a little bit of a problem because we did not have the Federal violation and the local police had the evidence. I did secure it and got it on a jet plane out of Carswell that night.

Mr. PARKER. From whom would you receive instructions in the headquarters?

Mr. SHANKLIN. Well, generally, my first call went to Mr. Hoover. Mr. Hoover asked me a time or two to do something. He wanted to know the President's condition. That I had to determine. He later saw Vice-President Johnson going around holding his coat, and he thought he had a heart attack. I had to find out what his condition was.

Then he wanted to know, also, when he was sworn in as President. Those were some of the things he said.

Then primarily I dealt with Mr. Al Belmont, who—I think his title was Assistant to the Director, Federal Bureau of Investigation. He had general, overall supervision of all investigative matters.

Most of my dealings were with either Mr. Belmont or Mr. Malley. Of course, when Malley came down he was there for 9 or 10 days, and then when he came back he was the liaison man as I recall, with the Warren Commission which was appointed.

Mr. PARKER. How long did Mr. Malley stay in Dallas?

Mr. SHANKLIN. As I recall it was exactly 9 days. He came down on Sunday night.

Mr. PARKER. That is the only period of time he was in Dallas you just mentioned and he returned.

Mr. SHANKLIN. Yes, that is all I recall that he was there.

Mr. PARKER. He spent a total of 9 days in Dallas.

Mr. SHANKLIN. Right.

Mr. PARKER. Mr. Shanklin, were you ever disciplined or reprimanded in any way for your role in the assassination investigation and if so, would you please describe the nature of that reprimand.

Mr. SHANKLIN. I have two—this is a little bit of an unusual situation. I got an individual letter of commendation for my handling of the assassination. The office got a letter of commendation for the handling of the assassination investigation.

Now, as I recall, I got two letters based on the Oswald investigation which would have been—

Mr. PARKER. Which was prior to the assassination.

Mr. SHANKLIN [continuing]. Prior to the assassination. See what I am talking about?

Mr. PARKER. Two letters in what regard?

Mr. SHANKLIN. Well, one letter from the investigation prior to it and then to show you how confused things were, on the night of the assassination, we were swamped with teletypes and telephone calls.

I know when they found out where the gun was, had been sent, somebody had to come over from the hotel to tell me to call the SAC up there, that he couldn't get a phone line in.

Well, two teletypes—the SAC in Chicago, I am talking about. At any rate, I used two teletype machines of GSA to send outgoing teletypes. I did not ask Mr. Belmont or Mr. Malley or anybody else for authority which was a violation of the rules. When that came out, I got a letter saying I have violated the rules. I am hereby being criticized for it.

Mr. PARKER. That is what you call a letter of censure?

Mr. SHANKLIN. Yes, sir.

Mr. PARKER. Okay. You received two letters of censure?

Mr. SHANKLIN. As I recall, that was it.

Mr. PARKER. Do you know who issued those?

Mr. SHANKLIN. They all came out under the name, J. Edgar Hoover.

Mr. PARKER. Do you know of anyone else connected with Lee Harvey Oswald or the investigation prior to or subsequent to the assassination investigation who were disciplined or reprimanded by J. Edgar Hoover?

Mr. SHANKLIN. No. I think Mr. Howe. Mr. Hosty and I seem to think some relief supervisor. I don't recall except for those.

Mr. PARKER Would it be fair to state that all the agents or supervisory personnel who were connected with the investigation prior to the assassination received a letter of censure or reprimand or discipline in some form or another?

Mr. SHANKLIN. Well, you see, you are going back. I wouldn't say that. Maybe those who had anything to do with it during the year of 1963.

You see, Oswald, had been—this is in the Warren Report, he had been interviewed two or three times over in Fort Worth, a year or 2 before. I don't know. I do not know who signed those reports. I wasn't there. I think he had also been interviewed once in New Orleans.

So, I don't know This whole matter of this discipline matter was handled out of Bureau headquarters.

Mr. PARKER. Did you have any role in the decision to discipline or in the implementation of the disciplinary action that was taken?

Mr. SHANKLIN. None that I know of.

Mr. PARKER. Are there any procedures available to Bureau personnel in appealing disciplinary actions?

Mr. SHANKLIN. Oh, yes. You can appeal.

Mr. PARKER. Who do you appeal to?

Mr. SHANKLIN. Well, I think it goes to the Civil Service Commission.

Mr. PARKER. Thank you.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. Mr. Shanklin, just as a sort of a reference, how many reprimands would you have in your file, just approximately in your career?

Mr. SHANKLIN. Well, I would have no particular idea because, let's face it, when I became a SAC, I got recognized and whether it was a personal thing or based upon activities of employees. That was Mr. Hoover's method. He also advised me that I would be given letters of commendation.

I could say very—right now, without trying to blow too much, but I would have 10 to 1 in commendations and incentive awards.

Mr. HOLLABAUGH. Perhaps it would be helpful to the committee, if we would pass out a supplemental statement which does not purport to be an entire statement of all the documents that relates to his personnel file, but I would like to place before the committee this supplemental statement that includes among other things, shows that he has eight outstanding performance letters which he received while he was an agent in the Dallas office.

With your permission, I would like to hand to the clerk, the supplemental statement so the committee will have it before them.

Mr. EDWARDS. That will be received by the committee without objection.

Mr. HOLLABAUGH. This does not purport to be a complete statement of his entire personnel record, but is—we have anticipated this might arise and we would like to get this before the committee.

Mr. SHANKLIN. I would just like to add here, I think I have had a very rewarding career in the FBI. The Dallas office has been successful in connection with kidnaping, hijackings, extortions, victim-type cases where I have supervised. I do not attribute it all to my ability, but I had the opportunity of working with outstanding personnel,

agents and clerical. We generally have had good relations and cooperation from local police, the sheriff offices, the rangers in protecting public safety. Among other things, I think I have real good success in supervising kidnaping cases, getting victims back.

I take a little bit of pride in my 20 or more years as an agent in charge and supervising some good cases, some that resulted in the return of the victim. I have never lost a victim. I never have had to kill a subject and I have never had an agent seriously hurt. I do not know whether I am—

Mr. BUTLER. I appreciate your putting that in the record. I personally appreciate the dedication of all the people in the FBI, but of course, even mighty Homer sometimes nods and we feel it is appropriate to inquire a little bit about this particular transaction. That is why I asked you about reprimands. It is unusual that you would be reprimanded. I get that impression.

Mr. SHANKLIN. I have sort of had a fatalistic attitude that the Lord wouldn't give me a job to do without giving me the ability of doing it. I call for help. That is all I can say.

Mr. BUTLER. Would it be appropriate to give us a similar summary of the reprimands that are in your file, just numerically when you get an opportunity to review the file.

Mr. SHANKLIN. I do not have the file.

Mr. HOLLABAUGH. Since Inspector Adams has appeared before this subcommittee, reading the transcript, references are made to what was done with respect to personnel in the Dallas office. We assumed that your subcommittee had already seen—you already had that. We did not undertake to duplicate them and submit them here with this supplemental statement.

If you wish, and it is true that the subcommittee has not seen the letters of censure, we will undertake to find them and submit them to you.

Mr. BUTLER. I would appreciate that. I would like to just get some idea from my own mind as to whether this was kind of a routine thing that was followed.

Mr. SHANKLIN. Are you talking about anything specifically having to do with the assassination? You see, I don't know as I would have every letter. This would be in my file. I think I could find those dealing with the assassination.

Mr. EDWARDS. Without objection I believe that it is important to have those for the file.

Mr. SHANKLIN. You are talking about those dealing with the assassination and the Oswald thing.

Mr. EDWARDS. Anything else that you think would be helpful to the committee in this area.

Mr. BUTLER. I am not fencing with the witness. I simply want to get a fair view of these things and how much they related to the particular inquiry. Certainly your career does not appear to have been impaired as a result of this in any way. You are not director today, but you moved along all right. I would just like to put that in the record.

Mr. SHANKLIN. I will give you any I have that I can locate.

Mr. BUTLER. Fine.

Mr. SHANKLIN. I am certain I did not get more than two or three out of that year. I would have to go back to training school. I do not know if I had any there or not.

Mr. BUTLER. How many agents were involved in this investigation of Oswald?

Mr. SHANKLIN. I would say approximately 100. There were approximately 50 sent in from our field divisions. This is in the Dallas division, you understand.

Mr. BUTLER. Yes.

Mr. SHANKLIN. Not the investigation—

Mr. BUTLER. What was under your supervision?

Mr. SHANKLIN. About 100, working in this matter.

Mr. BUTLER. Do you know a gentleman called, I believe it is Ural Horton?

Mr. SHANKLIN. Yes, I know Horton.

Mr. BUTLER. Were you with him when he went to the—in April—I don't know the time, when he was alleged to have gone with you to Abilene, to the party for one of the retiring agents?

Mr. SHANKLIN. I would remember, yes. I think we went down there. Horton had formerly been a resident agent there.

Mr. BUTLER. Are you aware of the earlier witness telling or testifying that he told you, testified he told her that he told you about this note. Are you aware of that?

Mr. SHANKLIN. Yes.

Mr. BUTLER. What is your reference. What is your recollection of the reference to the conversation?

Mr. SHANKLIN. I had just about 2 weeks before been to Kansas City to have conferences with Director Kelley. Something came up about that.

Mr. BUTLER. About what?

Mr. SHANKLIN. About my going to Kansas City, you know, to talk with Director Kelley. Then it was mentioned that—

Mr. BUTLER. Who mentioned what?

Mr. SHANKLIN. I don't know whether I mentioned I had been up there.

Mr. BUTLER. Are we talking about a conversation with Director Kelley or with Mr. Horton.

Mr. SHANKLIN. No, I am saying this was the conversation I had with Horton about making the trip to see Director Kelley. He knew that Hosty was in Kansas City. He said something about, did you see Hosty. I said: Yes, I saw him. Hosty said he was still concerned about his administrative action. He feels that matters were a little harsh with him and he mentioned something about wanting to see Kelley.

I told him to write a memorandum and Kelley would see him, I was certain. That is all I know about that.

Mr. BUTLER. Mr. Kelley became the Director, within the last 2 years; you had a conversation with Hosty with reference to the assassination investigation?

Mr. SHANKLIN. With reference to his feeling he ought to talk to Mr. Kelley about the discipline that had been taken against him.

Mr. BUTLER. Now that conversation did not concern itself with the Oswald note.

Mr. SHANKLIN. Absolutely no mention made.

Mr. BUTLER. At the time of the conversation you were unaware of the existence of the Oswald note.

Mr. SHANKLIN. Right sir, I had no knowledge of it.

Mr. BUTLER. Now at the time following that you had a conversation with Mr. Horton on the way to Abilene and you have no recollection of discussing with him at that time, the Oswald note; is that correct?

Mr. SHANKLIN. Absolutely not.

Mr. BUTLER. You still insist that your earliest knowledge of this was your conversation with Mr. Johnson.

Mr. SHANKLIN. Right.

Mr. BUTLER. Do you believe that such a note existed.

Mr. SHANKLIN. Well, I have to evaluate things. I have heard Mrs. Fenner say there was a note. I can't conceive of it saying bombing, it not being handled as Mr. Hosty says.

I could see where I could have been told about it and never remembered. I mean, I am trying to be as fair as I can about the thing.

Mr. BUTLER. If a note had showed up somewhere from Mr. Oswald to Mr. Hosty, dated 1 or 2 days before the assassination and in which Mr. Oswald said to Mr. Hosty something very kind, have a good Christmas or anything of that nature, would not the existence of that note and the circumstances of the prior investigation of Mr. Oswald be enough to require that you retain that and put it in the file?

Mr. SHANKLIN. I would think it would be up to the agent. I wouldn't know about it.

Mr. BUTLER. Well, I am not asking you if you knew about it. I am asking you if the appropriate people should not have concluded that that should be in the file, the destruction of it, regardless of how inoffensive the note might be, wouldn't the destruction of it be a violation of your policies, if not your procedures and it would be most inappropriate in view of those circumstances?

Mr. SHANKLIN. I would think you wouldn't destroy it if you had a file, generally. You wouldn't destroy anything that pertains to an individual you had a file on.

I do not know if there is any specific rule. If I got a Christmas card from a subject, I don't know that I would put it in the file generally. I mean it might be one of those things you might or you might not.

At any rate, in retrospect, certainly it ought to have been.

Mr. BUTLER. The young lady who testified, Mrs. Fenner, explained some kind of a procedure whereby you stand around and put together a file with somebody in charge and five or six people sit around putting numbers on pages and things of that nature. Who did that in this particular instance and when does that sort of a thing take place?

Mr. SHANKLIN. Well, that takes place in any great, long report where you would have a group of people. You would have to number the paper, pages. You would have say 40 pages or copies of the report. So you would have to have somebody number it and—

Mr. BUTLER. That is clerical at the lowest level.

Mr. SHANKLIN. Maybe an agent would be there overseeing it, but it would be generally clerical in nature, the actual assembly of the report: yes.

Mr. BUTLER. Mrs. Fenner raised a question at that time with Agent Hosty as to where was the letter. Whose responsibility would it be to

explain that or would that be some kind of a violation of procedure that that question was not resolved at that time?

Mr. SHANKLIN. I don't know. She asked him and he says what letter or something, well then it would be up to her whether she wanted to go back and ask him. I don't know that I had any rule saying that if you—

Mr. BUTLER. That is my question. Is it not the responsibility of everybody in the office for a significant piece of evidence like this, which she says was a threat, isn't—wasn't it everybody's responsibility to see that that was called to the attention of everybody that was putting the thing together? That is what concerns me. Everybody was sitting around. Somebody must have said that threatening letter, where was it. Somebody must have overheard it. There were some 20 people in the room I would judge. Wasn't everybody involved in covering up during those circumstances?

Mr. SHANKLIN. I don't think so. I don't think she said so that anybody heard it. I don't think so.

Mr. EDWARDS. The gentleman's time has expired. Mr. Seiberling.

Mr. SEIBERLING. Thank you.

Mr. Shanklin, I was very impressed with your statement that if there had been anything in the letter that you had seen that threatened to blow up an FBI office, that that would have been indelibly impressed upon your mind. Certainly that has some persuasive effect on my mind.

Now let us take the period after the assassination, when of course, you knew about Lee Harvey Oswald. If there had been any letter, whether the one described by Mrs. Fenner, or a letter such as Mr. Butler has mentioned to you, which was just a congratulatory letter or a personal letter from Mr. Oswald to Mr. Hosty or any other agent, wouldn't that also have been normally brought to your attention in the course of an investigation of the assassin of the President?

Mr. SHANKLIN. Well, if you had a congratulatory letter, maybe it would have. But whether I would remember that. You don't take into consideration that something like that, unless it was of real significance, I have 3,000 other things—people calling, you have to find out this, that and the other. I don't know that I would remember it.

Mr. SEIBERLING. Let me ask you this, don't you think that the fact, if it is a fact, that Mr. Oswald delivered any kind of a note threatening the FBI or one of its agents, and that that was not brought out until 12 years later is a reflection on the FBI?

Mr. SHANKLIN. I think somebody should have brought it out, yes.

Mr. SEIBERLING. And Mr. Adams admitted that it was wrong. It seems to me that if such a note existed at the very time you are investigating the person who wrote the note and the note was addressed to an agent of the FBI, that that would have been a fact which would have been very, very significant to anybody who knew about that.

Wouldn't you agree?

Mr. SHANKLIN. Well, I would think the agent should certainly have remembered. As I say, I was answering phones and doing this. Unless it had some threat, I don't know whether I would remember it. I have to go back 12 to 13 years.

Mr. SEIBERLING. But you would not say that the fact a letter was addressed by the assassin of the President to an FBI agent a few weeks

before hand, who came in personally to the office was something that would have been just sort of tossed off as insignificant if you had known about it, would you?

Mr. SHANKLIN. Oh, no. I just have to say that I do not remember the thing. I am not trying to be—

Mr. SEIBERLING. I am not suggesting that you do remember. All I am saying is, if it had been brought to your attention wouldn't that have been a fact that would have immediately have galvanized your mind?

Mr. SHANKLIN. I think I have answered that as best to my ability, and that is, if it had a threat in it, I think I would remember it. If it were just a note, I would probably have said that Mr. Howe could handle it in the normal course of events.

I never did take time to read every line in every report and everything. I am doing the best that I can.

Mr. SEIBERLING. I am not trying to test your memory. I am trying to test your judgment, as to whether or not it is—it would have been considered significant in the course of the investigation that Mr. Oswald had actually been in contact with people in the FBI office which was under your charge, prior to the assassination.

Wouldn't that be a significant fact in your mind?

Mr. SHANKLIN. Well, if you had that one thing, and it was one problem, yes. I suppose it would be.

Mr. SEIBERLING. Wouldn't that have been something that would have been brought ordinarily to the attention of your supervisors, or superior, if it hadn't been called to your attention?

Mr. SHANKLIN. If it had been called to my attention, I would have notified my headquarters.

Mr. SEIBERLING. We have heard testimony from others that it was brought to your attention that Mr. Hosty went to your office after he had interviewed Oswald and that Mr. Howe was there and in your presence Mr. Hosty reviewed with them his knowledge of Oswald and the note and you asked Mr. Hosty to prepare a memorandum.

Do you deny the correctness of that testimony?

Mr. SHANKLIN. I have no recollection whatsoever of it.

Mr. SEIBERLING. You also have no recollection of discussing this with Mr. Horton after you were on the way back from seeing Mr. Kelley in Kansas City.

Mr. SHANKLIN. I was on the way from Dallas to Abilene with Mr. Horton. This was some time after I had been to Kansas City. Something came up about Hosty and I did mention Hosty's name to him or he asked, did I see him. I said I did and that he was concerned about whether he should go see Mr. Kelley, write him a memorandum about the previous administrative action. I told him to do so.

Mr. SEIBERLING. You do not recall any discussion about the note?

Mr. SHANKLIN. No discussion about the note as far as I am concerned.

Mr. SEIBERLING. Well, thank you very much.

Mr. EDWARDS. Mr. Kindness.

Mr. KINDNESS. Mr. Shanklin, could you pin down a little more closely the time of this trip to Abilene with Mr. Horton.

Mr. SHANKLIN. This would have been in November—no, it would have been in December 1973. I went up to see Mr. Kelley some time in November of 1973.

Mr. KINDNESS. Turning to another subject, the physical circumstances in the Dallas office. Mrs. Fenner testified that the secretary who also read the note from Oswald had to go past Mrs. Fenner's desk to return to her place of work after visiting the ladies' room.

Would that also be the way that anyone would go in order to enter the office area if they had been out for lunch. For example, to be specific, if Mr. Hosty had been out to lunch when Mr. Oswald had come into the office and left the note, would Mr. Hosty have gone past Mrs. Fenner's desk to get to his place of work?

Mr. SHANKLIN. I do not think it would be required. He could. We had two floors at the time as I recall. The agents were down on the floor right under and there was a door they had a key to go into. It could be that he could come by there, or he could have gone in by the back door, on the next floor.

Mr. KINDNESS. The location of the switchboard is the next question. Where was the switchboard located in relation to the space occupied by the agents and in relation to Mrs. Fenner's location?

Mr. SHANKLIN. I just don't know. We moved out of there in the next April. I know we were on two floors. I do not recall where the switchboard was.

Mr. KINDNESS. The place where people came in the office--the public is where Mrs. Fenner worked, right?

Mr. SHANKLIN. She was the receptionist. We didn't have much space there. I was negotiating the week--the fact is we had bids the week of the assassination, earlier in the week for moving because of the inadequate space. GSA agreed. I know there wasn't much room out there. I don't think we had much of a reception room.

Mr. KINDNESS. Did you have somewhere between 50 and 70 agents at that time, plus clerical people?

Mr. SHANKLIN. I think we had about 70, but of course, you see, we had about 10 resident agencies. There were probably about 30 or 35 of them out in resident agencies. When we got the specials going, GSA, as I recall, gave me two additional offices, you know, down on other floors, so we would have enough room to handle things.

Mr. KINDNESS. Does that mean that there would have been people numbering let us say close to 50 agents in the Dallas office.

Mr. SHANKLIN. I think we probably had about 40. I would say probably 40 actually assigned to Dallas and then you had resident agencies where there were some there. Some of them came in and worked on it.

I know there were approximately 50 agents assigned on specials. I believe about 40 were clerical employees going back to the time that it is alleged that Mr. Oswald was in the Dallas office there would be around 40 agents working in the Dallas office or out of the Dallas office in those cramped quarters.

Mr. KINDNESS. Would it be normal for all of them to be out at one time or would it be normal for some agents to be in at all times?

Mr. SHANKLIN. We had agents in all the time. It was up to the supervisor to see that somebody was there during the lunch hour. Primarily the agents had to do the investigations. They didn't come back in and go out to lunch. It was those who were working in the office at that particular time.

If a man left early in the morning and was working all day out, he ate lunch out there. So, at any particular given time you wouldn't

know how many was going to be there. The supervisors certainly would not all leave.

Mr. Clark and I would not all leave generally speaking. So, you have coverage. You might have—if you had a bank robbery you jump on the radio and find where cars are.

Mr. KINDNESS. When you had been out of the office and returned to the office, how would you normally get your messages that came in while you were absent?

Mr. SHANKLIN. Generally my secretary will have them.

Mr. KINDNESS. In the case of agents, how were they normally handled?

Mr. SHANKLIN. Well, I think they would go through the switchboard. I know now, but I don't recall at that time. They would go by and get their card showing they were back in the office from the switchboard and they would say, here is a message for you. I think that is what happened at that time, probably.

Mr. KINDNESS. That switchboard was on the floor where the agents were.

Mr. SHANKLIN. I don't know. I just can't recall where it was.

Mr. KINDNESS. Thank you, sir.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Shanklin, you are asking us to disbelieve Mr. Hosty, disbelieve Mr. Howe, disbelieve Mr. William Sullivan and possibly Mr. Horton. I find this very contradictory and very puzzling.

Where were you sir, the night that Lee Harvey Oswald was killed?

Mr. SHANKLIN. Where was I? The night he was killed? That is on Sunday. I was still in the office.

Mr. DRINAN. Did you meet with Mr. Kyle Clark that night?

Mr. SHANKLIN. I wouldn't know.

Mr. DRINAN. To the best of your recollection at this moment in time, did you or did you not meet with him?

Mr. SHANKLIN. Certainly he was there some time during that day.

Mr. DRINAN. What is your best recollection. Did you meet with him that night?

Mr. SHANKLIN. I have no—he was working. He was sort of like I was working 16, 18 hours a night. I would have worked continuously from the Friday morning until Monday, at about 4 o'clock in the office.

Mr. DRINAN. To the best of your recollection, did you meet with Mr. Howe that night?

Mr. SHANKLIN. I have no—

Mr. DRINAN. To the best of your recollection. Yes or no, sir. We understand that it is a long time ago. But just say yes or no to the best of your recollection.

Mr. SHANKLIN. To the best of my recollection, I am certain that Howe was there some time during the day, but whether he stayed as long as I did, I would not know.

Mr. DRINAN. To the best of your recollection, did you meet with Mr. Hosty that night?

Mr. SHANKLIN. I have no recollection of Mr. Hosty.

Mr. DRINAN. Do you have any idea why Mr. Howe or Mr. Hosty agree that they were in conference with you that night and this is their testimony which I assume they will reiterate tomorrow, Mr. Hosty

will, and that at that time the letter from Oswald was discussed and one of these individuals asserts that you ordered its destruction?

Do you have any explanation of why in their very clear memory they recollect they met with you that night and that you as the superior officer in charge requested and required the destruction of that note?

Mr. SHANKLIN. I have no reason.

Mr. DRINAN. Do you think they are just deluded about this?

Mr. SHANKLIN. I say, I don't know.

Mr. DRINAN. Is there any motivation that you would suggest why Mr. Hosty has admitted that he destroyed the evidence?

Mr. SHANKLIN. I would not go into his motivation. I wouldn't know what his motivations were. I would have no reason to destroy it.

Mr. DRINAN. Mr. Adams testified here and said that the embarrassment to the Bureau could well have been the motivation. There is a rule and I cite the rule from the FBI document that the FBI manual says that when allegations are made against the employees of the Bureau, quote, "Every logical lead should be run out unless such action would embarrass the Bureau."

Do you think this could have entered into this very unfortunate destruction of evidence?

Mr. SHANKLIN. I don't know how it could have embarrassed the Bureau unless, as I say, it was a threat.

Mr. DRINAN. Well, it certainly is embarrassing now, sir, and Mr. Adams admits this, profoundly embarrassing, 12 years later. Then Mr. Hosty had reason to know that if this came out and the FBI had in fact neglected to follow up on this document which you admit was very inflammatory, that it would have been very embarrassing.

That is the only way that I could think that it would have led to the destruction of this evidence.

Mr. SHANKLIN. I can't speak as to what Mr. Hosty's motivation was. I could see in no way it could have embarrassed me. If it had been brought to my attention, I would have said, handle it.

Mr. DRINAN. Mr. William Sullivan, sir, alleges that over a period of time he had been regularly in touch with you and that he had discussed this matter.

Did you talk at any time during these critical days with Mr. William Sullivan, the Assistant Director of the FBI?

Mr. SHANKLIN. I talked with Mr. Sullivan, on a number of occasions. I never discussed this note with Mr. Sullivan, and under any circumstances.

Mr. DRINAN. Would you tell us what you discussed with Mr. Sullivan.

Mr. SHANKLIN. Well, Mr. Sullivan was the Assistant Director in charge of the Domestic Intelligence Division. That was where the Oswald security investigation had been supervised and was supervised.

Now the assassination was I think supervised in the Investigative Division. Shortly after the thing started, I know that Mr. Sullivan was in touch with me and I would be in touch with him. There was never—he is mistaken on the note thing. I never discussed the note with him.

Mr. DRINAN. Why is he mistaken and you not mistaken? There is a clear conflict of evidence and you are saying he is mistaken. I want a reason why he is mistaken.

Mr. EDWARDS. We will stand in recess until 1:30 o'clock this afternoon.

[Whereupon, at 12:05 p.m., the subcommittee recessed, to reconvene at 1:30 p.m., the same day.]

AFTERNOON SESSION

Mr. EDWARDS. The subcommittee will come to order.

We will continue with Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Shanklin, let me just recapitulate where we were. I stated that in my judgment, if we are to accept your testimony, then we must reject the testimony of Mr. Hosty, Mr. Howe, Mr. William Sullivan, and possibly some testimony of Mr. Horton.

I think we were talking about the question of Mr. Sullivan that if I may, could I return to the evening when Lee Harvey Oswald was murdered. After that it is your testimony, it is the testimony of Mr. Hosty and Mr. Howe, that they met together with you and that you directed one or both of them to destroy the evidence.

Now, would you recapitulate what you said please, about that alleged meeting.

Mr. SHANKLIN. I—

Mr. HOLLABAUGH. May I raise a question? Which testimony of Mr. Hosty and Mr. Howe is the gentleman referring to?

Mr. DRINAN. As reported in Mr. Adams' statement. Mr. Adams was here on October 31.

Mr. HOLLABAUGH. But neither Mr. Hosty, nor Mr. Howe have testified before this subcommittee, have they?

Mr. DRINAN. No; tomorrow I think we have both of them. They both will be here tomorrow.

Mr. HOLLABAUGH. Very well.

I just wanted the record to show that as far as we have known, neither of these gentlemen have given any testimony to the subcommittee.

Mr. DRINAN. No; it is tomorrow sir, and I—you are quite right. I am going back to Mr. Adams' testimony which I am sure you have had in full. In that report, a comprehensive report in which the FBI interviewed some 80 people, they asserted as the testimony of both of these gentlemen, that on that night, they met with the witness, and that according to them, a directive was given that that particular document from Lee Harvey Oswald should be destroyed.

Mr. SHANKLIN. I have absolutely no recollection of any such meeting. I certainly don't recall anything. I just do not think I would ever have ordered, in spite of the fact I had all kinds of problems immediately after Mr. Oswald died.

Headquarters called and we were setting up another special squad on the basis we had a civil rights investigation and that became a separate thing.

I did not know that both of these gentlemen even said that but I just have no recollection of that. I don't think I would have under any circumstances, ordered the note destroyed.

Mr. DRINAN. To the best of your recollection then, you are saying you deny their testimony, you did not meet with agents Hosty and Howe on that evening?

Mr. SHANKLIN. I would not say that I did not meet with them. I don't have any remembrance of it. Hosty and Howe were probably working like the rest of us, 15 or 16 hours a day. If they had any reason to come in and see me they could have because I was probably on the phone. I was setting up another special squad, I know of at that time.

So, I just do not recall it.

Mr. DRINAN. Coming to Mr. Clark. Mr. Clark, it has been asserted, came and spoke to Mrs. Fenner and said simply that you can forget about the Oswald letter. Apparently that is all he said.

Do you recall any conversation with Mr. Clark that might have prompted his subsequent remark to Mrs. Fenner?

Mr. SHANKLIN. I never discussed it, certainly never discussed the note. I knew nothing about it. I have no knowledge of any letter.

Now, Mr. Clark was my assistant. Our offices were going like this, I think [indicating], pretty close together. After the—now this probably did not take effect until Sunday or Monday, when I had him generally as I recall, run the office.

Do you see what I am talking about? I spent my whole time with the assassination and related matters.

I might point out here some of the things that, and I am sure if you look at the Warren report, you will find it, I had numerous calls from individuals who were just plain citizens. They said, well, I was at a cocktail party at such and such a time and so and so said he thought somebody ought to shoot the President.

Now, we had to run all those out. We had to set out leads. All those things were handled. I did have a wealth of duties.

Now, Mr. Malley didn't get down until, I think they sent him after Oswald was shot. He didn't get down to Dallas until Sunday night. Then I did have some help with handling what you might term the telephone calls as well as the other things. He particularly helped me with the telephone. We were getting calls from Australia, New Zealand, London, Paris, just all over.

Mr. DRINAN. In coming back to Mr. Sullivan, I am sure your lawyer and you have heard what Mr. Adams said as a result of the comprehensive survey, and you indicated just before the recess that you talked several times with Mr. Sullivan and Mr. Sullivan says that you admitted that you had a personnel problem, that you were reluctant to talk about this problem, and that it was his conclusion this problem related to the note left by Mr. Lee Harvey Oswald.

Mr. SHANKLIN. Well, I think Mr. Sullivan was mistaken in that. Certainly, from time to time, as I think I pointed out, Mr. Sullivan was the Assistant Director in charge of the Domestic Intelligence Division in which the Oswald security-type investigation was handled. I think that the facts are that he did know something about that. I may have told him that we had gotten some letters of censure or something like that. He certainly would have known it because it would have been in conjunction with his particular division.

I never mentioned the note. I knew nothing about the note, and Mr. Sullivan is just mistaken. That's all I can say.

Mr. DRINAN. My time has expired, sir. Thank you.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman.

Mr. Shanklin, I wonder if you could tell me whether or not you knew Chief Curry from Dallas. Did you know him?

Mr. SHANKLIN. Oh, yes. I have known Chief Curry for a long time. Well, I mean, I had been there several months before the date of the assassination. I came April 22.

Mr. DODD. Are you aware at the time of the assassination and afterward, Chief Curry made a statement to the press indicating that Oswald had contact with the FBI prior to the assassination. Are you aware of that statement he made?

Mr. SHANKLIN. Yes, there was never any denying that we had contact with him. He made some statement, yes.

Mr. DODD. That he was capable of violence?

Mr. SHANKLIN. Well, that, now you are getting into something that I don't think was in the statement. He said something about as I recall—this is separate from the note, now—he went on as I recall stating that somebody told him we had him under surveillance. We never had Oswald under surveillance. Someone from headquarters called me Saturday morning, I believe it was—

Mr. DODD. Someone called.

Mr. SHANKLIN. Well, someone watching television. I hadn't had time to watch television. I did call Chief Curry. I called him on the phone and I said we did not have him under surveillance. There is no argument that we knew he was here.

Mr. DODD. Did you ask him to retract his statement?

Mr. SHANKLIN. I asked him to straighten out the thing as far as—I never asked him to retract it. I think I said, I think you ought to tell the truth about it and he went back on TV as I recall and said we did not have him under surveillance.

Mr. DODD. If I told you that he said that part of his statement included the remarks that Oswald was known, or at least the FBI was aware at the time, that Oswald was capable of violence. Would you deny that was possibly the statement, or is it to your knowledge that he did make that kind of a statement?

Mr. SHANKLIN. That statement, as I recall, now you are getting into an entirely separate matter.

Mr. DODD. No, what I am trying to do is establish—

Mr. SHANKLIN. I do not think that was his statement at all, because you have got something that was in the Dallas Times Herald the next day, after I talked to him and he said that in my understanding he went back and retracted it. I don't recall anything saying that there was anything we told you that he was capable of violence.

I do not think that was in the first statement. The question was whether we had him under surveillance or not as far as I recall.

Mr. DODD. You did call Chief Curry and asked him to modify his statement.

Mr. SHANKLIN. I asked him to straighten out the record. Because he said we hadn't told him and I said that under the current regulation we have no instructions to tell you about an individual such as this. I think he agreed.

Mr. DODD. You mentioned in your prepared statement or it may have been impressions afterward that you had—one of the problems you incurred immediately after the assassination was that you had a problem with the rifle. You could not identify who the owner of the rifle was. I think that was your statement.

Mr. SHANKLIN. I said to identify it.

Mr. DODD. As to whom it belonged.

Mr. SHANKLIN. Yes.

Mr. DODD. Are you aware that the—there was a mail cover on Lee Harvey Oswald prior to the assassination, part of the investigation.

Mr. SHANKLIN. Now I don't know that. I mean it is so far back I just don't know. I do not think that was—I do know we got information from the SAC in Chicago. I think he called me and in trying to get to me he had to call the hotel and somebody had to come over and tell me to call him. They had found where this rifle had been shipped to a post office box, in Dallas, under the name of A. Hiddell, H-i-d-d-e-l-l, I believe. That turned out to be a post office box that had been rented to Oswald, best I can recall.

Mr. DODD. So, there was a mail cover.

Mr. SHANKLIN. No, I don't say there was a mail cover. I don't know. I think we probably checked right quick to see who had the box. I don't think—I mean, to the best of my recollection, it was not a mail cover.

We had the postal inspectors. We had the Secret Service. You had everybody in the whole city working. When we found that out, they were able to tell me who had this post office box.

Then something came up where he had used the A. Hiddell, I believe in New Orleans.

You are getting me into things—you see, I don't have the benefit of reviewing, but I know that the name A. Hiddell came up and the post office box was either a A. Hiddell or Oswald's name, but I am not saying we didn't have a mail cover. But I am saying what it was that we immediately got the postal inspectors to find out. All this was being done in a hurry. The fact it was midnight didn't make any difference. Everybody was working around the clock. The postal inspectors were working with us.

Mr. DODD. My time has expired. I will come back.

Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Shanklin, the alleged existence of the note surfaced on about the first part of July of this year. Do you have any idea where the information might have come from that went to the newspaper?

Mr. SHANKLIN. No, I don't. I have racked my brain on that. Mr. Johnson would not tell me. At first he said he certainly wasn't going to tell and he never gave me any indication. He said I believe it was on a Saturday, the 5th of July, at which time I suggested he get in touch with Mr. Kelley, or Mr. Adams, and if he weren't going to, then I would just call them and tell them to get in touch with him.

I retired a little over a week before. So, he has never as I understand, I have probably been asked by our headquarters, but I don't think he has ever agreed to say what his source is.

Mr. EDWARDS. Since that time, have you discussed this matter of the Oswald's note with Agent Hosty.

Mr. SHANKLIN. I have not.

Mr. EDWARDS. Mr. Kyle Clark?

Mr. SHANKLIN. No, sir, I have not.

Mr. EDWARDS. Helen May?

Mr. SHANKLIN. No, I have not.

Mr. EDWARDS. Agent Horton?

Mr. SHANKLIN. No, I have not.

Mr. EDWARDS. William C. Sullivan?

Mr. SHANKLIN. No, I have not.

Mr. EDWARDS. Howe.

Mr. SHANKLIN. No.

Mr. EDWARDS. Joe Pearce.

Mr. SHANKLIN. No.

Mr. EDWARDS. James White.

Mr. SHANKLIN. I think it is probably Joe Pearce you are thinking about.

Mr. EDWARDS. Joe Pearce.

Mr. SHANKLIN. Neither one.

Mr. EDWARDS. Anyone at the Bureau?

Mr. SHANKLIN. Oh, I have discussed it at the Bureau. I mean they came and interviewed me. I made it very definite. When he told me about it, I said, look, I am not calling anybody except Mr. Kelley. If I make a call someone will say I am covering up.

So, I have not talked to any of them concerning the note.

Mr. EDWARDS. When the Warren Commission was set up, did you have instructions from the headquarters in Washington to cooperate as the investigative arm of the Warren Commission?

Mr. SHANKLIN. Yes, sir, I certainly did.

Mr. EDWARDS. Did they have any reservations on the information that you had furnished to the Warren Commission?

Mr. SHANKLIN. Absolutely not. They had 15 attorneys that I recall. Mr. J. Lee Rankin, I believe was the chief attorney. He maintained liaison with Mr. Malley, Inspector Malley, after he got back. Usually it would be on a day-to-day basis. Mr. Malley would call me and say Mr. Rankin or someone from the Warren Commission wanted this in addition.

You know what I am talking about.

Mr. EDWARDS. Right.

Mr. SHANKLIN. So I did it.

Mr. EDWARDS. The FBI kept possession of Oswald's diary or notebook, address book, and the FBI, Dallas, reported the contents of Oswald's daybook or address book to the Warren Commission, but did not report that in the book Oswald had written down Hosty's name, license number and the address of the FBI. Can you explain why in reporting that to the Warren Commission, that information was left out?

Mr. SHANKLIN. I didn't know it was. Frankly, it was all over all the newspapers. It was no argument. I know it was explained, Mr. Chairman, as to how it came in there.

In other words, I know that was covered in some report. Now, I feel for certain. We sent all that stuff to our laboratory. I thought they photographed it and sent the results over but I also am certain that Mr. Hosty had to explain how that got in there. He went out to see Mrs. Payne, and I don't know when, but sometime before the assassination where Oswald was supposedly living. Oswald's wife was living there with Mrs. Payne.

One of the things that I do recall is that he left his number. He wanted to find out, as I recall, and this again, I think his purpose was

trying to find out where he lived in Dallas. Because they said he doesn't live here except on weekends. So, he left his number and he left his name there. Maybe Marina, I believe it was, maybe copied down the license number as he left. I think that is somewhere in the Warren report. There was no reason. It was in the papers, I know, pictures of the thing I think.

Mr. EDWARDS. But you have no knowledge as to why it was left out of the first report to the Warren Commission.

Mr. SHANKLIN. No, wasn't it in subsequent reports? I—

Mr. EDWARDS. It was in subsequent reports, I believe, yes.

Mr. SHANKLIN. That is why I am saying, maybe the first one I don't even know when we wrote it. We wrote two or three reports as quick as we can.

Mr. EDWARDS. Mrs. Fenner said that Oswald's note was rather illiterate and poorly written. That is not exactly what she said, but that is the impression that I got from her testimony. Yet, we do know he spoke and wrote Russian with moderate fluency.

After all this happened, the President being killed, and then Oswald being killed by Jack Ruby, was there discussion in the office that perhaps Oswald might be a Government agent?

Mr. SHANKLIN. Well, the thing came up. Again, this gets us—long as it is on here, there was a newspaper reporter from Houston, Tex., who had interviewed Oswald's mother when he defected and went to Russia. Mrs. Oswald at that time had said she thought, now this is not Marina, this is his mother, she thought that Oswald was an employee of CIA or State Department.

Now, this is to the best of my memory. He went back out after Oswald had been killed and he reinterviewed her. He wrote a story about this, but then he said, couldn't he have been an informant of the FBI? She said, Oh, yes.

So, the headlines as I recall was, Oswald rumored to be an informant of the FBI. So, we had that question. I had to submit affidavits that he was not an informant or check the files and no record. Hosty, I am sure, did. I do not know whether Mr. Howe did or not.

Mr. DODD. Will the gentleman yield?

Mr. EDWARDS. Yes, I yield.

Mr. DODD. Wasn't it your affidavit to the Warren Commission that he was not paid?

Mr. SHANKLIN. If it said not paid, that was the way it was printed. I meant to say that he never was an informer of the FBI. As far as the records that I could check.

Mr. DODD. Thank you, Mr. Chairman.

Mr. SHANKLIN. I do not know that. I do know I made an affidavit. One of the things that can dispel that now. At the time, again this goes back to when Mr. Hosty went up probably at my direction as I recall, and walked in and was introduced to Oswald. Oswald jumps up and said, in a real loud voice, so you're Hosty.

When—this indicated to me and particularly when we had to answer the question that whether he was an informer, that he didn't even know him because somebody came along and said he could have been an informer, of Hosty's, without Shanklin knowing it.

Do you see what I am talking about? Sure that thing came up. It started out though I think from this one story, the newspaper report.

Mr. EDWARDS. How long did Hosty interview Oswald?

Mr. SHANKLIN. I would not know. I don't have the exact time available. I know there was a report, but I don't know.

Mr. EDWARDS. Was there a transcription made?

Mr. SHANKLIN. Oh, yes. That is in the Warren Report, I am sure, his interview. I had another agent up there maintaining liaison, but I don't know anybody did—well, I know he reported his interview, yes, sir.

Mr. EDWARDS. My time has expired, Mr. Drinan.

Mr. DRINAN. I wonder, sir, if you could respond to this series of questions? Did Mr. Howe keep you regularly informed about all major developments as your second in charge? Could you say that he did tell you everything that he handled?

Mr. SHANKLIN. You mean Mr. Clark?

Mr. DRINAN. That's right, Mr. Clark, yes.

Mr. SHANKLIN. Well, I would presume that he was supposed to. I wouldn't know whether he told me everything that he was supposed to or not.

Mr. DRINAN. You had no reason to doubt him, his good judgment on any important thing. He would speak quickly and directly to the special agent in charge.

Mr. SHANKLIN. Well, I was comparatively new there. I do recall that I was in Amarillo and I turned on the TV one morning and I heard where an agent had been involved in a shooting in Dallas. I was available. I had a talk the night before. I did call Mr. Clark at that time. He said I thought you need not know it. I said, well, if somebody from the headquarters is calling about a shooting they wouldn't ask for you, chum, they would have asked for me. So, I want you to keep me advised. Far as I know that was the only time it happened.

Mr. DRINAN. So it would be highly unusual for Mr. Clark, obviously knowing about this note, that he would not tell you about it?

Mr. SHANKLIN. I know he didn't tell me. I do not know anything whether he knew about it or not.

Mr. DRINAN. Mr. Shanklin, another question. Would you make any comment on the fact the FBI tapped the phone of Mrs. Oswald for several months after the assassination and did not report this to headquarters?

Mr. SHANKLIN. I think you are going to have to check with headquarters about that. I don't think that as I know, I never would have tapped the phone for anybody without notifying headquarters. I can say that.

Mr. DRINAN. This was never known to the Warren Commission.

Mr. SHANKLIN. Sir?

Mr. DRINAN. This was never revealed to the—David Bell, counsel for the Warren Commission stated it struck him as horrible that this was never revealed.

Did you have any knowledge of a tap on Mrs. Oswald's phone for several months after the assassination?

Mr. HOLLABAUGH. Let me interject, sir. As you know, Mr. Shanklin, along with other FBI agents signed an employment agreement which is very restrictive as to what he can say.

It is my understanding that the Federal Bureau of Investigation has granted clearance to him to testify before the committee having to do with the note and certain facts surrounding it.

We—

Mr. DRINAN. Well, I deem, sir, this to be enormously relevant to the note. After he has been murdered, you go or the FBI goes, by testimony that is not contradicted, that for months and months the FBI taps the phone of Mrs. Oswald. I mean that is not relevant to the note? I just assert that it is relevant and I ask the witness to answer.

Mr. HOLLABAUGH. I do not know that it is so much a question of reluctance of the witness to answer a question of that kind, sir; the thing that has impressed me is that the Bureau in effect says to Mr. Shanklin, you are hereby released from your employment agreement to this extent and defines or says to him what it will be.

Now, should you wish to pursue this question?

Mr. DRINAN. I wish to pursue it right now, sir. I do not want to clear it with the FBI. I want to pursue it right now and I want the witness to answer. All right. That is my judgment.

If he wants to say he doesn't know about it, if he wants to invoke privilege about it, that is his privilege.

Mr. HOLLABAUGH. Well, since Mr. Shanklin is still bound by his employment agreement with the Federal Bureau of Investigation—

Mr. DRINAN. Sir, this is public knowledge. I read from the Washington Star. The FBI said in a statement yesterday, that is October 29, that the Agency had "conducted an electronic surveillance of Marina Oswald's residence from February 29, 1964, to March 12, 1964."

I just want him to comment on why this was done and does he have any comment on it. It is public knowledge.

Mr. HOLLABAUGH. In view of the restrictions under which Mr. Shanklin is here, I will tell him to decline to answer the question. Should the Bureau give us clearance from his employment agreement to go into these questions, then the witness will be very pleased to come and testify.

As of this moment, as we understand, the clearance given by the Federal Bureau of Investigation on the matter that the Congressman is asking the request about is, appears to be outside the scope of that subject matter. That being the case, we will respectfully request that the committee if it wishes to go into it, have the staff contact the Bureau. If they give us clearance to speak about these things then this witness is prepared to cooperate with the committee.

Mr. DRINAN. Mr. Chairman, it would be my judgment that it would be relevant. I would request that he obtain clearance.

One last thing. On the whole question of the continuing relationship of Mr. Hosty, that he was there for a number of years I take it or Mr. Howe too, and Mr. Clark, that they were there as your subordinates, Mr. Shanklin, for several months or years after the assassination I take it.

I wonder if at any time this was discussed directly or indirectly.

Mr. SHANKLIN. It was not discussed with me. I never discussed it with them or anyone else because I didn't know anything about it.

I think it was within the year they were all transferred somewhere else. Mr. Clark got promoted to assistant agent in charge of Chicago. I believe Mr. Howe went to Seattle. Mr. Hosty to Kansas City.

Mr. DRINAN. My time has expired. Thank you.

Mr. EDWARDS. Mr. Badillo.

Mr. BADILLO. Thank you, Mr. Chairman.

Have you ever testified before any commission about the Oswald case or the Kennedy assassination?

Mr. SHANKLIN. I did not; no.

Mr. BADILLO. You never were called before the Warren Commission?

Mr. SHANKLIN. No. I gave affidavits but I wouldn't know on what though. I never was called. I wasn't actually doing the investigation. Do you see what I am talking about? I had to get it out and done.

Mr. BADILLO. You were the one that was quoted as saying Oswald fired the rifle and you were the one who placed Oswald in the book depository.

Mr. SHANKLIN. I don't recall ever saying that. I mean, to whom did I say that? I don't recall ever making any such—I never interviewed him before or after obviously.

Mr. BADILLO. Anthony Lewis. New York Times, November 24, 1963. It says, Oswald—it was he who fired the rifle.

Mr. SHANKLIN. I don't recall. The laboratory report maybe was given out. I don't think I gave it out.

Mr. BADILLO. Do you recall that there was some question about the fact that Police Chief Curry said that he had spoken to a Lt. Jack Revill who spoke to Hosty and said that Hosty had said that Oswald was a nut and he was the kind of a fellow who would assassinate a President. Then Curry said you called him and told him to retract the statement. Do you remember that?

Mr. SHANKLIN. I answered, in effect I think I called him, I answered to Mr. Dodd a while ago. I don't know whether you were here or not, or Father Drinan. I did call Curry, but there was nothing said at that time about, as far as I know, anything said about his being capable of killing anybody.

Now this came up later on when Chief Curry, I believe testified before the Warren Commission, and he produced a note that Lieutenant Revill had given him, supposedly right after the assassination concerning a talk he had with Mr. Hosty on the way up the elevator. I believe that was in April 1964.

So, this was not brought to my attention. I do not recall anything about that until such time as Chief Curry brought that note up. Mr. Hosty has testified to that. Mr. Revill has testified to it, all in the Warren report. I know that was gone into in great detail.

Mr. BADILLO. In the terms of the files that are kept, there was a file on Oswald because Agent Hosty had been investigating him. In the normal file, when there is an investigation of an individual and a report is filed by the agent, is that just dropped in the file or is there an entry somewhere. Is there any place in the file where an entry is made of the number of visits that are made to the individual?

Mr. SHANKLIN. When your report is written out, generally it is supposed to bring everything up to date.

Mr. BADILLO. I mean, does the file have for example, as a lawyer, when I keep a file on a client, I will have a section where I will say November 1, client came in, November 3, interviewed this fellow, and then there will be the results of the interview. Somewhere in the file there is a listing by day of the activities that took place. Do you have that in FBI files?

Mr. SHANKLIN. Well, the agent, after an interview dictates it.

Mr. BADILLO. Does he enter the fact of the interview?

Mr. SHANKLIN. Well, the report of the interview then goes to the file and it is then included in a report. So, if he made an interview, he is supposed to write a report of it. Then you have a number of copies and they will be there.

Mr. BADILLO. In other words, then, if a report is missing there is no way you could verify whether or not the report should have been there. That is my question.

Mr. SHANKLIN. Well, if—if it is charged out.

Mr. BADILLO. I mean within the file. If I am a lawyer and I keep a record of what is happening with my client, and I know that an interview took place say on November 1, and then if I don't see a November 1 report, I know something is missing.

In other words, do any of your FBI files indicate what is supposed to be in the file?

Mr. SHANKLIN. I would say, no. I do not know if he has what you are talking about there. He is supposed to report the interview. Now at that time—

Mr. BADILLO. Well, let's make it more specific. If there was a letter sent by Oswald, was there any indication as to whether or not there should be a letter in the file?

Mr. SHANKLIN. No; not unless he entered it into the file. If it was serialized then it would be charged out. You see, it would either be in the file—

Mr. BADILLO. He is supposed to enter it in the file in some way.

Mr. SHANKLIN. Yes. If it is entered then it becomes a serial 4, for example, or if he put it in what we refer to as the evidence. If you are an attorney you probably have one saying evidence and another one pleadings and so on.

Well, we would have something if it said evidence, then you would have a folder to hold it. You would have on there 1-A1 or something like that.

Mr. BADILLO. Letter of so and so.

Mr. SHANKLIN. Yes.

Mr. BADILLO. Have you seen the Oswald file? Is there any indication that a note was received from Oswald on the date Mrs. Fennee testified?

Mr. SHANKLIN. I have not seen it since. I don't recall. I presume that would have to be answered by someone who has the files available.

Mr. BADILLO. My time is up. I think it might be important to get the file, because as I understand what he is saying, you are supposed to make an entry of the items in the file. It would be important if the note was received, it would indicate note received now in the entry.

Mr. SHANKLIN. I understand they checked that.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman.

Mr. Shanklin, I am trying to put this in perspective in my own mind. You had no knowledge at all and, correct me if I am wrong, no knowledge at all of Lee Harvey Oswald prior to the date of assassination, you personally.

Mr. SHANKLIN. Absolutely. I had no knowledge of him at all. Never heard the name before as I recall.

Mr. DODD. At the time that Oswald was apprehended in the theater in Dallas, there was an FBI agent by the name of Barrett who was on

the scene. Have you ever talked to Agent Barrett about why he happened to be there?

Mr. SHANKLIN. Well, the thing is we were instructed to cooperate with other agencies. I think the first thing Mr. Hoover said, and this was before they told me to investigate it completely, was to cooperate with the police.

I talked to Agent Barrett. I think Barrett heard on the radio something about a police officer being shot. He was out in that area. He worked with the police regularly. I think that was the reason he went there.

Mr. DODD. Is that normal operating procedure in an area that would not be normally in—the concern of the Federal Bureau of Investigation, for an agent to involve himself?

Mr. SHANKLIN. I would say any time a police officer was shot, as closely as we work with the police, I wouldn't criticize the agent for going and—

Mr. DODD. Not criticize, I am just wondering if you talked to him about why he happened to be there?

Mr. SHANKLIN. Well, I think that was it. I can't say definitely. You see, it was not a big issue because here is a police officer who has been shot. It was all over the radio, I guess. I think it was, he was in the area and he went there; yes.

Mr. DODD. This happened after word already came out, the fact the President had been just shot.

Mr. SHANKLIN. Right. Right.

Mr. DODD. So, you had news all over the radio that the President had been shot.

Mr. SHANKLIN. Right.

Mr. DODD. Then you get word that a policeman had been shot.

Mr. SHANKLIN. Now, of course, there is a lot of—

Mr. DODD. I would think, don't you, that the emphasis would be on the former rather than the latter.

Mr. SHANKLIN. Yes; that may be true. Also, now of course, nobody knows, far as I know, why Tippett was shot. I do not think it has ever been pinpointed that Tippett was—actually knew that this was somebody who killed the President.

Mr. DODD. They never knew at that point. They didn't have Oswald's name, the name Oswald wasn't in anyone's mind at that particular time. The only reason he gave you for having been there was because he heard over a police radio.

Mr. SHANKLIN. I recall that would be it. As I say, I didn't consider it a major thing at that time. Then, of course, when they bring Oswald in and you find he worked at the School Book Depository Building, I mean it became pertinent subject.

Mr. DODD. Once they brought Oswald in, did you ask them, was it at that point, then was this on Friday or Saturday, to the best of your recollection, if you can be more specific it would be helpful, what point did you discover that there was a file on Oswald.

Mr. SHANKLIN. Well, immediately when the agent who was maintaining liaison then, I don't know what time Friday afternoon it was. But he called me and said they had brought in Lee Harvey Oswald. I guess he gave me the descriptive data. He had shot Tippett. I checked—had the indexes checked. That is when I came up with a file.

As I recall, this is pretty hazy, but, as I recall, I—the file wasn't in the jacket at the time. So——

Mr. DODD. It wasn't in the jacket?

Mr. SHANKLIN. Well, I mean it was out with mail on it or something like that. I seem to recall that.

Mr. DODD. Why would that be out of the jacket?

Mr. SHANKLIN. Well, you have a jacket with a file and if it is listed as being in use or charged out, or if mail comes in on it, why it goes to the clerk's office. I mean you get into all kinds of procedures.

So, as I recall, they found the file. Then I know what I would have done by that time, I would either ask Mr. Hosty or Mr. Howe to review it and tell me what was in it.

Mr. DODD. You wouldn't review it yourself?

Mr. SHANKLIN. I wouldn't have time. I mean, here are people calling from headquarters. I am getting blasted all over the place for this, that and the other asking me things. I know I never had time to review any individual file.

Mr. DODD. You never reviewed Oswald's file?

Mr. SHANKLIN. I wouldn't say that I never looked at it, but I had to rely upon someone else to give me a summary.

Mr. DODD. Well, did you look at it or didn't you?

Don't you ever recall looking at that file one way or the other, yes or no. I would think that you would remember that. I can understand a 12-year lack of recollection, but I would think you would remember looking at a file of the man who has been accused of assassinating the President.

Mr. SHANKLIN. Well, I think I probably did, but when you try to pin me down with saying when, I would not know.

Mr. DODD. Well, let's forget the when; in that 3- or 4-day period, would it be safe to say that you looked at the Oswald file? Yes or no?

Mr. SHANKLIN. Well, I think I probably did. As I say, I can't say definitely that I did. I am sure I did. It is just that——

Mr. DODD. My time is up. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Shanklin, shortly before the assassination do you recall whether or not a Telex was received that was sent by the FBI Headquarters in Washington to all of the southern FBI offices to the effect that there was going to be an assassination attempt on President Kennedy?

Mr. SHANKLIN. I have no recollection of that. This thing came up I think first in 1968. All I could do then, I was still agent in charge, as I recall, I had records searched and people were interviewed, no record of it.

Mr. EDWARDS. Had you met Jack Ruby before you saw him on television?

Mr. SHANKLIN. I never met him.

Mr. EDWARDS. You never had met him?

Mr. SHANKLIN. Never met him.

Mr. EDWARDS. How soon did you find, after he had killed Oswald, that he had been interviewed six or seven times by the Dallas field office as a prospective informer.

Mr. SHANKLIN. I don't know. I would think that probably very shortly thereafter, again we would check and search our indexes. I see no reason why I wouldn't have found that. As you say, I think he was

called a potential informer. This was done a year or two before I arrived at Dallas.

Mr. EDWARDS. Did the Dallas field office furnish any names of dangerous persons to the Secret Service or to the local police before President Kennedy arrived there?

Mr. SHANKLIN. As I recall there was some fellow—the night before there was some man up at Sherman. I wouldn't know his name. I think the Secret Service maybe did pick him up. There was some kind of a booklet, not a booklet, a pamphlet being passed out on the street, treason or something like that. We picked up some of those, maybe.

I just seem to remember Mr. Hosty took those to the Secret Service. We furnished them everything we could get. I don't think we had anything that was maybe pertinent. I know those two or three things were done.

Mr. EDWARDS. If you had seen the Oswald note that he delivered to the FBI field office in Dallas several weeks before the assassination, and you found out it did say, as Mrs. Fenner stated it did, that he was going to blow up the FBI field office, et cetera, in other words, indicating violence, would it have been your regular procedure to have told the Secret Service about that before President Kennedy came to Dallas?

Mr. SHANKLIN. I don't believe at that time that we had any regulation to that effect. I would have certainly have taken some action which would have been to present it and to investigate it. Do you see what I am talking about?

One of the things the FBI was criticized about by the Warren report was the fact we were not disseminating as much information as they thought we should. That as a matter of fact, is in the report. But I don't think—I certainly would have called the Dallas Police Department and—if it said they were going to blow up the Dallas Police Department. This would be commonsense. I don't care what the book says. There wouldn't be anything in the book maybe that covered it, maybe, but it is natural if he says it he is going to blow up anybody, I would notify them, at that time.

Mr. EDWARDS. Mr. Kindness.

Mr. KINDNESS. No questions.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Sir, I wonder if you could make any suggestion that Mrs. Fenner possibly might exaggerate. In fairness to everybody here, she is the only one really that has stated the exact words or suggestions.

Mr. Hosty has asserted in the Warren Commission report and also in the development of the Department of Justice investigation, that there was really nothing specifically threatening.

I am wondering if you would want to make any observations about my question.

Mr. SHANKLIN. Well, I would say I can't conceive of any employee of the FBI having a statement that I am going to blow up the office without bringing it to my attention. I can't conceive of anyone that would not want it handled because you are working there. This would be self-preservation.

I am trying, I think, in my opening statement, to point out any threat of—any note containing threats of violence and had I known of it at the time, and I feel if there had been real threats of violence,

I can't conceive of even two or three people seeing it without bringing it to my attention. I was the agent in charge.

So, if there had been a note of violence, I don't think there would be any doubt that I would remember it. I might point out just about the middle of—the latter part of October, we had had an extortion case in Sweetwater, Tex., involving a threat to bomb four schools. This thing had the town—practically ran the town out. Everybody was scared to death. I know that was all over the office. We handled it as a special and finally apprehended him.

So, I mean, bombing and things, I just don't think—

Mr. DRINAN. Well, sir, the contradiction is this, that Mr. Hosty said before the Warren Commission, and I quote, Mr. Adams, the note which was given to him contained absolutely no threats, yet why therefore should he destroy the note if it contained no threats.

Mr. SHANKLIN. I don't know. I have no idea.

Mr. DRINAN. Well, after the last meeting here we had with Mr. Adams, when he was here, a press account concluded this way, there seems to be one uncontroverted fact that emerged from the first full-scale congressional hearing to examine the part played by the FBI in the assassination. That one undisputed fact is that somebody lied to FBI investigators this year about a 12-year coverup in the FBI Dallas field office.

I just had great difficulty in finding out the motives for the lies. I suppose Mr. Hosty might lend some, give some light on it tomorrow. Somehow this has to be resolved. It seems odd to me that you have never discussed this with Mr. Hosty when he came up.

Why didn't you? Was there any fear or why didn't you discuss the Dallas morning paper story with your former associate?

Mr. SHANKLIN. Before this—I felt if I called him one of the first questions you gentlemen would ask if I tried and called and tried to intimidate him. I have not talked to anyone of them. I did not intend to. They can hear what I have said. I am in the position that I did not feel that it was advisable to do so.

In the beginning of your question you said something about Mr. Hosty testifying before the Warren Commission on this note. I don't think he ever testified on the note in question here. Now you are talking about the one from Revill?

Mr. DRINAN. I am not. I am quoting Mr. Adams in the previous thing. Mr. Hosty testified before the Warren Commission that since he was the case agent on the Oswald investigation, he had no knowledge of any violent propensities on the part of Oswald.

Mr. SHANKLIN. That is why I am saying, yes.

Mr. DRINAN. Mr. Adams could be wrong. I don't know. That is his position.

Mr. SHANKLIN. He testified to that. I thought you said he testified that the note—I did not know he ever mentioned the note until after this thing in July.

Mr. DRINAN. You are quite right sir. That is a subsequent sentence. That raised another inconsistency. Why did he not tell the Warren Commission of what—about this particular note, to which he was privy.

Mr. SHANKLIN. I have no—I can't answer for Mr. Hosty. That's it. That would be up to him.

Mr. DRINAN. Would you agree with Mr Adams, who said that he really doesn't know why the note was destroyed, but that he feels that Mr. Hosty sought to avoid embarrassment either to himself or to the Bureau.

Mr. SHANKLIN. That again, would be up to what his thinking is. If it had been brought to my attention on the day of the assassination, if it was a note such as Hosty says, I would have probably have said, handle it and include it in your next report. I am being very serious about it. If it had no threat I would have said to include it in your next report, and probably never remembered with all the other things that were going on.

Now, why he decided to destroy it, I would never know.

Mr. DRINAN. As you know, there are 69 documents about Oswald in the FBI file, and this one was, as far as we know, the only one that was eliminated or destroyed and that goes back to the central question.

My time has expired. Thank you.

Mr. EDWARDS. Mr. Badillo.

Mr. BADILLO. You said that it would be inconceivable that if the note contained that kind of a threat, it would not be called to your attention. It seems clear that there was a note and the message was not a pleasant one because Mr. Hosty says different wording was contained in the note, that the wording was that Hosty should stop talking to Oswald's wife or otherwise Oswald would take appropriate action and report him.

Mr. Howe says that he saw the note, remembers that it contained some threat, but he couldn't recall the specifics. Now how is it conceivable that the note could be missing, in your opinion? Even if the threat was not as blunt as Mrs. Fenner has testified?

Mr. SHANKLIN. I didn't know Mr. Howe said it had a threat.

Mr. BADILLO. He says he remembers the note.

Mr. SHANKLIN. If it said to take appropriate action could mean an awful lot of things. I am agent in charge and I have had any number of calls and someone wants to report something about an agent out here. I have had to call him in and find out what was happening. The appropriate action would tell the agent in charge about the way he conducted an interview. I don't know.

Mr. BADILLO. We have had other testimony in connection with other matters where the FBI personnel and supervisors have testified that it is a crime to destroy letters or notes in the files. We have asked them why have they kept material on for example, certain Members of Congress. Some of them are dead in the file. The testimony was it was a crime to destroy it. Is that your understanding, that it is a crime to destroy it.

Mr. SHANKLIN. I would presume any evidence certainly it would be. I don't know exactly now, but we have had, have to have some kind of destruction as they call it of files within 5 years you destroy certain types for room.

Mr. BADILLO. Other than that. Just to take it from a file and destroy it.

Mr. SHANKLIN. I would think it would be some kind of a——

Mr. BADILLO. Even if done by an FBI agent.

Mr. SHANKLIN. Yes, I don't think the FBI agent had any more right to destroy it than anybody else.

Mr. BADILLO. Now tell me, what specifically was it that you were criticized for, the letter of censure in the Oswald investigation. What was the reason that you were censured?

Mr. SHANKLIN. I guess—I would have to find the letter. Generally, I think they felt we had too—I don't know—it is hard for me to answer. I will get the thing.

Mr. BADILLO. Was it you or the office who was criticized?

Mr. SHANKLIN. Well, it came to me as the SAC in the office, special agent in charge. Any time if they are criticizing the agents under you in something like this, they would probably criticize me.

All I recall when—they asked me when I first heard of Oswald and I told them. I can get the thing. I wouldn't know. That goes back again. I can find it, I am sure.

Mr. BADILLO. You say as late as 1974, Agent Hosty, was concerned about his letter of censure. He asked you whether he should take it up with Mr. Kelley.

What was Agent Hosty criticized for?

Mr. SHANKLIN. Well, I think it was the general thing again. I haven't seen it. Personally, I don't know as I saw his particular letter.

Mr. BADILLO. Wouldn't you, as the agent in charge? Don't you get copies?

Mr. SHANKLIN. I think I would have, yes. On the other hand—I probably would have seen it. I guess it said general mishandling of the investigation. I don't know. I know later on when I came up, something was said that we should have had him on a certain index. Well, it wouldn't have made any difference if we had, as to dissemination.

Mr. Hoover was of the opinion that we should have disseminated the fact that a defector was in the area. That is generally what we had. Now you would have to get this from headquarters, but I think that is what we were criticized for in the Warren report, our dissemination policy.

Mr. BADILLO. Should you have done it or not? Is that just Mr. Hoover's opinion and nobody else's.

Mr. SHANKLIN. Under the then regulations, we couldn't have, or shouldn't have; just on that. At that time, as I recall, there was no—if there was anything that was indicated as a threat against the President, we called Secret Service immediately, any kind of a threat. If there had been any indication at all, that Oswald or anyone else might hurt the President, we would have called them.

Somebody asked me about conferences. I know I had a conference ahead of time, telling me, coming up with any indication that somebody would do anything against the President, get with Secret Service.

I had very close relations with the then special agent in charge of Secret Service. We talked daily on anything that came up.

Mr. BADILLO. You feel that Mr. Hoover's criticism of you was improper.

Mr. SHANKLIN. No, I didn't say that. I have never said that. When I took over the job as special agent in charge I expected to get criticized if he felt my performance in a particular situation wasn't up to date or up to what he thought was standard.

I expected to get commended if it was better than that. So, that is all I can say. I mean, Mr. Hoover believed in discipline. I personally think you have to have discipline in any organization such as the FBI if it is going to be effective.

Mr. BADILLO. My time is up.

Mr. EDWARDS. Mr. Kindness.

Mr. KINDNESS. Mr. Chairman, if I might just get one question cleared up.

Mr. Shanklin, if the note in question that Mr. Oswald is alleged to have delivered to the desk of Mrs. Fenner never became a part of the file, there would not be any other record of that note available, would there?

Mr. SHANKLIN. Not that I know of. I don't know how there would be.

Mr. KINDNESS. But if it did become a part of the file, I am not quite sure of the response that you gave to Mr. Badillo a little while ago, as to whether there would be an index of that file's contents.

Mr. SHANKLIN. Well, I don't think there would be any index of every serial. You see, this would have become either a serial or a piece of evidence like he is talking about in his law firm. If it became a piece of evidence then it would be listed.

Now, in connection with the assassination investigation, after the assassination, I did have special indices, I would index each serial and who was interviewed in it. But you can see the tremendous problem that you would have running all of your cases that way. So there is no, or was no requirement on a routine case, that you do have at the time.

Mr. KINDNESS. If, following—

Mr. SHANKLIN. Now if it had been serialized then there should be something if it is out, there should be something that shows this is a serial, and it is missed. If it was charged out and only—the only copy, then it would be shown what it was during the time that it was out of the file.

Mr. KINDNESS. If, following the assassination of President Kennedy the note did exist, was still in existence, would it have been let's say would it be the responsibility of Mr. Hosty that is, according to the testimony we have up to this time, the note had been turned over to him and was presumably in his possession at least for some period of time and presumably some period of time extending after the assassination of President Kennedy. If at that point it was in his custody, would he have been the sole person to decide what to do with that note as to whether it went into a file?

Mr. SHANKLIN. I think if the supervisor knew about it he would probably assume some responsibility. Generally speaking something like that if it were handed directly to the agent, you would expect him to exercise judgment in handling it.

Mr. KINDNESS. Would there be any rules that were in effect at that time that would tend to control his decision as to whether to put it in the file or not to put it in the file?

Mr. SHANKLIN. I think most of the time it would be good judgment. I see no reason why this wouldn't have gone in the file under the circumstances. I don't know how you want to look over everybody's shoulder completely. You see what I am talking about. The message center gave him the note. He should have taken appropriate action.

Mr. KINDNESS. Was there in effect at that time any rule as to what

you do not file in a file so as to keep from gathering excessive amounts of paper in the file?

Mr. SHANKLIN. I do not recall that. I think later and I think I have seen testified they had something here in Washington that would not be filed. I do not know. That is just routing slips, things like that.

If I sent a routing slip to an agent and said you do this by such and such a date, ordinarily you don't put that in the file. I mean, you expect him to do it. Maybe you have a tickler and if he has not done it then you call him to task for it. You do not clutter up the file with every little thing.

Mr. KINDNESS. As a matter of judgment, going back to the point that the agent would be expected to exercise good judgment as to whether to put it into a file, would it—if the note was in existence after the assassination of President Kennedy—would it not have been good judgment to retain that note in the file because it was written by or purportedly written by Lee Harvey Oswald and contained at least an example of his handwriting at a time that was fairly close to the point in time in which the assassination of the President occurred?

Mr. SHANKLIN. I would think so.

Mr. KINDNESS. Thank you. No further questions, Mr. Chairman.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman.

Mr. Shanklin, you told us you talked to Chief Curry in the Dallas Police Department. Did he ever tell you that he had ever had any contact with Oswald subsequently? I do not mean prior to—have you ever heard of it?

Mr. SHANKLIN. I never heard of it, no.

Mr. DODD. Did any other organization, agency down there ever mention that to you that they had a contact with him?

Mr. SHANKLIN. I don't think so.

Mr. DODD. We have some reports—Congressman Badillo made some reference to soon after the assassination—there were reports regarding paraffin tests on Oswald. There were reports regarding fingerprints on, I guess the soda pop bottle and some chicken bones that had been on the sixth floor of the room, of the book depository.

The first reports that came out a couple of days after the assassination reporting, or at least indicating, that evidence showed that in fact Oswald had been in the room, paraffin tests had been performed on.

Mr. SHANKLIN. Evidence?

Mr. DODD. Evidence of positive paraffin tests of the cheek and hands of Oswald, fingerprint evidence on the soda pop bottle and chicken bones, food in that room.

The statements from the press—and again, perhaps you have no recollection, but—the statements were attributed to you in the press reports. I am looking back on a Xerox copy of the November 25, 1963 edition of the New York Times in an article by Anthony Lewis. I am quoting from the article, "Already authorities have collected evidence of all sorts. Gordon Shanklin, FBI agent in charge of Dallas said today the rifle that killed the President had been traced to Oswald."

He goes on down, speaking of you, "the FBI agent noted these other pieces of evidence which have been assembled by the Dallas Police, the FBI, and the Secret Service."

He goes on to mention specifically talking about a number of things that apparently you had indicated as evidence pointing to Oswald. Among those included a palm print on a brown paper bag found at a window of the schoolbook warehouse.

On down further it talks about paraffin tests used to determine whether a person has fired a weapon recently and this was administered to Oswald shortly after he was apprehended Friday, after the assassination, and it showed that particles of gunpowder from a weapon, probably a rifle, remained on Oswald's cheek and hands.

Subsequently, it was discovered, in fact, the brown paper bag and palm print belonged to a Bonnie Ray Williams who had apparently eaten in the room.

Subsequent examination indicated, in fact, the paraffin had only really been showing a positive on the hands of Oswald, and not on his cheeks.

Do you recall the information, where he got the information initially?

Mr. SHANKLIN. I would not have known anything about the paraffin tests. The only thing that I would recall, there was an awful lot of misquoting that went on around that time, is that I got the evidence on the night of the 22d, early morning of the 23d. It was brought to our laboratory. It was examined and returned.

I do not even know what was the evidence. We did not make any paraffin test. That would have been the police. The bottle and the paper bag and that, that—then the report was given to the Dallas Police Department on Saturday afternoon. I know that was given out. But I didn't give it out. I delivered it or had someone deliver the lab report, as I recall and had it delivered to Chief Curry and maybe District Attorney Wade. I never said anything. I know this. I never said anything about paraffin tests. I knew nothing about it. What is the date of that?

Mr. DODD. That is the 25th. That would have been a Monday.

Mr. SHANKLIN. I made no press release on it. I say, I do know that I probably referred them if they asked me, to either headquarters or to, I know Chief Curry did have the lab report because that was one of the things we agreed to, immediately furnish the lab report to him.

Mr. DODD. You never gave any statements?

Mr. SHANKLIN. I never recall giving any such statement. I would have known nothing about a paraffin test. That would have been conducted by the police themselves.

Mr. DODD. Thank you, Mr. Chairman. That is all.

Mr. EDWARDS. Mr. Parker.

Mr. PARKER. Yes, thank you, Mr. Chairman.

Mr. Hollabaugh, I want to go back to an unfinished piece of business and ask you once again what the basis was on which the declination to answer Father Drinan's question was.

Mr. HOLLABAUGH. I believe you have seen the standard employment agreement which FBI agents sign with the Bureau of Investigation. If you have not, I will immediately get a copy to you.

Mr. PARKER. We have asked the Bureau for a copy. They have not yet provided it.

Mr. HOLLABAUGH. We have a copy. There is no reluctance at all to give it to you. Now this employment agreement—

Mr. PARKER. Let me stop you, if I might. We will get a copy of the employment agreement.

We were informed by the Federal Bureau of Investigation, and we did agree to four limitations on the appearance of any witness before the committee.

We discussed this with you and your client, with the Federal Bureau of Investigation. Those four limitations were that there would be no discussion of any ongoing investigation; there would be no discussion which would reveal any kind of confidential source; there would be no discussion that would reveal third bureau or third agency information without the approval of that third agency, and there would be no divulgence of any kind of sensitive techniques of the Bureau.

On which of those four bases are you declining to answer?

Mr. HOLLABAUGH. None of those bases. I am relying on Mr. Shanklin's employment agreement. When we were asked to represent Mr. Shanklin in this matter, Mr. Shanklin came to us, we went to the Federal Bureau of Investigation. The first question I asked was, what part or how much of the employment agreement that Mr. Shanklin is under, has been cleared or in fact, released insofar as this particular hearing is concerned.

I was advised the subject matter this subcommittee wished to go into was the visit of Oswald to the FBI office and the note, if one existed.

I asked that question two or three times and I was so advised—and it was my understanding that that was the understanding between the Bureau and this subcommittee.

As a result of that, and I think when Mr. Shanklin came to your office for an examination, my recollection is that your line of questions was limited to these two subjects.

Now, the problem, as counsel for Mr. Shanklin, is that, I feel he is still under this broad employment agreement with the Bureau. It says specifically he will not discuss matters that came to his knowledge while he was with the Bureau, and I feel that he is—until the Bureau releases or says to him you may also discuss this, I think that Mr. Shanklin is bound by this employment agreement.

If the Bureau says, I am simply being cautious in that I would like, if you gentlemen would wish to go ahead into other subject matters, and if the Federal Bureau of Investigation says he is released from his employment agreement, to allow him to discuss any such matters, then I would discuss with Mr. Shanklin as to what he knows.

Mr. PARKER. If there were to be a violation of that employment agreement, what sanctions would there be Mr. Hollabaugh?

Mr. HOLLABAUGH. Well, that is a very good question.

Mr. PARKER. Could you simply tell me the answer.

Mr. HOLLABAUGH. The employment agreement recites several statutes by citation, 18 U.S.C., and certain other sections. Now as to all that I am attempting to do is keep the lines clear.

I would be very happy if you gentlemen wish to ask Mr. Shanklin about the wiretap matter that the Congressman from Massachusetts was asking about, and if the Federal Bureau of Investigation says, yes, you are released from that part of your employment agreement

to testify about it, then I would discuss it with Mr. Shanklin and we will go on from there.

Mr. PARKER. Thank you very much, Mr. Hollabaugh.

Mr. Shanklin, you testified the first you knew of the note was when you received the phone call from Mr. Thomas Johnson, of the Dallas Times Herald on July 5, 1975.

Can you tell the date or the dates you were interviewed by Mr. Bassett subsequent to that date?

Mr. SHANKLIN. After Mr. Johnson had told them, I came to Washington, I think—he said he would talk to them and I said, well, you go ahead and do it. Then I came up to Washington I think on the 8th of July, I believe.

Mr. PARKER. Was that a trip voluntarily made or were you summoned to Washington?

Mr. SHANKLIN. They called me. I wasn't summoned. I talked to them about this at that time. They said he had been up and told them.

Mr. PARKER. Who is "they."

Mr. SHANKLIN. I believe it was—I don't know whether it was Bassett or not at the time. Maybe it was Bassett or Jim Adams, one of them.

Mr. PARKER. Then you did come to Washington.

Mr. SHANKLIN. Yes.

Mr. PARKER. What date was that, sir?

Mr. SHANKLIN. I think it was July 8.

Mr. PARKER. Were you interviewed in Washington at that time?

Mr. SHANKLIN. They asked me if I knew anything about it. I said—the question is where to start, you might say.

Mr. PARKER. Who did you talk to in Washington?

Mr. SHANKLIN. Again, Bassett and Adams.

Mr. PARKER. Was there anybody else you talked to in Washington?

Mr. SHANKLIN. I don't think so. Mr. Connelly who is in the Inspection Division.

Mr. PARKER. Would you characterize this as a meeting?

Mr. SHANKLIN. It was a meeting, yes.

Mr. PARKER. The question or subject of which was the pending revelation of the Dallas Times Herald?

Mr. SHANKLIN. Right. They went into more detail what they talked to him about than I did. I tried to stay clear from the thing.

Mr. PARKER. What was the subject matter in that meeting with Mr. Adams and Mr. Bassett?

Mr. SHANKLIN. I guess they asked me if I knew anything about it. I said I didn't know anything about it, have they looked in the file, was the thing reported?

Mr. PARKER. Was your statement given before or after that meeting?

Mr. SHANKLIN. I don't think I gave a statement. I gave them two statements. I came back in July. I think you probably know—I do not have a copy of my statement. It seems to me it was July 21.

Mr. PARKER. Your statement was given in Washington, D.C.

Mr. SHANKLIN. The first one was.

Mr. PARKER. You were reinterviewed?

Mr. SHANKLIN. Yes, I was interviewed then.

Mr. PARKER. When were you reinterviewed?

Mr. SHANKLIN. In September, the last week as I recall.

Mr. PARKER. Did anything else transpire at that meeting? Any other subject discussed?

Mr. SHANKLIN. No.

Mr. PARKER. Is it correct, Mr. Shanklin, and we have gotten somewhat of an education here today as to how the Dallas Office functioned, that all information that would have flowed from the Dallas Field Office to Washington, would have flowed through your office.

Mr. SHANKLIN. No, not necessarily. You have the Assistant Agent in Charge. I couldn't sign everything that goes out of there and the supervisors sign things going out of there, reports out.

Mr. PARKER. Those would go directly to Washington without your seeing them?

Mr. SHANKLIN. Some of them do, yes, they would. I was supposed to see all matters that—it is a judgment call.

Mr. PARKER. Would it be safe to say though, on a case in the nature of the assassination of the President of the United States, that all material and information flowing from the Dallas Office to Washington, would have gone through your office?

Mr. SHANKLIN. No. No. I couldn't say that. Because Mr. Malley was down there for 9 days. He probably signed out some teletypes.

Mr. PARKER. With the exception of Mr. Malley?

Mr. SHANKLIN. Well, if it were a major importance, yes, I couldn't—let's face it, again, I depended upon being advised. I put two men in charge and two specials. I had one of them in charge of one type and one of them the civil rights thing. Now, when you bring in a thousand page report, I would read the synopsis and ask him about anything, trying to determine—I might have initialed it without reading the thing, every page.

Mr. PARKER. It would have gone through your office; is that correct?

Mr. SHANKLIN. It would have—

Mr. PARKER. Special agents were not empowered to deal directly with Washington.

Mr. SHANKLIN. Oh, no, no.

Mr. PARKER. Is it also safe to say then, that all information or requests or authority that came from Washington to the Dallas Office would come to you?

Mr. SHANKLIN. It should, yes.

Mr. PARKER. They did not get in contact with special agent Hosty directly or Mr. Howe or anyone else.

Mr. SHANKLIN. No.

Mr. PARKER. Any instructions—

Mr. SHANKLIN. Well, a supervisor might talk with somebody. He might, but generally not, and particularly in connection with this.

Mr. PARKER. If there was in fact a note from Lee Harvey Oswald which was received in the Dallas Office and was communicated to Washington, D.C., any instructions with regard to that note would have come through you.

Mr. SHANKLIN. I think so.

Mr. PARKER. Thank you very much.

Mr. EDWARDS. Mr. Shanklin, recently there have been some distressing disclosures about the FBI, and indeed, about the CIA and some other Government agencies. These disclosures have added to the fuel of the American public's reservations about the investigation that was

made after the Kennedy assassination, and the integrity of the Warren Commission report.

Indeed, it has gotten so bad recently, so severe recently, that pending before the Rules Committee of the House of Representatives is a resolution that if passed by the House and the Senate would completely reopen the investigation and create a new select committee or new commission or something like that.

Now, in the 12 years since this murder, this assassination took place in Dallas, Tex., and you were the SAC in charge, do you have any second thoughts. Do you have any reservations whatsoever about the investigation that took place and the conclusions and findings of the Warren Commission?

Mr. SHANKLIN. Well, of course, I am in that position that I was the supervisor of the FBI's investigation. Do you see what I am talking about?

Now, the Warren Commission had, as I pointed out, 15 attorneys. They had available information on CIA, maybe the State Department that I did not individually have.

Now, based on the leads and everything, I have seen nothing that would indicate that would change the decision. But, on the other hand, they were in position of being the judges.

As I say, there was nine of them I believe, and they had 15 lawyers. Mr. Rankin was a very capable lawyer. He was going all out. Each day almost we would get requests for something that they would want us to do, in addition to maybe what was in the report.

I personally, just from my observation, I do not think there has ever been anything as fully investigated.

Now you always have this. Nobody knows what was in Oswald's mind. I had people tell me the same thing. I saw where somebody is writing a book in England and we have the wrong man buried in Fort Worth now. I do not know whether you all have seen that.

So, I have seen nothing to change it.

Mr. EDWARDS. Mr. Klee.

Mr. KLEE. Thank you very much, Mr. Chairman.

Before I begin my questions, I would like to ask the witness if he would submit a copy of his employment agreement with the FBI for the record, I will not pursue that, if that is all right.

Mr. SHANKLIN. No problem.

Mr. HOLLABAUGH. We would be pleased to give you one.

Mr. EDWARDS. Without objection it will be received.

Mr. KLEE. Thank you.

Mr. Shanklin, you ran the Dallas division office. I would like to explore with you some of the rules and regulations in effect then with respect to the powers and capacity of a receptionist such as Mrs. Fenner.

Mr. HOLLABAUGH. Excuse me. Could we have just a moment's break.

Mr. KLEE. Yes.

Mr. EDWARDS. We will recess for 5 minutes.

[A brief recess was taken.]

Mr. EDWARDS. The subcommittee will come to order.

Mr. Klee.

Mr. KLEE. Thank you, Mr. Chairman.

Mr. Shanklin, I was about to probe the FBI Dallas Office regulations and orders under which Mrs. Fenner would have been operating when she received the alleged note from Oswald.

If someone had come into the office and thrown the letter addressed to a special agent onto the desk, would any rule or any regulation have required or precluded the receptionist from reading that letter?

Mr. SHANKLIN. Well, if it dropped out in front of her, we just wouldn't have any regulation saying I think you wouldn't be ordinarily reading other people's mail. But if it dropped out in front of her like she said, she obviously saw the thing, well then, I don't know what good she could do about it. I didn't have any rule. I thought it was commonsense if there is an envelope addressed to me personally, why people wouldn't be opening it. The mail is opened ordinarily, routine mail would be opened in the chief clerk's office.

Mr. KLEE. Yes, she stated it is not her normal routine to open letters. I was wondering if there were any regulations or J. Edgar Hoover and the National Bureau had any regulations about mail addressed to an agent being opened by a receptionist.

Mr. SHANKLIN. I did not know of any regulation. I did not know we needed any. You can have so many rules you can't keep up with them. I do not know where there would be one.

I would say, if you didn't have it sealed and it is falling out, you have an opportunity to read it, fine.

Mr. KLEE. In your experience, did many people bring things into the Bureau Office in an envelope that wasn't sealed?

Mr. SHANKLIN. No.

Mr. KLEE. Usually if they took the time to put it in an envelope they would seal it?

Mr. SHANKLIN. Most of the time, in my experience, yes.

Mr. KLEE. Were there any rules or regulations governing Mrs. Fenner's conduct when she received the letter, and discussing with other Bureau employees such as Helen May or showing the letter to Helen May? Was that kind of a thing done all the time?

Mr. SHANKLIN. Well, I don't think it would be done all the time. On the other hand, it is not a personal—well, it would be personal, I guess, but it is just the question of judgment.

Mr. KLEE. In your experience, in running the FBI field office, if an employee such as Mrs. Fenner had recognized that the person that delivered the note, Lee Harvey Oswald, was the same person that had assassinated the President, when a person such as that came into the office the next day, would you expect a person at least to gossip around and mention it to another employee that that connection had been made.

Mr. SHANKLIN. Well, I don't know that—I don't know that she saw Oswald being shot. Is that right?

Mr. KLEE. Mrs. Fenner testified that when she saw that Lee Harvey Oswald was the person that assassinated the President on TV, that she jumped up and said something to the effect that, "My God, that is the man who gave me the note." Then she went on to work later that day.

Mr. SHANKLIN. And didn't mention it.

Mr. KLEE. And didn't mention it. Do you find that extraordinary?

Mr. SHANKLIN. Mrs. Fenner, she didn't go into this. She didn't get

along with employees too well. She had her own little office. She pointed out here this morning that she was working on applicant type investigation as she has been for the last several years.

So, I don't know. She will talk to certain people maybe and maybe she wouldn't with others. She is an experienced employee.

Mr. KLEE. I have one other question about her function. She testified this morning that she was numbering pages on a report of some form with Special Agent Hosty. Do special agents normally do clerical things like that?

Mr. SHANKLIN. I would say he was out there seeing that the pages were placed in the proper order. I do not think—if it would have been something in connection with this case, that is what he was doing. That is what I would think he would be doing, seeing that these reports were being assembled. There is probably 10 or 15 copies. He might just be overseeing the whole thing.

Mr. KLEE. Did you ever order Hosty to interview Lee Harvey Oswald?

Mr. SHANKLIN. I told him—after Lee Harvey Oswald was found to be in the police department in the afternoon and as the murderer, charged with the murder of Tippett, and I found we had the case.

Mr. KLEE. Is that the 23d?

Mr. SHANKLIN. No, it is the 22d. That is that afternoon. I talked—I am sure with Mr. Al Belmont and told him we had a file. He suggested that the agent, the case agent file, the agent who had the case file should go up and try to interview him. So, I am certain that I told Mr. Hosty to go and sit in on the interview.

Mr. KLEE. Did you ask him to summarize the file for you?

Mr. SHANKLIN. I don't know as I did at that time. I would be more inclined to think that I asked Mr. Howe to summarize the file.

You see, things are breaking and somebody is telling me to get the rifle and somebody is telling me to get somebody up there. We knew that Oswald. I don't mean that Oswald, but Marina lived out in Irving. We were trying to find out where Oswald lived. I mean everything is—

Mr. KLEE. You were running the entire operation.

Mr. SHANKLIN. I was having to. The phone calls were coming in to me.

Mr. KLEE. You stated that you had been there approximately 7 months.

Mr. SHANKLIN. Yes, sir.

Mr. KLEE. As the special agent in charge.

Mr. SHANKLIN. Yes, sir.

Mr. KLEE. Was this the first time that you had been a special agent in any field office? The Dallas office?

Mr. SHANKLIN. Oh, no.

Mr. KLEE. Had you—how long had you been a special agent by the time the President was assassinated?

Mr. SHANKLIN. Well, I entered in May 1943.

Mr. KLEE. Special agent in charge.

Mr. SHANKLIN. Huh?

Mr. KLEE. How long had you been special agent in charge.

Mr. SHANKLIN. My first office as agent in charge was in November 1953, in Mobile. Then I stayed there until 1955, and went to Pittsburgh as agent in charge. Then they brought me back on the inspection staff. I served and stayed on the inspection staff about 18 months, inspecting other offices all over the country. I went to El Paso for 1 year. I went to Honolulu for 4 years. I came from Honolulu to Dallas. I was agent in charge of all those places.

Mr. KLEE. After the assassination, what was your progress since then in terms of being a special agent in charge?

Mr. SHANKLIN. I continued as special agent in charge in Dallas. Certainly it is a good office. I got my within grade. I was already in the second step of grade 17, when the assassination occurred.

Mr. KLEE. I do not mean to cut you off, but my time is limited. I would like to proceed. When did you retire?

Mr. SHANKLIN. I retired I think, June 27, 1975.

Mr. KLEE. In your 25 years of experience of all of the investigations that you supervised as a special agent in charge, did you have anything that was more monumental or made a greater impact on your career than this Oswald and the Kennedy assassination?

Mr. SHANKLIN. No, sir, I could not have. I told them I should have an extra year of longevity, kiddingly. I put in approximately 2 years work within the 11 months.

Mr. KLEE. From the time of the assassination, you worked for 80 straight hours without any sleep at all.

Mr. SHANKLIN. That is right. I never got any sleep until 4 or 5 o'clock in the Monday afternoon, after Malley got down there and I left the office. That is the first time. I left the office once before. I ran home on Saturday night about 11 o'clock and while taking a shower I get a call that someone said they are going to kill Oswald, better move Oswald, they were moving him. I came back to the office after I could not get the police chief and I stayed there until I finally did get him.

Mr. KLEE. If, during this 80-hour period you had ordered a note destroyed or became aware of a note pertaining to Oswald and the assassination, that is certainly something that you would remember today; isn't it?

Mr. SHANKLIN. I think I would certainly have remembered not ordering any note destroyed, or ordering any note destroyed. I am going to have to say that I feel that if I saw the note and if it were as Hosty said, I would have said, handle it, take care of it in the next report and that would have been it. I may have forgotten it. I think I would remember any instance of saying destroy anything.

Mr. KLEE. Well, also, since Oswald was the subject of the assassination threat, if there was a file on Oswald, wouldn't you remember whether you had looked at that file? Isn't that an extremely important thing in the course of supervising an investigation?

Mr. SHANKLIN. Well, here is the thing. You have to—you have to delegate some things. I was being told to do 3,000 things or something similar. I don't know. I think I would probably have asked Mr. Howe. He is the supervisor. I think I probably said, get this out. I have to call Belmont. I want a summary, or something. Do you see what I am talking about?

Mr. KLEE. That is reasonable. Would you have remembered reading the summary of the problem?

Mr. SHANKLIN. I am certain that I told Mr. Belmont what was in the file. They then started looking for their file in Washington.

Mr. KLEE. Thank you, Mr. Chairman. I have no further questions.

Mr. EDWARDS. Are there other questions?

Mr. DRINAN. Mr. Chairman, just one last point.

We are in a quandary here because we will have evidence tomorrow and testimony. We were told on October 20, and I have the document here before me that the Department of Justice is not going to follow through with any prosecution.

I quote from the Deputy Attorney General, Mr. Harold Tyler,

The only possible theory of prosecution will be by way of a perjury indictment for false testimony relating to events that occurred 12 years ago.

In all candor, sir, at lunchtime I looked up the perjury statutes and what are witnesses required to say. There is a section here when the examinee's answers are unresponsive during the inquiry concerning acts or conduct and that is not to be measured by the same standards.

I wonder if you have any explanation why you are so ambiguous and hesitant. You said a moment ago that you may have misunderstood. You really would not answer categorically my sole questions about whether or not you met on the night of Lee Harvey Oswald's murder with your two associates.

I am just wondering if you want to respond to the questions that are in my mind.

Mr. SHANKLIN. Well, if I know what they are, I do.

Mr. DRINAN. This simple question. Why are you so equivocal?

Mr. SHANKLIN. I do not think I am. I mean, I am trying to tell you the truth.

Mr. DRINAN. We have to believe you sir, or we have to believe four others who contradict you. We can't have it both ways.

Mr. HOLLABAUGH. I wish to state the definition of the issue here is not entirely as the gentleman from Massachusetts seems to make it. If you are asked sir, what you did on the night of November 22, 1963—

Mr. DRINAN. I could tell you categorically every moment.

Mr. HOLLABAUGH. Yes.

Mr. DRINAN. I, as a private citizen. I think every American remembers precisely and it was not November 22, it was November 24, when Lee Harvey Oswald was killed.

Mr. HOLLABAUGH. The 22d was when the President of the United States was killed.

Mr. DRINAN. I know. But I am asking two nights later.

Mr. HOLLABAUGH. Well, I would just like to refer to one thing.

Mr. DRINAN. I am asking the witness, sir.

Mr. HOLLABAUGH. Well, I am about to read what the witness said.

Mr. DRINAN. All right.

Mr. HOLLABAUGH. In his opening statement he said:

I understand that agents Hosty and Howe have stated that the Oswald visit and note were brought to my attention during the period immediately following the assassination of the President. Since, at that particular time, I was overwhelmed with innumerable major problems and duties, it is, of course, conceivable that their recollection is correct. I simply do not remember anything like that.

Now—

Mr. DRINAN. You are verifying exactly what I am asking the witness. You are verifying exactly. He doesn't categorically deny. He doesn't say they are wrong. He doesn't say they are right. It is very ambiguous. I am just wondering why he wouldn't remember.

It seems to me if he met on a matter of this moment, that he would remember. If he wants to say that he never met, that is perfectly all right, but he is not going to say that, or he hasn't said that.

Mr. HOLLABAUGH. If you were in charge of this investigation and that night the man had been working for some 48 hours without any sleep—

Mr. DRINAN. Sir, it is not that night. It is—

Mr. HOLLABAUGH. It is the 24th.

Mr. DRINAN. The 24th.

Mr. HOLLABAUGH. He started the 22d. He did not go to bed until Monday, the following Monday. What you are insisting upon is a confrontation of trying to make it appear that somebody is an out and out liar.

Mr. DRINAN. That is what Mr. Adams says. It is not my words, sir. Mr. Adams, who prepared this and who testified, said that. Obviously you come down to that. We can't believe them all. You have to believe one group or the other. There is totally contradictory evidence.

If the Department of Justice is not going to resolve it, they are not going to prosecute at all, so it is left up to Congress. We represent the American people here. We are not going to sit back and tell them and allow totally, absolutely contradictory statements to go unchallenged. It is our duty not to do that.

Mr. HOLLABAUGH. Well, when you are now speaking of events that occurred some 12 years ago and the circumstances under which these events occurred, I am surprised that the gentleman from Massachusetts would think somebody could have such a definite effective memory of a matter of that kind.

I think the record will show that we have never claimed for Mr. Shanklin that he is infallible. He is simply attempting to tell this committee, to the best of his ability, exactly what he recollects. That is precisely what he has done.

Mr. DRINAN. Well, he hasn't done that, sir. I asked time and time again and he—if you want I will ask your client once again, to the best of your recollection, did you or did you not meet with your two closest associates on that evening; yes or no.

Mr. SHANKLIN. I am certain if they were in the office obviously we were close together. We would have met. But I have no independent recollection of having a meeting in my office. They were running in and out. Everybody was.

Mr. DRINAN. You are verifying my point, sir, that you are not saying yes or no. You are not saying that you had a meeting. You are not saying you didn't have a meeting.

Mr. SHANKLIN. I don't think that I had any meeting as such. People would be coming in and they would be saying something. The phone was ringing. Again, we are setting up a new special. You are talking about the day Oswald was killed. Isn't that right? I am being called. I have to get another special squad set up. I have to get GSA to get me the space. I have to get teletypes. I have to get everything else going.

So, I don't think I had any meeting. I had everybody coming in. They were running in and out. I wouldn't call it a meeting. I had no

time for conferences as such. If someone wanted something they would come in and I would make a snap decision and that would be it.

Mr. DRINAN. Well, I thank you, sir.

I yield back the balance of my time.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Mr. Shanklin, you said you were taking a shower Saturday night and you got a phone call from someone telling you they were going to try and kill Lee Harvey Oswald. Can you tell me who the phone call was from?

Mr. SHANKLIN. I don't know. The office got the call. This has been taken up in the Warren report. I called the office. I was home about 11 and I was trying to take a shower. This is the first time I had any chance.

Mr. DODD. This is Saturday.

Mr. SHANKLIN. Right.

Mr. DODD. Yes.

Mr. SHANKLIN. I came on back down because they could not get the police chief. I came on back and then I finally got in touch with the deputy chief and I said I want to talk to Curry. The next morning I got him and told him I wanted to report this directly to him. He said he had everything taken care of. He had two armored trucks.

Mr. DODD. Were you able to determine who the call came from? Was it an anonymous call?

Mr. SHANKLIN. It was an anonymous call. It came into the clerk that operated the switchboard. Probably the same individual, I found out later, called the sheriff's office. Nothing ever happened.

Mr. DODD. Something happened. He was killed.

Mr. SHANKLIN. Never happened on that. I know that everybody that got the calls listened to Ruby's voice and they said it wasn't Ruby. I don't know.

Mr. EDWARDS. You said that maybe you did have a conversation with Mr. Hosty and he misunderstood what you told him?

Mr. SHANKLIN. I am not saying—I am saying, as I just finished up here, with people running in.

Mr. BADILLO. In other words, you are saying maybe it did happen and maybe Agent Hosty thought he heard you say to destroy the note when in fact you didn't.

Mr. SHANKLIN. I know I never said destroy the note. Maybe that is the interpretation he got, I do not know.

Mr. BADILLO. You think now maybe he thought you said destroy the note?

Mr. SHANKLIN. I don't think because I do not recall saying—

Mr. BADILLO. The last round of questioning you said that it is illegal for FBI agents to destroy evidence.

Mr. SHANKLIN. Right.

Mr. BADILLO. Therefore, if in fact the note was destroyed, whoever destroyed it committed a crime, even though he was an FBI agent? Right?

Mr. SHANKLIN. Well, that would be up to the U.S. attorney.

Mr. BADILLO. He said you told him to destroy the note and you told him to commit a crime.

Mr. SHANKLIN. I did not tell him to destroy the note.

Mr. BADILLO. That is what is involved here. That if the note was destroyed, a crime was committed, assuming that it happened as you have suggested Agent Hosty misunderstood, he had no right to destroy the note even if you told him to. Isn't that so?

Mr. SHANKLIN. I would think so. I would think committing a crime, I would think he—I am trying to point out is, I do not know. You are trying to say that one person's lying and this and the other. I don't know that I talked to him even. I would imagine that I did see him if he was working at that time. You see, this is 12 years now. We kept maybe records for I think 2 or 3 years time in the office.

Mr. BADILLO. Now you say it is possible you may have discussed the note?

Mr. SHANKLIN. I am trying to say here——

Mr. BADILLO. You say it is possible, right?

Mr. SHANKLIN. I am not saying it is possible I discussed the note. No, I don't think so. I am trying to point out in this thing that if the note said anything about it had a threat, I do not think I would have forgotten it.

Do you see what I am talking about? If Mr. Hosty came running in there with innumerable other things or Mr. Howe came in and they said we have a note here from Oswald that says don't bother my wife but talk to me or I will go through proper channels, I do not know that I would remember that. I would have said, handle it, which in my opinion would have been to include it in a report and that would have been it.

Mr. BADILLO. There is no conceivable phrase he could have said that might have led Agent Hosty to think you meant to destroy the note?

Mr. SHANKLIN. I don't think so.

Mr. BADILLO. On that issue, there is no language that he could have used?

Mr. SHANKLIN. I don't know of any I would have. I am just saying I don't know anything along that line.

Mr. KINDNESS. Mr. Chairman.

Mr. EDWARDS. Yes.

Mr. KINDNESS. There is one thing that seems to keep recurring in the questioning of the committee that concerns me. I think we need to ask counsel for the committee for clarification of the record in relation to Mr. Shanklin's testimony and that is there has been reference repeatedly to a crime being committed if a note was destroyed.

Can counsel point out what crime we are talking about and what statute we are talking about or whether we are really talking about the archives regulations.

Mr. PARKER. Yes.

Mr. KINDNESS. The second part of the question is, if it was never a part of the file, maybe it should have been part of the file, but if it never became a part of the file would the statute apply.

Mr. BADILLO. Would the chairman yield before counsel answers the question. You may remember we had an earlier hearing this year where the question came up as to evidence in the files of the FBI which had nothing to do with the commission of a crime, it had to do with the question of Members of Congress.

The testimony at that time by the FBI personnel was that even if the evidence had been properly secured, because there were wiretaps, or because it was, there was no basis for opening up the file, that it—they could not destroy that evidence because it would constitute the commission of a crime, unless they followed specified procedures which were outlined in the FBI manual.

Once the evidence gets into the file, even if it is improperly secured it is, they testified, a crime to destroy it.

Mr. KINDNESS. That is not an answer to my question. I direct the question to counsel as to what he would advise at this point as to what statute if any statute is involved.

Mr. PARKER. Mr. Kindness, I think I will have to respond to that in writing. I think each of the hypotheticals you posed may well have a different answer.

It would depend on what the note was. Whether it had been serialized. Whether or not it was in the file.

Mr. KINDNESS. Yes.

Mr. PARKER. We will prepare a memorandum for our members.

Mr. KINDNESS. I would ask counsel if he has been consulted by any member of this subcommittee for advice as to whether this does constitute a crime, the destruction of anything that was not part of the file or was not part of the file, prior to this time.

Mr. PARKER. Is your question whether I have been asked specifically for advice—

Mr. KINDNESS. For advice with respect to preparation for this hearing.

Mr. PARKER. Yours has been the first question.

Mr. KINDNESS. Thank you.

Mr. DRINAN. If I may, Mr. Chairman, I think we should put this in. Mr. Adams says that the concealment and subsequent destruction of the note, the action was wrong. It was in fact a violation of the firm rules that continue to exist in the FBI, rules which require that the fact of Oswald's visit and the text of his note be recorded in the files of the Dallas office and that they be reported to our headquarters later.

So, I am not certain of the crime, the point Mr. Kindness makes, but it certainly was in violation of the rules of the FBI.

Mr. KINDNESS. I think that is really the point in question, the rules of the FBI and not—rather than the statutory provision. I do think the record should be clarified on that point.

Mr. EDWARDS. This concludes the hearing today.

[Whereupon, at 3:30 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., the next day.]

[Subsequent to the hearing, the following statement by J. Gordon Shanklin was supplied for the record:]

SUPPLEMENTAL STATEMENT OF J. GORDON SHANKLIN

During his testimony before this committee, Mr. Adams was asked about my record of achievement in the Federal Bureau of Investigation. I am proud to have served my country for over 32 years as an agent of the Bureau, and I am proud of my career within that organization. In order that the facts with respect to my service as special agent in charge of the Dallas office be entirely clear to this committee, I ask that the following documents be entered into the record:

1. Eight "Outstanding Performance Ratings" which I received while agent in charge of the Dallas office.

2. An official resolution of the Federal-State Law Enforcement Committee of the State of Texas, dated September 4, 1975 together with a letter forwarding the resolution to the Attorney General and to the Director of the F.B.I.; and

3. A letter addressed to Director Hoover from Harding L. Lawrence and Mr. Hoover's reply thereto.

4. Letters from Joe M. Dealey to myself and to the President of the United States, and a letter from Acting Director Gray to Mr. Dealey.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,
Washington, D.C., April 2, 1968.

Mr. J. GORDON SHANKLIN,
Federal Bureau of Investigation,
Dallas, Tex.

DEAR SHANKLIN: I am very pleased to advise that your services for the period April 1, 1967, to March 31, 1968, have merited an Outstanding Rating. There is enclosed a copy of this rating which you may retain.

In addition, and in recognition of your exceptional performance, I have approved an incentive award for you in the amount of \$450.00. A check representing this award will be forwarded to you at a later date. I do not want the opportunity to pass without letting you know that I sincerely appreciate the superior and dedicated fashion in which you have discharged your many responsibilities.

Sincerely,

J. EDGAR HOOVER.

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

REPORT OF PERFORMANCE RATING

Name of Employee: J. GORDON SHANKLIN

Where Assigned: DALLAS (Division) (Section, Unit)

Official Position Title and Grade: SPECIAL AGENT IN CHARGE

Rating Period: from April 1, 1967 to March 31, 1968

ADJECTIVE RATING: OUTSTANDING Employee's Initials _____
Outstanding, Excellent, Satisfactory, Unsatisfactory

Rated by: [Signature] Assistant to the Director 4/2/68
Signature Title Date

Reviewed by: [Signature] Associate Director 4/2/68
Signature Title Date

Rating Approved by: [Signature] Director 4/2/68
Signature Title Date

TYPE OF REPORT

- Official
 - Annual
- Administrative
 - 60-Day
 - 90-Day
 - Transfer
 - Separation from Service
 - Special



J. GORDON SHANKLIN, SPECIAL AGENT IN CHARGE, DALLAS DIVISION

As Special Agent in Charge of the Dallas Division, Mr. Shanklin has discharged the varied responsibilities of his position in a definitely superior manner during the past year and is entitled to an Outstanding rating for the period April 1, 1967, to March 31, 1968.

Mr. Shanklin has demonstrated that he is completely familiar with all matters within the jurisdiction of the FBI in his territory and has properly distributed his indomitable energies between investigative and administrative duties with equal effectiveness. Knowledgeable of his responsibilities and selfless in his determination to do a superior job, Mr. Shanklin has achieved an impressive record of accomplishments. These successes have been justifiably attributed to the splendid esprit de corps developed in his subordinates.

Mr. Shanklin's most capable leadership is characterized by sincerity, dedication, stability, industry and the ability to get definite results. A successful career employee who has served the Bureau with distinction for many years, he has discharged his responsibilities in a most creditable fashion which certainly merits the rating of Outstanding.

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

REPORT OF PERFORMANCE RATING

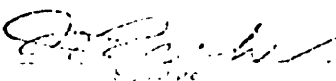
Name of Employee: J. GORDON SHANKLIN

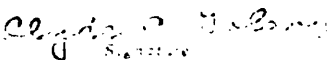
Where Assigned: DALLAS
(Division) *(Section, Unit)*

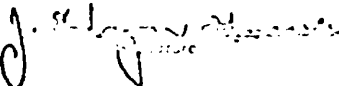
Official Position Title and Grade: SPECIAL AGENT IN CHARGE

Rating Period: from APRIL 1, 1968 to MARCH 31, 1969

ADJECTIVE RATING: OUTSTANDING Employee's Initials _____
Outstanding, Excellent, Satisfactory, Unsatisfactory

Rated by:  Assistant to the Director 4/1/69
Signature *Title* *Date*

Reviewed by:  Associate Director 4/1/69
Signature *Title* *Date*

Rating Approved by:  Director 4/1/69
Signature *Title* *Date*

TYPE OF REPORT

- | | |
|--|--|
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| <input checked="" type="checkbox"/> Annual | <input type="checkbox"/> 60-Day |
| | <input type="checkbox"/> 90-Day |
| | <input type="checkbox"/> Transfer |
| | <input type="checkbox"/> Separation from Service |
| | <input type="checkbox"/> Special |

FEDERAL BUREAU OF INVESTIGATION
 UNITED STATES DEPARTMENT OF JUSTICE

REPORT OF PERFORMANCE RATING

Name of Employee: J. GORDON SHANKLIN

Where Assigned: DALLAS
(Division) (Section, Unit)

Official Position Title and Grade: SPECIAL AGENT IN CHARGE

Rating Period: from APRIL 1, 1969 to MARCH 31, 1970

ADJECTIVE RATING: OUTSTANDING Employee's Initials
Outstanding, Excellent, Satisfactory, Unsatisfactory

Rated by: [Signature] Assistant to the Director 4/1/70
Signature Title Date

Reviewed by: [Signature] Associate Director 4/1/70
Signature Title Date

Rating Approved by: [Signature] Director 4/1/70
Signature Title Date

TYPE OF REPORT

- | | |
|--|--|
| <input checked="" type="checkbox"/> Official | <input type="checkbox"/> Administrative |
| <input checked="" type="checkbox"/> Annual | <input type="checkbox"/> 60-Day |
| | <input type="checkbox"/> 90-Day |
| | <input type="checkbox"/> Transfer |
| | <input type="checkbox"/> Separation from Service |
| | <input type="checkbox"/> Special |

U.S. DEPARTMENT OF JUSTICE,
 FEDERAL BUREAU OF INVESTIGATION,
 OFFICE OF THE DIRECTOR,
 Washington, D.C., April 8, 1971.

Mr. J. GORDON SHANKLIN,
 Federal Bureau of Investigation,
 Dallas, Tex.

DEAR SHANKLIN: I am taking this occasion to advise you that you have been afforded an Outstanding performance rating covering your superior services for the period April 1, 1970, to March 31, 1971. You may retain the rating which is enclosed.

It is also a pleasure to inform you of my approval of an incentive award for you in the amount of \$450.00 in recognition of your exemplary achievement and a check representing this award will be sent to you at a later date. You should take pride in your noteworthy performance which has contributed in a large degree to the successful handling of our many responsibilities and I am appreciative.

Sincerely,

J. EDGAR HOOVER.

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

REPORT OF PERFORMANCE RATING

Name of Employee: J. GORDON SHANKLIN

Where Assigned: DALLAS
(Division) (Section, Unit)

Official Position Title and Grade: SPECIAL AGENT IN CHARGE

Rating Period: from APRIL 1, 1970 to MARCH 31, 1971

ADJECTIVE RATING: OUTSTANDING Employee's Initials
Outstanding, Excellent, Satisfactory, Unsatisfactory

Rated by: [Signature] Assistant to the Director 4/1/71
Date

Reviewed by: [Signature] Associate Director 4/1/71
Date

Rating Approved by: [Signature] Director 4/1/71
Date

TYPE OF REPORT

- Official
 Special
- Administrative
 90-Day
 60-Day
 Transfer
 Separation from Service
 Special

THREE

BEST COPY AVAILABLE

J. GORDAN SHANKLIN, SPECIAL AGENT IN CHARGE, DALLAS DIVISION

He makes a most impressive personal appearance, always being dressed in proper business attire and this, coupled with a warm, friendly and outgoing personality, serves to make him a most effective representative of the Bureau. In his contacts with law enforcement officials and civic and business leaders, he engenders a feeling of confidence and respect. He has served as Special Agent in Charge in such a truly superior fashion during the period April 1, 1970, through March 31, 1971, as to fully deserve this rating of Outstanding.

He has the primary responsibility for all administrative and investigative matters within the limits of his field office territory. It is incumbent upon him to be thoroughly conversant with all important developments and it is necessary for him to provide on-the-scene supervision of major cases. Of necessity, he must make quick and independent judgments on matters affecting not only the welfare of his field office but the entire Bureau as well.

His qualities of leadership are particularly admirable and, by example, he instills in employees working under his supervision a desire to excel and to do the best possible job. He is ever willing to set aside personal considerations in order to insure that the Bureau's interests are protected and advanced. His dedication to the purposes and ideals of the FBI and his enthusiasm for the tasks at hand have earned for him the respect of superiors and subordinates alike.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,
Washington, D.C., April 4, 1972.

Mr. J. GORDON SHANKLIN,
Federal Bureau of Investigation,
Dallas, Tex.

DEAR SHANKLIN: It is with considerable pleasure that I inform you that your exemplary services for the period April 1, 1971, to March 31, 1972, have merited an Outstanding performance rating for you. You may retain the original of this rating which is enclosed.

In recognition of the superior manner in which you have discharged your important responsibilities this past year, I have approved an incentive award for you of \$450.00 and the enclosed check represents this award. I do not want the occasion to pass without expressing my appreciation for your continued devotion to the work of the Bureau.

Sincerely,

J. EDGAR HOOVER.

Rev. 12-3-70

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

REPORT OF PERFORMANCE RATING

Name of Employee: J. GORDON SHANKLINWhere Assigned: DALLAS
(Division) (Section, Unit)Official Position Title and Grade: SPECIAL AGENT IN CHARGERating Period: from APRIL 1, 1971 to MARCH 31, 1972ADJECTIVE RATING: OUTSTANDING Employee's Initials
Outstanding, Excellent, Satisfactory, UnsatisfactoryRated by: J. G. [Signature] Assistant to the Director 4/3/72
Signature Title DateReviewed by: Clyde A. Tolson Associate Director 4/3/72
Signature Title DateRating Approved by: J. G. [Signature] Director 4/3/72
Signature Title Date

TYPE OF REPORT

- Official
 Annual
 Administrative
 90-Day
 95-Day
 Transfer
 Separation from Service
 Special

THREE

J. GORDON SHANKLIN, SPECIAL AGENT IN CHARGE, DALLAS DIVISION

As Special Agent in Charge he performed in such an exemplary manner during the period from April 1, 1971, through March 31, 1972, as to definitely merit this outstanding rating.

He is a most impressive representative of the FBI by virtue of the fact that he possesses a very effective personality and is always properly attired in con-

servative, businesslike dress. He instills a feeling of confidence in all with whom he comes in contact and his proven competence has earned the respect of one and all.

He consistently demonstrates on a daily basis remarkable leadership qualities and is obviously dedicated to the ideals and purposes of the Bureau. He engenders in his subordinates the same desire to do the best possible job at all times. He is totally selfless and quickly and cheerfully subordinates personal considerations to those of the organization.

As Special Agent in Charge he bears the responsibility for all administrative and investigative matters in his field office territory. He must be thoroughly knowledgeable with respect to all major developments, and he is obliged to provide on-the-scene supervision of vitally important cases. It is necessary for him on numerous occasions to make instant and independent judgments on matters affecting not only his field office but the entire Bureau as well. He has proven himself to be a most valued member of our FBI.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,
Washington, D.C., April 17, 1973.

Mr. J. GORDON SHANKLIN,
Federal Bureau of Investigation,
Dallas, Tex.

DEAR GORDON: Your service during the period from April 1, 1972, to March 31, 1973, have been superior and have earned for you an Outstanding performance rating. The original of this rating is enclosed which you may retain.

I have also approved an incentive award for you in the amount of \$450.00 in recognition thereof and the enclosed check represents this award.

You have continually carried out your assignments in a most dedicated and skillful fashion this past year and I want you to be aware of my appreciation for your fine efforts in behalf of the FBI.

Sincerely yours,

I. PATRICK GRAY, III,
Acting Director.

FEDERAL BUREAU OF INVESTIGATION
 UNITED STATES DEPARTMENT OF JUSTICE

REPORT OF PERFORMANCE RATING

Name of Employee: J. GORDON SHANKLIN

Where Assigned: Dallas (Division) (Section, Unit)

Official Position Title and Grade: Special Agent in Charge, GS 17

Rating Period: from 4-1-72 to 3-31-73

ADJECTIVE RATING: OUTSTANDING Employee's Initials
Outstanding, Excellent, Satisfactory, Unsatisfactory

Rated by: _____ Signature Title Date

Reviewed by: _____ Signature Title Date

Rating Approved by: L. Patrick Grayson Acting Director 4-2-73
 Signature Title Date

TYPE OF REPORT

- Official
 - Annual
- Administrative
 - Off-Duty
 - Post-Duty
 - Transfer
 - Separation from Service
 - Special

THREE

U.S. DEPARTMENT OF JUSTICE,
 FEDERAL BUREAU OF INVESTIGATION,
 OFFICE OF THE DIRECTOR,
 Washington, D.C., April 15, 1974.

Mr. J. GORDON SHANKLIN,
 Federal Bureau of Investigation,
 Dallas, Tex.

DEAR GORDON: I am especially pleased to inform you that your services for the period April 1, 1973, to March 31, 1974, have been superior and have merited an

Outstanding performance rating for you. The original of this rating is enclosed which you may retain.

It is also my pleasure to advise you of my approval of an incentive award in the amount of \$450.00 for you in special recognition of your exemplary efforts in behalf of the Bureau. A check representing this award is enclosed. The skillful and dedicated fashion in which you have carried out your assignments is certainly appreciated.

Sincerely yours,

CLARENCE KELLEY.

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

REPORT OF PERFORMANCE RATING

Name of Employee: J. GORDON SHANKLIN

Where Assigned: DALLAS
(Division) (Section, Unit)

Official Position Title and Grade: SPECIAL AGENT IN CHARGE, GS-17

Rating Period: from 4-1-73 to 3-31-74

ADJECTIVE RATING: OUTSTANDING Employee's Initials
Outstanding, Excellent, Satisfactory, Unsatisfactory

Rated by: _____
Signature Title Date

Reviewed by: _____
Signature Title Date

Rating Approved by: [Signature] Assistant Director 4-1-74
Signature Title Date

TYPE OF REPORT

- Official
 Annual
- Administrative
 60-Day
 90-Day
 Transfer
 Separation from Service
 Special

THREE

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,
Washington, D.C., April 7, 1975.

Mr. J. GORDON SHANKLIN,
Federal Bureau of Investigation,
Dallas, Tex.

DEAR GORDON: For the superb fashion in which you carried out your duties during the past year, you have earned an Outstanding performance rating and the original of this rating is enclosed for your retention.

Furthermore, I have approved for you a \$450.00 incentive award which is represented by the enclosed check. You have continued to demonstrate a large degree of dedication and enthusiasm in handling your assignment thus being of considerable benefit to our organization and I am most appreciative.

Sincerely yours,

CLARENCE M. KELLY.

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

REPORT OF PERFORMANCE RATING

Name of Employee: J. GORDON SHANKLIN

Where Assigned: DALLAS
(Division) (Section, Unit)

Official Position Title and Grade: SPECIAL AGENT IN CHARGE, GS-17

Rating Period: from APRIL 1, 1974 to MARCH 31, 1975

ADJECTIVE RATING: OUTSTANDING Employee's Initials
Outstanding, Excellent, Satisfactory, Unsatisfactory

Rated by: _____
Signature Title Date

Reviewed by: _____
Signature Title Date

Rating Approved by: [Signature] Assistant Director 4/1/75
Signature Title Date

TYPE OF REPORT

- Official
 - Annual
- Administrative
 - 60-Day
 - 90-Day
 - Transfer
 - Separation from Service
 - Special

**OFFICIAL RESOLUTION OF THE TEXAS FEDERAL-STATE LAW ENFORCEMENT
COMMITTEE**

Whereas J. Gordon Shanklin, a native of Elkton, Kentucky, having received a Bachelor of Arts and a Juris Doctor degrees from Vanderbilt University, Nashville, Tennessee, and

Whereas J. Gordon Shanklin did engage in the private practice of law in Nashville, Tennessee, and

Whereas J. Gordon Shanklin did enter duty as a special agent of the Federal Bureau of Investigation in May, 1943, and

Whereas J. Gordon Shanklin has continued to serve his country faithfully in the Federal Bureau of Investigation in the following assignments:

1. As Agent in West Virginia and New York City;
2. As Supervisor assigned to the Federal Bureau of Investigation Headquarters in Washington, D.C. from 1947 until 1951;
3. As Assistant Special Agent in Charge of the Mobile, Alabama office from September, 1951 until November, 1953;
4. As Special Agent in Charge of the Mobile, Alabama office beginning in November, 1953;
5. As Special Agent in Charge of the Pittsburgh, Pennsylvania office;
6. As Inspector at the Federal Bureau of Investigation Headquarters in Washington, D.C. in 1956;
7. As Agent in Charge of the El Paso Division during 1958;
8. As Agent in Charge of the Honolulu, Hawaii Division from January, 1959 until April, 1963; and
9. As Agent in Charge of the Dallas, Texas, office from April, 1963 until July, 1975, and

Whereas J. Gordon Shanklin during the entire period of time in service to his country has well and faithfully performed his responsibilities above and beyond the call of duty, and

Whereas J. Gordon Shanklin has served as a devoted and participating member of the Federal-State Law Enforcement Committee: Be it resolved,

That the Federal-State Law Enforcement Committee hereby expresses its appreciation and gratitude to J. Gordon Shanklin for service to his country and to his fellow Americans; and further, be it resolved,

That the Committee transmit a copy of this resolution to Mr. Shanklin, Mr. Edward H. Levi, Attorney General of the United States, Mr. Clarence Kelley, Director of the Federal Bureau of Investigation, and that a copy of the resolution be made a permanent part of the minutes of this Committee.

THE ATTORNEY GENERAL OF TEXAS,
Austin, Tex., October 8, 1975.

Re J. Gordon Shanklin: Commendation resolution from Texas Federal-State Law Enforcement Committee upon retirement from FBI service.

Hon. EDWARD H. LEVI,
*Attorney General of the United States,
Department of Justice, Washington, D.C.*

Hon. CLARENCE KELLEY,
*Director, Federal Bureau of Investigation,
Washington, D.C.*

GENTLEMEN: Mr. J. Gordon Shanklin, former FBI Agent in Charge, Dallas, Texas, has recently retired from active duty after thirty-two years service to his country. Mr. Shanklin has been an active member of our Texas Federal-State Law Enforcement Committee. Pursuant to unanimous vote of the Committee, the enclosed commendation resolution was presented to Mr. Shanklin at the Committee's September 4, 1975 meeting. Further, pursuant to said vote, the resolution is herewith forwarded to you for your information and files.

We have been pleased to have Agent Shanklin in our organization and at work for our government and citizens of this country.

Very truly yours,

JOHN W. ODAM,
*Secretary, Federal-State Law
Enforcement Committee.*

JANUARY 24, 1972.

HON. HARDING L. LAWRENCE,
Chairman of the Board and Chief Executive Officer, Braniff International Exchange Park, Dallas, Tex.

DEAR MR. LAWRENCE: Thank you for the very kind remarks in your letter of January 17th concerning the work of Mr. Shanklin and my associates in our Dallas Office following the hijacking of one of your aircraft. I am pleased by the high regard you have expressed for their efforts and they share my appreciation for your thoughtfulness in writing.

Sincerely yours,

J. EDGAR HOOVER.

JANUARY 17, 1972.

Mr. J. EDGAR HOOVER,
Director, Federal Bureau of Investigation, Department of Justice, Washington, D.C.

DEAR MR. HOOVER: Yesterday a 22 year old man commandeered the B-727-200 aircraft we were operating as Braniff Flight 88 while it was enroute from Houston to Dallas. Approximately seven hours later the pirate was in the custody of your representatives here in Dallas.

Much of the credit for the timely, safe and humane manner in which this incident was terminated goes to Mr. J. Gordon Shanklin, Special Agent in Charge. He and members of his staff worked in close and continuous contact with my organization from the outset and were uniformly professional in the discharge of their responsibilities.

It is a distinct pleasure to associate with men of Mr. Shanklin's caliber and I request that you advise him and he in turn his subordinates of my deep and sincere appreciation of their most effective work.

Very sincerely,

HARDING L. LAWRENCE.

THE DALLAS MORNING NEWS,
December 26, 1972.

Mr. J. GORDON SHANKLIN,
Agent In Charge, Federal Bureau of Investigation, Dallas, Tex.

DEAR GORDON: For all of us Joe Dealeys I say once more how very grateful we are for your inspired leadership last week. You performed magnificently under trying circumstances both professional and personal. You will be long remembered in our thanks and prayers for effecting Mandy's release as well as apprehending the kidnappers and recovering the ransom money. Many, many thanks.

Enclosed with this brief and restated word of sincere appreciation is a blind copy of a letter going forward today that probably falls far short of expressing all that I'd like to say about a man I much admire.

You and those who assisted you so admirably helped make our Christmas a truly memorable one and we, the families, join altogether in hoping that you and yours enjoyed a blessed day filled with thanksgiving and all the good things you have earned and deserve.

Kindest personal regards.

Cordially,

JOE M. DEALEY, *President.*

THE DALLAS MORNING NEWS,
Dallas, Tex., December 26, 1972.

HON. RICHARD NIXON,
President of the United States of America, Washington, D.C.

DEAR MR. PRESIDENT: After some sixty hours of terrifying suspense, it was finally over. The horrible nightmare of Mandy Dealey's kidnapping was ended. She was home—unmolested and unharmed—with her husband and a few friends who had kept the long vigil beginning with her disappearance two and a half days earlier.

Now the police work would start in earnest, leading, hopefully, to the apprehension of those involved and the recovery of the ransom paid to secure Mandy's release. J. Gordon Shanklin, Agent in Charge of the Federal Bureau of Investiga-

tion at Dallas, the man who had personally captained the entire operation, was centered in a knot of officers in a corner of the room that had served as a command post. This man, haggard from lack of sleep, suffering from intestinal flu, dropped his head and offered a prayer, saying simply: "I thank God for Mandy's safe return and for His supreme guidance throughout this terrible experience." With that he turned away and strode into the action that ended successfully within the next five hours.

These details I furnish here as my high personal commendation of a man who gave of himself so unselfishly and in the doing gave such a great measure of confidence and hope for those directly involved. He is a tremendous credit to the organization he serves, and I am proud that as a citizen of these United States I share a comradeship with him.

Also, these words of sincere gratitude and appreciation I address to you as President, the highest officer in our land, that you may make your own personal evaluation of what I consider a truly great and competent individual and man.

With warmest personal regards, I am,

Cordially yours,

JOE M. DEALEY, *President.*

JANUARY 3, 1973.

Mr. JOE M. DEALEY,
President, the Dallas Morning News, Dallas, Tex.

DEAR Mr. DEALEY: Thank you so very much for your courtesy in sending to me a copy of your December 28th letter to the President.

As Acting Director of the FBI, I know of the magnificent dedication to duty of men like Special Agent in Charge J. Gordon Shanklin, and it is especially gratifying to know of his actions during the recent traumatic episode involving your daughter-in-law. I want you to know that your expression of support and confidence in SAC Shanklin is deeply appreciated.

With my best wishes and warm respect.

Sincerely,

PAT GRAY.

2

3

FBI OVERSIGHT

Circumstances Surrounding Destruction of the Lee Harvey Oswald Note

FRIDAY, DECEMBER 12, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Seiberling, Drinan, Dodd, Butler, and Kindness.

Also present: Alan A. Parker, counsel; Catherine LeRoy and Thomas P. Breen, assistant counsel; and Kenneth N. Klee, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Our first witness today is James P. Hosty, special agent, Federal Bureau of Investigation, who, we understand, between November 1 and November 9, 1963, was the recipient of the letter written by Lee Harvey Oswald and delivered to Mrs. Fenner at the field office of the FBI in Dallas.

We will commence, as yesterday, with questions by counsel, Mr. Parker.

Will you introduce the people with you, please, Mr. Hosty?

Mr. BRAY. John M. Bray, counsel, of Washington, D.C.

Mr. LILLY. And Francis X. Lilly, of Washington, D.C.

Mr. KINDNESS. Mr. Chairman?

Mr. EDWARDS. Yes, Mr. Kindness?

Mr. KINDNESS. May I submit this resolution regarding media coverage, television and radio, to the subcommittee for its acceptance?

Mr. EDWARDS. Without objection, the resolution offered by Mr. Kindness regarding TV and radio is accepted.

Mr. Hosty, will you stand so that we can give the oath?

Mr. HOSTY. Yes, sir.

Mr. EDWARDS. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HOSTY. I do.

Mr. EDWARDS. Mr. Parker, would you begin.

TESTIMONY OF JAMES P. HOSTY, JR., SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION, ACCOMPANIED BY JOHN M. BRAY, COUNSEL, WASHINGTON, D.C.

Mr. PARKER. Mr. Hosty, would you please state your full name and address for the record?

Mr. HOSTY. James Patrick Hosty, Jr., that's H-o-s-t-y. I live in Westwood, Kans.

Mr. PARKER. When did you first become an FBI agent?

Mr. HOSTY. On January 21, 1952.

Mr. PARKER. When were you assigned to the Dallas Field Office?

Mr. HOSTY. In the early part of December 1953.

Mr. PARKER. And where are you presently assigned?

Mr. HOSTY. I am presently assigned to the Kansas City Office of the FBI.

Mr. PARKER. What were your duties as a special agent in the Dallas Field Office?

Mr. HOSTY. I was assigned to what we call a security squad, which handles matters in the domestic intelligence field.

Mr. PARKER. When and how did Lee Harvey Oswald first come to your attention?

Mr. HOSTY. He first came to my attention in approximately June 1962, when I saw a newspaper article concerning his return to the United States from the Soviet Union with his Russian-born wife and child.

Mr. PARKER. Did you have a case at that time on Lee Harvey Oswald?

Mr. HOSTY. No, sir; I did not.

Mr. PARKER. Did you at that point open a case on Lee Harvey Oswald?

Mr. HOSTY. No, sir; I did not.

Mr. PARKER. Did the Bureau open a case on Lee Harvey Oswald?

Mr. HOSTY. Yes, sir; they did.

Mr. PARKER. Was there a previous case opened on Lee Harvey Oswald?

Mr. HOSTY. I don't believe so.

Mr. PARKER. The first case that would have been opened was subsequent to his return from Russia with his wife and child?

Mr. HOSTY. I believe so.

Mr. PARKER. Was that case assigned to you?

Mr. HOSTY. No, sir. It was not.

Mr. PARKER. Who was it first assigned to?

Mr. HOSTY. Mr. John Fain, that's F-a-i-n.

Mr. PARKER. Was Mr. Fain in the Dallas Field Office?

Mr. HOSTY. No, sir. He was in the Fort Worth Resident Agency, which is a branch of the Dallas Office.

Mr. PARKER. Did you also have a separate file on Marina Oswald?

Mr. HOSTY. I did not, sir. No; not at that time.

Mr. PARKER. Did the Federal Bureau of Investigation have a separate file?

Mr. HOSTY. At a later date, yes, sir.

Mr. PARKER. And who had that file besides you?

Mr. HOSTY. It was first assigned to Mr. John Fain.

Mr. PARKER. Could you define the security case for me, please?

Mr. HOSTY. The security case on Lee Oswald was a case concerning his possible recruitment by the Soviet Union by the KGB, and we were looking into the possibility of his working for them.

Mr. PARKER. And why the file on Marina Oswald?

Mr. HOSTY. Because of the fact that she was newly arrived from the Soviet Union. It is a policy to open selective cases on people that fall within certain age and educational levels to determine if they also have been sent over here, have been recruited and sent over here.

Mr. PARKER. Approximately when did the file on Lee Harvey Oswald first come to your attention or have been assigned to you?

Mr. HOSTY. It was first assigned to me on March 31, 1963, when I reopened a closed case on Lee Oswald.

Mr. PARKER. And who assigned that case to you?

Mr. HOSTY. Mr. Kenneth Howe, the supervisor, actually assigned it to me.

Mr. PARKER. And when did the file on Marina Oswald, the case on Marina Oswald first become assigned to you?

Mr. HOSTY. That case was assigned to me in October of 1962, when Mr. John Fain retired. There was what we call a pending inactive case on Marina Oswald, and when he retired, that was reassigned to me.

Mr. PARKER. Did you ever interview Lee Harvey Oswald prior to the assassination of President John Kennedy?

Mr. HOSTY. No, sir. I did not.

Mr. PARKER. And did you ever interview Marina Oswald prior to the assassination?

Mr. HOSTY. I talked to her briefly on November 1, 1963.

Mr. PARKER. And did you talk to her on any other occasions?

Mr. HOSTY. I saw her and nodded to her, but did not talk to her on the 5th of November, 1963.

Mr. PARKER. Did you ever interview Mrs. Paine prior to the assassination?

Mr. HOSTY. I did on November 1 and November 5, 1963.

Mr. PARKER. Was the occasion of your seeing Mrs. Oswald the same as the occasion of your seeing Mrs. Paine?

Mr. HOSTY. That is correct.

Mr. PARKER. Would you describe those for me, please?

Mr. HOSTY. Yes. I was, on November 1, attempting to locate the whereabouts of Lee Oswald. We had received information that his wife was living with Mrs. Paine in Irving, Tex., but that he was not there. After first checking Mrs. Paine to see if she was a reliable person, I then went to her house and asked her for the whereabouts of Lee Oswald. At this time, Marina Oswald came into the room, and I talked to her through Mrs. Paine.

Now, Mrs. Oswald could not speak English, or not a sufficient amount of English, and I had to talk to Mrs. Oswald through Mrs. Paine as interpreter.

Mr. PARKER. Were you directed to interview Lee Harvey Oswald or Marina at any time?

Mr. HOSTY. No, sir. I was not directed to interview Lee Oswald at any time. I had a lead to interview Marina Oswald. We were attempting to interview her. Yes, sir.

Mr. PARKER. Would you describe for me the investigation that you did conduct concerning Lee Harvey Oswald or Marina prior to November 22, 1963?

Mr. Hosty. The first time I did any investigation on Lee Oswald was a lead request from Mr. John Fain in approximately August of 1962, following his first interview with Lee Oswald.

He requested that I check the Immigration and Naturalization Service files on both Lee Oswald and on Marina Oswald over in Dallas. I did that and prepared a memorandum as to the information I had obtained and furnished that information to him. At that time I also made a recommendation that a case be opened on Marina Oswald for future interview.

Mr. PARKER. And you mentioned a short time ago that the Lee Harvey Oswald case was reopened?

Mr. Hosty. Right. And then—all right. Following this request to interview Marina Oswald, a decision was made to let her wait approximately 6 months or longer, until she had a chance to familiarize herself with the English language and American habits and customs. So, it was decided that she would be interviewed sometime in the latter part of February or sometime in March. It was in this capacity that this case was reassigned to me on Marina Oswald.

In March I went to Fort Worth, Tex., to try to locate the Oswalds, which was their last known address, determined they had moved to Dallas, went back to Dallas, and went to their address in Dallas and determined from the landlady that she had just expelled the Oswalds from her apartment building because they'd been having domestic quarrels; and she told me where they had moved to, just down the street.

Now, because of the fact that we're told not to interview these foreign immigrants under any but tranquil conditions, not when they're under a stress or a strain, I notified the FBI Headquarters that I'd located them, and because of the difficulty, that the interview would be delayed.

And then, at this time, I had a chance to review the closed file on Lee Oswald, and noticed that during the time it had been closed, information had come to our attention indicating that he was either on the mailing list or was in contact with the Communist Party "Daily Worker." I felt that this was contrary to the statements that he'd made in August of 1962, when the case was closed on him, so recommended on this basis that it be reopened to reexamine his position.

I then, later in May, went out to recheck to see if the Oswald domestic difficulties had subsided, at which time I determined that they had left the Dallas area for a place unknown. Later we were able to determine—our New Orleans Office was able to determine that they were in New Orleans, at which time I furnished the background material on the Oswalds to the New Orleans Office and furnished the proper material to them, and the case was transferred to their jurisdiction. And then it became completed as far as the Dallas Office was concerned.

Now, in approximately October of 1963, the New Orleans Office notified us that Oswald had disappeared and his wife had disappeared from New Orleans, and that Marina Oswald had left with a woman speaking Russian who was driving a station wagon with Texas license plates, and they did not know where Lee Oswald was.

That's what I was doing on November 1, trying to locate Lee Oswald on the basis of this lead, that we finally determined the woman was Mrs. Paine, who had picked up Marina Oswald, and we were trying to determine from her where Lee Oswald was.

Mr. PARKER. Would you recount your conversations or the substance of your conversations with Mrs. Paine then on the 1st and 5th of November?

Mr. Hosty. Yes. I went to her house and identified myself as a Special Agent of the FBI. I was alone. I was the only agent there, and told her what I was interested in. She was very friendly, and cordial, and cooperative. She told me that Mrs. Oswald and their two children were living with her. They were temporarily separated from Lee Oswald, and that he visited them on weekends, and that he came out most weekends to visit, and that he was working in Dallas in the Texas Schoolbook Depository.

She did not know where he lived, other than he lived in a rooming house somewhere in the Oak Cliff section of Dallas. During this conversation Mrs. Oswald came into the room. She'd apparently been napping or been somewhere else in the house, and Mrs. Paine then advised her in Russian who I was. I could see she was upset and I assured her not to be worried, that the FBI wasn't there to harm her, we were there to help her, this was not a police state, we were not the Gestapo and reassured her. We just had general conversations along those lines, sort of a conversation to reassure her. I intended to interview her, but I didn't have all the proper material at this time. So, I indicated to her I might be back to see her again at a later date to talk to her in detail.

Mrs. Paine said she would try to find out where Lee Oswald was living and let me know. It was for this purpose on November 5, while I was en route from Dallas to Fort Worth, the Paines' residence is just a short distance from one of the main highways between Dallas and Fort Worth, I just deviated slightly from my path, drove over to the Paine residence. I had another agent with me at the time. We drove up into the driveway of the Paine residence. I went up to the door and just briefly asked Mrs. Paine—this was on November 5—if she had any further information on Oswald; and at this time I saw Marina in the background. She was in the living room and I could see her briefly.

The only—Mrs. Paine did not have the address of Lee Oswald, but she did furnish the additional information that Lee Oswald had identified himself to her as a Trotskyite Marxist. That was the only other pertinent information.

Mr. PARKER. Do I understand correctly, then, Mr. Hosty, that if you had not had information that Lee Harvey Oswald had had some contact with the "Daily Worker" that the Lee Harvey Oswald file would have remained closed prior to November?

Mr. Hosty. Probably. Yes, sir.

Mr. PARKER. Who was present at the interviews that you had with Marina Oswald?

Mr. Hosty. The first interview—it was Mrs. Paine and myself, as well as Marina Oswald; and the second time, when I talked to Mrs. Paine and saw Marina briefly, there was another agent named Gary Wilson who was with me.

Mr. PARKER. What was your caseload approximately during October, November of 1963?

Mr. Hosty. It would vary between 40 to 50 cases.

Mr. PARKER. Was Lee Harvey Oswald or the Marina Oswald case active compared to the other cases assigned to you?

Mr. HOSTY. Yes, sir. They were both pending cases. Yes, sir.

Mr. PARKER. How many pre-November 22 reports or memos did you make to the Lee Harvey Oswald file?

Mr. HOSTY. I beg your pardon, sir?

Mr. PARKER. How many pre-November 22 reports or memos did you make to the Lee Harvey Oswald file?

Mr. HOSTY. I'll try to recount them to the best of my recollection.

The first one would have been a memo concerning my contact with the Immigration Service. It would have been in August of 1962.

The next communication would have been a communication I sent to FBI Headquarters at the end of March 1963, in which I reopened the Lee Oswald case and told them of his location and domestic difficulties, et cetera.

The next communication was a memo to the SAC reporting that they were no longer residing in the Dallas area and had moved to an unknown address.

The next communication would have been to the New Orleans Office in approximately June of 1963, advising the New Orleans Office of the background of Lee Oswald since they had located him in their division.

Some time in the month of July, I wrote a full report setting forth all of this information in report form to the New Orleans Office, at which time we transferred the case formally to New Orleans.

Then, the next communication would not have been until November 4, in which I reported my contact with Mrs. Paine on the previous Friday. I contacted her late on Friday and was not able to get out a communication until Monday morning, November 4, advising headquarters in New Orleans that I had located Oswald.

That was the last communication prior to November 22.

Mr. PARKER. How many pre-November 22 reports or memos did you make to the Marina Oswald file?

Mr. HOSTY. I would have made the memo on the Immigration contact; the letter on November—excuse me—March 31, 1963, would have actually been a joint letter; it would have been to both files; and also the one to New Orleans in June of 1963; and the memorandum in May of 1963 would have been a joint memo to both files.

Mr. PARKER. Prior to November 22, 1963, with respect to the Lee Harvey Oswald and Marina Oswald files, what was the frequency of your contact with either Mr. Howe or Mr. Shanklin?

Mr. HOSTY. I would see Mr. Shanklin very infrequently, an agent in charge, he was concerned with the overall operation of the Office. However, Mr. Howe, I would see on a daily basis, but not in any particular conversations on that case, though, on the Oswalds.

Mr. PARKER. I'm talking about these two cases.

Mr. HOSTY. The only time I remember talking to Mr. Howe prior to November 22, 1963, on this case was when I reopened the Lee Harvey Oswald case. I brought it to his attention and recommended I wanted it reopened, and he agreed with it. That was my only time I talked to him about it.

Mr. PARKER. Mr. Hosty, was a note from Lee Harvey Oswald delivered to you in the Dallas Field Office?

Mr. HOSTY. Yes, sir.

Mr. PARKER. When did that occur?

Mr. HOSTY. It would have been, I believe, sometime after November the fifth; probably November the sixth, seventh, or eighth. It could conceivably have been delivered on the fourth or fifth; but probably the sixth, seventh, or eighth of November.

Mr. PARKER. What is your reference point for those dates?

Mr. HOSTY. Well, my reference point would be that my interview with Marina Oswald on November 1 was what precipitated the note, and he couldn't have possibly come to the office before Monday, November the fourth, at the earliest; and the reason I say it had to be before the eighth is because of a letter that he wrote to the Soviet Union in which he—the Soviet Union Embassy in Washington, D.C.—in which he referred to this protest.

Mr. DRINAN. Would you yield, Counsel?

Mr. PARKER. Yes, sir.

Mr. DRINAN. Thank you for yielding. I want to have this question before we develop something. You wrote in November 5, and yet you saw Mrs. Oswald, you wrote the note, the memo to headquarters on November 4, and yet you saw her again on November 5?

Mr. HOSTY. Yes, sir.

Mr. DRINAN. Well, the information that you required from Mrs. Oswald and from Mrs. Paine on November 5, was that ever transmitted to the FBI?

Mr. HOSTY. Yes, it was, after November 22. I hadn't officially and formally written it up as of November 22.

Mr. DRINAN. But why did you write the memo on November 4 when you knew that you were going to have another interview with both of them the next day?

Mr. HOSTY. I didn't know specifically I was going to go back that next day. But the reason I sent the communication to headquarters in New Orleans was primarily to notify them we had located Lee Oswald. That was the primary purpose of that communication.

You see, he was missing. We didn't know where he was, and I was notifying New Orleans we had now located him, and for the New Orleans Office to furnish me with the material they had and notify headquarters we had located him.

Mr. DRINAN. Well, on the date that he apparently came with the note, you say the sixth, seventh, and eighth, are those dates much more probable than dates prior to November 5?

Mr. HOSTY. I think so because I think there is some indication that my second visit out there agitated him further, and I think this is based upon what Mrs. Paine and Marina had said that further agitated him.

Mr. DRINAN. Thank you. Thank you for yielding.

Mr. PARKER. Mr. Hosty, after that note was delivered when did you first see it?

Mr. HOSTY. Some time that afternoon when I returned to the office.

Mr. PARKER. And what did it say?

Mr. HOSTY. Well, it was in an envelope, a business-type envelope, a blank envelope, and it was on plain bond paper. I don't—I do not recall a signature on it. I believe it was handwritten. It was quite short, no more than two paragraphs in length; and the first part of it stated that

I had been interviewing his wife without his permission and I should not do this; he was upset about this. And the second part at the end he said that if I did not stop talking to his wife, he would take action against the FBI.

Mr. PARKER. When you first saw the note, was it contained within the envelope or just attached to it?

Mr. HOSTY. It was in the envelope; folded and within the envelope.

Mr. PARKER. Was there anything else attached to it?

Mr. HOSTY. No, sir.

Mr. PARKER. Was there a routing slip?

Mr. HOSTY. No, sir.

Mr. PARKER. And where did you first see the envelope?

Mr. HOSTY. It was handed to me by Mrs. Nanny Lee Fenner.

Mr. PARKER. At her desk in the reception room?

Mr. HOSTY. At the reception desk. Right.

Mr. PARKER. And was the note folded inside the envelope?

Mr. HOSTY. I believe it was folded three ways and put inside the envelope.

Mr. PARKER. Can you describe to me how it was folded?

Mr. HOSTY. It was folded like any communication would be folded. Folded like this, three ways; folded over and put into the envelope.

Mr. PARKER. What did you do with the note at that time?

Mr. HOSTY. I read it. It didn't appear to be of any serious import. It appeared to be an innocuous type of complaint which, I might add, I get many of. This is not unusual. I looked at it. It didn't seem to have any need for any action at that time, so I put it in my workbox.

Mr. PARKER. Can you tell me before November 22, 1963, of your knowledge, who else would have seen that note and under what circumstances?

Mr. HOSTY. To my knowledge, I couldn't say that anybody had seen it other than myself.

Mr. PARKER. And did you know at that point in time whether Mrs. Fenner had seen it or not?

Mr. HOSTY. She didn't indicate that she had.

Mr. PARKER. What did you do on November 22, 1963, prior to the assassination? What were you doing that day?

Mr. HOSTY. All right, I'll start with the time of the—do you want me to start with the morning?

Mr. PARKER. Yes, please.

Mr. HOSTY. The first thing in the morning we had a conference of all agents. It was a regular conference, which Mr. Shanklin had every other Friday. Among the things he brought up was the fact that the President was coming to town. Although the FBI had no responsibility whatsoever for safeguarding the President, he advised us again, as he previously advised us, that if we had any information indicating any possibility of violence against President Kennedy, we should immediately report it to the Secret Service.

I then left and joined an Army Intelligence officer and an agent from the Alcohol, Tobacco, and Firearms Division, in which we were discussing a case of mutual interest to our three agencies. This conference took up the rest of the morning, and we then went—I then went to lunch and was having lunch when a waitress came and told me that the President—excuse me, I then went and watched the President

go by on Main Street. I was present when he passed by, and then I went to lunch. I was having lunch when the waitress came and told me the President had just been shot.

I then proceeded immediately to the office. I knew that although we had no jurisdiction over this matter, that we would probably be called to assist the Secret Service, so I headed back to the office. As I came up to the office I met one of the supervisors, who told me to go and get a radio car and get out in the street, call in and stand by for further orders.

I took the radio car and headed in the general vicinity of the Trademart, where the luncheon was to be, where I knew many of the police officers were. I got out briefly at the Trademart to see if anybody was around who I could find, and nobody was there. They had all moved out. Then got back in the radio car and received a call from headquarters. They wanted four cars to proceed immediately to Parkland Hospital, where President Kennedy and Governor Connally had been taken. I was close by and responded. I was one of those cars to go there.

I drove to the hospital and called in that I had arrived at the hospital and was asking for further instructions. At this time, Mr. Kenneth Howe got on the radio. He recognized my voice and told me to immediately return to the Dallas office, which I did.

I got back to the office. Mr. Howe told me that since I was the one that had the most knowledge of rightwing extremists—I might add that I spent approximately two-thirds of my time investigating rightwing extremists, such as Ku Klux Klan, and organizations of that type. He said since I have the most knowledge in the office of these type people that I was to immediately start reviewing the files for suspects in the assassination.

Well, I was doing this, and I was talking to people at the police intelligence unit when word came through that the police had Lee Oswald in custody. I immediately recognized him as one of my cases. I previously heard that the shots had come from the Texas Schoolbook Depository and, of course, I knew that he was employed there, so I realized that this was very pertinent and attempted to locate the Lee Oswald file.

It was out of its regular file jacket and, after some minutes of looking around, one of the supervisors located the file in the chief clerk's office. Some new mail had just arrived from FBI headquarters, and the file was taken out to put this mail with it.

I then took the file immediately to Mr. Shanklin's office and advised him that we had a case on Lee Oswald. He was in on the phone to FBI headquarters, and I sat at his side while he called and furnished him the information. I went through the file to get the various information concerning Lee Oswald from the file and give it to him so that he could relay it to headquarters.

It was during this period that somebody at FBI headquarters—I don't know who—instructed Mr. Shanklin to send me and another agent immediately to the Dallas Police Department to furnish them information on Oswald that we had and to sit in on the interview of Oswald at the police station.

I then proceeded to the police station, at which time, upon entering the building, I met Lieutenant Revill, had a short conversation with Lieutenant Revill concerning some of the background on Oswald. I

then proceeded—Lieutenant Revill then took me to the third floor, where Captain Fritz had his office, and I then went in—after a short delay, I went in and sat in on the interview of Lee Oswald.

According to my records, it shows that I entered the interview at exactly 3:15 p.m., and it lasted exactly until 4:05 p.m. This would be central time on November 22, 1963. The outset of my entering the room with another agent, Agent James Bookhout; when I entered I identified myself immediately as special agent of the FBI, I identified myself by name. Lee Oswald immediately reacted to me and said something to the effect: "Oh, you're the one who's been interviewing my wife. I've heard about you." He got upset, and it took a little while to get him calmed down.

We then proceeded to sit in on the interview. Now, Captain Fritz asked most of the questions. It was his prisoner and he conducted most of the questions. I sat there and furnished him information that he could ask Oswald and pointed out things to him to help him along in the interview, but primarily, it was his interview with myself assisting. When the—

Mr. PARKER. Who else was present with you in that room?

Mr. HOSTY. There was Captain Fritz, of course; two of Captain Fritz' detectives, whose names I can't recall; Special Agent James Bookhout and myself.

Mr. PARKER. And Lee Harvey Oswald?

Mr. HOSTY. And Lee Harvey Oswald, of course.

Mr. PARKER. There was nobody else in the room?

Mr. HOSTY. No, not in the inner office.

Mr. PARKER. Was there a stenographer in the room?

Mr. HOSTY. No, sir.

Mr. PARKER. Was there a recording device of any kind?

Mr. HOSTY. Not to my knowledge.

Mr. PARKER. Was anybody making notes in the room?

Mr. HOSTY. I was.

Mr. PARKER. You were the only person making notes?

Mr. HOSTY. To the best of my knowledge.

Mr. PARKER. Continue please.

Mr. HOSTY. All right. At 4:05 p.m., one of Captain Fritz' detectives came into the room and said that they were ready for the lineup. For this reason the interview was cut short and Oswald was taken out for the first of many lineups. I then came out and made a brief telephone call and had a conversation with some of the agents to furnish me instructions from headquarters. I looked at some of the evidence that they had, including the address book with my name in it, I learned of my name being in the address book at this time.

I had a conversation with Forrest Sorrells, of the U.S. Secret Service, and some of his agents that were with him, and then shortly thereafter returned to the FBI office in Dallas, where I met Mr. Howe and Mr. Shanklin.

Mr. PARKER. Did you dictate an official memorandum of that day's activities?

Mr. HOSTY. Of the interview, yes, sir, I did.

Mr. PARKER. And that was placed into the file?

Mr. HOSTY. Yes, sir.

Mr. PARKER. Did that conclude your activities on November 22?

Mr. HOSTY. Well, sir, it was this time that I returned to the office that I was confronted by Mr. Shanklin and Mr. Howe with the note which I had left in my work box from approximately November 6, 7, or 8.

Mr. PARKER. Where did that take place?

Mr. HOSTY. Where or when?

Mr. PARKER. Where?

Mr. HOSTY. In Mr. Shanklin's office.

Mr. PARKER. And you were in Mr. Shanklin's office when both Mr. Howe and Mr. Shanklin discussed with you the note?

Mr. HOSTY. Yes, sir.

Mr. PARKER. Would you describe that for me?

Mr. HOSTY. Well, Mr. Shanklin was quite agitated and upset about it, and he asked me about it. I explained to him the circumstances of my getting it, the circumstances of my visit to Mrs. Paine and talking to Marina. He then directed me to put it in writing, prepare a memorandum for him, setting forth all the details, circumstances, which I then did—dictated a memorandum in duplicate.

Mr. PARKER. You said he; who actually is that?

Mr. HOSTY. I'm sorry, Mr. Shanklin.

Mr. PARKER. Mr. Shanklin, right.

Mr. HOSTY. Directed me to prepare a memorandum, setting forth the details, the circumstances surrounding my reception of the note. I then prepared this memorandum which ran at least two pages, possibly three or four pages, setting forth my explanations. It was in duplicate. I furnished both copies of the memorandum to Mr. Shanklin.

Mr. PARKER. Was that memorandum dictated?

Mr. HOSTY. Yes, sir. It was dictated to, I believe, Martha Connally was the stenographer.

Mr. PARKER. And then what did you do with the memorandum?

Mr. HOSTY. I gave it to Mr. Shanklin.

Mr. PARKER. On the same day?

Mr. HOSTY. On the same day.

Mr. PARKER. All right. What were your activities on November 23, 1963?

Mr. HOSTY. We first had a conference. Mr. Shanklin called all the agents together the first thing in the morning, around 8 o'clock, and passed on certain instructions from FBI headquarters, and we immediately following that, I dictated from my notes of the previous day of my interview of Lee Oswald, dictated that interview to a stenographer, at which time, in accordance with Bureau regulations, I then destroyed my original notes since the memorandum concerning my interview was now to be the official record.

I was then instructed to go out and interview Mrs. Paine in great detail, so approximately midmorning, 10:30 or 11, I arrived at Mrs. Paine's residence in Irving, Tex., with another agent, Special Agent Joseph B. Abernathy. We then proceeded to interview Mrs. Ruth Paine and her husband, Michael Paine, who was then there. We interviewed them both in considerable detail as to the background data on Lee Oswald and Marina Oswald, everything that they knew about this matter.

Mr. PARKER. Was the note and your memorandum brought to your attention on the 23d of November in any way?

Mr. HOSTY. I don't recall any time it was brought to my attention.

Mr. PARKER. When was it next brought to your attention again?

Mr. HOSTY. The next time I recall it being brought to my attention was on Sunday, November 24; it was at least 2 hours after the announced death of Lee Oswald. It could have been 3 or 4 hours afterward. It was sometime that afternoon of November 24. Mr. Howe told me that Mr. Shanklin wanted to see me and Mr. Howe in his office.

We then proceeded from the 11th floor, where my desk was, and Mr. Howe's desk, to the 12th floor to Mr. Shanklin's office, and we entered Mr. Shanklin's office. I went in first; Mr. Howe was behind me.

Mr. PARKER. Was the door open?

Mr. HOSTY. Yes, sir.

Mr. PARKER. Were the circumstances in that area crowded or was there much activity?

Mr. HOSTY. No, sir. It was on Sunday and most of the stenographic and clerical personnel were off. They had worked late hours on Saturday and Friday, as the agents had. Most of the agents were on duty, but nearly all of them were out covering various leads. There were very few people in the office at the time.

Mr. PARKER. Then present in Mr. Shanklin's office were Mr. Shanklin?

Mr. HOSTY. Mr. Howe and myself.

Mr. PARKER. Was Mr. Shanklin seated or standing?

Mr. HOSTY. He was standing behind his desk.

Mr. PARKER. Were you seated or standing?

Mr. HOSTY. I was standing in front of his desk.

Mr. PARKER. And Mr. Howe, where was he placed?

Mr. HOSTY. To the best of my knowledge he was behind me, back by the door.

Mr. PARKER. What transpired then?

Mr. HOSTY. Mr. Shanklin reached down into the lower righthand drawer of his desk. It's a large double drawer, in which he has numerous manila folders, where they keep various notes. There is a folder for each agent, and they keep various notations and routing slips and error forms, and other things like that in these folders. He reached down and took out the memorandum and the note in question. He handed it to me, and he said, in effect, Oswald's dead now, there can be no trial; here get rid of this.

I then proceeded to tear it up in his presence. He said, "no, get it out of here; I don't even want it in this office; get rid of it." I then took it out and destroyed it.

Mr. PARKER. And how did you destroy it?

Mr. HOSTY. I took it into the washroom and flushed it down the drain.

Mr. PARKER. Did you find the directions to you from Mr. Shanklin quite clear? You understood him?

Mr. HOSTY. Yes; there was no doubt in my mind he wished me to destroy it.

Mr. PARKER. Do you believe when you did that that you were in violation of any FBI rule or Federal statute at the time?

Mr. HOSTY. No, sir.

Mr. PARKER. Did you discuss what you did with the note with anyone at any time, or have you since?

Mr. **HOSTY**. On one occasion, with Mr. Shanklin. Several days later he asked me if I had, in effect, destroyed it, and I assured him I had. That was the last time I have any recollection of discussing it.

Mr. **PARKER**. Can you pinpoint that time for me more precisely?

Mr. **HOSTY**. It would have been a week or two afterward; that's all I could say.

Mr. **PARKER**. Was it just a conversation in passing, or were you in the room for some specific reason?

Mr. **HOSTY**. Well, yes, sir. It had to do with another communication, which he had also asked me to destroy, which I hadn't.

Mr. **PARKER**. What was that communication, Mr. Hosty?

Mr. **HOSTY**. It's the Commission Exhibit 103.

Mr. **PARKER**. Would you describe it for me?

Mr. **HOSTY**. It's a rough draft of the letter that Lee Oswald wrote to the Soviet Embassy on November 9, 1963. It's a rough draft in his handwriting, which I obtained from Mrs. Paine on the 23d of November 1963. Now, the rough draft is Commission Exhibit 103, the typed copy is Commission Exhibit 15.

Mr. **PARKER**. Commission exhibit what number?

Mr. **HOSTY**. Fifteen.

Mr. **PARKER**. Would you describe that for me more fully? On what occasion did he ask you to destroy that record?

Mr. **HOSTY**. That was sometime on, I believe, the Tuesday following the assassination. I was having, I was writing up my interview with Mrs. Paine on the 23d. She had given me this letter, this rough draft letter, and I was trying to figure out how to work it into the report form, whether I should quote it directly or refer to it, and make it a separate addendum.

I went in and asked him just exactly what form he wanted me to do this in, and he became highly upset and highly incensed and appeared to be almost on the verge of a nervous breakdown, and said, "I thought I told you to get rid of that, get rid of it."

I then left his office and didn't know quite what to do. I felt that he'd misunderstood what I was trying to tell him, and another agent, named Bardwell Odum, had apparently overheard the conversation. He came up to me and said that he had taken a similar letter that he had received from Mrs. Paine. Now, let me explain, Mr. Odum had been sent out to interview Mrs. Paine late Saturday night or early Sunday morning after my interview. Mr. Shanklin had sent him out to—I guess you might say—doublecheck my version of my contact with Marina Oswald to make sure I wasn't trying to play down my part, and he went out and reinterviewed Mrs. Paine, at which time Mrs. Paine told Agent Odum that when she had given me this rough draft before, that she had made a copy in her own handwriting of this letter, and Agent Odum said, "well, she had better give that to him too." So he took that and then sometime, apparently on Sunday or Monday, he had brought this note to Mr. Shanklin's attention, and Mr. Shanklin said to him in effect—this is according to Mr. Odum now—"I thought I told Hosty to get rid of that thing."

We then discussed what we should do, and we decided that we would not get rid of these notes and I made an exhibit out of Commission exhibit 103 and placed it in the file under the heading of "Handwriting Specimens of Lee Harvey Oswald." I then referred

to this in my report to the Bureau, and about 2 weeks later they came down and noticed this and asked where this was, and I was unable to produce the letter and send it in to the, in to headquarters, and it was following this misunderstanding, he again brought up with me what had I done with the first letter.

Mr. PARKER. Mr. Hosty, were you asked by Mr. Shanklin or anyone else in the Bureau to destroy any other note or document, piece of paper, exhibit or any other thing during the course of this investigation?

Mr. HOSTY. No, sir. No, sir. That would be all.

Mr. PARKER. Have you ever been asked by anybody within the Bureau in any other case that you have ever had to destroy any other piece of evidence, document, piece of paper or thing?

Mr. HOSTY. Well, not evidence. Of course, we periodically destroy serials on a routine basis. If something has not been——

Mr. PARKER. Other than on a routine basis?

Mr. HOSTY. Something that has not been put in the record as this, it's done quite frequently, yes.

Mr. PARKER. You were asked by Mr. Shanklin to destroy two different items?

Mr. HOSTY. Right.

Mr. PARKER. You did destroy one; you saved the other. Why did you do that?

Mr. HOSTY. Right. The reason I didn't the second time is because it was obvious to me that the second item was highly pertinent. It confirmed Lee Oswald's contact with the Soviet Embassy in Mexico City. Also because of Mr. Shanklin's demeanor and temperament, it was obvious to me that he was verging on a nervous breakdown. He obviously didn't know what he was saying. He was quite upset, and then, of course, my conversation with Mr. Odum following which he said the same thing, we decided that we would not follow the procedure here.

Mr. BRAY. Counsel, may I interrupt for a moment?

Mr. PARKER. Yes.

Mr. HOSTY. I also wanted to clear up the point that in addition to the note that was destroyed, I also destroyed my memorandum that I had prepared, that 2 to 4 page memorandum setting forth the explanation; that was also destroyed at the time the note was destroyed.

Mr. PARKER. Yes; to clarify that for my understanding, when you destroyed the note, you also destroyed the memorandum about that note?

Mr. HOSTY. Of explanation, correct.

Mr. PARKER. Did you play a role in the assassination investigation after November 24, 1963?

Mr. HOSTY. Yes, sir, very much so.

Mr. PARKER. What was that?

Mr. HOSTY. As I said, I interviewed Mrs. Paine and Michael Paine in great detail on the 23d. I was the first one to interview Marina Oswald in great detail. I believe it was on the following Tuesday. I was the one of two agents who Mr. Howe sent to get all of the evidence from the Dallas Police Department to catalog it, photograph it and enter it into the record; all the evidence that they had obtained, and

continued to be primarily responsible for many of the principal interviews in connection with the background of Lee Oswald.

Mr. PARKER. What was the last activity of yours, about what date, with respect to that assassination investigation?

Mr. HOSTY. I don't recall any interviews after, say, June or July, maybe probably an interview with Mrs. Paine.

Mr. PARKER. In 1964?

Mr. HOSTY. 1964, yes.

Mr. PARKER. When was the last time you reviewed either the Lee Harvey Oswald or the Marina Oswald files?

Mr. HOSTY. It would have been sometime in the summer of 1964.

Mr. PARKER. Did you testify before the Warren Commission?

Mr. HOSTY. I did.

Mr. PARKER. Did you volunteer or give any information about the note or its destruction?

Mr. HOSTY. I did not.

Mr. PARKER. Why not?

Mr. HOSTY. I wasn't asked.

Mr. PARKER. Did you give any information or volunteer any information with respect to your instructions regarding Commission exhibit 103?

Mr. HOSTY. No, sir.

Mr. PARKER. Why not?

Mr. HOSTY. I wasn't asked.

Mr. PARKER. Did you think about volunteering the information?

Mr. HOSTY. No, sir.

Mr. PARKER. Why not?

Mr. HOSTY. I was instructed when I went up there that I was to only answer the questions that were set to me, and I was not to expand on anything and not to elaborate, only to answer the questions that were put to me.

Mr. PARKER. And who gave you those instructions?

Mr. HOSTY. They were given to me by at least two officials in Dallas and at least one in FBI Headquarters. They were given to me by Mr. Shanklin, Mr. Gemberling, who was a supervisor who succeeded Mr. Howe, and also by former Assistant Director Alan Belmont.

Mr. PARKER. Mr. Hosty, did you receive any reprimands or discipline for your handling of any phase of the Lee Harvey Oswald case?

Mr. HOSTY. Yes, sir, I did.

Mr. PARKER. What specific discipline did you receive and when?

Mr. HOSTY. I received a letter of censure in December, I believe around December 12, 1963. I received the first letter of censure, placed on probation. I then received two letters of commendation, and I was then taken off probation 90 days later. I received a second letter of censure on, dated August 6, 1964, which was the same thing. It was for the exact same violations with one addition. That was on October 6, 1964. I was placed on probation and suspended for 30 days.

Mr. PARKER. And were you transferred?

Mr. HOSTY. I had been transferred the previous week to Kansas City. That transfer came through on September 28 and then the letter of censure came through on October 6.

Mr. PARKER. Do you have copies of your letters of discipline?

Mr. HOSTY. I do.

Mr. PARKER. In your mind was your discipline justified?

Mr. HOSTY. No, sir.

Mr. PARKER. Would you explain that to me?

Mr. HOSTY. Yes, sir. I received instructions from Mr. Shanklin on or about December 5, 1963, to answer, I believe there were 16 questions, which had been telephonically furnished to Mr. Shanklin by Assistant Director James Gale, who was the Chief Inspector of the FBI. He posed 16 questions, based upon his review of the FBI Headquarters file. Some of these questions pertained to the handling of the case by agent John Fain, who is now retired. Mr. Howe, who had been the supervisor over both Mr. Fain and myself, who was instructed to answer the questions dealing with the Fain phase of it, and I was instructed to answer the questions dealing with my phase of the case.

I put my answers to these questions in a memorandum dated I believe, on or about December 6, 1963, which questions pertained to Fain. I said something to the effect of "handled by Fain," and the ones that I handled I have made answers.

Approximately 2 days later, on or about December 8, 1963, Supervisor Ken Howe came out of SAC Shanklin's office. He was obviously perturbed and upset, and he handed both copies of my memorandum of December 6 to me and said, here, keep these, you might need these someday.

I took his advice and kept the memorandum. Approximately 5, maybe 6 years ago I had an opportunity to review my personnel file. I might add that agents are not allowed to see their personnel files, but this was accidentally left out of the safe and left on the supervisor's desk. I got a chance to read it. I was always curious as to why I was censured. It had never made sense. The questions that I had answered seemed to be cleared up. I then looked in the file and found the memorandum purportedly setting forth my answers and the answers were not the ones that I gave on December 6, 1963. There were two points in question. The data stated that I had stated, that I felt maybe I was wrong and should have done it differently. I did not state that, and the letter of censure was based upon these false and changed answers.

Mr. PARKER. You're indicating to me then, Mr. Hosty, that the document in the FBI personnel file regarding yourself is different from the document which you prepared and submitted to whom?

Mr. HOSTY. I prepared and submitted to SAC Shanklin.

Mr. PARKER. Do you have a copy of the original document which you prepared?

Mr. HOSTY. Yes, sir; I do. My attorney does.

Mr. PARKER. Would you furnish that to the subcommittee?

Mr. BRAY. Yes, sir; we will.

Mr. PARKER. Along with your letter of censure?

Mr. HOSTY. Yes, sir; we have that.

[The material requested follows:]

LAW OFFICERS OF ARENT, FOX,
KINTNER, PLOTKIN & KAHN,
Washington, D.C., January 14, 1976.

Representative DON EDWARDS,
Chairman, Subcommittee on Civil and Constitutional Rights,
House of Representatives, Washington, D.C.

DEAR Mr. EDWARDS. In response to your letter of December 15, 1975, enclosed please find copies of the following documents:

1. A letter dated December 13, 1963, addressed to Mr. Hosty signed by J. Edgar Hoover placing Mr. Hosty on probation;

2. A letter dated September 28, 1964, addressed to Mr. Hosty signed by J. Edgar Hoover notifying Mr. Hosty that he was transferred to Kansas City, Missouri;

3. A letter dated October 5, 1964, addressed to Mr. Hosty signed by J. Edgar Hoover notifying Mr. Hosty that he was being suspended for thirty (30) days without pay and again placed on probation;

4. A letter dated October 8, 1964, addressed to Mr. Hosty signed by J. Edgar Hoover notifying Mr. Hosty that his request for a transfer to a city with a warmer climate than Kansas City, Missouri was denied;

5. A letter dated October 9, 1964, addressed to Mr. Hosty signed by J. Edgar Hoover wherein Mr. Hosty's offer to provide his services to the FBI during his period of suspension was refused; and,

6. A memorandum dated 12/6/78 to: SAC, DALLAS (DALLAS 100-10461) from: SA JAMES P. HOSTY, JR., SUBJECT: LEE HARVEY OSWALD, aka IS-R- Cuba, which is a self-explanatory memorandum containing the "... answers to questions as set forth in the memorandum of SAC SHANKLIN to the File, 12/5/63, at the request of Assistant Director JAMES H. GALE".

I have contacted Mr. Hosty who returned from his vacation on Wednesday, January 14, 1976, and requested him to supply me with a written authorization for you or anyone acting under your specific direction to review his FBI personnel file.

Please contact me if you have any questions concerning the materials which we have furnished or other matters.

Very truly yours,

FRANCIS X. LILLY.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., December 13, 1963.

Mr. JAMES P. HOSTY, Jr.,
Federal Bureau of Investigation,
Dallas, Tex.

DEAR MR. HOSTY: It has been determined that your recent handling of a security-type case was grossly inadequate. Specifically, there was an unwarranted delay on your part in reporting certain pertinent information and the investigation you conducted was most inadequate. Furthermore, the explanation which you furnished as to why you failed to conduct a certain interview was absolutely unacceptable and your judgment in connection with this aspect of the case was exceedingly poor. Moreover, in view of the information developed concerning the subject of this investigation, it should have been apparent to you that he required a status which would have insured further investigative attention.

In view of the slipshod manner in which you handled this investigation, you are being placed on probation. It will be incumbent upon you to handle your future duties at a higher level of competence so that further administrative action of this nature will not be necessary.

Very truly yours,

J. EDGAR HOOVER, Director.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., September 28, 1964.

Mr. JAMES P. HOSTY, Jr.,
Federal Bureau of Investigation,
Dallas, Tex.

DEAR MR. HOSTY: Your headquarters are changed from Dallas, Texas, to Kansas City, Missouri, effective upon your arrival there on or after this date. This change is made for official reasons and you will be allowed transportation expenses and per diem at the rate of \$13.00 per day within the U.S., \$6.00 per day for air travel, rail travel, and ocean travel by steamship outside the continental limits of the U.S., transportation expenses for your immediate family, and transportation costs of household goods and personal effects as provided for in Public Law 600 dated August 2, 1946, and Executive Order 9805, dated November 25, 1946, as amended. You are authorized to use your privately owned automobile and you will be reimbursed at the rate of ten cents per mile plus inci-

dental expenses, not to exceed the cost by common carrier, as prescribed by Section 3.5b(2) of the Standardized Government Travel Regulations, over the most direct route for all persons officially traveling therein. Should your dependents travel separate and apart from you, expenses will be allowed under the same conditions as above.

Very truly yours,

J. EDGAR HOOVER, *Director.*

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., October 5, 1964.

Mr. JAMES P. HOSTY, Jr.,
*Federal Bureau of Investigation,
Dallas, Tex.*

DEAR MR. HOSTY: Further consideration has been given to the facts relating to your handling of your duties in connection with an Internal Security case which was assigned to you in the Dallas Division and it has been determined that your shortcomings in this matter was most reprehensible. An unwarranted delay occurred on your part in reporting certain important information and the investigation you conducted in this case was completely inadequate. Your failure to conduct an interview of the subject's wife was inexcusable and your judgment with respect to this phase of the investigation was very bad. In addition, it should have been apparent to you in view of certain information developed, that the subject required a status which would have insured further investigative attention. Furthermore, during subsequent testimony regarding the case in question, you made certain statements which were entirely inappropriate.

In view of the above, you are being suspended without pay from the close of business October 6, 1964, to the close of business November 5, 1964, and placed on probation. It will be necessary for you to carry out your future assignments with greater efficiency and more consideration for the Bureau's interests if you are to continue in the service.

The Federal Salary Reform Act of 1962 provides that before a within-grade increase can be granted, a determination must be made that the performance of the employee is at an acceptable level of competence. Although you have completed the required waiting period for such a salary increase, it is not possible to make a favorable determination regarding your competence at this time in view of the circumstances set out above.

Very truly yours,

J. EDGAR HOOVER, *Director.*

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., October 8, 1964.

Mr. JAMES P. HOSTY, Jr.,
*Federal Bureau of Investigation,
Dallas, Tex.*

DEAR MR. HOSTY: Your Special Agent in Charge has forwarded your letter of October 5, 1964, in which you request that your pending transfer to Kansas City be changed to a metropolitan office with a warmer climate and that the transfer be deferred until a later date because of family problems.

The reason for your request is understandable and this matter has been very carefully considered. However, I must advise that favorable action cannot be taken and you should arrange to report to the Kansas City Office in compliance with your transfer orders as soon as public business permits.

Sincerely yours,

J. EDGAR HOOVER, *Director.*

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., October 9, 1964.

Mr. JAMES P. HOSTY, Jr.,
*Federal Bureau of Investigation,
Dallas, Tex.*

DEAR MR. HOSTY: This will acknowledge receipt of your letter of October 6, 1964, in which you have offered your services during your period of suspension.

Your kind remarks have been noted and have been made a matter of record. I regret to inform you that it will not be possible for the Bureau to utilize your services during your suspension period.

Sincerely yours,

J. EDGAR HOOVER, Director.

U.S. Civil Service Commission (EMPLOYEE - See General Information on Form 10) 5 PART 50-119
 (FOR AGENCY USE)

1. NAME (CAPS) LAST-FIRST-MIDDLE HOSTY, JAMES P. JR. (HR.)		MR - MISS - MRS	2. (FOR AGENCY USE)	3. BIRTH DATE (Mo., Day, Year) 8-28-24	4. SOCIAL SECURITY NO. 354-16-1823
VETERAN PREFERENCE 2. <input type="checkbox"/> 1-NO 3-10% DISAB 4-15% DISAB 5-30% DISAB 6-35% DISAB			6. TENURE GROUP	7. SERVICE COMP. DATE	8. PHYSICAL HANDICAP CODE
9. FEGLI 1-COVERED 2-NON-COVERABLE 3-WAIVED			10. RETIREMENT 1-YES 2-NO		11. (FOR USE OF)
12. CODE NATURE OF ACTION SUSPENSION			13. EFFECTIVE DATE (Mo., Day, Year) Beginning: 08 10-6-64 Ending: 08 11-5-64 (32 Calendar Days)		
15. FROM: POSITION TITLE AND NUMBER Special Agent #61-F-48 170			16. (FOR AGENCY USE) OCCUPATION CODE GS 13 Series 181		
19. NAME AND LOCATION OF EMPLOYING OFFICE					

20. TO: POSITION TITLE AND NUMBER		21. PAY PLAN AND OCCUPATION CODE	22. GRADE OR LEVEL	23. SALARY
24. NAME AND LOCATION OF EMPLOYING OFFICE				

25. DUTY STATION (City - County - State)		26. LOCATION CODE		
27. APPROPRIATION S. & H., FBI		28. POSITION CLASSIFICATION	29. PAY PLAN	30. STATE

31. REMARKS
 A. SUBJECT TO COMPLETION OF 1 YEAR PROBATIONARY PERIOD FOR PERIOD OF 1 YEAR
 B. SERVICE COUNTING TOWARD CAREER OR PERMANENT TENURE FROM
 SEPARATIONS SHOW REASONS BELOW AS REQUIRED. CHECK IF APPLICABLE: C. DISMISSAL D. FROM APPOINTMENT OF 6 MONTHS OR LESS

Suspend without pay for a period of 30 calendar days beginning at the close of business 10-6-64, and ending at the close of business 11-5-64. This action is being taken in view of his failure to perform his duties in a satisfactory manner.

32. DATE OF APPOINTMENT (Mo., Day, Year)	34. DATE OF LAST PROMOTION AND TITLE
33. OFFICE MAINTAINING PERSONNEL FOLDER (City - County - State)	<i>J. Edgar Hoover</i> Director
35. EMPLOYEE FEDERAL ID NUMBER DJ 87: FEDERAL BUREAU OF INVESTIGATION	10-13-64

1. EMPLOYEE COPY

[U.S. Government Memorandum, Dec. 6, 1964]

To: SAC, Dallas (100-10461).
 From: SA James P. Hosty, Jr.
 Subject: Lee Harvey Oswald, aka IS-R-Outba.

The following are answers to questions as set forth in the memo of SAO Shanklin to the file, 12/5/68, at the request of Assistant Director James H. Gale.



(1) The Dallas Office did not recommend Oswald for the Security Index during period that he was in the Dallas Division because the subject's activities while in the Dallas Division did not fit the criteria for the Security Index as set forth in the Manual of Instructions.

(2) The case on Marina Oswald was opened on a specific recommendation of this writer on 7/19/62, at which time it was noted that she fell within the criteria of the SOBIR program (Manual of Instructions, 105-E). By letter to the Bureau dated 7/25/62, Bureau was advised on a UACB basis that in view of the pending investigation on Lee Harvey Oswald this case would be put in a pending inactive status, to be reopened at a later date for consideration or advisable action. This case was reactivated and in March of 1963 it was determined that the Oswalds had just moved from their apartment on Elsbeth. It was determined that Lee Oswald had been drinking to excess and had been beating his wife on numerous occasions. There had been many complaints from other tenants concerning this. The Oswalds were located at another location on West Neeley Street and a letter was sent to the Bureau advising the status of the case. Upon careful review of the Manual of Instructions, Section 105-E, it was noted that it would be necessary to utilize a friend or sponsor of Marina Oswald for interpreter and that the atmosphere of the interview would have to be conducted in such a manner as to not cause any undue emotional stress or strain on the person being interviewed. In view of the reported marital difficulties between the Oswalds, it was decided to wait a suitable period to determine whether the domestic situation had been sufficiently clarified, so as to permit a proper interview as desired in Section 105-E of the manual. Upon recontact of the subject in May, it was determined that the subject had moved, leaving no forwarding address. Later, when the subject was determined to be in New Orleans, origin in this case was transferred to the New Orleans Office. Dallas Office obtained the forwarding address of Marina Oswald on 10/28/63, and on 10/29/63 verified her residence at 2515 W. 5th, Irving, Texas. One of the primary purposes of the interview of Mrs. Ruth Paine on 11/1/63, was for the purpose of laying the necessary groundwork for interview of Marina Oswald; however, in view of the allegations concerning Lee Oswald's contact with the Soviet Embassy in Mexico City, it was decided not to conduct this interview until Dallas had been made origin in both the case on Marina Oswald and Lee Harvey Oswald, so that the Dallas Office could be certain that we were in possession of all facts concerning both Marina Oswald and Lee Oswald. Change of origin was not received by the Dallas Office until 11/21/63, and not received by this writer until 11/22/63.

(3) This phase of the investigation was handled solely by former SA John W. Fain.

(4) This phase of the investigation was handled solely by former SA John W. Fain.

(5) This phase of the investigation was handled solely by former SA John W. Fain.

(6) In accordance with SAC Letter 62-48E, results of investigations in Espionage and Nationalistic Tendency cases may be recorded in memorandums to the SAC. It should be noted following the submission of Dallas letter to the Bureau, 3/25/63, such a memorandum was placed in the file covering the investigation conducted in Dallas in May of 1962, also setting forth leads to contact relatives and neighbors within the Dallas-Fort Worth area. It should be noted that subsequent investigation has determined the subjects left the Dallas area in May of 1963. In July of 1963, the New Orleans Office determined that the subjects were residing in the New Orleans Division, and origin was changed. After it had been determined that the subjects had left Dallas, the lead to determine Lee Oswald's employment appeared unnecessary at the time. It should be noted that the subjects were not active in any subversive organizations at this time and had done nothing to arouse any undue interest. The sole purpose of the investigation at this time was to locate and interview Marina Oswald in accordance with 105-E, Manual of Instructions.

(7) After Marina Oswald moved to New Orleans Office, and serials furnished to that office, it was left to the discretion of the New Orleans Office how and when Marina Oswald should be interviewed.

(8) On 11/1/63, following the interview of Mrs. Ruth Paine, a teletype was sent requesting a change of office of origin from New Orleans to Dallas. The Dallas Office had previously received information that Oswald had been in contact with the Soviet Embassy in Mexico City. For this reason, the Dallas Office was awaiting a change of origin so that the Dallas Office would be in possession of all informa-

tion before attempting an interview of the subject. It should be noted until such time as origin was changed the Dallas Office could not be sure that we were in possession of all information and it was felt until such time this was certain, any interview would be decidedly premature.

(9) The information that Oswald subscribed to *The Worker* on 9/28/62 was received prior to the time this case was assigned to the writer and it was initiated for file when the case was closed. This case was not re-opened to the writer until 3/25/63, at which time this information was reported.

(10) The information concerning the whereabouts of Lee Oswald was obtained in the later afternoon of 11/1/63, a Friday. This writer did not return to the Dallas Office until after 5 p.m. All security information must go Registered Mail. There is no Registered Mail sent out of the Dallas Office after four o'clock Friday and before the following Monday. This airtel was rough-drafted on 11/1/63, but could not be mailed until 11/4/63.

(11) The Dallas Office received the WFO communication re contact with the Soviet Embassy in Washington, D. C., on 11/22/63. This communication was never routed to this writer.

(12) The Dallas Office determined on 5/27/63 that the subject had moved. Subsequent investigation reflects that they actually moved on 5/11/63.

(13) The information concerning Oswald's contact on 4/21/63 with the FPCC was not received by the Dallas Office until 7/1/63. The New Orleans Office was in receipt of information on 7/5/63 showing contact with FPCC in New York, by letter dated 7/5/63. At the time of the receipt of the information that Oswald had been in contact with the FPCC on 4/21/63, it was known that Oswald was no longer in Dallas and the primary concern was his location so a report could be submitted.

(14) The information received by the Dallas Office on 10/18/63, concerning the subject's contact with the Soviet Embassy in Mexico City was quite limited. INS, Dallas, merely advised that they were in possession of a communication indicating CIA, Mexico City, identified an individual possibly identical with Lee Oswald was in contact with the Soviet Embassy in Mexico City. Because of the third agency, this writer was not permitted to actually see the communication. A copy of this CIA communication was forwarded to the Dallas Office by airtel dated 10/24/63 and received 10/25/63. By airtel dated 10/25/63, received 10/28/63, the Dallas Office was advised of the address on West 5th St. in Irving, Texas. In 10/29/63, it was determined that this was the residence of Ruth Paine, and Marina Oswald was residing there. On 10/30/63 and 10/31/63, background investigation was conducted on Ruth Paine to determine whether or not it would be feasible to approach her. On 11/1/63, Ruth Paine was approached and subject Lee Oswald's whereabouts was determined and the New Orleans Office advised. It was deemed advisable, until such time as the Dallas Office had all pertinent information from the New Orleans Office, to await any further investigation. It should be noted that the subject had previously advised agents of the FBI that he would periodically be in contact with the Soviet Embassy in Washington, D.C., regarding his wife's status.

(15) This office furnished U. S. Secret Service in Dallas, Texas, no information concerning Lee Harvey Oswald prior to his arrest on 11/22/63. The Dallas Office furnished no information to the Dallas PD concerning Lee Harvey Oswald prior to his arrest on 11/22/63.

(16) The Dallas Office has maintained close liaison with the Dallas Police and furnishing information concerning racial matters and individuals belonging to hate and klan-type groups. In accordance with Bureau instructions, no information has ever been furnished to the Dallas PD concerning individuals with subversive backgrounds.

Mr. PARKER. Did you appeal your discipline?

Mr. HOSTY. I appealed it to Director Kelley in October of 1973, yes, sir.

Mr. PARKER. Did you appeal it at any time prior to that at the time it was being imposed?

Mr. HOSTY. No, sir; I felt that would be useless.

Mr. PARKER. Why did you feel that would be useless?

Mr. HOSTY. Because it was obvious that the people I would have to appeal to were the ones that were responsible for the change.

Mr. PARKER. What is the appeal procedure?

Mr. Hosty. Actually, there is no appeal other than to the FBI headquarters, and FBI headquarters disciplines you, you can only appeal their decision with one exception if the individual is a veteran, within the meaning of the Veterans Preference Act of 1964, which I am. If disciplinary action exceeds certain limits, like they cannot separate me, reduce me in grade, or suspend me for more than 30 days without the right of appeal to the Civil Service Commission. If you will note, my disciplinary action came right up to that point and stopped. They came up to the point where I could appeal and then stopped. I therefore had no appeal rights.

Mr. PARKER. Yes. Do you know of your own knowledge of other persons who have received discipline on account of the Lee Harvey Oswald investigation?

Mr. Hosty. Yes, sir; I do.

Mr. PARKER. Would you tell me who they are, please?

Mr. Hosty. Mr. Kenneth Howe, supervisor, was reduced from supervisor to agent, and was transferred. He was censured twice, the same as I was, in December and then again in October.

Agents Doyle Williams, William Anderton, and Vincent Drain of Dallas, were all disciplined, twice I believe, both in December of 1963 and again in October of 1964.

The agent in New Orleans, Milton Kaack, was transferred. At least two supervisors in FBI Headquarters were demoted and transferred, and at least three others were given letters of censure, but not transferred.

Mr. PARKER. Do you know of anyone who came in contact with the Lee Harvey Oswald case, including the FBI, who was not disciplined or censured or transferred?

Mr. Hosty. Mr. Shanklin was not. Jack Quigley, who interviewed Lee Oswald in New Orleans, was not. John Fain had already retired and, of course, couldn't be, but everybody else up through Mr. Belmont was at least censured.

Mr. PARKER. Thank you.

Mr. EDWARDS. Mr. Seiberling.

Mr. SEIBERLING. Thank you, Mr. Chairman. Mr. Hosty, picking up that point, do you have a feeling that, perhaps, this was a matter of hindsight being better than foresight, that the FBI may have censured you because they thought that in retrospect somebody should have taken Oswald more seriously than they did?

Mr. Hosty. Well, sir, I might add that the disciplinary action taken against me had to do with my handling of the case in the March 1963 period, 8 months before President Kennedy was even going to come to Dallas. At no time did the disciplinary action ever question my judgment on not referring the matter to the Secret Service. It had to do with administrative handling of my not interviewing Marina Oswald in November of 1963 and my placing a memorandum in the file opposed to writing a letter to the FBI Headquarters in 1963, in May of 1963.

Mr. SEIBERLING. Now, if they took that dim a view about some matters which, at the time, seemed to be insignificant, what sort of a position would they have taken if they had known about the destruction of the Oswald note and your memorandum relating to it?

Mr. Hosty. I don't know, sir.

Mr. SEIBERLING. Did you ever think that it was somewhat strange that Mr. Oswald, if he intended to assassinate the President in early November, would have come to the FBI and drawn attention to himself?

Mr. HOSTY. It does seem strange, yes, sir.

Mr. SEIBERLING. Did you ever have any conversations with any other people in the FBI or anywhere else about the oddness of that behavior?

Mr. HOSTY. Only ones I ever recall discussing the note with would be Mr. Howe and Mr. Shanklin.

Mr. SEIBERLING. Now, getting to the investigation of Oswald prior to November 22 was that just a routine check? Did you have many cases of that degree of importance?

Mr. HOSTY. I wouldn't call any case routine. What we were investigating, as of November 1, was his reported contact with the Soviet Embassy in Mexico City. We were attempting to establish his whereabouts and attempting to establish as best we could without interviewing him. I might add I could not interview him under the restrictions I was under because of the nature of the investigation. We were trying to determine as best we could what he was up to, what he was in contact with them for.

Mr. SEIBERLING. You mean you could interview his wife, but not interview him?

Mr. HOSTY. That's right, sir.

Mr. SEIBERLING. Would you explain why that type of distinction was made?

Mr. HOSTY. Because to interview a person concerning a contact such as he made with the Soviet Embassy, we would have to ask him and that would give away the techniques and the knowledge that we had. We would be telling him more than he would be telling us.

Mr. SEIBERLING. But interviewing his wife, you didn't have to ask him—

Mr. HOSTY. I was not going to interview her about that. I was going to talk to her about her background, hoping that in the process she might possibly volunteer something without my asking the question.

Mr. SEIBERLING. Now, can you tell us as precisely as possible what you recall was in the note that was left for you by Mr. Oswald?

Mr. HOSTY. Yes, sir; the first part of it criticized me for contacting his wife without his knowledge.

Mr. SEIBERLING. You say he criticized you. Exactly what did he say, if you recall?

Mr. HOSTY. To the best of my recollection, it said, if you want to talk to me, come talk to me, don't bother my wife. I want to know when you interview my wife. Don't interview her without my permission, and he said if you don't cease talking to her, I will be forced to take action against the FBI.

Mr. SEIBERLING. Did he indicate what kind of action it would be?

Mr. HOSTY. Well, sir, I know that he was a member of the American Civil Liberties Union, and I just assumed he meant legal action. We had some—

Mr. SEIBERLING. It didn't say anything about the blow-up at the office?

Mr. Hosty. No, sir; I would have remembered that.

Mr. SEIBERLING. Now, you said that you considered this was just a routine note?

Mr. Hosty. Yes, sir.

Mr. SEIBERLING. And, yet, you did not consider Lee Oswald to be just a routine case, the Oswald case?

Mr. Hosty. No; you can't say any case is routine. You've got to consider each case on its own merit. I wouldn't say it was the most important case I had and it wasn't the least important.

Mr. SEIBERLING. Although you said this was a routine nut letter, you didn't consider Oswald a routine nut?

Mr. Hosty. No, sir.

Mr. SEIBERLING. Now, getting to the conversation you had with Mr. Shanklin in which he had your note, you're aware of the fact that Mr. Shanklin denies any knowledge of the note prior to July of this year?

Mr. Hosty. Yes, sir; I've seen that.

Mr. SEIBERLING. And he has so stated under oath to this committee as recently as yesterday.

Mr. Hosty. Yes, sir.

Mr. SEIBERLING. And you are under oath.

Mr. Hosty. Yes, sir; I understand that.

Mr. SEIBERLING. So, is there any, do you wish to change your testimony in any way upon reflection?

Mr. Hosty. No, sir. No, sir; absolutely not.

Mr. SEIBERLING. Just one other question. After—let's now go to the period after the assassination: At that point do you think that the fact that Mr. Oswald wrote a note to you—whatever it may have said—became very significant?

Mr. Hosty. No, sir. As Mr. Shanklin had stated, he was dead; there could be no trial, and I thought that was the controlling factor here, there would be no trial.

Mr. SEIBERLING. But you distinguished between that note and the other document of Mr. Oswald's that Mr. Shanklin asked you to get rid of?

Mr. Hosty. Right. Right.

Mr. SEIBERLING. Well, as an FBI Agent, do you think that Mr. Shanklin would have reported that to his superior? He has so stated that he would have if he'd known about it.

Mr. Hosty. I can only state that he was in frequent telephonic contact with FBI Headquarters during that 2-day period. I don't—I have no information from my knowledge that he did report it.

Mr. SEIBERLING. Do you think, do you have any information indicating whether he acted on his own or under orders from some higher up telling you to either destroy that note or the other Oswald note?

Mr. Hosty. I'd have no way of knowing that, sir.

Mr. SEIBERLING. Thank you very much.

Mr. Hosty. Thank you, sir.

Mr. EDWARDS. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman. Mr. Hosty, going back to the note that was delivered to the receptionist's desk in the Dallas office, could you tell me, when you received that note was the envelope sealed?

Mr. Hosty. No, sir; I don't believe it was.

Mr. Kindness. Was the—you refer to it as a business-type envelope?

Mr. Hosty. Yes, sir; that's my recollection of it.

Mr. Kindness. Would you care to elucidate a little more on what you mean by that term, the size of the envelope, what was its shape?

Mr. Hosty. It would be the long envelope that you would be able to put an 8- by 10-inch letter into; you'd fold it three times. It would be, I guess 8 or 9 inches long and I guess about 3 or 4 inches in height.

Mr. Kindness. Like a No. 9 or a No. 10 envelope?

Mr. Hosty. Yes, sir; I believe that's what they call them.

Mr. Kindness. Could you tell us about the size of the paper that was inside?

Mr. Hosty. I believe it was a plain bond, 8 by 10.

Mr. Kindness. And a single page?

Mr. Hosty. A single page; yes, sir.

Mr. Kindness. You've referred to the folding of the paper a little while ago in your testimony. Could you recall with clarity how it was folded and the way the folds turned?

Mr. Hosty. The normal way would be folded three ways. That was the way it was.

Mr. Kindness. So that the content of the letter would not be observable?

Mr. Hosty. No, sir.

Mr. Kindness. Until you opened it up?

Mr. Hosty. That's correct.

Mr. Kindness. And that was the condition as best you can recall of the letter when you received it?

Mr. Hosty. When it was delivered to me; right.

Mr. Kindness. Do you recall whether any of the writing on the letter was on the lower one-third of the folded page?

Mr. Hosty. No, sir; I just recall it being written in the normal way in the middle of a page. It took up approximately two-thirds of the page, perhaps.

Mr. Kindness. A rather short letter, really?

Mr. Hosty. Yes.

Mr. Kindness. And was it all handwritten?

Mr. Hosty. To the best of my recollection. I do not recall a signature.

Mr. Kindness. Do you recall whether there was a return address, I mean an address?

Mr. Hosty. No, sir; I don't believe there was.

Mr. Kindness. Or a salutation inside of, say, dear Mr. Hosty?

Mr. Hosty. I don't recall a salutation; no, sir.

Mr. Kindness. Do you recall a signature?

Mr. Hosty. I don't recall a signature.

Mr. Kindness. You have referred to Mr. Oswald in your testimony on a few occasions as Lee Oswald?

Mr. Hosty. That's correct.

Mr. Kindness. Would you have anticipated or expected to see his signature as Lee Harvey Oswald on a document, or a letter, or note of this sort?

Mr. Hosty. I believe he normally signed Lee H. Oswald, from what I've been able to determine since the assassination. Now, before that,

I didn't have that much information on how he used, how he signed his name.

Mr. KINDNESS. In the course of your earlier investigations on the immigration and naturalization aspect of the matter, do you recall having occasion to see any documents that were signed by Oswald?

Mr. Hosty. I'm sure there were some in there. There would have had to been, but I don't specifically recall any.

Mr. KINDNESS. In regard to the notes of your interview with Oswald at the Dallas Police Department on November 22, 1963, after dictating the memorandum of that interview, you destroyed your notes. That was your testimony?

Mr. Hosty. Yes, sir.

Mr. KINDNESS. In what manner were the notes destroyed?

Mr. Hosty. Put into the wastebasket.

Mr. KINDNESS. They were not shredded or flushed down the toilet?

Mr. Hosty. No, sir. We burn all of our trash. It's taken out and burned, so anything you put into a wastebasket in an FBI office, we know is going to be burned. That's the only thing we do.

Mr. KINDNESS. Why did you not use the same manner of destruction for the memorandum and the note; that is, the memorandum about the note on the receptionist's desk?

Mr. Hosty. As I testified, I started to and Mr. Shanklin told me to get it out, get it out of his office, so for that reason I took more—

Mr. KINDNESS. Did you infer from that, then, that he meant a more immediate means of destruction?

Mr. Hosty. Yes, sir; that's the way I interpreted it.

Mr. KINDNESS. As to the physical circumstances in the Dallas FBI office at that time, do you recall where the switchboard was?

Mr. Hosty. The switchboard would have been, now, as you get off the elevator bank and you turn to the left—

Mr. KINDNESS. Excuse me, which floor are we on?

Mr. Hosty. The 12th floor, sir, of the Santa Fe Building.

Mr. KINDNESS. The 12th floor?

Mr. Hosty. As you get off the elevator, you turn to the left, you would enter the switchboard door by the switchboard; if you turn to the right, you'd go into the reception room.

Mr. KINDNESS. Which way was it normal for you to go to your desk?

Mr. Hosty. I could go either way. By going past the receptionist, I could pick up messages and check my mail. By going past her I could go past the mail slots where they would put incoming mail, so I, quite often, would go into the front way so I could check my mail on the way in.

Mr. KINDNESS. That would be the normal way?

Mr. Hosty. Yes.

Mr. KINDNESS. Thank you. My time is up.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Mr. Hosty, what was the content of the two- to four-page memo that you dictated to Martha Connally?

Mr. Hosty. Father, that was a memo of explanation to Mr. Shanklin, explaining to him the circumstances of my getting the note, the circumstances of my visit to Mrs. Paine and Marina Oswald, the purpose of my visit and what transpired there, and all matters relating to it, more or less as I explained to this committee.

Mr. DRINAN. When Mr. Shanklin, in a very agitated way, said, "Destroy this," what was his motive? Why was he so concerned about this? When he said, furthermore, that there can be no trial now, you assumed that this would have been relevant at a trial?

Mr. HOSTY. I don't know. I assume so; I don't know.

Mr. DRINAN. What don't you know?

Mr. HOSTY. Whether he assumed it would have been necessary at a trial.

Mr. DRINAN. That's what you testified, that since there is not going to be any trial, you can destroy this now.

Mr. HOSTY. Yes, sir.

Mr. DRINAN. And you agreed with him. What was relevant in that memo that would have been relevant at a trial?

Mr. HOSTY. I couldn't tell you anything.

Mr. DRINAN. Why, therefore, did you take his instructions?

Mr. HOSTY. Because I was ordered to, sir.

Mr. DRINAN. What?

Mr. HOSTY. Because I was ordered to, Father.

Mr. DRINAN. You were ordered on another occasion, but you didn't do it. What is the ultimate motivation of Mr. Shanklin? Why did he want to cover up?

Mr. HOSTY. I don't know, sir.

Mr. DRINAN. Well, you must have some assumption because on another occasion you refused to cover up.

Mr. HOSTY. That's correct, Father.

Mr. DRINAN. Therefore he did, he was trying to cover up.

Mr. HOSTY. That would have to be an assumption. I don't know what his—

Mr. DRINAN. Is there any other inference?

Mr. HOSTY. No, sir.

Mr. DRINAN. There is no other possible inference from the story that you've told, except that Mr. Shanklin desired to cover up because this would have been embarrassing to him or to you, or to both, or to the Bureau?

Mr. HOSTY. I don't know, Father.

Mr. DRINAN. How would it have been embarrassing to Mr. Shanklin personally?

Mr. HOSTY. I don't know.

Mr. DRINAN. We must conclude that that was the only motive he had for covering up, that he didn't want to be embarrassed?

Mr. HOSTY. Well, I don't know, unless there are other facts that weren't brought to my attention.

Mr. DRINAN. But from all that you know about the situation, the only possible inference is that he sought to cover up in order to avoid embarrassment to himself and not to you?

Mr. HOSTY. I don't know, sir.

Mr. DRINAN. When he reached down into the lower right-hand corner and took this out, I would assume that you could say that he had pondered on this a long time?

Mr. HOSTY. I couldn't say for sure, Father.

Mr. DRINAN. No, but you say that this had never occurred in your life there with him?

Mr. HOSTY. No.

Mr. DRINAN. It's essential that we get to the bottom of this. There is a complete clash of evidence; and we have to establish motives one way or the other.

Now, what did you say in the memo—I think that is very essential because he saw the note, but is there anything in that memo that hasn't come out in the testimony about your seeing Mrs. Oswald?

Mr. HOSTY. No, sir, not that I know of.

Mr. DRINAN. Why would he have said this is not, we are not going to have a trial, he's dead? Why would he assume that this would have been relevant at the trial?

Mr. HOSTY. I don't know, Father.

Mr. DRINAN. In connection with the other document that you were told to destroy and you refused, would you elaborate on the exact circumstances of how this came about?

Mr. HOSTY. Yes, sir. This occurred about Tuesday, or possibly Wednesday, after the assassination, when I took this letter in to Mr. Shanklin. I tried to explain to him what it was all about.

Mr. DRINAN. Why did you go to him directly? Why didn't you go to Mr. Howe? It's most unusual for you to go to the top official.

Mr. HOSTY. No. This case had taken on unusual proportions and Mr. Shanklin was in direct control of the case. So, it would have been a good idea to bring it up with him. He was directly controlling the case now.

All right. I took this other communication to him and tried to, started to explain to him what I wanted to do and see if this was the right way to do it. Now, I think that he possibly confused this with the other letter and thought I was talking about the first one.

Mr. DRINAN. That's entirely new testimony now. Why didn't you mention that before?

Mr. HOSTY. I'm sorry. I thought I did.

Mr. DRINAN. All right. Go on with it.

Mr. HOSTY. He then became highly upset, became emotionally upset and it was obvious that he was, as I say, almost verging on a nervous breakdown. This was another reason why I didn't follow his orders. He seemed to be losing control of himself and he didn't seem to really know what he was doing.

Mr. DRINAN. And why was he so agitated?

Mr. HOSTY. I don't know. He probably hadn't had any sleep in several days and was under tremendous pressure. I would say that was the reason.

Mr. DRINAN. Well, for how long during that interview was he confused, that he thought this was the other matter, the memo that you had dictated about the note that Oswald left?

Mr. HOSTY. I don't think it became straight in his mind until 1 week or 10 days later when we forwarded it to FBI headquarters and he became aware of it.

Mr. DRINAN. So, during that entire interview, when he was so agitated, he thought that the letter that you were talking about was the one that he wanted destroyed?

Mr. HOSTY. Correct.

Mr. DRINAN. Well, my time is running out. But the last question, then—you have to give evidence why he was so agitated.

Mr. Hosty. I couldn't say, sir. I think he probably thought I hadn't complied with his earlier orders.

Mr. DRINAN. My time has expired. Thank you.

Mr. EDWARDS. Mr. Dodd?

Mr. DODD. Thank you, Mr. Chairman.

Mr. Hosty, did that memo contain any information about the book depository, which you had verified or had information from Mrs. Paine indicating that Mr. Oswald had worked at the book depository? Was that included in that memo?

Mr. Hosty. It would contain a general gist of my conversation with her November 1 and November 5. Yes, sir.

Mr. DODD. Do you recall specifically whether or not it was mentioned?

Mr. Hosty. I'm sure—it would have, yes, sir.

Mr. DODD. But it did make mention of that?

Mr. Hosty. Yes, sir.

Mr. DODD. Are you aware whether or not the FBI maintained a mail cover on Lee Harvey Oswald?

Mr. Hosty. No, sir. Not during the time the case was assigned to me. I would have known of it.

Mr. DODD. There wasn't any?

Mr. Hosty. There was none during the time I had control of the case.

Mr. DODD. The night Mr. Shanklin told you to get rid of that letter and memo, was there a meeting as such, or do you recall specifically whether or not they were coming in and out, or was there a formal meeting?

Mr. Hosty. Not to my knowledge. He was in his office alone when I entered.

Mr. DODD. He called you in alone?

Mr. Hosty. Well, as I previously testified, Mr. Howe was behind me. He entered the office behind me. I don't know if he remained in the office or not. But he did go in with me.

Mr. DODD. Mr. Chairman, we've got a quorum call. I'd like to suspend the meeting for a few moments.

Mr. EDWARDS. You go ahead. We'll reserve your time.

Mr. DODD. All right.

Mr. Hosty. Mr. Dodd, could I clear up one thing? I think you mentioned about the memo as to Mrs. Paine telling him he worked in the book depository—I had furnished that information in writing on November 4 to FBI headquarters; so, I mean, I had not destroyed the original on that. So you understand.

Mr. DODD. Fine. Thank you.

I wonder if you could—I wonder if you could fill me in on some information. You had never talked personally with Lee Harvey Oswald?

Mr. Hosty. Not prior to 8:15 p.m. on November 22, 1963.

Mr. DODD. When you went to see him after he was apprehended, what did he say to you when you walked in?

You were sent down to interview him after he had been arrested?

Mr. Hosty. Correct.

Mr. DODD. When you walked in to see him, did he say anything to you?

Mr. Hosry. Yes, sir, he did. I identified myself by name and by position, and he became highly upset and incensed and said, to the effect, you're the one that's been interviewing my wife. I've heard about you. And he became upset with me, yes, sir.

Mr. Dodd. And that was the extent of it? That was how—those were his initial remarks to you?

Mr. Hosry. Yes, sir.

Mr. Dodd. Did you know Agent Barrett?

Mr. Hosry. Bob Barrett. He's a very good friend of mine.

Mr. Dodd. Do you have any knowledge as to why he would have been at the theater in Dallas for the apprehension of Oswald?

Mr. Hosry. Yes, sir, I would. I heard him calling over the radio and advising he was en route there. He said that a police officer had been shot, they had the person in question cornered, he thought there was a connection between it and the assassination, and he was proceeding immediately to the location.

Mr. Dodd. Who said he thought he had an explanation?

Mr. Hosry. Mr. Barrett.

Mr. Dodd. Did you ever discuss that with him at a later date?

Mr. Hosry. Yes, sir.

Mr. Dodd. Did he tell you where he thought, where he got the information that that would lead him to believe that at that particular time there was a connection?

Mr. Hosry. Yes, sir. Because it's highly unusual for somebody just to shoot a police officer down in cold blood in the middle of the day out in the open like that within hours, within a short time after the assassination. He felt there was possibly a connection.

Mr. Dodd. And that's the reason he gave?

Mr. Hosry. Yes, sir.

Mr. Dodd. You received a lead that Oswald had moved from the New Orleans area to the Dallas area in November of 1963?

Mr. Hosry. No, sir. He had disappeared from New Orleans to a location unknown, and that his wife had departed from New Orleans with a woman who spoke Russian and was driving a station wagon with Texas license plates; and I think they surmised that there could be a Dallas connection or a Fort Worth connection because of their previous residence there; and that's why we were notified.

Mr. Dodd. Your lead came from the New Orleans FBI office?

Mr. Hosry. Yes, sir. That's correct.

Mr. Dodd. It came from an agent?

Mr. Hosry. Well, the correspondence was from agent in charge to agent in charge; from agent in charge at New Orleans to agent in charge at Dallas.

Mr. Dodd. You don't know where that lead came from in New Orleans?

Mr. Hosry. It was developed by Agent Kaack, as I later determined, from his neighborhood inquiries at the Oswalds' last residence.

Mr. Dodd. And that was the source of it?

Mr. Hosry. Yes, sir.

Mr. Dodd. Mr. Chairman, I yield at this point.

Mr. Edwards. Mr. Hosty, the rough draft letter written by Oswald to the Russian Embassy that the SAC asked you to destroy—

Mr. HOSTY. Yes, sir.

Mr. EDWARDS [continuing]. The entire time he thought it was something else?

Mr. HOSTY. I surmise that. I can't say that for certain.

Mr. EDWARDS. Was anybody else in the room with you when it was ordered destroyed?

Mr. HOSTY. Not to my knowledge, other than what I related as to what Odum—he apparently overheard him yelling at me. Odum apparently had heard it. He's the only one I know of that heard him.

Mr. EDWARDS. Do you think that there is a chance that Mr. Shanklin knew that the letter that he ordered you to destroy was actually a rough draft letter written by Oswald to the Russian Embassy?

Mr. HOSTY. I didn't get a chance to explain it to him. No, sir.

Mr. EDWARDS. So, you are certain that he thought it was the original Oswald note?

Mr. HOSTY. I'm not certain. I think, because I did not get an opportunity to fully explain it to him. I started to explain it and he blew up at me.

Mr. SEIBERLING. Will the gentleman yield?

Mr. EDWARDS. Yes, sir.

Mr. SEIBERLING. Well, now, Mr. Hosty, as I understood your original testimony before Father Drinan's question, you testified that Mr. Shanklin, that you had a conversation with Mr. Shanklin about the rough draft letter and that after he told you to dispose of that he said, and what about that other thing I told you to get rid of.

Mr. HOSTY. No, sir. That followed. When we finally get it straightened out and sent the, what is now Commission exhibit 103 to FBI headquarters, he said to me, well, I misunderstood you. Apparently now you did get rid of the first note.

Mr. SEIBERLING. Oh, I see. That was after the conversation, this conversation?

Mr. HOSTY. This would have been approximately 1 week or 10 days later. Right?

Mr. SEIBERLING. Thank you.

Mr. EDWARDS. Mr. Hosty, who reported the contents of Lee Harvey Oswald's address book to the Warren Commission?

Mr. HOSTY. I was the one who took it into evidence from Captain Fritz in the early morning hours of I believe it was Tuesday, which would have been the 26th of November. I took it from Captain Fritz, took it into FBI custody. I personally delivered that notebook to Insp. James Malley. I had previously told them that my name was in there, and I delivered it and pointed out my name to Inspector Malley and said, here it is, and then proceeded to put it with the other evidence and forward it to Washington, D.C. It was taken early that morning by airplane to Washington, D.C. to our FBI laboratory.

Mr. EDWARDS. Well, the next question is clear then. Why did the FBI leave out your name, license number, address of the FBI field office, when they reported this information to the Warren Commission?

Mr. HOSTY. I don't know, sir. I wasn't responsible for that reporting. I would have reported it.

Mr. EDWARDS. Can you surmise why they would leave your name out?

Mr. Hosty. I think the explanation that was given—now here, I'm stating hearsay from what Agent Gemberling has testified, that he took a memorandum which had been prepared by myself concerning the names, the names in English that were in the book. I prepared a memorandum on the 22d of November, of all of the names that I could read in the address book. You see, some of them were in Russian, which I could not read.

I wrote down as best I could all of the names in English, prepared a memorandum. Of course, I prepared a separate memorandum concerning my name, and the memorandum I prepared was for the purpose of leads, for identifying these other people.

Now, Mr. Gemberling apparently took what was meant as a lead memorandum and used it as investigative insert. This is where the error occurred. It was an error of using something for which it was not intended, and he just copied the lead sheet in as an investigative insert. That's the way he has explained it.

Mr. Edwards. It's disturbing that you received instructions not to volunteer information, however helpful. The FBI was the official investigating arm of the Warren Commission, and there have been accusations made against the FBI that it withheld information from the Warren Commission, and we find out, right in this testimony this morning, that you were instructed not to give them full cooperation.

Mr. Hosty. I don't believe it was meant in quite that context, sir. I think what they meant was that there are many sensitive areas in this whole investigation, and if the Warren Commission wanted to bring one of these areas up, I should answer it. If they did not bring it up, I wasn't to volunteer it.

Mr. Edwards. Did the Warren Commission ask you this question, do you have anything more that you think is significant?

Mr. Hosty. I don't believe so.

Mr. Edwards. If they had asked you that question, what would you have said about the Oswald memo?

Mr. Hosty. I probably would have had to tell them, yes, sir.

Mr. Edwards. How do you think this story got broken in July of this year?

Mr. Hosty. Well, I believe an ex-agent who talked to Mrs. Fenner had talked to or furnished it to the Times Herald. I believe the version that first appeared in the paper was that Oswald was going to kill me, which, of course, is preposterous. Even Mrs. Fenner denies that.

Mr. Edwards. Do you know who the ex-agent might be?

Mr. Hosty. Well, I have some suspicion, but I can't say for sure. I wouldn't want to accuse somebody unjustly if I don't really know.

Mr. Edwards. Well, how many agents in the Dallas Field Office knew about it?

Mr. Hosty. I understand about 30.

Mr. Edwards. About 30. How many in the Washington Headquarters?

Mr. Hosty. To my knowledge, none.

Mr. Edwards. Well, wasn't Mr. Shanklin on the telephone a lot with J. Edgar Hoover?

Mr. Hosty. He was on telephone to FBI Headquarters. I don't know specifically who he was talking to.

Mr. Edwards. Were he and Mr. Hoover rather close?

Mr. Hosty. Well, he worked for Mr. Hoover and he reported to him.

Mr. EDWARDS. Well, another new element that came up today, something that is most difficult to understand, and that is your personnel file.

Mr. Hosty. Yes, sir.

Mr. EDWARDS. There is information in the personnel file that you say has been changed without your authority?

Mr. Hosty. Yes, sir. That's correct.

Mr. EDWARDS. Your own memorandum was changed by somebody in the FBI?

Mr. Hosty. That's correct.

Mr. EDWARDS. OK. Who do you think did it?

Mr. Hosty. I couldn't say.

Mr. EDWARDS. Why do you think it was done?

Mr. Hosty. I beg your pardon, sir?

Mr. EDWARDS. Why do you think it was done? Why were the answers being different—

Mr. Hosty. Because the answers I gave, I denied any guilt, any wrongdoing, and in order to find me guilty, they wanted me to plead guilty to something, so they changed it so I, in effect, was entering a plea of guilty, when I, in fact, did not. That's my only explanation.

Mr. EDWARDS. Well, in two days of investigation we have quite a list of things that went wrong that shouldn't have gone wrong. We have the Oswald letter that was destroyed; we have the letter to the Russian—the rough draft of the letter to the Russian Embassy; and the Commission Exhibit 103 that very well could have been destroyed if you had followed out the orders of the Special Agent in charge.

Mr. Hosty. That's correct.

Mr. EDWARDS. We have the instructions to FBI agents not to volunteer any information to the Warren Commission, however, helpful; and then we have your personnel file—your personnel file with changes in it unauthorized by you.

Mr. Hosty. Right.

Mr. EDWARDS. That's quite a number of disturbing elements.

Mr. Hosty. Yes, sir. It sure is.

Mr. EDWARDS. Mr. Seiberling?

Mr. SEIBERLING. Mr. Chairman, thank you.

Mr. Hosty, why do you think anyone would have wanted to concoct a case for disciplinary action against you?

Mr. Hosty. I couldn't say for certain.

Mr. SEIBERLING. Have you thought about it from time to time?

Mr. Hosty. Yes, sir. I would say that they probably wanted to shift the principal blame to me and to the others who were disciplined.

Mr. SEIBERLING. In your dealings with Mr. Shanklin, do you have the impression that he's the kind of person who would take action on a questionable matter on his own, or would he ask for orders from his superiors?

Mr. Hosty. Well, that's a question that would, of course, call for a conclusion. But I would think that he normally took orders.

Mr. SEIBERLING. In other words, he was not the kind of person who would take it on his shoulders to do something that might be controversial?

Mr. Hosty. I couldn't say for certain.

Mr. SEIBERLING. But I'm asking you for an estimate of his character personality.

Mr. HOSTY. He normally followed orders like we all did.

Mr. SEIBERLING. That's not only a matter of personality, but a matter of FBI practice, isn't it?

Mr. HOSTY. Yes, sir.

Mr. SEIBERLING. Now, turning to a little different question. When you interviewed Mr. Oswald, what was his general demeanor?

Mr. HOSTY. At the outset he became upset with me, as I explained, over my having talked to his wife. He then calmed down, and it was a normal interview. He was careful not to say anything that could be used against him. He seemed to be in full control of his faculties other than at the end of the interview, when I proposed a question to Captain Fritz concerning his possible visit to Mexico City. He became agitated at that. That's the only two times that he became agitated.

Mr. SEIBERLING. Did he seem like a person, considering the circumstances, that he was normal for a man of his faculties. Or a wild man, or what?

Mr. HOSTY. Yes sir. No, sir. He was in control of his faculties and knew what he was saying.

Mr. SEIBERLING. Now, Mrs. Fenner told us, when I asked her how it was, 6 weeks that she thought it was, or maybe it was only 2, but in any event several weeks after Mr. Oswald left the note to you on her desk that she was able to recognize him when she saw him on television after the President's assassination, and she said, well, it was his wild look, his wild eyes, and his general manner of being somewhat disturbed. Do you have anything in your experience that would give us any feeling as to whether her impression was the correct impression or not.

Mr. HOSTY. No, sir. During the time that I conducted the interview of him, other than those periods where he lost his temper, he was calm and collected.

Mr. SEIBERLING. Now, you were following his case before November 22?

Mr. HOSTY. Right.

Mr. SEIBERLING. Did it strike you that he was a person who was mentally disturbed in any way?

Mr. HOSTY. No, sir.

Mr. SEIBERLING. In anything that you saw?

Mr. HOSTY. No, sir.

Mr. SEIBERLING. Thank you. I have no further questions, Mr. Chairman.

Mr. EDWARDS. Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. Hosty, you testified earlier that when you testified before the Warren Commission, you had certain instructions as to the manner in which your testimony should be examined, or the boundaries thereof. Do you have any such instructions today?

Mr. HOSTY. Yes, sir. I sought instructions from FBI Headquarters, and I was instructed to tell everything; to hold back in no manner, shape, or form.

Mr. KINDNESS. Would you be able to respond to this question, then, within that framework? In order for us to determine how this story

came to light through the Dallas newspaper in July of 1975, should this subcommittee attempt to obtain the testimony of Mr. Horton?

Mr. HOSTRY. Mr. Horton? He's not—Which Mr. Horton? There's two Horton's in the—

Mr. KINDNESS. The one who is a retired agent.

Mr. HOSTRY. Oh. That would be Ural Horton. I doubt if he is the original source. I don't think of him as being the original source. Perhaps he is. I don't know.

Mr. KINDNESS. We had testimony from Mrs. Fenner yesterday indicating that he had a particular interest in talking about the case, at any rate, in talking about the note and the relationship of Mr. Shanklin's demeanor to the discussion of that note. But you would not have any further thoughts on that?

Mr. HOSTRY. He had some interest. I don't know what interest he would have, sir, no.

Mr. KINDNESS. Just in discussing it with Mrs. Fenner in what might have been a joking way, but indicating, according to Mrs. Fenner, that when Mr. Horton discussed the Oswald note with Mr. Shanklin he became very agitated.

Mr. HOSTRY. Well, that's news to me. I'd never heard that until yesterday when I heard that Mr. Horton's name came up because, you see, he was not even assigned in Dallas at the time. He was assigned to the Abilene, Tex. Resident Agency at the time of the assassination.

Mr. KINDNESS. Would the knowledge of the Oswald note be common among the agents who were associated with the Dallas office but were resident agents in other cities?

Mr. HOSTRY. They would be less liable to know about it than the people in Headquarters; but the people from the resident agencies periodically come into Headquarters City. All of the files are kept in Headquarters City, which necessitates their coming into Headquarters City periodically; so we do come to see them from time to time. So he would have less opportunity, but he would have an opportunity.

Mr. KINDNESS. Is there anything else in connection with the inquiry in here this morning having to do with the conduct of the investigation of the Oswald note or the alleged implication of Oswald in the assassination of President Kennedy that you could tell us that we have not asked you that would throw any light on the conduct of that investigation or the results thereof?

Mr. HOSTRY. No, sir. I can't think of anything more.

Mr. KINDNESS. Is there anything that you could add to your testimony here this morning that would clarify and which you have not already offered about how the investigation was handled?

Mr. HOSTRY. Yes. I would like to emphasize that my instructions were given to me prior to my testimony before the Warren Commission, are general instructions, I think, that any law enforcement officer is given before he appears in any trial or any hearing, that you are to stick to what you have first-hand knowledge of and not to volunteer anything. And I feel that what they had in mind was that there were many sensitive areas in the Warren Commission inquiry, and if they did not want to bring it up, I was not to bring it up. In other words, they were to set the pace, just as today. I can only answer questions that you propose to me. I was to do the same

thing there, that if they didn't want to bring it up, I wasn't to bring it up.

Oh, yes, and another thing I should bring to mind is I was specifically directed not to discuss FBI policy of why we did things certain ways. If they asked me any questions on policy, I was to defer that to Mr. Belmont, who would follow me in testimony. I remember there was one question they brought up concerning FBI policy and I told them that he would answer that, and he did following my testimony.

Mr. KINDNESS. Thank you, Mr. Hosty.

Mr. EDWARDS. We will recess for 10 minutes to attend a rollcall vote.

[A brief recess was taken.]

Mr. EDWARDS. The committee will come to order.

The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Mr. Hosty, you indicated for the first time publicly that there was a forgery in your file, and you said that the reason for this in your judgment was that they wanted to shift the blame to you.

If this forgery hadn't been there, if they hadn't shifted the blame, what precisely is to blame?

Mr. HOSTY. Well, I suppose you mean the blame that the Warren Commission placed on the FBI. Is that what you mean?

Mr. DRINAN. I'm asking you what you mean. What blame did they want to shift to you? Why did they cover up and alter the records in your judgment and shift the culpability of the blame? What would have happened to them if they hadn't done this?

Mr. HOSTY. I don't know, unless the people would have put the blame on FBI policy, perhaps, FBI headquarters.

Mr. DRINAN. But they felt it was going to come on them and who was "they"? Who would have falsified your file?

Mr. HOSTY. I couldn't say for certain.

Mr. DRINAN. Well, I would like you to, contrary to FBI instructions, to tell us the truth, the whole truth and nothing but the truth about every facet of this matter, how you discovered it—is that unauthorized—and what you have done about it and what Mr. Kelley said in August of 1978.

Mr. BRAY. Excuse me, if I might just clarify that. That is not contrary to FBI instructions or any instructions this witness has.

Mr. DRINAN. All right. Tell us everything that is relevant about this new development.

Mr. HOSTY. Yes, sir. As I explained, I made those answers on or about December the 6th, 1968, in a memorandum to the agent-in-charge. On or about December the 8th, 1968, former supervisor Kenneth Howe handed my memorandum back to me. He seemed to be upset and agitated. He said, keep these, you might need these some day, so I did keep them.

It was about 5 or 6 years ago—I don't recall the precise date—it would have been in the spring, however, that my personnel file was accidentally left out on a supervisor's desk, and I had an opportunity to review it. And I had never been able to quite understand what they were talking about in my letters of censure, about delayed reporting, because I felt particularly strong on that point that I was

not guilty of delayed reporting, and they criticized me for not having conducted an interview of Oswald's wife.

I felt that I was in good position there because the explanations I made, and I looked at the memorandum to see what possible motive they would have for the, for this letter of censure. Then I noticed that the answers in there were different from the ones I had given.

Mr. DRINAN. How many answers were different?

Mr. HOERY. Just those two on those two points.

Mr. DRINAN. What next did you do about the very serious charge of the falsification of a Federal file by superiors?

Mr. HOERY. I didn't do anything until Mr. Kelley became Director. Then I brought it to his attention shortly after he became Director.

Mr. DRINAN. And what happened after that?

Mr. HOERY. I told him orally. He told me to reduce it to writing, which I did, and send it to him personal and confidential to his personal attention so that it would not go through normal channels, and I didn't hear anything for approximately 5 weeks, and then I received a letter from him, which I can make available, which he—

Mr. DRINAN. In essence, what did that letter say?

Mr. HOERY. In essence, it said that the action was taken under Director Hoover and that he, himself, could do nothing about that previous action taken by another person.

Mr. DRINAN. Did he admit the forgery?

Mr. HOERY. Not in the letter, no, sir.

Mr. DRINAN. Did you have proof that it is a forgery?

Mr. HOERY. I presented my original answers to him as an attachment to my letter of explanation.

Mr. DRINAN. And did you have proof that the two or three paragraphs had been substantially changed?

Mr. HOERY. I could see that from looking at it.

Mr. DRINAN. No, I mean, did he accept that contention?

Mr. HOERY. He has never come back and said otherwise. I'd never been advised to the contrary.

Mr. DRINAN. Are you satisfied with that answer?

Mr. HOERY. Well, he didn't do anything immediately about it; however, I can say this, that I was given a small promotion approximately 8 months after that.

Mr. DRINAN. Any connection?

Mr. HOERY. I couldn't say that it was directly connected, but that was the first favorable personnel action I had received since November 1963.

Mr. DRINAN. Well, my time has come up as expired, but, if I may, I'll come back to this, but one last point. Is all of this relevant to the subject of this inquiry?

Mr. HOERY. Well, I was asked to bring up this. I believe Mr. Edwards wanted to bring up the part about the disciplinary part, and it would be pertinent to that, but perhaps not pertinent to the destruction of the letter, but I would bring it up, as I understand, at Representative Edwards' personal request.

Mr. DRINAN. Except that, maybe—

Mr. HOERY. Maybe.

Mr. DRINAN. Are you assuming or asserting that the same person

who told you to destroy the letter also directly or indirectly falsified the file?

Mr. HOSTY. It's possible.

Mr. DRINAN. Thank you.

Mr. EDWARDS. Mr. Parker.

Mr. PARKER. Thank you, Mr. Chairman.

Mr. Hosty, I believe that you testified today that there was no signature, to the best of your recollection?

Mr. HOSTY. To the best of my recollection, that's right, sir.

Mr. PARKER. And you did not have any conversation with Mrs. Fenner when you received the note the first time?

Mr. HOSTY. The only thing that she said was that she gave me the note and was kind of laughing and thought it was amusing and said something to the effect that some nut came by and left this for you.

Mr. PARKER. How did you know then that the note was from Lee Harvey Oswald?

Mr. HOSTY. Really, I didn't know. I should have made that clear at the outset. I think I mentioned that to you earlier, that really I wasn't certain if it was from him or from another one of my subjects who had been giving me some trouble along these lines. I wasn't really 100 percent certain until I talked to Oswald at the police station that afternoon when he brought up the same point again.

Mr. PARKER. So the note resided in your workbox during that period of time and you actually did not know who—

Mr. HOSTY. Not for certain, no, sir.

Mr. PARKER. With respect to the personnel files in the Bureau, are they kept in any particular place?

Mr. HOSTY. Yes, sir. They are kept in the SAC safe.

Mr. PARKER. That would be in every office?

Mr. HOSTY. Every office that I know of.

Mr. PARKER. Back in 1963 or 1964, do you recall who the Director of Personnel was for the Bureau?

Mr. HOSTY. Nicholas P. Callahan, who is now Associate Director.

Mr. PARKER. I see, and he would have been over all the personnel?

Mr. HOSTY. He was Assistant Director of Administration. Personnel would come under him, and I understand Mr. James B. Adams was the personnel officer. He is the present Deputy Associate Director, who testified before you. He was the personnel officer under the direct supervision of Mr. Nicholas Callahan.

Mr. PARKER. All right. You mentioned that you thought there was some kind of stop put on your file?

Mr. HOSTY. Yes, sir.

Mr. PARKER. Do you know who might have, or have any idea who might have put that stop on your file?

Mr. HOSTY. I've been told, sir, that it was former Associate Director Clyde Tolson.

Mr. EDWARDS. Mr. Hosty, what kind of a case had you opened on Lee Harvey Oswald and why was he under investigation?

Mr. HOSTY. Well, sir, it was originally opened, as I testified earlier, approximately June of 1962, following his return from the Soviet Union.

We were investigating to see if he'd been influenced or was being directed or controlled by the Soviet Union in any way, and, of course, the same would apply to his wife, as I explained.

We open certain cases on people coming from the Soviet Union, Communist China, if they fall within certain criteria, age and educationwise.

Mr. EDWARDS. You thought that they might have become spies or saboteurs?

Mr. HOSTY. It's a possibility, yes, sir.

Mr. EDWARDS. What was the additional information that had arrived from headquarters resulting in Oswald's file from Dallas being out of its jacket?

Mr. HOSTY. All right. That was a communication from the Washington field office, dated, I believe, November 19, 1963, setting forth information that Oswald had been quite recently in contact with the Soviet Embassy in Washington, D.C.

Mr. EDWARDS. How do you account for the fact that practically everybody who worked on the Oswald matter in the FBI was censured or transferred except Mr. Shanklin?

Mr. HOSTY. I can't explain that. It is unusual.

Mr. EDWARDS. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman. Mr. Hosty, could we go back over this change in the record in your personnel file?

You say your file became available for your examination by chance in the spring of what year?

Mr. HOSTY. It would have been 5 or 6 years ago. I can't pinpoint the year better than that.

Mr. KINDNESS. And you were still in the Dallas office?

Mr. HOSTY. Kansas City, sir.

Mr. KINDNESS. You were in Kansas City at that time?

Mr. HOSTY. Right, right.

Mr. KINDNESS. And the special agent in charge there is who, or was who at that time?

Mr. HOSTY. I believe at that time it would have been Mr. Karl, that's K-a-r-l Dissley.

Mr. KINDNESS. Is there any possibility that he left that available for your examination on purpose?

Mr. HOSTY. I couldn't prove that.

Mr. KINDNESS. Do you believe that to be true?

Mr. HOSTY. I couldn't say.

Mr. KINDNESS. Were the circumstances such that it was unusual for your file to be out like that?

Mr. HOSTY. Normally, they are kept in the special agent in charge's safe except when there is some reason to be using them, and the reason I say it was the spring is the end of March of every year, every agent has an efficiency report written at which time they need the personnel file to write the efficiency report, and all of the personnel files of all of the agents were out on the various supervisors' desks in preparation of these annual efficiency reports, not only mine, but all of the files were out.

Mr. KINDNESS. Had you, prior to that time, discussed with Mr. Dissley your personnel situation?

Mr. HOSTY. Yes, sir.

Mr. KINDNESS. Your Dallas service?

Mr. EDWARDS. Would you yield at that point? I'd like to ask further on that subject. Do you think that your career plans or career has changed since the Oswald matter came up?

Mr. HOSTY. I never received any favorable personnel action after November 22, 1963 until after I talked to Mr. Kelley.

Mr. EDWARDS. Thank you.

Mr. KINDNESS. Now, resuming, Mr. Hosty, do you have reason to believe that Mr. Dissley was sympathetic toward your problem there?

Mr. HOSTY. Very definitely.

Mr. KINDNESS. All right, now, as to the content, the actual content of the material in the file that was changed, what was the nature of that piece of paper? Again, would you go over that for us?

Mr. HOSTY. All right. It was a memorandum from the agent-in-charge to FBI headquarters.

Mr. KINDNESS. Was it signed by him?

Mr. HOSTY. No, it was not signed. It was what we call a memorandum form. It was a letter in which he set forth—the following are the answers to the questions proposed by Assistant Director Gale on December 5, 1963, and then one that they were set forth—SA Howe would answer certain ones and I would answer certain ones, and then at the end there was an addendum by himself, by Mr. Shanklin.

Mr. KINDNESS. And the answers to the questions, would you characterize them as being reportedly Mr. Shanklin's answers, or your answers, or Mr. Howe's?

Mr. HOSTY. In the memorandum they were listed as my answers. It said, SA Hosty and then setting forth what was purported to be my answer.

Mr. KINDNESS. Your version of those answers, is that available in writing anywhere?

Mr. HOSTY. Yes, sir. My attorney has it.

Mr. KINDNESS. And we would be supplied with those?

Mr. HOSTY. Right. It has some corrections and additions that were made by Mr. Howe. He made some changes on it in his handwriting, and they would appear on the one memorandum, and some minor changes that I made in my handwriting will appear in the other copy.

Mr. KINDNESS. Was the responsibility for the report then Mr. Shanklin's?

Mr. HOSTY. Right.

Mr. KINDNESS. And there is no signature on either yours, or Mr. Shanklin's, or Mr. Howe's?

Mr. HOSTY. No, it would be direct to Director, FBI from SAC, Dallas.

Mr. KINDNESS. And you're certain it was not a forgery?

Mr. HOSTY. No, sir.

Mr. KINDNESS. It would be incorrect to characterize it as a forgery?

Mr. HOSTY. That's correct.

Mr. KINDNESS. But it was a report within the personnel function of the Bureau?

Mr. HOSTY. Right.

Mr. KINDNESS. Could you go over for us the exact nature of the differences in the language, comparing your answers to those answers that appear in the report?

Mr. Hosty. Yes, sir. The principal difference was in the reply, as I recall, to answers to questions 5 and 6. At the end they stated, in effect, that I agreed that I should have done it the other way, that I had admitted doing it wrong, which I did not state.

Mr. KINDNESS. Now, and you took that to mean that Mr. Shanklin was saying in the report that you had said that?

Mr. Hosty. It was set out in such a way that it was supposed to represent my answers, or Mr. Howe's answers.

Mr. KINDNESS. In the same report, was there any language indicating that Mr. Shanklin was expressing his views or that this was his report?

Mr. Hosty. As I recall that, there was a statement by him at the end, yes, sir.

Mr. KINDNESS. Did that statement tend to confirm the answers that appeared above? Is that the meaning?

Mr. Hosty. Yes. He concurred in the above answers, or something to that effect.

Mr. KINDNESS. Thank you. My time is up.

Mr. EDWARDS Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman.

Mr. Hosty, did you ever give Mrs. Paine or Marina Oswald the address of the FBI Office in Dallas?

Mr. Hosty. I gave Mrs. Paine my name and my telephone number. I don't believe I gave the address; I just gave the telephone number, to the best of my recollection.

Mr. DODD. Okay. Now, you testified on a number of occasions that you had never met Lee Harvey Oswald prior to your encounter with him during the interview, after he was arrested?

Mr. Hosty. That is correct.

Mr. DODD. There has been some problem in that the notebook entry lists your name, address and also the license plate number of your car.

Mr. Hosty. That's correct. Right.

Mr. DODD. Could you explain for us how it would be possible for that kind of an entry to be made?

Mr. Hosty. Yes. Marina Oswald has testified under oath before the Warren Commission that she jotted down my license number when I visited out there, either on November 1 or November 5, and furnished it to her husband.

Mr. DODD. Would that testimony be accurate based on where your car was parked?

Mr. Hosty. Oh, yes, sir, yes, sir.

Mr. DODD. She could have seen the license plate on your car?

Mr. Hosty. No problem at all.

Mr. DODD. You were parked right in front of her house.

Mr. Hosty. No. I was parked next door and then when I left, I would have driven in front of the house, went to the end of the block, circled around and come back in front of the house again, so I would have passed in front of the house coming and going, so she could have seen it those times.

Mr. DODD. And you think that's probably how she saw it?

Mr. Hosty. In the second time I went out on November 5, it's my recollection I parked in the driveway.

Mr. DODD. Oh. You talked about where there had been some note made of the fact that there was some mail received on November 22 in the FBI Office?

Mr. HOSRY. That's correct.

Mr. DODD. Was there a photo from the, was there a photo sent from the Central Intelligence Agency, marked Lee Harvey Oswald?

Mr. HOSRY. No, sir. That letter, that photograph, was delivered on the 23d of November 1963, and that was given to Bardwell Odum. I am familiar with the picture in question.

Mr. DODD. And from whom was that?

Mr. HOSRY. From the CIA in Mexico City. They brought a photograph on the 23d, early—the morning of the 23d.

Mr. DODD. Was there any memo attached to that picture?

Mr. HOSRY. I didn't see one.

Mr. DODD. And do you know what happened to the picture?

Mr. HOSRY. Yes, sir. Odum trimmed off the edges of the picture to remove the background and then he took it to the hotel where Marina Oswald and Margarita Oswald, Lee Oswald's mother, were staying, and he attempted to show the photograph that—this is hearsay, you understand, now, this is what Odum himself told me—that he then took the picture and tried to show it to Marina Oswald, and he was unable to. Then he came back and returned the picture. I don't know what happened to the picture after that.

Mr. DODD. And do you know what happened, why it was difficult for him to show the picture? Was there some—

Mr. HOSRY. Margarita Oswald didn't want Marina Oswald to talk to him.

Mr. DODD. Could you tell us about in detail the mail that was received on the 22d of November regarding the Oswald file?

Mr. HOSRY. Yes, sir. That was a letter from the Washington Field Office, dated, I believe, the 19th or maybe the 18th of November, received on the 22d of November, and it contained information concerning a communication that Oswald had just sent to the Soviet Embassy in Washington, D.C.

Mr. DODD. And you have that? That's the only piece of correspondence, the only piece of information, that you're aware of that arrived on November 22d regarding Lee Oswald?

Mr. HOSRY. Well, there were numerous teletypes going back and forth after the assassination, I mean prior to the assassination, you mean?

Mr. DODD. Yes.

Mr. HOSRY. That afternoon we had numerous, but that was the only one that came on the 22d, prior to the assassination.

Mr. DODD. Prior to the assassination, that's what I'm talking about. OK, did you meet on the morning of November 22d with an Army Intelligence agent?

Mr. HOSRY. I did.

Mr. DODD. Is his name James Powell?

Mr. HOSRY. No, sir.

Mr. DODD. Would you give me his name?

Mr. HOSRY. Ed Coyle—C-o-y-l-e.

Mr. DODD. Do you know James Powell?

Mr. HOSRY. Not—I don't think so, sir.

Mr. DODD. I wonder if you could give us—yesterday Mr. Shanklin testified that during his trip to Kansas City, you pressed him about wanting to see Director Kelley.

Mr. HOSTY. I believe when he came to Kansas City to see Director Kelley, I believe I had already talked to Director Kelley, if my memory is correct, and I was waiting for his reply at that time.

He, I think Mr. Shanklin might have misunderstood me that I was in the process of trying to get the matter straightened out, and he might have drawn the inference from that that I had not already talked to him, but I believe I had already talked to Director Kelley and was waiting for his reply at that time.

Mr. DODD. Did Mr. Shanklin tell you to prepare a memo on it, if you wanted to see him, or—

Mr. HOSTY. Something to that effect. He said, oh, I don't know why you want to bother with that, forget about it, just write him a memo, and he changed the subject.

Mr. DODD. Forget about what?

Mr. HOSTY. I beg your pardon?

Mr. DODD. Forget about what?

Mr. HOSTY. Forget about trying to get the situation changed. He said, you don't want to get promoted anyway, what's the difference, and he tried to change the subject.

Mr. DODD. Do you think it's fair to assume that the reason he wanted to change the subject was because he didn't want information regarding the destruction of the letter to come out?

Mr. HOSTY. I don't know.

Mr. DODD. My time is up.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. No questions.

Mr. EDWARDS. Mr. Klee.

Mr. KLEE. Thank you very much, Mr. Chairman.

Mr. Hosty, your recollection has been very detailed in many respects today.

I wonder if you could tell the subcommittee, has this been your direct recollection of the events of 12 years ago, or have you in some manner refreshed your recollection of events?

Mr. HOSTY. It's a combination of the two. It's my best recollection, and in many cases I have looked at a few documents, but mostly it's due to my recollection.

Mr. KLEE. When did you first learn that a note had been left for you, which we subsequently learned was Oswald's note?

Mr. HOSTY. I learned that the afternoon of the day it was delivered.

Mr. KLEE. After lunch?

Mr. HOSTY. Sometime after lunch, right.

Mr. KLEE. And did you learn that from a switchboard message, or did you just learn when you went to pick up your messages at the desk?

Mr. HOSTY. My recollection was, I passed Mrs. Fenner's desk, and she brought it to my attention as I went past her desk.

Mr. KLEE. Did you come in the front door and go up to the desk to check your messages before you went to your office, or did you come from your office to the desk, do you recall?

Mr. HOSTY. My office was on the 11th floor, but we would always

enter through the front so I could go by and check my mail. You see, by going by Mrs. Fenner's desk, I could check my incoming mail, as well as checking telephone messages.

Mr. KLEE. And you saw a blank envelope that had the note in it?

Mr. HOSTY. It may have had my name on the outside of the envelope. I think he had it as "Hasty." He had my name misspelled if I recall.

Mr. KLEE. I see. Earlier you testified "to the best of my recollection" that Mrs. Fenner did not read the note?

Mr. HOSTY. I didn't say that. I said she didn't read it in my presence. I have no knowledge if she did read it or didn't read it.

Mr. KLEE. Well, subsequently, you commented that she said the note was from some nut or something like that?

Mr. HOSTY. Right.

Mr. KLEE. You think this could simply be from her observation of the person, rather than from having read the contents?

Mr. HOSTY. It would be possible from her observations of him.

Mr. KLEE. Did you describe the contents of the note to anybody?

Mr. HOSTY. No, sir, other than to Mr. Shanklin and Mr. Howe. Of course, they had the note in front of them.

Mr. KLEE. Did you ever work on a report where you either supervised the numbering of pages by Mrs. Fenner or in which you assisted her in the numbering of pages of the report?

Mr. HOSTY. What she has reference to there was the first report that was put out, I believe, on the 30th of November or maybe it was the second one December the 2nd. I believe it was the report of Warren de Bruyes, in which we were numbering pages. Yes, there was about six or seven agents and several clerks involved in helping assemble and number the pages. We were trying to get it out in a hurry. It was a multipage report. It ran several hundred pages.

Mr. KLEE. We heard testimony yesterday that when Mr. Shanklin was told by—excuse me, 1 minute—by Mr. Horton that the note was in existence, that he nearly jumped out of the window of the car, or that Mr. Horton asked him about whatever happened to the note, that he almost jumped out of the car window.

Why do you think Mr. Shanklin would have a reaction like that? This would be in December of 1973.

Mr. HOSTY. That's the first time I heard about this, when it came up yesterday. I don't know anything about this event of December of 1973.

Mr. KLEE. Coming back to the report where you helped Mrs. Fenner number the pages, do you recall her asking you anything about the existence of the note?

Mr. HOSTY. I recall her saying something to the effect, do you remember when he came up to the office, or something to that effect, and I just changed the subject and walked away from her.

Mr. KLEE. Do you remember what your response to her was?

Mr. HOSTY. Yes, it was negative, or I said, I don't know what you're talking about, and walked away from her.

Mr. KLEE. Why would you give her that response?

Mr. HOSTY. I didn't want her talking about it.

Mr. KLEE. Well, Mr. Chairman, I have no further questions.

Mr. EDWARDS. Yes.

Mr. SEIBERLING. Mr. Chairman, I'd like to ask one question.

Mr. Howe—

Mr. HOSTY. Mr. Hosty, sir.

Mr. SEIBERLING. Excuse me, Mr. Hosty.

Mr. HOSTY. You have Mr. Howe next. That's quite all right.

Mr. SEIBERLING. Sorry. Do you have any conclusions of your own as to whether there was any motive in anybody who tried to cover up anything in connection with the FBI's handling of this case or anybody—I mean anyone in the FBI?

Mr. HOSTY. No, sir.

Mr. SEIBERLING. But you do have before you the fact that Mr. Shanklin ordered you to destroy the memorandum and the note, and that your personnel file was falsified, and that you were downgraded, and your promotion—

Mr. HOSTY. I was not downgraded, sir.

Mr. SEIBERLING. You were disciplined and so was Mr. Howe. He was demoted.

Mr. HOSTY. Right.

Mr. SEIBERLING. Again, would you tell us how you rationalize these events? Why do you think these would take place?

Mr. HOSTY. Why, what? The disciplinary action?

Mr. SEIBERLING. Well, this whole series resulting in a falsified memorandum in your personnel file.

Mr. HOSTY. As far as the administrative action, the personnel action, the only conclusion I can have is that certain people in FBI Headquarters wanted to fix the blame on the agents in the field, rather than on the people at Headquarters.

Mr. SEIBERLING. Blame for what?

Mr. HOSTY. For any alleged failures on our part.

Mr. SEIBERLING. Did the office, did anyone in the office express any feeling that they had failed somehow?

Mr. HOSTY. No, sir. We didn't feel we had.

Mr. SEIBERLING. Did Mr. Shanklin ever express that kind of view?

Mr. HOSTY. No, sir. As you know, the Warren Commission was critical of the FBI.

Mr. SEIBERLING. But, these events regarding the destruction of the memorandum and note occurred before the Warren Commission ever came to any conclusion.

Mr. HOSTY. That's right, before it was even planned.

Mr. SEIBERLING. You have no thoughts of your own as to why the disciplinary action, why the orders to cover up by destroying papers, and so forth?

Mr. HOSTY. No, sir, I couldn't say.

Mr. SEIBERLING. Thank you.

Mr. EDWARDS. Mr. Hosty, do you have any knowledge of an alleged Telex that was received in all Southern field offices shortly before the assassination warning that President Kennedy might be assassinated in Dallas?

Mr. HOSTY. I was questioned about that the last few months, the same as many agents around the FBI were, and if any such teletype existed, it would have been brought to my attention.

I feel that this person is referring to a teletype that was sent after the assassination of President Kennedy and before the identification

of Lee Oswald as the assassin. There was a period of about 3 or 4 hours. A teletype quite similar to the purported teletype sent 5 days earlier, was sent during that 3-hour period. I have seen that, and I think that is where the confusion lies.

Mr. EDWARDS. And did you know Jack Ruby?

Mr. HOSTY. No, sir, not prior to the 24th of November.

Mr. EDWARDS. Did you meet him after that?

Mr. HOSTY. No, sir, I never did meet him.

Mr. EDWARDS. I mean, did you interview him?

Mr. HOSTY. No, I did not interview him.

Mr. EDWARDS. Did you know anything about him? Had you heard of him before this?

Mr. HOSTY. Not prior to the 24th of November.

Mr. EDWARDS. Are there any other questions?

Father Drinan.

Mr. DRINAN. Mr. Howe was censured for his failure to place Oswald on the FBI Security Index, and he alleges that the regulations at that time did not require it?

Mr. HOSTY. That is correct.

Mr. DRINAN. Do you feel that the letter that came from Oswald, if that had gone through the normal channels and had been added to Oswald's file, would that have resulted in Oswald being placed upon the FBI Security Index?

Mr. HOSTY. No, sir, it wouldn't, and even if he had been, it wouldn't have changed the picture as far as referral to the Secret Service.

Mr. DRINAN. Well, let's stay with the Security Index.

Mr. HOSTY. All right. All right.

Mr. DRINAN. Obviously, that's a very serious charge against Mr. Howe and they demoted him for it, and he says that the regulation didn't require that?

Mr. HOSTY. That's correct.

Mr. DRINAN. Do you think that Mr. Shanklin might have felt that when he became so agitated and told you to destroy this note, do you think that he might have theorized that if this had gone into the files, then it would be known that the FBI blew it because this gentleman should have been on the Security Index?

Mr. HOSTY. I don't think he would have been on the Security Index; even if he had been, it still wouldn't have made any difference.

Mr. DRINAN. No, but the allegation is that he wasn't there and he should have been. Now, tell us exactly why, in your judgment, you and Mr. Howe were correct is not putting Mr. Oswald on the Security Index?

Mr. HOSTY. Because the Security Index was a criteria that was set up in accordance with the McCarran Act in 1950, which was individuals who would be taken into custodial detention in the event of a national emergency, and the criteria, as outlined, at that time had to do with persons who belonged to major subversive organizations, and he didn't belong to a major subversive organization. Therefore, he didn't fit the criteria as it existed at that time.

Mr. DRINAN. Well, does the FBI in Washington have some justification for demoting Mr. Howe, saying you failed to place Oswald on this list? They must have some criteria.

Mr. Hosty. None, no, sir, none whatsoever. Not on the basis of that.

Mr. DRINAN. Well, I come back to the conclusion that Mr. Hosty and Mr. Howe are being penalized over a long period of time by someone—and I wonder whether you can tie this up with something that you indicated, that a gentleman very high in the FBI, Clyde Tolson, put a stop on you file?

Mr. Hosty. That's correct.

Mr. DRINAN. Tell us more about that.

Mr. Hosty. I learned that from Mr. Dissley shortly before Mr. Dissley retired from the FBI. He told me he had determined, he had recommended me for promotion to, I guess you would say, assistant supervisor—we call relief supervisor—and he had been turned down by headquarters and told that that was the reason that there was a stop on my file from Mr. Tolson. He told me this within, oh, within a few weeks before he retired.

Mr. DRINAN. What conclusion can we draw, trying to make some sense out of this whole thing, that here it's not in the Dallas office, it's at the highest levels of the FBI, and you are suggesting that somehow they want to prevent you from rising as you normally would in the FBI?

Mr. Hosty. Right. That's correct.

Mr. DRINAN. What motivation do they have?

Mr. Hosty. I wouldn't be able to fathom Mr. Tolson's mind. I don't know why he did it. I couldn't say.

Mr. DRINAN. Would you say that the same thing applies to Mr. Howe? That there's a constant discrimination, if you will, or a constant stop on his normal growth in his career?

Mr. Hosty. From what I know of his activities after he was transferred to Seattle, he did not receive any favorable personnel action until after I talked to Mr. Kelley to my knowledge.

Mr. DRINAN. Are you two people being penalized more than all of the others that were censured?

Mr. Hosty. I would say more, yes.

Mr. DRINAN. Sir, we are trying to make sense out of this, trying to assess responsibility, and it becomes more and more strange. It seems to me that you obviously have thought in your mind over the years as to the motivation, and would you have any theories of the motivation of other individuals who would be doing this to two people?

Mr. Hosty. No, sir, I couldn't.

Mr. DRINAN. Well, what is the possible motivation? Why should they have given you a small promotion 8 months after you complained? They gave you no rectification of your record?

Mr. Hosty. No, sir.

Mr. DRINAN. All right. And that was the first. Was your salary kept low?

Mr. Hosty. No, sir I was allowed to increase in the normal in-grade steps after I was taken off probation.

Mr. DRINAN. Well, the inference is drawable that someone has a lot to hide or to cover up and that is one of the continuing ways by which they do it

Mr. Hosty. Possibly.

Mr. DRINAN. Well, we're left with a mystery in the end that I told this to the gentleman yesterday, that's there four people who who disagree with him fundamentally and someone has to rectify that, I suppose, to find out who was telling the truth and who isn't. But that I'm left with the concept here that we just don't know what has been going on all of these years.

One final question. In your judgment should the Warren Commission be reopened?

Mr. HOERY. Based upon what I know, I think they have all the information or they had all the information.

Mr. DRINAN. They didn't have all the information that you told us this morning, sir.

Mr. HOERY. Well, that's true, but I don't think that would be sufficient basis to reopen it.

Mr. DRINAN. Do you think that there is enough new evidence to justify a new commission, a new committee of some type, going back over the entire matter of the assassination of the President?

Mr. HOERY. That would have to be a judgment made by persons higher than myself.

Based upon what I know, I don't think there's sufficient additional information for them to take further action.

Mr. DRINAN. Thank you. I yield back to the chairman.

Mr. EDWARDS. Mr. Kindness.

Mr. KINDNESS. In view of the line of questioning and testimony that we've just completed, I think it's necessary to go into one other matter in your personnel situation. First: What is your educational background?

Mr. HOERY. I have a bachelors degree in business administration, accounting minor from the University of Notre Dame, Notre Dame, Ind.

Mr. KINDNESS. And have you worked in a supervisory capacity since you have been with the FBI?

Mr. HOERY. No, sir, I was barred from that. I mean I did not work in a supervisory capacity before November 22, 1963, and an attempt to make an assistant supervisor or relief supervisor 5 or 6 years ago was turned down.

Mr. KINDNESS. And did you ever have supervisory experience in any other employment prior to being with the FBI?

Mr. HOERY. No, sir.

Mr. KINDNESS. Is there any reason to believe that you may not be qualified for supervisory position in relation to other things in your personnel record, not relating to this matter.

Mr. HOERY. Not that I know of.

Mr. KINDNESS. Are there many agents that you know of with your years of experience who are not in the supervisory position?

Mr. HOERY. Beg your pardon, sir?

Mr. KINDNESS. Are there many agents you know of in the FBI with your same years of experience who are not in a supervisory position?

Mr. HOERY. Only approximately 1 out of 10, or 1 out of 12 would be a supervisor, and then there would be 1 or 2 relief or assistant supervisors for each squad, so the percentage would be that the majority would not be.

Mr. KINDNESS. Is it conceivable, then, that the fact that you are not a supervisor is entirely unrelated to the Oswald situation?

Mr. HOERY. I couldn't state that for certain.

Mr. KINDNESS. Could you state for certain that it is related then?

Mr. HOERY. I can't say for sure. I might clarify here that Mr. Disley never did make his recommendation in writing to FBI headquarters because he was, he had made a telephonic inquiry first to see if it was feasible to send the written request in, and when he was telephonically advised no, then there was no written record made.

Mr. KINDNESS. But not everybody has achieved it?

Mr. HOERY. Right, and I fully realize it. I'm not judging that.

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Seiberling.

Mr. SEIBERLING. Well, there's always room for one more. Mr. Hosty, in your experience in the FBI, have there been other cases where it looked as though Washington was trying to focus the blame for some failure away from itself and onto some agent out in the field?

Mr. HOERY. This was a normal procedure.

Mr. SEIBERLING. Thank you.

Mr. EDWARDS. Are there further questions?

Mr. DODD. Yes, Mr. Chairman, I have just a couple. I neglected to ask Mr. Hosty, when you talked to Mr. Shanklin in Kansas City, and the suggestion made that you prepare a report or file a report, did you do that? Did you prepare a memo, a report to go to Mr. Kelley?

Mr. HOERY. Excuse me, I didn't understand the question.

Mr. DODD. Well, according to your testimony and yesterday Mr. Shanklin's testimony, that he had made a suggestion to you regarding this matter, that a memo be prepared, did you prepare a memo or something like that?

Mr. HOERY. Yes, sir. I had already prepared it. The letter had already been sent to Mr. Kelley. He didn't apparently realize, when I had talked to him, that I had already talked to Mr. Kelley and that I had already sent a letter to him.

Mr. DODD. Could we have a copy of that memo that you prepared?

Mr. HOERY. Yes. My attorney has it.

Mr. DODD. Thank you.

[The material requested follows:]

October 24, 1973.

Re personnel matter.

DIVISION, FBI

(personal and confidential):

In compliance with your instructions following our conversation in Kansas City on 10/19/73, I am setting forth the basic facts that we discussed. I am convinced that the administrative action taken against me in December, 1963, and again in October, 1964, was unjustified for the following reasons:

(1) The letter of censure in December, 1963, and the suspension in October, 1964, were based upon answers to questions telephonically furnished by former Assistant Director James Gale on 12/5/63. I answered these questions by memo to the SAC in Dallas dated 12/6/63.

About four years ago I had an opportunity to review my field personnel file in the Kansas City Office and noted that Serial 157 of the Dallas section of this file contains answers dated 12/8/63, which are not the same answers I submitted on 12/6/63. Most particularly I object to the answers to Questions 5 and 6 that appear in my personnel file. I am enclosing a copy of my memo to the SAC, Dallas, dated 12/6/63, which you will note is different from the one appearing in my personnel file.

I am aware, however, that former Supervisor Kenneth Howe did make alterations to my answers without my advice or consent, but with my knowledge. I am enclosing a copy of my memo to the SAC, Dallas, dated 12/6/68, with his corrections, and a copy of a routing slip from Howe to me furnishing me with the corrections. However, the answers appearing in my personnel file are not these answers either. It appears my answers were changed a second time, probably on 12/8/68, without my knowledge. The most obvious change is the false answer to Questions 5 and 6, in which I am falsely quoted as saying, "Perhaps I should have notified the Bureau earlier." This constitutes an admission of guilt, which I did not make at any time.

As to the motive for the above and the persons responsible, I believe the third paragraph of [deleted]¹ letter dated [deleted], pretty well pinpoints the responsibility. I am enclosing a copy of this letter.

(2) The letter of censure and suspension dated October, 1964, constitutes double jeopardy based upon the letter of censure dated December, 1963. The only thing added to the letter of October, 1964, was the statement that I made inappropriate remarks before a Hearing Board. Yet former Director Hoover personally advised me on 5/6/64, and SAC Gordon Shanklin of the Dallas Office in June, 1964, that my testimony before the Warren Commission was excellent. The Bureau had a summary of my testimony on 5/6/64, and the full text of my testimony one week later, five months before my letter of censure in October, 1964, and no mention was made at any time concerning my inappropriate remarks until October, 1964. Mr. Hoover also assured me on 5/6/64, that the Warren Commission would completely clear the FBI. The unexpected failure of the Warren Commission to do this, I believe, was the principal reason for my second letter of censure and suspension in October, 1964.

(3) The matters covered in both letters of censure had no bearing whatsoever on the outcome of the case; namely, the prevention of the assassination of President Kennedy.

In accordance with your specific request on 10/19/73, the following should be noted regarding the failure to place Lee Harvey Oswald on the Security Index:

Oswald was not on the Security Index because he did not fit the criteria in existence as of 11/22/63. The criteria was later changed to include Oswald. It should be noted, however, even if he had been on the Security Index, no specific action would have been taken regarding him or any other Security Index subject at the time of President Kennedy's visit to Dallas.

The FBI as of 11/22/63, had only one responsibility regarding presidential protection, at the insistence of the U.S. Secret Service. The responsibility was to furnish the Secret Service any information on persons making direct threats against the President, in possible violation of Title 18, USC, Section 871. I personally participated in two such referrals immediately prior to 11/22/63.

In conclusion, [deleted]² letter dated [deleted], sums up my attitude in this matter that because of the action taken by the Bureau in October, 1964, the Bureau in effect told the world I was the person responsible for President Kennedy's death.

On 10/19/73, you asked me what I think should be done. I believe that it first must be determined if I was derelict in my duty in any manner, and was responsible for President Kennedy's death. After that it should be determined what damages I suffered, and then we can discuss the third point—what action should be taken.

I can state with a perfectly clear conscience that I in no way failed to do what was required of me prior to 11/22/63, and based upon information available to me, which was not all the information available to the U.S. Government on 11/22/63. I had absolutely no reason to believe that Oswald was a potential assassin or dangerous in any way.

I have no desire to blame anyone else or to seek an alternate scapegoat. I am firmly convinced, despite the totally unjustified conclusion of the Warren Commission, that the FBI was not in any way at fault.

¹ Information deleted for reasons of personal privacy.

² The material referred to above has been received as executive committee material and is retained in the subcommittee files.

In accordance with your instructions, I will not discuss the contents of this letter with anyone. In the event you want further clarification on any point, I will gladly furnish additional information to you.

SA JAMES P. HOSRY, Jr.
Kansas City Office.

Mr. DODD. Do you know whether or not there was an agent in New Orleans by the name of Dobey or de Breeze? Warren de Bruyes?

Mr. HOSRY. Warren de Bruyes?

Mr. DODD. That's it.

Mr. HOSRY. Warren de Bruyes. Yes, I know him well.

Mr. DODD. Did he have contact with Oswald? Do you know?

Mr. HOSRY. From what he told me, he didn't. He came to Dallas, I believe on November 24, 1963, as part of the large group of agents that were sent in from adjoining field offices to assist us. We got approximately 80 agents sent in from other field offices that came in to help us, and he was one of them.

I saw his name on the list and recognized his name as being an agent familiar with security work and for that reason I asked for him to work with me, and he was with me when we picked up the evidence from the Dallas Police Department on Tuesday following the assassination, and he did work with me for about 2 weeks.

Mr. DODD. But, to the best of your knowledge, he had no contact with Oswald?

Mr. HOSRY. He told me he hadn't.

Mr. DODD. You have no other reason to believe that he did?

Mr. HOSRY. He'd have no reason to tell me otherwise.

Mr. DODD. He mentioned it in the notebook entries. The omission of your name and address and so forth, and that the reason was that you were really looking for lead information, since you were——

Mr. HOSRY. Agent Gemberling accidentally took what was meant to be a lead memo and made an investigative insert out of it, according to his testimony, and I have no reason to believe otherwise.

I prepared the memorandum in question for the purpose of identifying the persons named in the notebook, and since my identity was already known to myself and the agent in charge, I had that on a separate memo.

Mr. DODD. Now, if that's the case, why would the memo also include the names of John Connally, Marina Oswald, and the Paines, who were all known as well?

And why would it omit your name, or why would your name be omitted, if that were the basis of excluding it?

Mr. HOSRY. Well, I don't remember John Connally's name being on the list. It may have been.

Mr. DODD. Or Marina Oswald, or the Paines? They were known.

Mr. HOSRY. I don't believe their names were in the notebook, that I recall. I might be incorrect in my recall, but I don't recall their names being in his address book.

Mr. DODD. But there were notations in there to that effect.

Mr. HOSRY. Oh, well, then I don't recall that.

Mr. DODD. That doesn't seem to follow, does it? If that were the reasons given.

Mr. HOSRY. Well, I dictated all of the names that were in English. I could not pick out the Russian names. I dictated them into the memorandum for the purpose of identifying them.

Mr. DODD. In fact, you copied out everything?

Mr. HOSRY. That I could, yes.

Mr. DODD. That you could decipher?

Mr. HOSRY. Right.

Mr. DODD. All right. Now, I asked you one question earlier about whether or not you had any information as to whether or not the FBI had a mail cover?

Mr. HOSRY. They did not during the period I had the case.

Mr. DODD. All right. Let me ask you a question, a policy question now. Now, according to Commission exhibit 2718, by April 1963, the FBI had access to the contents of letters written by Oswald, according to the confidential informant T-2, who did not know Oswald personally.

Mr. HOSRY. Right, that's correct.

Mr. DODD. The return address on this April 21, 1963 letter was P.O. Box 2915, which it turns out is the same post office box where the rifle was kept.

Mr. HOSRY. Right.

Mr. DODD. Apparently the FBI knew about that box earlier because they had information from other informants as to subscriptions that Oswald had taken out on certain books, magazines, military work, and so forth. So, while you might be led to believe that the FBI didn't have access to everything coming in, it certainly would appear that they had access even to outgoing mail based on the fact that he was making subscriptions, or was supplied with subscriptions.

Mr. HOSRY. Now that information was received from the point where the mail was received, not from a Dallas source.

Mr. DODD. But in other words, they would have to know they would be watching for Oswald, or were they just checking out those magazines particularly?

Mr. HOSRY. No, they wouldn't be particularly watching for Oswald. They would be watching for any incoming mail. I think that the thing that you have reference to is a letter that he wrote to the Fair Play for Cuba Committee?

Mr. DODD. Yes.

Mr. HOSRY. That would have been a mail cover on the Fair Play for Cuba Committee, rather than on Oswald.

Mr. DODD. But you have no information at all, none whatsoever as to the allegation that there was a mail cover, either ingoing or outgoing, incoming or outgoing?

Mr. HOSRY. Not by the FBI on Oswald.

Mr. DODD. Well, let's assume they did. There seems to be some information that they were at least watching mail to some degree coming in.

The fact that you had known of the fact that he was working at the Book Depository, which was on the route of the Presidential motorcade—

Mr. HOSRY. I didn't know it was the route, no, sir.

Mr. DODD. You didn't know the Book Depository was on the route?

Mr. HOSTY. I didn't know what the route was until——

Mr. DODD. It was published in the paper.

Mr. HOSTY. The day before. I didn't read the route in detail.

Mr. DODD. It seems to me that that information—I just can't help but believe that the FBI was not aware of the fact that this fellow had received a gun.

Mr. HOSTY. We weren't aware of it, no, sir.

Mr. DODD. A mail cover just based on the information that we're receiving covering the same box.

Mr. HOSTY. Well, sir, mail covers were very, very difficult to get approved. They still are. We didn't have approval to place a mail cover.

Mr. DODD. I might take issue with that.

Mr. EDWARDS. The time of the gentleman has expired.

Mr. DODD. Yes, it has. Thank you.

Mr. EDWARDS. Mr. Butler?

Mr. BUTLER. One question. I understand you had a conversation with Mr. Kelley in Kansas City?

Mr. HOSTY. Yes, sir.

Mr. BUTLER. Since Director Kelley became Director, in that conversation, that is the one where he suggested you prepare a memorandum, did you mention the note—the Oswald note to him at that time?

Mr. HOSTY. No, sir.

Mr. BUTLER. Did you discuss it?

Mr. HOSTY. Did I discuss what?

Mr. BUTLER. Did you discuss this in such a form that it would appear that he was aware of the existence of the Oswald note?

Mr. HOSTY. No, sir, I didn't discuss the note in any context.

Mr. BUTLER. Thank you.

Mr. EDWARDS. We are going to recess until 1:30, at which time special agent Kenneth C. Howe will be the witness. Mr. Howe has requested that because of the nature of his work that there be no films or cameras and the subcommittee has agreed to his request. This does not mean that the meeting will not be public, and that the media won't be allowed to be present, but there will be no filming or still or live photos taken.

We will recess until 1:30.

Mr. HOSTY. Am I dismissed, Mr. Chairman?

Mr. EDWARDS. Yes.

[Whereupon, at 12:20 p.m., the subcommittee recessed to reconvene at 1:30 p.m. the same day.]

AFTERNOON SESSION

Mr. EDWARDS. The subcommittee will come to order. Our witness this afternoon is Kenneth C. Howe, special agent of the San Diego office of the FBI.

Mr. Howe, will you stand and raise your right hand? Do you solemnly swear that the testimony you give before this committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HOWE. I do.

Mr. EDWARDS. Mr. Parker?

**TESTIMONY OF KENNETH C. HOWE, SPECIAL AGENT, FEDERAL
BUREAU OF INVESTIGATION**

Mr. PARKER. Thank you, Mr. Chairman.

Mr. HOWE. Mr. Parker, before we start the testimony and start the questioning, may I make a remark or two?

Mr. PARKER. You certainly may.

Mr. HOWE. First I want to thank the committee for acceding to my request that there will be no filming during my testimony.

Mr. PARKER. Just a little louder please.

Mr. HOWE. Is that better?

For acceding to my request that there will be no filming, and to the newsmen who might possibly have been disappointed as a result of that.

Second, I think perhaps it's unnecessary since the committee possibly understands that I myself, just like the others who have testified here today, have gone back in their memories 12 years to a veritable maelstrom of events that were going on in the Dallas office in the 2 days following the assassination. You might almost say it was like a kaleidoscope which would turn again before you had a chance to really fix in your mind the pattern that was at the end of the scope.

Third, when I was told I was to come over here to testify, I was given to understand that the testimony that I would give or would be expected to give would be confined more or less exclusively to the receipt and the handling and the disposition of the Oswald note. As a consequence of that, I did not avail myself of any opportunity to review the Oswald file, which existed prior to the assassination. It was only 1 of some 500 to 600 active pending investigations which I supervised on my desk at that time in the Dallas office; and it was in a category that was more or less minor to my general and principal duties which were the supervision of fugitive type cases, unlawful flight cases, parole and probation violators, selective service violators, and things of that type.

As a consequence, there could possibly be some questions raised which I will be unable to answer because I didn't have the familiarity with that particular file that the case agent would have. As I said, it was only 1 of some 500 or 600 cases and 500 or 600 matters which I reviewed and supervised on my supervisory desk.

Thank you very much.

Mr. EDWARDS. Thank you, Mr. Howe.

Mr. Parker?

Mr. PARKER. Thank you, Mr. Chairman.

Would you please state your name and general address for the record.

Mr. HOWE. Kenneth C. Howe. My address is 666 Upas Street, San Diego, Calif.

Mr. PARKER. You are currently a special agent of the Federal Bureau of Investigation, assigned to the San Diego office?

Mr. HOWE. Yes, sir.

Mr. PARKER. When were you first assigned to the Dallas field office?

Mr. HOWE. About August 1959.

Mr. PARKER. In November of 1963, what was your rank and position?

Mr. HOWE. I was supervisor of a desk in the Dallas office, on the squad.

Mr. PARKER. Pardon?

Mr. HOWE. On the desk or a squad.

Mr. PARKER. When were you first promoted to that position?

Mr. HOWE. I can't specifically place that date. I hadn't been a supervisor at the time of the assassination any more than a year.

Mr. PARKER. What were your duties and responsibilities as a supervisory agent?

Mr. HOWE. As I just explained, it was my responsibility to supervise some 500 or 600 matters on my desk, primarily those in the fugitive category.

Mr. PARKER. How frequently and on what basis would you have contact with the special agents who were under your supervision?

Mr. HOWE. I would see them, of course, on a daily basis, when there was any problem that they had which arose and they wanted to discuss it with me, they would come into my office and discuss it. I had no set schedule for talking to them on any particular frequency.

Mr. PARKER. Under what kind of circumstances would you become involved in the details of any individual case?

Mr. HOWE. Only if something arose which they felt they should discuss with me, prior to taking any action on it. Our investigations in a good many cases are pretty well run by rules and regulations and instructions which we have in our manual and each agent knows those. They conduct their investigations in accordance with those rules and regulations. The supervisor in the major portion of his responsibility, back in those days at least, was determining on the basis of the material which flowed over your desk in connection with those cases, how they were being handled, and of course, we had various rules that certain things had to be submitted at certain intervals and with respect to those we ran ticklers.

And if there was anything that showed up at the time a tickler brought a file to your attention, or if there was anything that should be discussed with the agent, well, then he would be called in and it would be discussed with him.

Mr. PARKER. Being supervisor then entailed basically a desk job in which you were reviewing other peoples' written memorandums and reports.

Mr. HOWE. That's right.

Mr. PARKER. Under what circumstances would you bring any individual case or matter to the attention of the special agent in charge?

Mr. HOWE. Anything that involved major Bureau policy, anything which I thought would be of interest to him in connection with his responsibility as the administrative head of the office.

Mr. PARKER. OK. You mentioned earlier that you had somewhere in the neighborhood of 500 to 600 cases. Is that right?

Mr. HOWE. That's right.

Mr. PARKER. That was back in 1963?

Mr. HOWE. That's right.

Mr. PARKER. Is that still true of the supervisory agents?

Mr. HOWE. There have been a lot of changes made in that respect, and I might say for the better: so far as the caseload on any supervisor's desk is concerned.

Mr. PARKER. And you now believe that each agent and each supervisor has a smaller caseload to worry about?

Mr. HOWE. They have a smaller caseload at this time than at that time, that's right.

Mr. PARKER. Does that increase the quality of the work presently, in your mind?

Mr. HOWE. It definitely has.

Mr. PARKER. Prior to November 22, 1963, were you aware of Lee Harvey Oswald?

Mr. HOWE. Prior to November 22?

Mr. PARKER. Prior to November 22, 1963.

Mr. HOWE. Yes. I was aware of the Oswald case inasmuch as it was one of the cases on my desk.

Mr. PARKER. And you did know that agent James Hosty had a file on Lee Harvey Oswald?

Mr. HOWE. Well, the case was assigned to him, right.

Mr. PARKER. Had you assigned that case to him?

Mr. HOWE. That I can't specifically say at this time. As I say, I've had no opportunity or didn't even try to get an opportunity to review the file; and whether I assigned the case to Hosty or whether it was an active pending case when I became a supervisor and had already been assigned to him, I definitely don't recall. I know it was assigned initially to John W. Fain, over in the Fort Worth resident agency; and it's my recollection—or to the best of my recollection, he was handling the case at the time I took over.

In that event, yes, I would have reassigned it then from him to agent Hosty.

Mr. PARKER. At that point in time, what was the nature of the FBI's interest in Lee Harvey Oswald?

Mr. HOWE. Our principal in the investigation, of course, was the likelihood that because he had returned from Russia with a Russian wife, and had attempted to defect while he was in Russia, our principal concern at the time, I am sure, was to determine whether there might be any espionage feature to his return to the United States with his Russian bride.

Mr. PARKER. Would you then characterize Oswald, the Lee Harvey Oswald file, prior to the assassination, as a routine security file?

Mr. HOWE. Primarily, not completely I wouldn't say because most of our security files were on individuals who were native Americans and had never been abroad. That case perhaps was considered a little bit more important because of his travels in Russia.

Mr. PARKER. Did agent Hosty ever bring anything unusual about the Oswald, Lee Harvey Oswald file to your attention during this period of time?

Mr. HOWE. Not that I recall.

Mr. PARKER. So you would say then that your contact with the file at this particular period of time was just in the context of routine review?

Mr. HOWE. That's right.

Mr. PARKER. When and under what circumstances did you first learn of the note that Oswald delivered to the Dallas office?

Mr. HOWE. My first knowledge that Oswald had allegedly been in the office and had left a note for agent Hosty was in hearing Nan Fenner make that remark. It was either to me directly, or to someone else within my hearing, and that's when I first learned of the fact that he had been in the office and had left a note for agent Hosty.

Mr. PARKER. Can you pinpoint approximately the point in time when you first learned of this?

Mr. HOWE. No more firmly than to say it was some time after the death of Oswald, or his having been killed by Ruby.

Mr. PARKER. That was when you first learned of the note?

Mr. HOWE. That's right.

Mr. PARKER. You think that would be then on November 24 or subsequent to that date?

Mr. HOWE. It would be some time around the 24th, I presume, or the day after. I can't firmly fix that in my mind.

Mr. PARKER. How did you learn—you learned of the note from Nan Fenner?

Mr. HOWE. From Nan Fenner's remarks.

Mr. PARKER. Did you take any action regarding the note when you first heard about it?

Mr. HOWE. Yes. My responsibility, of course, in connection with something like that was to let my SAC know, which I did.

Mr. PARKER. That would be Mr. Shanklin?

Mr. HOWE. Mr. Shanklin. And I did, if for no other purpose than to find out whether he had heard about this thing and what he knew about it.

Mr. PARKER. And what was the response?

Mr. HOWE. He hadn't heard about it.

Mr. PARKER. When did you first actually see the note?

Mr. HOWE. It was some time subsequent to that particular event, and there even I can't say whether it was 2 or 3 days or possibly a week or 10 days later. I can't draw out of that accumulation that we were going on then, that specific time, but it was some time following that, that I was going through Hosty's workbox in an effort to find something in one of the cases that was assigned to him because it wasn't in the file and in the course of going down through his workbox I came across this note which, of course, I immediately—then I recall—associated with the note that Nan Fenner had been talking about and which she alleged had been left there, in her opinion at least, by Mr. Oswald.

Mr. PARKER. Was there anything about the note that brought it to your mind, or was it purely the conversation with Miss Fenner that brought it to your mind, that it was from Lee Harvey Oswald?

Mr. HOWE. You mean after finding it?

Mr. PARKER. Yes.

Mr. HOWE. My recollection of it is that it was the fact that I associated this thing with the remarks made by Nan Fenner.

Mr. PARKER. Did you read the note?

Mr. HOWE. Yes. I read the note.

Mr. PARKER. What were its contents?

Mr. HOWE. That I can't say. I can no longer visualize that note. I know it had something in it to the effect that whoever wrote it was dis-

turbed to some extent because Hosty had been interviewing their wife or talking to their wife or something along that line; and I also have a vague recollection that there was something threatening in the note, something perhaps to the effect that—"stop talking to my wife or else." Now what the "or else" was, I can no longer specifically say.

Mr. PARKER. If the language of the note had threatened to bomb or destroy the FBI headquarters or the Dallas Police Department, do you think you would have had a better recollection?

Mr. HOWE. I believe so, but I can't say so categorically, no.

Mr. PARKER. What action did you take when you discovered the note in the workbox, Mr. Hosty's workbox?

Mr. HOWE. Well, my first reaction was, of course, that this was something that the SAC should know about. And I took the note directly to his office.

Mr. PARKER. What was Mr. Shanklin's response when you brought that note to him?

Mr. HOWE. I walked into his office with the note and in some fashion—I can't remember my exact words—explained to him what I had and where I had found it. And his reaction was that—don't talk to me about it, I don't want to talk about it, I don't want to hear anything about it.

Mr. PARKER. Mr. Howe, what do you think he meant by that response?

Mr. HOWE. Well, my impression at that stage was, of course, that he knew what I had, and for what reason—I don't know—he didn't want to discuss it with me.

Mr. PARKER. What did you do with the note after you then took it from Mr. Shanklin? Was it handed back to you?

Mr. HOWE. Pardon?

Mr. PARKER. The note was then handed back to you?

Mr. HOWE. That's one area where, again, I can't fix the exact movement in my mind. I have—I have, each time this thing has come up since July, have always said—and it is all I can recall right now—I did one of three things at that juncture. Since the SAC wasn't going to discuss it with me, as I felt that he should, I either left it on his desk, I carried it from his office and the next time I saw Hosty, gave it to him personally, or I put it back in Hosty's workbox. I know that I subsequently advised agent Hosty what I had found, where I had found it, and what I had done about it, and suggested that he see the SAC concerning the matter.

Mr. PARKER. And when you brought the note to Mr. Shanklin's attention, did you give it to him? Did you hand it to him?

Mr. HOWE. I don't have any recollection of actually having handed the note to him. As I said, he—I can visualize his motion [indicating] don't talk to me about it.

Mr. PARKER. After taking one of the three actions that you just recalled, did you ever again discuss the note with either Mr. Hosty or Mr. Shanklin after that period of time?

Mr. HOWE. I have no recollection of having discussed the note thereafter with either of them.

Mr. PARKER. Did you ever participate in any kind of discussion or

meeting which gave any instructions regarding the disposition of that note?

Mr. HOWE. No, sir.

Mr. PARKER. In your view, what would have been the proper procedures for handling a note or document such as the Oswald note, if you—

Mr. HOWE. Normally—you mean when it's received in the office?

Mr. PARKER. Uh-huh. Let's assume that it was addressed to special agent Howe. What were the normal procedures you might have followed?

Mr. HOWE. Well, that would depend upon what exactly was in the note; and there again, I myself can't visualize it.

Mr. PARKER. Let's assume that the version of the note was the version which Mrs. Fenner says.

Mr. HOWE. In that event, that constituted a possible violation of Federal law, and although perhaps not a serious one under the circumstances, it should have been presented probably to the United States attorney for at least a preliminary opinion as to whether or not it constituted a violation of Federal law; particularly some law pertaining to obstructing the performance of an officer of the United States Government, or obstructing an officer of the Government in the performance of his duty.

Mr. PARKER. If the note was the version in terms of its content which Mr. Hosty says it was, what would you have done with it?

Mr. HOWE. In that event, in all likelihood, if it was as Mr. Hosty says, something very vague and which he couldn't relate to any specific matter at that time, then at least it should have gone into a new—a new file should have been opened, if there was no way of associating with Oswald. There should have at least been an unknown subject case opened on it because it was a violation; or if it did have sufficient information in it to identify it definitely with Mr. Oswald, then it should have gone at least into his file.

Mr. PARKER. When did you first learn of the note's destruction?

Mr. HOWE. Pardon?

Mr. PARKER. When did you first learn of the note's destruction?

Mr. HOWE. My first positive knowledge that the note was destroyed was when I was given that information in the course of the interrogations or the interviews following July of this year.

Mr. PARKER. The interviews that you refer to are what interviews?

Mr. HOWE. Well, with Mr. Bassett of the headquarters of the FBI.

Mr. PARKER. You were interviewed by the headquarters of the FBI subsequent to July?

Mr. HOWE. Yes, I was.

Mr. PARKER. How many times were you interviewed?

Mr. HOWE. Once in San Diego, and once here in Washington.

Mr. PARKER. Mr. Howe, were you disciplined or reprimanded in any way for your role in the Oswald investigation prior to the assassination?

Mr. HOWE. Yes, I was.

Mr. PARKER. Would you describe the nature of the disciplinary action and the reasons for it, please?

Mr. HOWE. The first action taken, of course, was a letter of censure which censured me for my supervision of the case, prior to the assassination, and placed me on probation.

Mr. PARKER. When did you get that letter?

Mr. HOWE. I can't specify the exact date when that letter was received. It was within weeks after the assassination.

Mr. PARKER. What was the specific behavior cited, or was there anything cited?

Mr. HOWE. There were two or three things mentioned in the letter. There again, I haven't reviewed that prior to coming here to testify. One of them was, of course, that Oswald was not as he should have been placed on the Security Index. There was an alleged 12-day delay in investigation which was caused by our determining he was in Dallas, at which time New Orleans was the office of origin, he had been in New Orleans. They were the headquarters, what we call the office of origin in the case since he was there.

We learned he was in Dallas. We advised New Orleans of that. The proper procedure in that case and in all other cases was to, what we call, refer it upon completion. When we determined he was in Dallas, we referred upon completion of that phase back to New Orleans with instruction that they submit FD 128, which is the form the Bureau uses to change origin of the case from one office to another office when the subject changes locations.

There was a 12-day delay, then the case was RUC which means technically it was in a closed status. We usually do that. We close the case when the other office comes back and transfers the origin to us on the basis that the subject is now in our territory and the case is reopened. There was a 12-day delay there until New Orleans came back and we reopened the Oswald case.

Mr. PARKER. For substantially the same reasons is that why special agent Hosty was reprimanded?

Mr. HOWE. In general, yes, so far as I recall.

Mr. PARKER. Do you know who was responsible for the disciplinary action?

Mr. HOWE. No specific individual that I can name. The disciplinary action was initiated and transmitted to the field from Washington headquarters.

Mr. PARKER. Do you feel that action was justified?

Mr. HOWE. I accepted it as one of those things that you accept in the Bureau. Now that's not the only thing, of course. Subsequent to that letter, if that's what you want me to do, go on!

Mr. PARKER. Yes.

Mr. HOWE. Subsequent to that letter, of course, I was removed from the supervisory desk and put back as a regular agent. Following that—

Mr. PARKER. When did that take place?

Mr. HOWE. It wasn't—I was on the supervisory desk until about May. I think, of 1964. So it would have been between—shortly after the few weeks after the assassination when the first letter came in censuring me and placing me on probation these other events took place. I was taken off the supervisory desk on instructions of Washington headquarters. Subsequent to that I was removed from the status I had as an inspector's aide. That came in after—approximately the

same time as removal from the desk, and following that, following the—after I was off the desk and working again as an agent in Dallas, when the Warren Commission's hearing was completed and they made their judgments and recommendations concerning it. I received another letter of censure based upon the same facts as the original one.

Mr. PARKER. Those are all approximately the same dates that agent Hosty was also reprimanded?

Mr. HOWE. That's right.

Mr. PARKER. Do you know, Mr. Howe, whether Mr. Shanklin would have reviewed or OK'd those disciplinary actions?

Mr. HOWE. I don't know exactly what you mean there. Do you mean—

Mr. PARKER. Would the special agent in charge have reviewed or approved of the disciplinary actions?

Mr. HOWE. Well, let me explain how those things are handled.

First, in any case of that sort, the matter is reviewed either with the SAC or with the seat of government. In this case, of course, the material for review in order to make a decision was sent to Washington. So the review and the evaluation was made there. That material, of course, would have been sent to Washington with a letter or recommendation from the SAC as to what he felt would be proper administrative action, if any, in connection with the explanation we had made to the alleged derelictions.

Mr. PARKER. Were you asked to make out an affidavit or answer a series of questions for the seat of government with regard to the pre-assassination investigation?

Mr. HOWE. Yes, sir.

There was no affidavit. There was a series of—well, No. 1, let me give you a little picture on that. No. 1, chief inspector, Gale, who was at that time chief inspector in Washington, requested a complete copy of the Oswald file, up to and including November 22, 1963. We made an exact copy of every serial in that file. We duplicated each serial and transmitted—I am sure the copy—it could have been either the copy or the original, and we kept the copies. I don't know.

But in any event, the complete file in that reference went to Washington. It was reviewed there, and on the basis of that, there was a list of questions, a number of questions, I don't recall exactly how many, which were transmitted by the inspection division to the San Diego office—I'm sorry—the Dallas office, with the request that we be asked to answer these questions, which we did.

Mr. PARKER. Who's we?

Mr. HOWE. Agent Hosty and myself, and there might have been one or two questions in that list that Mr. Shanklin himself had to answer. I don't recall.

Mr. PARKER. You did answer the questions?

Mr. HOWE. Yes, sir.

Mr. PARKER. And to your knowledge, Mr. Hosty answered the questions?

Mr. HOWE. Yes, sir.

Mr. PARKER. You heard Mr. Hosty testify here earlier today?

Mr. HOWE. Yes, sir.

Mr. PARKER. He testified that you returned to him a copy of his memorandum in response to those questions that he had drafted in response to the headquarter's request. What's your recollection of that incident?

Mr. HOWE. That's something that I hadn't thought of for 12 years, until Mr. Hosty mentioned it here today. After he mentioned it, I tried to think back and remember what took place. When we got the questions from Washington, D.C., agent Hosty and myself sat down and answered those questions to the best of our ability, making up our answers in double-spaced, more or less rough draft form.

Following that, we took that rough draft form into Mr. Shanklin's office. At that time, Jim Malley, from the Bureau was there too, and he was there in the office. We went over them with Mr. Malley and Mr. Shanklin. There were some changes they suggested as to how perhaps this should be worded a little bit differently, or that should be worded a little bit differently. We made those changes.

There were all four of us together there at the time. I know Mr. Hosty says I subsequently gave to him the rough draft copy of the thing with the changes on it. I possibly did that. I don't specifically recall doing it. But, of course, after we had gone over this, the four of us together, and made these changes, then of course this rough draft would have been taken. The thing would have been put up in completed form, and the rough draft normally would have been destroyed.

Now I possibly gave back to Hosty for his own information those changes that had been made—which had been made. He was there when the changes were made.

Mr. PARKER. Did you individually fill out answers to questions, or was it just one set that the two of you combined on in answering?

Mr. HOWE. The questions were just one set.

Mr. PARKER. Just one set for the two of you?

Mr. HOWE. Right.

Mr. PARKER. All right. Mr. Hosty testified earlier today something to the effect that you gave him back a copy and said, "Here, you are going to need this." Did you keep a copy of that?

Mr. HOWE. No, sir.

Mr. PARKER. You did not retain a copy?

Mr. HOWE. I was satisfied with the changes that were made in what I had initially said. There was one thing that perhaps I had in my original memo that they suggested I take out, and that was the caseload on my desk. They felt that that was not pertinent, and perhaps it wasn't. And it was agreeable with me to take it out.

Mr. PARKER. Have you seen a copy of that memorandum and those answers to this since you filled that out?

Mr. HOWE. Of the original questions?

Mr. PARKER. Yes.

Mr. HOWE. No, sir.

Mr. PARKER. If you saw them again would you be able to recall what your answers were?

Mr. HOWE. Not in great detail; no.

Mr. PARKER. Would you recognize the draft if you saw it again?

Mr. HOWE. The rough draft?

Mr. PARKER. Yes.

Mr. HOWE. I could perhaps recognize my own writing if, as Mr. Hosty says, the thing he has have notations on them by me. I recall standing in Shanklin's office. We weren't even sitting down. I had—we had our rough draft copy on top of a bookcase and I was standing there with it, and we were reading it to Mr. Malley and Mr. Shanklin, discussing our answers and making the changes that were suggested and which were agreeable to me, and I presume, to Mr. Hosty.

Mr. PARKER. With respect to the note, Mr. Howe, you apparently gave instructions to Mr. Hosty to go to see Mr. Shanklin about the note?

Mr. HOWE. That's right.

Mr. PARKER. Did he do that immediately?

Mr. HOWE. I don't know.

Mr. PARKER. You did not accompany him into the room?

Mr. HOWE. I heard Mr. Hosty say that I did. I have no recollection of having gone in the room with him. I might have walked up to the door, but I certainly was not there when this discussion of which he speaks took place.

Mr. PARKER. Thank you.

Mr. EDWARDS. Mr. Seiberling?

Mr. SEIBERLING. Thank you, Mr. Chairman.

Mr. Howe, if you had known about the note of Mr. Oswald to Mr. Hosty at the time it was given to Mr. Hosty, what would have been your normal course of action?

Mr. HOWE. Well, there again, the same set of circumstances would exist, as I explained earlier, it would depend on exactly what the note said. If it said, as Nan Fenner contends, something about blowing up the Dallas Police Department and the Dallas FBI office, that would constitute a violation of Federal law which I probably would have told Hosty to investigate and handle. With reference to Oswald, if there was sufficient information in there to associate it with Oswald; if not, in all likelihood, we would have opened it. It would have been a normal procedure to open a nonsub file, talk to the U.S. attorney, see if he would authorize prosecution on the basis of that note, and govern ourselves according to his opinion.

Mr. SEIBERLING. Now, suppose it just said what Mr. Hosty recollects it said, that Oswald told him to stay away from his wife or he'd take some action?

Mr. HOWE. That would perhaps be a question of judgment as to what you would do with something like that. If it amounted to sufficient—a sufficient threat to possibly constitute a violation of obstructing a Government official in pursuit of his duties, a Government officer, then you would present it.

If it were pretty mild, and just someone beefing about what you were doing, then it more than likely would go into the files as a matter of record and nothing done specifically about the note itself.

Mr. SEIBERLING. Now, Mr. Hosty testified that he considered the investigation of Mr. Oswald prior to November 22 to be an important, serious investigation, an important, not just a routine investigation. Would you have characterized it—how would you have characterized it?

Mr. HOWE. The Oswald investigation prior to the assassination?

Mr. SEIBERLING. Yes.

Mr. HOWE. As I said earlier, it wasn't exactly routine because it had some elements in it that wouldn't be elements in a normal case of that type. That element in his case which made it a little bit above the ordinary was the fact that he had been to Russia, that he had tried to defect, that he came back with a Russian wife. There was a possibility of espionage in that particular case, where perhaps there wouldn't be in a case in that category which just involved someone who was a member of an organization dedicated to the overthrow of the Government or something like that.

Mr. SEIBERLING. Now, that being the case, when the note was received from Oswald, wouldn't that be something more than routine?

Mr. HOWE. If the note was specifically from Oswald?

Mr. SEIBERLING. Yes. Oswald to Hosty saying lay off or I'll do something, take action against the FBI.

Mr. HOWE. Yes. I judge that you would consider it such because of Oswald being who he was.

Mr. SEIBERLING. Well, that's exactly my point. He wasn't just anybody. Even if he was a member of the American Civil Liberties Union, which might imply that he would take legal action; if he was a person who had some other propensities, why, I suppose, action could cover a lot of things. Do you happen to know whether the file on Oswald up to that time showed that he was dangerous in any physical, violence sort of sense?

Mr. HOWE. Nothing within my recollection of the file. And I am almost certain that this is true, completely. There was nothing in his file to show that he had any special propensity for violence.

Mr. SEIBERLING. Now, you have testified you told Mr. Shanklin about the note at the time you learned of it, which was after the assassination.

Mr. HOWE. Yes, sir.

Mr. SEIBERLING. And you testified to that under oath, and you have also testified about the fact that when you saw the note you took it into Mr. Shanklin's office and gave it to him personally.

Mr. HOWE. No, sir. I have never said I gave it to him personally. I took it into his office, wanted to discuss it with him. He wouldn't discuss it with me, and I have no recollection of, as I think you are inferring there, of handing the note to him.

I said that one of three things happened following the fact that he wouldn't discuss it with me: I either left it on his desk.

Mr. SEIBERLING. Well, that's what I mean. But you took the note into him?

Mr. HOWE. Yes, sir.

Mr. SEIBERLING. And you told Mr. Hosty that he should talk to Mr. Shanklin about it.

Mr. HOWE. That's right.

Mr. SEIBERLING. You're aware that Mr. Shanklin has stated that he has no recollection of this note at any time up to July of this year?

Mr. HOWE. Yes, sir.

Mr. SEIBERLING. He doesn't recall ever having seen it or heard of it.

Mr. HOWE. Yes, sir.

Mr. SEIBERLING. And he so testified under oath, and you're under oath. Now there is an obvious conflict here. Is there any testimony of yours that ought to be corrected or altered in any way to make sure we have the record straight?

Mr. Howe. No, sir. I certainly—there was certainly no doubt in my mind that he knew what I had when I went into his office.

Mr. SEIBERLING. Thank you. My time is up.

Mr. EDWARDS. Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. Howe, when you saw the Oswald note, could you describe its condition? Was it in an envelope? Was it a single piece of paper?

Mr. Howe. No, sir; I can't. I've been asked that before and I can't.

Mr. KINDNESS. Do you recall whether it was signed?

Mr. Howe. No; I have no recollection whether it was signed or whether it wasn't, as I have said before. I glanced at the note, recognized what it was, took it to Shanklin's office. I obviously probably read the note, but I can't visualize it at this time. I don't know. I associate it with Nan Fenner's statement that Oswald brought a note into the office and this appeared to be the note concerning which she had spoken.

Mr. KINDNESS. When you found the note in Mr. Hosty's workbox, do you recall whether you identified it by opening it and getting something out of an envelope, or surely you recall whether it was something you just accidentally ran across, or something you would open up an envelope to find?

Mr. Howe. My belief in that connection would be that since I was going through his box with no thought that this letter was down in there, going through his box looking for a serial, in some matter assigned to him which I thought might be in his file, or his box, because it wasn't in the file; if I had come to an envelope with just the name Mr. Hosty on it, I probably would have gone right by it.

So from that, I would say that the letter was lying there open in the box; and whether there was an envelope with it, or over it or under it, I can't say.

Mr. KINDNESS. And you don't recall that there was any question about whether this note was a note delivered by Lee Harvey Oswald or not, but rather that it was accepted as being that?

Mr. Howe. I was firmly of the belief that at least it was the note that Nan Fenner was referring to. Whether it came from Oswald, I don't know that there was anything in the note. There could have been and there might not have been anything in the note itself which would identify it with Oswald specifically.

Mr. KINDNESS. Then, as far as your recollection is concerned, it's possible that the note was not signed, and it's possible that the only connection between that note and Oswald is Mrs. Fenner's identification of that note as being a note delivered by a man whom she later identified on television as being Oswald?

Mr. Howe. That's right. And here, let me make an explanation which will clarify anything that might come up. When Mr. Bassett first talked to me about this matter I couldn't recall anything more about the appearance or the content of the note than I now can. But I knew that in some fashion I recognized that note as something having to do with Oswald. And in my statements to him, my initial statement I said something to the effect that it must have had something in it either mentioning the name Oswald or mentioning the name Marina, or something of that sort.

Upon further thinking back and digging back through my memory in connection with the matter, I remembered the Fenner statement, and then it became apparent. And now I'm pretty firmly, without any question, of the belief that what I associated—not necessarily with Oswald, because of what the note said—but because it represented the note concerning which Nan Fenner had said Oswald left at the office.

Do I make myself clear on that?

Mr. KINDNESS. I have—yes. I have no further questions.

Mr. EDWARDS. Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Howe, both you and Mr. Hosty agree that Mr. Shanklin was, as you put it, opposed to discussing the contents of the note; and, as Mr. Hosty put it, that he was determined to destroy the note.

Can you give any motivation why Mr. Shanklin took this attitude toward this particular note?

Mr. HOWE. No, sir.

Mr. DRINAN. Did he do this very often?

Mr. HOWE. Mr. Shanklin normally was pretty approachable as an agent in charge. But at this particular time, he had, as has been explained here earlier, he had been going without sleep for quite some time, and there was—the conditions in the Dallas office with things going right and left and piling up on top of each other as a result of the assassination, and the various facets of it, and the shooting of Ruby—he naturally was busy.

But I think something of this sort at least to my mind was of sufficient importance that we should at least discuss it.

Mr. DRINAN. Had he ever refused to discuss anything previously?

Mr. HOWE. No, sir.

Mr. DRINAN. Do you think that his attitude toward this note—the way he blocked it out then, the alleged statement that he wanted to destroy it—do you think that it entered into his attitude subsequently when he at least acquiesced in censures in your record?

Mr. HOWE. I don't quite get the import of your question, sir.

Mr. DRINAN. Well, I'm trying to trace this particular attitude of Mr. Shanklin with the subsequent attitudes that he had toward you and toward Mr. Hosty. He acquiesced in penalties being inflicted upon both of you and I'm wondering whether that acquiescence was tied up with his reaction to both of you in connection with this note.

Mr. HOWE. I'm not sure that Mr. Shanklin did acquiesce. What his cover letter to our responses to the Bureau's questions were—what was in that cover letter, I don't know. I've never seen it.

Mr. DRINAN. Ordinarily, the man in charge had something to say about the conduct and performance of who's under him.

Mr. HOWE. That's right. He would make his recommendation normally in the cover letter, transmitting our answers to the Bureau. Now whether that was so in this particular case, I don't know.

But in the normal disciplinary case of that sort, when there is some question of whether a disciplinary action should be taken, that is the way it works. The agents involved or the agent involved, either way, prepares his explanation of what took place and why and how; the SAC then covers that with a letter of his to the Bureau and transmits

that to the Bureau with his recommendation as to what, in his opinion, the facts of the matter warrant—discipline, no discipline, or what.

Mr. DRINAN. Well, if this had been filed in the usual way, would anything different have happened? Would Mr. Oswald have been placed upon the Security Index?

Mr. HOWE. If this hadn't happened?

Mr. DRINAN. If this note that he brought had been filed in a routine way, would that have altered anything subsequent?

Mr. HOWE. You mean if it had the wording which Nan Fenner says, or if it were just a routine note, such as Mr. Hosty says it was?

Mr. DRINAN. In either hypothesis.

Mr. HOWE. If it were merely a note, such as Hosty describes it, and it didn't have any specific threat in it, probably not.

If it were as Nan Fenner says, then it would be a matter of judgment. In connection with placing people on the Security Index, there were at that time certain criteria outlined in our Bureau manual as to what was necessary to place an individual on the Security Index, or at least recommend him to the Bureau for being placed on the Security Index.

There was one, as I recall, one kind of catch-all phrase at the bottom which would involve individuals who despite the fact that they had no membership in a revolutionary organization might be considered for inclusion in the Security Index. It would be a matter of judgment then on the part of the agent and the supervisor as to whether or not the facts taken as a whole warranted him being placed on the index because he might be dangerous to the country in the event of an emergency.

Mr. DRINAN. So that if this note had been processed in the normal way, Oswald might well have been placed upon the Security Index?

Mr. HOWE. He might have been. I wouldn't say that he would have been, but it would have been a matter of judgment at that time.

Mr. DRINAN. And would that mean that when a President visits Dallas, such a person on the Security Index is turned over to the Secret Service?

Mr. HOWE. No, sir. As a matter of fact, the Security Index, of course, is now a pretty well-known fact, publicly and otherwise. At that time it was not. It was more or less a program within the Bureau with the authority of the Attorney General that was pretty much a Bureau program, and the facts of it kept within the Bureau. There was no dissemination of information concerning individuals on the security index, and not even information—we were careful not to even mention Security Index outside the Bureau.

We did not automatically, as we do now, practically inundate Secret Service with information concerning subversives that we make reports on. Any report that we make in those particular categories—now, a copy goes to Secret Service as a matter of course, as an automatic matter.

Back then, no. We would perhaps be prohibited from giving that information concerning a Security Index subject as such to any other agency, including the military agencies.

Mr. DRINAN. My time has expired.

Thank you.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. Mr. Howe, with reference to your conversations with Mrs. Fenner, her testimony was to the effect that she immediately took the note to you while Mr. Oswald was there when she first received it and that you read it and told her that it was just a nut. Is that your recollection?

Mr. HOWE. No, sir; I think you have me confused with Mr. Clark, the assistant agent in charge.

Mr. BUTLER. Yes I do, yes I do, excuse me you're right. I meant Mr. Clark, that is correct.

Turning now, to the question of the Security Index, as I understand it, censure has reference to your failure to place this name on the Security Index, prior to the assassination, or something of that nature. If it had been on the Security Index prior to that time and this note had come in, would there have been some immediate correlation between the two that would have initiated a course of action which did not take place?

Mr. HOWE. No. The fact, the placing of an individual on the Security Index didn't in any way alter the nature of the case except to make the subject perhaps a little more important an individual because that meant this individual specifically would be picked up in the initial phases of any program that would come up as a result of an emergency such as a war, invasion, or something like that.

These individuals on the security index would be the first ones to be picked up and put into custodial detention because of their propensity for violence, their dedication to the overthrow of the Government, the possibility that they would aid a foreign enemy.

Mr. BUTLER. With reference to the information that you found in the note that you found in Hosty's workbox, I am trying to place that in time. That took place after the assassination?

Mr. HOWE. Yes, sir.

Mr. BUTLER. But before Oswald was killed.

Mr. HOWE. Oh, no, sir, it was after Oswald was shot. That definitely was after Oswald was shot by Ruby.

Mr. BUTLER. So your recollections with reference to seeing the note are that it all took place after Oswald's death?

Mr. HOWE. That's right. What I couldn't fix there in point of time is the time between when Nan Fenner mentioned the note and the time that I actually found the note in Hosty's box. A few days, 10 days, or how long after in there I don't recall.

Both of the events were after the assassination and after the death of Oswald.

Mr. BUTLER. Well your conversation with Nan Fenner was also after the death of Oswald?

Mr. HOWE. Yes.

Mr. BUTLER. Now, when you had the conversation with Mr. Shanklin, which he said he didn't wish to talk about this, did you have the impression at that time that he had some prior knowledge of the note or not?

Mr. HOWE. Well, I feel certain he did have, yes.

Mr. BUTLER. You had the distinct impression that he knew about the note and that was the reason he didn't want to talk about—

Mr. HOWE. Because I had talked to him about the note when Nan Fenner initially mentioned it before the note was found.

Mr. BUTLER. Oh, you had had an earlier conversation with him yourself?

Mr. HOWE. Yes.

Mr. BUTLER. Oh, I see.

Mr. HOWE. Because I wanted to know whether he had heard this statement of Nan Fenner that Oswald was supposed to be in the Bureau office and left a note there.

Mr. BUTLER. And then after you finally found it he didn't want to see it, that was your impression?

Mr. DRINAN. Will the gentleman yield? When precisely was that, your first conversation?

Mr. HOWE. That was within a day or two following Ruby's shooting Oswald, it was after both those events, the assassination and the shooting of Oswald. It was in that, right in that immediate time.

Mr. DRINAN. And, if I may, what was his reaction?

Mr. HOWE. He hadn't heard about it.

Mr. DRINAN. How did he react after that?

Mr. HOWE. Well, Hosty was talked to about it at that time. And Hosty admitted he had gotten the letter. But he said it meant nothing to him. It was, he described it pretty much the way he described it here this morning. He was asked where the note was and he said he didn't know and it hadn't meant anything to him. And, at that time at least, he said there was nothing in the letter to identify with any particular individual. He perhaps has discarded it—he didn't know. He hadn't thought about it.

Mr. DRINAN. Thank you. I yield back.

Mr. BUTLER. One more question, Mr. Howe. Here, with reference to the letter of censure for failing to place his name on the security index, you had no inquiries or no indications prior to the assassination and the death of Oswald. You had no inquiries which indicate that you were under consideration for censure or that there was any inquiry with regard to your handling of this file? Nothing of this took place until after the assassination?

Mr. HOWE. Oh, yes, that's right, because the Bureau normally wouldn't—well, I wouldn't say normally, because copies of our reports and information in the file would go to Washington in our reports. There was always the occasion when the Bureau would analyze your report, and take issue with you as to whether or not that man should be on the Security Index.

Mr. BUTLER. But you had no indication that this type of inquiry was going on?

Mr. HOWE. In this particular case, no; because the Bureau had raised no particular question about having him on the index although a report had been submitted concerning his activities.

Mr. BUTLER. I yield back, Mr. Chairman.

Mr. HOWE. There was, there again, a difference of judgment. We didn't think he should be on the Security Index, and apparently the Bureau didn't either until after the assassination when they said he should have been on the index.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman. Mr. Howe, you may have responded to this earlier, when I was absent, but with regard to your discovering the note in Mr. Hosty's box, it is my understanding that

you were not present in the room when the conversation took place between Mr. Shanklin and Mr. Hosty, but rather that it comes as secondhand information to you as a conversation regarding the note.

Mr. HOWE. When Hosty followed through with my instruction that he should see the SAC concerning the matter, no.

It is possible I walked up to the office with him or something like that but I was not in the office when this conversation took place?

Mr. DODD. How do you know that Mr. Hosty said Mr. Shanklin was unable to find the note?

Mr. HOWE. I don't quite get your question.

Mr. DODD. Well, it is my understanding that your statement regarding that conversation was that apparently Mr. Hosty told Mr. Shanklin he was unable to find the note or that he may have thrown it away. Subsequently you discovered the note.

Mr. HOWE. No, this was on the occasion of the first notice that I had concerning the thing.

Mr. DODD. Correct.

Mr. HOWE. And I talked to Mr. Shanklin and Hosty was then talked to and said yes he had gotten this letter to which Nan Fenner was referring. But it had nothing in it to indicate who it was from. It seemed unimportant to him and he probably had discarded it.

Mr. DODD. OK. Now, was it common practice for one agent to happen to be going through the box or wastebasket of another?

Mr. HOWE. Well, I was a supervisor and I was looking for a serial, and it was not unusual to go to the case agent's workbox to look for something that you couldn't find in the file of a case assigned to him.

Mr. DODD. OK.

Mr. HOWE. And, as a matter of fact, the clerical help in the office also would normally do that when they were searching for some particular thing.

Mr. DODD. Now, in the second instance, when Mr. Shanklin apparently told you that he didn't really care to hear anything after you made the connection, when you saw the note in Mr. Hosty's workbasket and then remembering the conversation that Mrs. Fenner brought up, putting the pieces together, you read the note and then you went and saw Mr. Shanklin and he apparently said, "Well, I don't want to be bothered with that, let's forget about it." And then you were trying to put together exactly what you did with the note. Would you state for me exactly what you think you did with the note?

Mr. HOWE. Well, I say then my recollection is not clear. I certainly did one of three things, because Shanklin wouldn't discuss it with me; I either left it on his desk and walked out, or I walked out and took the note with me and gave it to Hosty personally, with instructions that he should see the SAC about this, or I took it back and put it in his workbox or his mail slot and told him subsequently what I had found and what I had done, and that I had told the SAC about it, and he should see the SAC concerning it.

Mr. DODD. All right. Now, this, the chronology of this event occurs, of course, after the assassination of the President and after Oswald was shot by Ruby?

Mr. HOWE. That's right.

Mr. Dobb. I am a little perplexed on that point. It seems to me that if I were, if I had discovered a note written by the man charged with the assassination of the President and I brought that note to Mr. Shanklin or a person in his position, I find it hard to believe that I wouldn't be able to tell you precisely what I did with that note.

I can't figure out how, given the monumental circumstances surrounding a note from an assassin of a President of the United States, you wouldn't be clear as to what he did with that note. I can understand that looking back over 12 years and trying to remember point by point what happened, I can sympathize with that.

But, I cannot understand when you consider that this was after the assassination of the President, after the assassination of the man who was accused of the assassination of the President, that you wouldn't remember precisely and exactly what you did with that note.

Mr. Howe. There is no one more aggravated than myself sometimes that I can't recall these specific things, but I can't. And the only explanation I can give to my satisfaction is the fact that these things took place under circumstances which were very, very unusual as you will have to agree.

In addition to that, for 12 years I have been trying to forget the thing because I was disciplined, perhaps I was just biased when I felt I didn't warrant the discipline I got, but I wanted to stay in the Bureau. I liked the Bureau. I liked the work. If I was going to do that, I had to erase it from my mind to my best ability and not eat my heart out because in that event I could certainly not do my job as an agent with the FBI.

Mr. Dobb. I have no further questions. Mr. Chairman.

Mr. Edwards. Mr. Howe, you overheard Mrs. Fenner make a remark about the note a couple of days after the assassination. Is that correct?

Mr. Howe. That's right.

Mr. Edwards. Right. And you went to Mr. Shanklin's office and mentioned it to him. What did he say?

Mr. Howe. Well, he had no knowledge of it and naturally he was interested in learning something about it, too. And following that, Hosty was talked to with the results that I just mentioned.

Mr. Edwards. He said he couldn't find it?

Mr. Howe. He couldn't find the note.

Mr. Edwards. How much time passed before you went through his file and found it?

Mr. Howe. Well, that's the period that I can't fix specifically. It could have been 2 or 3 days. It could have been several days, it could have been a week or 10 days, I am not sure exactly how long that it was.

Mr. Edwards. So, Mr. Shanklin knew about the note within a couple of days after the assassination?

Mr. Howe. He knew of Nan Fenner's allegation that the note had been delivered to the office by Oswald. And Hosty, of course, admitted that it had, that he had gotten the note.

Mr. Edwards. So, at that time, he didn't call Hosty in and say I want it destroyed? Apparently there was a period there—

Mr. Howe. Oh no, oh no, because as far as we knew, the note evidently was no longer in existence, so far as we knew at that stage.

As a consequence, it was an impasse. Nan Fenner said one thing. Hosty said another thing. We had nothing on which to verify the recollection of either.

Mr. EDWARDS. No; but Mr. Shanklin didn't say, if you come upon that note, destroy it.

Mr. HOWE. Oh, no, sir.

Mr. EDWARDS. In other words, the inference was that the note should have been brought in to him if it was found?

Mr. HOWE. That is right.

Mr. EDWARDS. It was found and you brought it in.

Mr. HOWE. As I say, because the note was presumably no longer in existence at that time, it was an impasse and we couldn't establish it was from Oswald or it wasn't from Oswald, because of the great influx of other happenings at that time it was set aside as perhaps something we could do something about later because it accomplished nothing to have these two things said about the note without being able to establish which one was right.

Mr. EDWARDS. But there was a change in Mr. Shanklin's attitude. That's the point I am trying to make. When you first told him about the threatening letter, he didn't say, my God, when you find it, I want it destroyed. He didn't get excited at all?

Mr. HOWE. No, sir.

Mr. EDWARDS. But several days later, it might have been as late as 10 days later, when the note was brought in to him, that is when he apparently didn't want to know anything about it?

Mr. HOWE. Well, he said, I don't want to talk about it.

Mr. EDWARDS. Well, now, the normal thing for a man like Mr. Shanklin to do, an old pro like he was in the Bureau, would have been to phone Washington and brief them of the matter. Is that correct?

Mr. HOWE. Well, I don't know if there is any specific Bureau regulation that draws the line on what you have to call the Bureau about and what you wouldn't have to call the Bureau about.

Mr. EDWARDS. Why would he change his mind then about the note? Why would he be reconciled to having it turn up for several days and then suddenly change his mind and get very exercised and say, I want it destroyed. I don't want to learn anything about it, whatever it was?

Mr. HOWE. Well, he didn't say on this first occasion if you find this note, then bring it to me. We just assumed then that the note had been destroyed, although obviously, it had been delivered to the office and we had Nan Fenner's statement that she thought it was Oswald who brought the thing into the office.

There was no statement made. We took Hosty's word for the fact that he couldn't find the note and evidently had discarded it because he didn't think it was of any consequence.

And, as a result, Shanklin didn't say, so far as I remember it, nor did I, that if you find this thing, bring it to us. We just presumed that it was gone then.

Mr. EDWARDS. But Mrs. Fenner had said that the note said that Oswald was threatening to blow up the FBI office or the Dallas police, so, certainly, it must have been an extraordinarily tough note.

Mr. HOWE. If it was as Mrs. Fenner says so, yes that's right. But she said one thing, Hosty said another and we didn't have the note.

And any way of establishing outside of Nan saying it was her belief without any doubt it was Oswald who brought that note in, we only had her word for that. We had no way of establishing that actually it was Oswald.

Mr. EDWARDS. How many people in the FBI field office in Dallas knew about the note?

Mr. HOWE. Frankly, I don't know. There have been statements made that it was well known throughout the office. If it was, I wasn't aware of it. I don't know. I didn't discuss it with anyone.

Mr. EDWARDS. Was it ever discussed in your presence at coffee or at a gathering?

Mr. HOWE. No; and I didn't discuss it with anyone.

When the note came to my attention and all these events happened in which I was involved with respect to the note, it was kind of an after the fact sort of thing. I do know if there had been anything in that note that would have been of any benefit to the assassination investigation, there would have been some action taken on that particular phase.

But it provided no leads that could be followed and it gave no evidence of a conspiracy; it was of no assistance to the investigation that was ongoing at that time.

Oswald was dead and there was no action that could be taken from that standpoint. The only thing that that letter established was that Oswald was a person who was capable of doing a dangerous act or of at least threatening a dangerous act, if it was the way Nan said. And who needed more proof of that at that time?

It became at that stage of the game, as far as I was concerned, an administrative matter, a personnel matter that should be handled by the SAC.

Mr. EDWARDS. Well, Mr. Shanklin learned about the existence of the note within a couple of days after the assassination. And, if it was discussed, the information came to Mrs. Fenner, who said that the note had a threat to blow up the FBI field office.

Mr. HOWE. Well, I don't recall that.

Mr. EDWARDS. Mr. Shanklin did not get exercised in any way at all at that time. Later on, something must have changed his mind, because he really got exercised later on. He wouldn't talk to you about it.

Mr. HOWE. He wouldn't discuss it.

Mr. EDWARDS. And, according to Mr. Hosty, he insisted that it be destroyed, torn up. How do you account for the fact that he changed his attitude?

Mr. HOWE. I have no explanation for that.

Mr. EDWARDS. What were the nature of the questions that the FBI in Washington sent you? The series of questions?

Mr. HOWE. Well, one of them, of course, was why wasn't Oswald on the Security Index? Why was there a delay of 12 days during which the case was on RUC status, waiting for a transfer back to us from New Orleans. Why was that lapse of 12 days, or why was the case allowed to be closed for that 12 days. It seems to me some routine communication to the effect that Oswald had subscribed to the Daily Worker had come in the file and we hadn't taken action on it, because a subscription to the Daily Worker was a dime a dozen, really. We had a lot of communications to that effect.

We were asked why we hadn't taken some action in connection with that. There were other—I can't recall anything, anything else, anything other than that.

Mr. EDWARDS. Did you testify before the Warren Commission?

Mr. HOWE. No, sir.

Mr. EDWARDS. Did the FBI give you any particular instructions today, such as Mr. Hosty was given when he, before he testified to the Warren Commission that your instructions are just to answer questions, don't volunteer anything?

Mr. HOWE. No, sir, I was told, the only thing I was told was that the hearing was to be more or less exclusively on the receipt to handling and the disposition of the Oswald note and that I should give any information to the committee that I had in my possession concerning those things.

Mr. EDWARDS. Well, if a person is an investigator for a commission doing the investigative work for a commission, it would hardly be proper for someone to tell an investigator, just answer questions, don't volunteer anything.

Don't you think that the duty of an investigator is, as an agent to his principal, to tell him everything that the investigator has found out?

Mr. HOWE. I issued no instructions of that sort to Mr. Hosty.

Now, you are asking me for an opinion there concerning kind of a hypothetical case, is that—

Mr. EDWARDS. No. I am asking this because there are a number of allegations that the FBI was not candid with the Warren Commission, that there is a certain amount of evidence to support that allegation. I was wondering what your instructions were from the FBI, insofar as your relations with the Warren Commission were concerned.

Mr. HOWE. I don't know, sir. Because, Hosty, if he was briefed at all, was briefed here in Washington, not in Dallas.

Mr. EDWARDS. Did Mr. Shanklin call Mr. Hoover often? Did they talk on the telephone?

Mr. HOWE. I wouldn't say that he talked to Mr. Hoover as much as he would talk to other people at the Bureau. On the average, I presume he would talk to the Bureau about once a day or twice a day, under normal circumstances. It might be several times on 1 day, and then for 2 or 3 days not at all.

But he didn't normally talk to Mr. Hoover. It was usually to some lower echelon official in connection with some specific communication in which that official had an interest or who was supervising the area that was under the responsibility of that particular official.

Mr. EDWARDS. Did Mr. Shanklin speak often to Mr. Tolson?

Mr. HOWE. No more so than to Mr. Hoover.

Mr. EDWARDS. Mr. Hosty testified that Clyde Tolson put a stop on his personnel file, so that he could not get promoted. Do you think that happened to you?

Mr. HOWE. I don't know. I didn't know that it had been done to Hosty's file or that it was done to my file. I don't know. I have not seen my Bureau file; I have no information that anything like that had happened to my file.

Mr. EDWARDS. Well, did your career change after the Oswald investigation like Mr. Hosty says his did? Mr. Hosty says things have been a lot different ever since that one investigation was conducted which he

participated in. And you participated in the same investigation, you were reprimanded, you were demoted. Since that time has your career gone as you would have expected if the events relating to Oswald hadn't taken place?

Mr. HOWE. No, sir. Well, yes. I wouldn't say that I was discriminated against in any way following that. Now, whether there was something on my file in Washington which was done to advance this man any further or something of that sort, I don't know.

Personally, I was very happy to be a street agent, and was not concerned about the fact that I wasn't given consideration for being other than that after leaving Dallas. I was in grade 13, which was an agent's top grade at that time and I am still in grade 13 at the top. I have got my regular in-grade pay raises, and Mr. Hosty has, too.

Mr. EDWARDS. You were in the Dallas field office several years before the assassination. Did you know Jack Ruby?

Mr. HOWE. No, sir.

Mr. EDWARDS. He was an informant or at least he had reported six or seven times to an agent at the Dallas field office but probably did not furnish any information.

Did you know about that?

Mr. HOWE. No, sir. He would have been what we call a 137 case, if anything, and that is a criminal informant and concerning those, I would have no knowledge. I don't know whether he was or wasn't and can make no comment on that except to say what's been said before, that if he was an informant, I didn't know that first hand, outside of just hearsay. Normally, I wouldn't know whether he was or wasn't an informant.

Even back in those days, when these contacts with him took place, I wouldn't be aware of those because that was what we call a 137 case. Those 137 cases are informant cases and were handled on a desk apart from mine. I handled the 134 cases because those were cases involving individuals who were informants in the security field.

Mr. EDWARDS. Thank you.

Mr. Seiberling?

Mr. SEIBERLING. Thank you, Mr. Chairman.

Mr. Howe, did you ever—did the thought ever pass through your mind that it was rather odd for a person who was apparently contemplating assassination of the President to contact an FBI office a couple of weeks beforehand?

Mr. HOWE. I have never thought of that specific question or matter for conjecture. No, we have no information to indicate that Oswald contemplated shooting the President 2 weeks before it happened. There was nothing in our investigation which indicated that in any fashion.

Mr. SEIBERLING. Except that he did assassinate the President?

Mr. HOWE. That's right, and the only indication that we have that he might have been contemplating something of that sort began no more than the evening before when he went to Irving.

Mr. SEIBERLING. Now, Mr. Shanklin said that after the assassination that if he had known of this note or any sort of communication from Oswald to an agent shortly before the assassination, that he would have considered this a serious enough matter to report to his superiors. But he said he didn't know of such communication.

After the assassination would you have had a similar reaction, or did you have a similar reaction when you learned of the note or saw the note?

Mr. HOWE. That I should report it to my superiors?

Mr. SEIBERLING. Yes.

Mr. HOWE. I did.

Mr. SEIBERLING. Right, exactly.

Now, would you have thought that he would normally have reported that to his superior?

Mr. HOWE. I won't make any effort to comment upon the validity of Mr. Shanklin's reaction to something of that sort. I don't know.

Mr. SEIBERLING. Well, let me put another question. You know Mr. Shanklin pretty well, I presume, and his habits of thought and behavior. Do you think Mr. Shanklin would have taken it upon himself to order the destruction of the note, or would he have taken that type of action only on instruction of his superiors?

Mr. HOWE. I don't feel qualified to make any comment on that, Mr. Seiberling.

Mr. SEIBERLING. Well, let me ask you a more general question. Was Mr. Shanklin the kind of person who would take action on some possibly controversial matter without getting the approval of his superiors, or was he the kind of person who followed orders and didn't take that sort of action?

Mr. HOWE. There again, that would be conjecture on my part. I have no positive answer. I don't think I am qualified to comment on something of that sort.

Mr. SEIBERLING. Now, you were disciplined for two things. The censure letters were based on two things, one of which was a censure for something that you were not required by the rules to do. Is that true?

Mr. HOWE. Well, that particular item you're referring to I presume is the Security Index thing.

Mr. SEIBERLING. Yes.

Mr. HOWE. As I explained earlier, we have certain criteria, written criteria for that. One item in that list of criteria was a kind of a catch-all. One of those statements that you could have used your own judgment: Is this man dangerous enough even though he is not a member of a revolutionary organization, dangerous enough to the national security that he should be placed on the Security Index?

And they gave certain things there such as having engaged in violent activities, having made irrational comments concerning the Government, having threatened things against the Government and so forth. If it was one of those things where it was left more or less up to the judgment of the agent, if he needed something to use to qualify someone for the Security Index, in those particular cases, of course, you would have to explain pretty fully to the Bureau why you were doing it under those circumstances, and they would then judge whether you were right or whether you were wrong.

Mr. SEIBERLING. Well, based on everything that we know now about Mr. Oswald, as to his activities prior to November 22, was there anything that would have justified putting him in the Security Index?

Mr. HOWE. Not necessarily. Merely being prone to violence would not really be a criteria for putting him on the Security Index.

Mr. SEIBERLING. But was there any evidence that he was prone to violence prior to that?

Mr. HOWE. No, there wasn't. But given what we know of him now, quite obviously he was.

Mr. SEIBERLING. But what we know of his activities prior to November 22?

Mr. HOWE. No, because the thing at that time, as I said, our principal concern with him at that time was whether he might not possibly be an espionage agent, or something of that sort, have an espionage mission in the United States, after he came back from Russia and trying to defect over there.

Mr. SEIBERLING. So that he might be justifiably——

Mr. HOWE. That wouldn't necessarily mean that he was a danger to national security from the standpoint of taking action against the Government. We hadn't established that he was an espionage agent. As a matter of fact, it looked a little bit as though he couldn't possibly be because he didn't have the mental capacity which, it seems to me, would lead the Russians to trust him with an espionage mission.

Mr. SEIBERLING. Well, in your opinion, have we established it yet? Do we even know now that he was an espionage agent?

Mr. HOWE. No, sir.

Mr. SEIBERLING. So your judgment would be now the same as it was then?

Mr. HOWE. Yes, sir.

Mr. SEIBERLING. Now, the other thing about the 12-day delay in transferring the file from New Orleans to Dallas, that strikes me as being a sort of trumped up charge. Would that be a proper characterization?

Mr. HOWE. That was the Bureau's estimate of the matter, and it was their judgment, and I accept it.

Mr. SEIBERLING. Well-- but what was so bad about a 12-day delay in transferring a routine file from one place to another?

Mr. HOWE. I wouldn't have considered it very important myself. I don't think it had any bearing on the subsequent action in any fashion, and I don't know why the Bureau picked that out as a point too.

Mr. SEIBERLING. Well, let me now just ask you the same question I asked Mr. Hosty.

Was it a practice at that time in the FBI that wherever there was a possibility that the FBI might be criticized for some failure or alleged failure, that they made a scapegoat of some agent in the field in order to get the focus away from Washington?

Mr. HOWE. I wouldn't put it quite that way, no; because the Bureau is all one organization, a reflection because of a dereliction on an agent is a reflection against the FBI as a whole, and that's the reason derelictions of specific agents were subject to disciplinary action, because that reflected on the Bureau.

Mr. SEIBERLING. But I get the impression from Mr. Shanklin's testimony, and Mr. Hosty's that the Washington office was constantly issuing both commendations and criticisms, censures to agents in the field, and the managers of field offices. And I'm beginning to get the feeling that Washington wanted to have a record on practically every agent so that if anything went wrong they'd always have something that they could pin on—pin the blame on someone out in the field to

keep the greater father in Washington pure and free of any taint of fault.

Is that true?

Mr. HOWE. No; that wouldn't be my analysis of the situation at all.

Mr. SEIBERLING. Well, what is your analysis?

Mr. HOWE. That Mr. Hoover, as is unquestionably well-known, was a strict disciplinarian. He considered anything that happened to the Bureau in any of its various phases or various subsidiary offices as a reflection upon the Bureau itself. It wasn't necessarily a question of picking out a scapegoat. It was disciplining because of the fact that your actions reflected on the Bureau in some fashion.

Mr. SEIBERLING. Did the Washington office—oh, excuse me.

Mr. HOWE. I was just going to ask whether you understand what I'm trying to say there.

Mr. SEIBERLING. I understand.

Mr. HOWE. They weren't looking for a scapegoat necessarily to say well, it wasn't the Bureau's fault or this agent's fault.

Mr. SEIBERLING. No, but they were looking for a basis on which they could always show that they had taken corrective action. Isn't that correct?

Mr. HOWE. Possibly so, yes.

Mr. SEIBERLING. Did the Washington office ever admit that it had done anything wrong or failed in any way publicly? I'm talking about—

Mr. HOWE. Oh well, people here at the seat of Government, as it is known, were disciplined and given letters of censure and given the same action as a street agent out in the field if something went wrong.

Mr. SEIBERLING. Is that true of the Director himself? Did he ever personally, publicly take the blame for any mistakes?

Mr. HOWE. I can't say. I don't know.

Back through the years—he's been here since 1924, he has been here since 1924—whether anywhere along the line there was anything like that, I don't know. I don't know of any such instance.

Mr. SEIBERLING. Well, one further question.

If it is true, and we're going to find out if it's true—that Mr. Hosty's memorandum was altered between the time you and he put it together, as compared to one in his personnel file? Would you say that looked like someone was trying to railroad you and Mr. Hosty by these disciplinary actions?

Mr. HOWE. Well now, that's a hypothetical question. It would depend on the circumstances. I have no knowledge that our answers were changed without our knowledge.

Mr. SEIBERLING. My question is: If it turns out that they were falsified, how would you react to that?

Mr. HOWE. If they were actually changed without our knowledge and without us having been given an opportunity to acquiesce to those changes, I would say that whoever changed them was perhaps trying to protect themselves in some fashion, or protect the office or protect someone by throwing a little more blame on us.

But I have no knowledge that that took place in connection with this situation, with Mr. Hosty.

Mr. SEIBERLING. Well, why would anyone want to do that, in your opinion?

Mr. HOWE. As I say, to protect himself perhaps, if he felt something in your explanation reflected on him and he didn't want that in there, and he changed it arbitrarily without recourse to you, or letting you know or giving you an opportunity at least to acquiesce, what else can you deduce from that except that he's trying to protect himself?

Mr. SEIBERLING. Why would Mr. Shanklin want the Oswald note destroyed?

Mr. HOWE. I don't know.

Mr. SEIBERLING. You can't guess?

Mr. HOWE. No. I don't have any idea. I know that so far as I was concerned—

Mr. EDWARDS. Would you yield at that point?

Wasn't it common knowledge that Mr. Hoover was looking at every aspect of the assassination personally? He signed all the letters that I saw to the Warren Commission personally. Even the most insignificant matter that was reported by the FBI to the Warren Commission was signed by Mr. Hoover personally.

Wouldn't you say—isn't it probably true that everything that was going on at Dallas relating to the assassination, Oswald, et cetera, was personally supervised in Washington by Mr. Hoover?

Mr. HOWE. No, sir, I wouldn't say that. Every communication that goes out of the Bureau, even today, is over the signature of the Director; and any communication we send to the Bureau from the field is not addressed to FBI headquarters, or to some lower echelon official. Everything is Director, FBI. That's a standard policy and has been so for as long as I've been in the Bureau.

The mere fact that those letters carry the name of Mr. J. Edgar Hoover—

Mr. EDWARDS. Oh, yes, of course, we can understand that. But the assassination of the President of the United States, that's something again; and I think that you understand how Mr. Hoover's motivations went. And are you going to tell us that he didn't pay close attention to what was going on?

Mr. HOWE. Oh, unquestionably he did. But what I was getting at was the mere fact that his name appeared on the outgoing communication wouldn't necessarily mean that he personally signed that letter, or personally prepared it, or personally approved it. If it were something inconsequential, of little significance, it would possibly be sent out by one of the assistant directors, an associate director, or someone like that.

Anything of importance, I'm sure, would have gone over Hoover's desk and he would have signed it or approved it personally.

Mr. EDWARDS. But if Mr. Hoover had found out that Shanklin had, without his knowledge, ordered the destruction, wouldn't he have fired Shanklin?

Mr. HOWE. I presume there would have been disciplinary action of some sort. I don't know what that would have been.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Mr. Howe, you are a very nice gentleman, and you don't want to injure anybody in the Bureau, and you don't want to injure the Bureau. Those are commendable virtues.

But I would want you to respond very candidly, if I may ask this question. When you read that Mr. Shanklin denied all knowledge of

this note, and I assume that you read it in the report that Mr. Adams gave, in any event, at the moment in time you for the first time knew that Mr. Shanklin denied all knowledge of the note that you discussed with him, were you amazed?

Mr. HOWE. Yes.

Mr. DRINAN. Did you discuss this with anyone?

Mr. HOWE. No, sir; I didn't discuss this with anyone, and haven't to this day, with the exception of Mr. Bassett and Phil McNair.

Mr. DRINAN. Did your amazement carry over yesterday when Mr. Shanklin all through the day adamantly stuck to his story that he never discussed this with you? Were you amazed at his testimony yesterday?

Mr. HOWE. I can't say whether Mr. Shanklin recalls this matter specifically, or whether he perhaps doesn't recall it.

Mr. DRINAN. But it's surprising to you, is it not?

Mr. HOWE. I would say unusual, but I wouldn't say impossible.

Mr. DRINAN. Have you ever seen Mr. Shanklin go against your impression of reality in anything else? Have you ever seen anything like this in his—

Mr. HOWE. No, sir.

Mr. DRINAN. Thank you. Do you feel that you are the scapegoat of someone?

Mr. HOWE. No; despite the fact that I feel perhaps the administrative action taken was a little more severe than was justified. I don't think I was being made a scapegoat. I was being disciplined because the Director felt that my actions, in his judgment, or in the judgment of whoever prepared the disciplinary action down here, were a reflection upon the Bureau.

Mr. DRINAN. I wonder if you'd give us your idea of where the subcommittee could go now. Right now it's a no-end situation. The press will say Congress did not get to the bottom of the concealment and the destruction of Oswald's letter. They will also say—and I think it's a valid inference—that the FBI was allowed by Congress to continue to cover up the coverup.

And where do we go from here? It's not up to us to say whether anybody has told falsehoods here. That's up to the Department of Justice. But, as you know, the FBI concluded very solemnly that the facts disclosed—the Department has concluded this is not an appropriate case for criminal prosecution at this time. Will they do it in the future? What should we do now in order to save the reputation of people and to help the FBI since that's our function as the oversight subcommittee?

Mr. HOWE. Frankly, I don't know, Mr. Drinan. I've given you all the information I have to the best of my ability.

Mr. DRINAN. I know you have.

Mr. HOWE. I am not going to pass any judgment on what should or shouldn't be done. The Bureau is making changes, I think much for the better, and in some respects specifically giving supervisors more time to supervise their cases as they should be supervised. The caseloads of the agents—the caseloads are being cut down to the point where an agent can devote more time to his important cases.

We're trying to separate the wheat from the chaff. I think there are a lot of good things going on in the Bureau.

Mr. DRINAN. One last question. Kyle Clark apparently said to Mrs. Fenner, "You can forget about the Oswald note." Would you have any reflection on that?

Mr. HOWE. I never knew anything about that before. I have no comment to make.

Mr. DRINAN. That came up yesterday.

Mr. HOWE. I know that came up yesterday. That's the first I've heard of it and I have no comment concerning it.

Mr. DRINAN. Do you think Kyle Clark would be able to lend any wisdom to this investigation?

Mr. HOWE. I don't know.

Mr. DRINAN. Thank you very much.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman.

I'd like to go back and try to get things together in my own mind. Maybe if you can just sort of give me yes or no responses.

Do you recall having the name of Lee Harvey Oswald come to your attention one way or another prior to the assassination of President Kennedy?

Mr. HOWE. Oh, yes, because it was a case on my desk.

Mr. DODD. So you recall that?

Mr. HOWE. That's right.

Mr. DODD. Do you remember learning of the delivery of the Oswald note after the shooting of Oswald, from Mrs. Fenner? She said something to you about it.

Mr. HOWE. Yes. That was my first knowledge of the letter.

Mr. DODD. Do you recall talking to Mr. Shanklin about Mrs. Fenner bringing that to your attention?

Mr. HOWE. Yes.

Mr. DODD. Are you sure that you found the note in Hosty's work basket?

Mr. HOWE. Of that I'm certain.

Mr. DODD. Absolutely certain?

Mr. HOWE. That's one thing I specifically and definitely know. I discovered the note in Hosty's workbox. Whether Hosty knew it was there, I don't know.

Mr. DODD. But you recall that specifically?

Mr. HOWE. Yes.

Mr. DODD. Do you recall when you found the note how quickly you put sort of two and two together?

Let me ask you this: Did you recognize the note by the signature?

Mr. HOWE. I don't recall that there was any name, signature or name otherwise, in the note.

Mr. DODD. How did you know it was the note then?

Mr. HOWE. I associated the note when I saw and read its contents, which I did at that time, at least on one occasion, and I can't visualize it now and tell you exactly what that was.

Mr. DODD. Well, don't you get a lot of nut letters? Couldn't that have been from anyone?

Mr. HOWE. No, it closely enough resembled the letter that Nan Fenner said Oswald had brought into the office.

Mr. DODD. So it's kind of fresh in your mind that Mrs. Fenner,

talking about the Oswald note, was something that you were conscious of quite severely?

Mr. HOWE. Oh, yes.

Mr. DODD. So when you saw this letter addressed to Mr. Hosty, talking about going to do something, despite the fact that you can't recall whether or not that was signed by Mr. Oswald, that rang a bell with you right away?

Mr. HOWE. That's right, because that was within, at the most, a week or 10 days perhaps following my first knowledge of the letter, and that was still fresh in my mind. Naturally when I ran across this thing, I glanced at it and saw what it was and—my God—

Mr. DODD. Right away it hit you—that's that Oswald letter?

Mr. HOWE. That that's that letter Nan Fenner was talking about.

Mr. DODD. Is that what you said? That's that Oswald note. Did you have that kind of a thought?

Mr. HOWE. Well, if you want to call it that. Let's call it the Oswald note now.

Mr. DODD. OK.

Mr. HOWE. But that was the note to which Nan Fenner was referring, and to which she said someone had brought into the office who she believed was Oswald.

Mr. DODD. Then what was your immediate reaction? I'd better show Mr. Shanklin this right away?

Mr. HOWE. Yes, of course.

Mr. DODD. That was pretty much your first response?

Mr. HOWE. And that's what I did.

Mr. DODD. And do you recall that—

Mr. HOWE. Yes.

Mr. DODD [continuing]. Being your first response? And do you recall going in and showing Mr. Shanklin the note?

Mr. HOWE. I had the note in my hand and told him what I had and where I'd found it. There was no doubt in my mind that he knew what I was talking about because we had—it had been discussed before.

Mr. DODD. And at that point your memory sort of ceases. You can't recall what you did with the note?

Mr. HOWE. That particular step in there as to exactly what I did with the note—I know I did one of those three things, but which one I don't know.

Mr. DODD. Can you see how I'm kind of perplexed?

Mr. HOWE. I know what you mean.

Mr. DODD. You remember all of these things. As well as remembering that you knew about Oswald even before the assassination. I think that's tremendous to be able to remember that with all of the cases that you had. But then not being able to remember what happened to that note once you gave it to Shanklin, recognizing by your own testimony the significance of that note when you found it in Hosty's box and how it rang a bell with you, and then not being able to remember what happened to that note when you brought it into Mr. Shanklin.

Mr. HOWE. Well, as I said before, no one has been more aggravated than I have been with myself that I can't recall specifically some things that happened back in those hectic days. I can't specifically recall. I've tried to ever since July. I've thought periodically about this thing. I have been questioned about it and it has bothered me that I

haven't been able to reconstruct the thing minute by minute as to what took place.

But that's not the only thing I can't recall or reconstruct back in those days. I couldn't go back and tell you exactly what happened when.

Mr. DODD. What else can't you recall?

Mr. HOWE. Pardon?

Mr. DODD. What else can't you recall?

Mr. HOWE. I mean so far as the investigation was concerned; when this happened, when that happened in specific chronological order. I said it was a kaleidoscope really, those first few days or first week or two after the assassination. You can imagine we were going in 14 different directions at once, and the whole office was that way. It was a confusing time.

Mr. DODD. Did you ever see the note again?

Mr. HOWE. No, sir.

Mr. DODD. So you must have left it in Shanklin's office; at least that is one of the possibilities.

Mr. HOWE. That's what I said, it's one of the three possibilities. I never saw the note subsequently nor have I any knowledge of what happened to it.

When I turned the note over to—I didn't turn it over to Shanklin—but after that particular episode there, having left the office and telling Hosty to see the SAC—

Mr. DODD. Well, excuse me.

You've mentioned one of the three possibilities that you put it back in Hosty's workbox.

Mr. HOWE. Yes, that's what I say. But whatever I did—

Mr. DODD. But you told me you didn't see it after you left Shanklin's office.

Mr. HOWE. Well, after that series of events there, I did one of the three things with the note, and let me say there, that's what I mean, after that I never again saw the note.

Mr. DODD. Did Mr. Shanklin look at the note or did you just hold it out for him to read?

Mr. HOWE. I had it in my hand. I didn't hand it to him. He didn't read it. I know that.

Mr. DODD. He didn't read it?

Mr. HOWE. But I described to him what I had and where I'd found it.

Mr. DODD. Is your testimony he didn't read it?

Mr. HOWE. He didn't read it at that time, no.

Mr. DODD. He didn't put his hands on it? You just kind of held it out there for him to look at?

Mr. HOWE. That's right. I had it in my hand and wanted to put it on his desk, and then I thought we would discuss this thing, what do we do now, here is this thing that we thought didn't any longer exist.

Mr. DODD. And you don't remember putting it back in your pocket?

Mr. HOWE. No, I don't.

Mr. DODD. What would you most likely have done with other information that you brought to Mr. Shanklin in the past? I'm sure you saw him many, many times regarding many pieces of information—normally, when you brought something into Mr. Shanklin to see, did

you normally take it back out with you, or did you leave it for him to look over?

Mr. HOWE. Well, that would depend. If it was something that I wanted to discuss with him and we sat down and discussed it at that time and we came to a conclusion, I would carry it back out with me. If it was something that I felt he should review with a little care, I didn't want to wait until he did it, I would leave it there and then walk out.

Mr. DODD. He would normally make a request—leave this here, I would like to look at it further.

Mr. HOWE. Sometimes. If he were busy with something else he would say well, OK leave it there, I'll take a look at it when I get a chance.

Mr. DODD. And if he didn't say that, normally you'd take it back out with you when you left?

Mr. HOWE. Well, if we had come to some conclusion in connection with whatever problem might be involved and what I had gone in about, I would take it back out with me and go on from there on my own.

Mr. DODD. Thank you.

Mr. EDWARDS. Mr. Seiberling?

Mr. SEIBERLING. One more question.

Suppose the note had not been destroyed and in due course had been included in the file on the investigation of the assassination? Do you have any feeling as to what would have been the reaction of the Washington office of the Bureau as to the existence of the note and the failure to take action on it prior to the assassination?

Mr. HOWE. I think there would have been action taken of a very severe nature possibly in connection—had that taken place, although I don't know.

Mr. SEIBERLING. Against the head of the Dallas office?

Mr. HOWE. Well, there again, this thing would be handled in accordance with Bureau policy. There would be an explanation demanded. That explanation would be prepared. It would with the SAC's recommendation. That's a hypothetical matter.

Mr. SEIBERLING. So that it wasn't necessarily an irrational act by Mr. Shanklin, if indeed he did order the destruction of the note? It could have been a self-protective act.

Mr. HOWE. It—I don't know. You could look at it that way I suppose. The note could have had just one consequence. Actually at that stage of the game it represented nothing more than something on which Jim Hosty, you might say, could have been very, very severely criticized when the thing was evaluated in the hysteria following the assassination on the basis of facts which existed prior to the assassination, and which at that time would not have been a great big deal.

Mr. SEIBERLING. So either Hosty or you or Shanklin or all three could have been injured by it?

Mr. HOWE. I don't see where I would have been in any way culpable.

Mr. SEIBERLING. Well, simply because you were his superior, like the captain who's in command of the ship that sinks. Whether he was on deck or not at the time, or on the bridge, he is responsible.

Mr. HOWE. No, not for something that was never brought to your attention. I don't feel that I would have been held in any way responsible in connection with that, if some action had been taken in connec-

tion with that letter. I did what I was responsible for doing in connection with it, as soon as I had an opportunity to do it.

Mr. SEIBERLING. But you do feel that nevertheless there could have been some very sharp reactions on the part of Washington as to the fact that the note had not been disclosed prior to the assassination?

Mr. HOWE. As I see it, the note would have only served one purpose, and that would have been for action, disciplinary action, as I said, directed primarily at Jim Hosty because it would have been said he should have done something with it prior to the assassination. Of course, that's what I say. It would be severe because it would be evaluated in the light of what had occurred, rather than in the light of the circumstances which existed prior to the assassination; in which event I don't doubt.

But what if he hadn't had an inspection then, and that note had come to light in the course of that inspection that there would have been anything more than a mild letter of censure because it would be called a delayed investigation.

But after the assassination, it would not have been, in my opinion, rationally evaluated. And that's the only thing that the letter was good for at that time. It was an administrative matter, a personnel matter, and after I turned it over to the SAC I was through with it as far as I was concerned. Administrative action, disciplinary action, recommendations concerning for or against are the responsibility of the SAC.

Mr. SEIBERLING. Well, on that, since apparently Mr. Hosty would be the one that would most likely be penalized, I suppose you might assume that he would have the greatest incentive to destroy the note.

But if he did that all on his own, why then certainly no one else would have been criticized for it.

Mr. HOWE. Well, that's probably true.

Mr. SEIBERLING. Is that true?

Mr. HOWE. That's probably true, if he did that on his own.

Mr. SEIBERLING. But Mr. Shanklin does not testify that he didn't order the destruction of the note. He testified that he never even heard of the note.

Mr. HOWE. I understand that.

Mr. SEIBERLING. Which is a rather strong combination of circumstances.

Mr. HOWE. All I can tell you is--to the best of my ability--my recollection of the events which are pertinent to the activity concerning the note.

Mr. SEIBERLING. Thank you.

Mr. EDWARDS. Are there any other questions?

If there are no other questions, the committee will recess until Monday morning at 9:30 in this room.

Mr. HOWE, thank you very much for your testimony.

[Whereupon, at 3:26 p.m., the committee recessed to reconvene at the call of the Chair.]



APPENDIX

INTRODUCTION TO APPENDIX

Requests made of James B. Adams, Deputy Associate Director of the Federal Bureau of Investigation at the hearing of October 21, 1975 were further amplified in a letter from Chairman Edwards of October 29, 1975 to the Attorney General. That letter follows this introduction, which is followed by the responses. On December 15, 1975 Chairman Edwards requested the Attorney General to respond to further questions regarding issues raised in the testimony of James P. Hosty, Jr. before the Subcommittee on December 12, 1975. Chairman Edwards' letter of December 15, 1975 appears in this appendix with the response following the request. Certain of the responses by the FBI were treated by the Subcommittee as executive session material because of personal privacy considerations and not included in this appendix. Those materials are: questions 8(a) as to names of individuals interviewed regarding the destruction of the Oswald note and 8(c) as to names of all individuals regarding the alleged telex to the New Orleans FBI office. Subcommittee staff reviewed materials relating to the questions at FBI Headquarters for additional information which would aid the Subcommittee in determining the circumstances surrounding the destruction of the Oswald note. No information was developed which would settle the conflicts which arose in testimony before the Subcommittee.

The Subcommittee believes that the Committee on Assassinations, created by the House of Representatives during the 94th Congress, will deal further with these subjects during their inquiry.

OCTOBER 29, 1975.

HON. EDWARD H. LEVI,
Attorney General of the United States,
Department of Justice,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: At a hearing on October 21, 1975, held by the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, the witness, James B. Adams, Deputy Associate Director of the Federal Bureau of Investigation was asked to augment the record in certain instances.

Mr. Adams was advised that this Subcommittee would submit a series of questions regarding FBI procedures and some legal issues involved which are attached and marked Exhibit A. The witness was directed to respond to the submitted questions under a continuation of his oath, or to submit the answers as a sworn statement. The other matters to be furnished are as follows:

1. Copy of the Report (Summary) first furnished to the Warren Commission which did not refer to Agent Hosty along with the report later furnished to the Commission which included the reference data on Agent Hosty.

2. Agreement (Guidelines) by which FBI furnishes information to the Secret Service regarding individual or group threats to the Executive.

3. The Oswald file of some 60 documents which existed at the time of the deliberations of the Warren Commission with designation of which documents were reviewed by the Commission and which were not so reviewed. Mr. Adams indicated that he would submit a statement for the record at this time.

4. Copy of any and all internal rules of the FBI (whether in the formal rules and regulations or not) regarding the procedures for reporting misconduct, whether active or passive. Identify any changes made in such rules between 1963 and 1975.

5. Report or reports regarding the discipline of any FBI or Department of Justice personnel related to the conduct of the investigation of the assassination of President Kennedy. Please provide the names, nature of the violation, discipline imposed, 1963 and 1975 rank or job description and present address (employment and home if known).

6. Copies of 302 (report of interview) or any other reports referring to each FBI contact with Jack Ruby and Lee Harvey Oswald (whether personal, thru intermediaries or otherwise).

7. Chicago Police Department Report #55513 for an offense on or about December 9, 1939 and detective report dated on or about December 8, 1939. Reports involve the shooting of a union official referred to in the testimony of Mr. Adams. Please advise if there is now or ever has been a "tickler" or other notation on any of the subject files asking that the FBI be notified if any inquiries or requests were made concerning such files.

8. The names and addresses including past positions (in 1963) and present positions of all people interviewed during the FBI inquiry into (a) the Oswald note and its destruction (b) the Ruby contacts with the FBI and (c) the Walter allegation of receipt of a Telex shortly before November 22, 1963 in the New Orleans Field Office. After receiving this list we shall inform you of the individuals still in the employ of the FBI which the Subcommittee wishes to interview preparatory to further hearings.

9. The report and summary provided by the FBI to the Department of Justice regarding the Oswald note which resulted in the decision by the Department of Justice on the potential criminal issues involved in the destruction of the note and the failure to report its existence, delivery or destruction.

I would appreciate your forwarding the readily available information immediately without waiting for a compilation of a response to each question. Please also provide as soon as possible a specific statement as to which, if any, requests will be complied with in executive session or should be deemed executive committee material. Please provide a timetable of when each item can be addressed to this Subcommittee.

Sincerely,

DON EDWARDS,
*Chairman, Subcommittee on Civil and
Constitutional Rights.*

Enclosure.

EXHIBIT A

QUESTIONS REGARDING PROCEDURES FOR HANDLING CORRESPONDENCE DELIVERED TO FBI OFFICES

1. What was the FBI procedure for processing information delivered to a field office in November, 1963?

2. Were files initiated on the basis of a message delivered to such an office?

3. Would such a message be treated differently if the author was known to the FBI?

a. If so, how?

4. Are FBI procedures for handling messages delivered to field offices any different today than in 1963?

5. Are field offices authorized to destroy documents without headquarters approval? What was the policy in November, 1963, and what is it now?

6. What are FBI regulations regarding unauthorized destruction of documents?

7. Has the FBI experienced any cases, other than the Oswald case, where one or more of its personnel may have destroyed or otherwise mishandled a document?

If so: (a) What were the circumstances? (b) What were the dispositions? (c) What personnel action was taken?

8. Has the FBI devised any plans or procedures to further limit the possibility of unauthorized destruction of documents in its possession?

9. What are the procedures for advising the Attorney General of an internal investigation by the FBI of its own personnel?

10. Are all such investigations routinely referred to the Attorney General regardless of the disposition?

11. Are the facts and circumstances of an internal investigation of FBI personnel maintained in the personnel file of the individual involved?

12. Are separate investigative files initiated at the time of such an incident?

13. According to FBI rules, what are the possible personnel actions which can be taken against an employee who violates a rule or procedure of the FBI?

14. Have any matters involving FBI personnel ever been referred to the Attorney General for prosecution or for review for possible prosecution?

(a) If so, what were the nature of the offenses and what action was taken?

LEGAL ISSUES REGARDING VIOLATION OF FBI RULES

1. Has the Attorney General researched the possible charges which might be lodged against a person who destroys documents in contravention of the rules of a government agency?

2. What are the possible charges?

3. What additional charges, if any, could be lodged if, in sworn testimony, an individual fails to disclose, having a duty so to do, the fact of an improper destruction of documents?

4. In the case of an unauthorized destruction of documents, what is the statute of limitations on such an offense if the discovery of such an act occurs 10 or 12 years after the fact?

5. What potential charges would be against an FBI employee who had knowledge of a violation of Bureau rules by another employee, but failed to report such violation?

6. Has the Attorney General had cases involving destruction of documents of non-disclosure of agency violations in the past?

7. If so, have any involved the FBI?

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,

Washington, D.C., November 20, 1975.

Re report first furnished to Warren Commission which did not refer to Special Agent James P. Hosty, Jr. and later report furnished to Warren Commission which included the information relating to Special Agent Hosty.

To: Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary.

By letter of October 20, 1975, the Honorable Don Edwards, Chairman of the above-captioned Subcommittee, requested to be furnished certain information to augment the record regarding the testimony of FBI Deputy Associate Director James B. Adams on October 21, 1975.

Mr. Edwards asked that readily available information be furnished to the Subcommittee without waiting for a compilation of a response to each question.

Item Number One of Mr. Edwards' letter requested "Copy of Report (Summary) first furnished to the Warren Commission which did not refer to Agent Hosty, along with the report later furnished to the Commission which included the reference data on Agent Hosty."

The first report apparently referred to in this request is one dated December 23, 1963, which was submitted by Special Agent Robert P. Gemberling of the Dallas FBI Office. This report was furnished to the Warren Commission. The information pertaining to Lee Harvey Oswald's address book, which is apparently the subject matter of this request, is contained on pages 671-701 of that report. In the interest of economy, since that report is 818 pages long, only the pertinent pages 671-701, are being furnished in this response. These pertinent pages follow:

RESPONSE TO QUESTION 1

(4) SUBJECT'S ADDRESS BOOK

On November 27, 1963, Captain Will Fritz made available, to SA James P. Hosty, Jr., an address book found at the residence of Lee Harvey Oswald, Dallas, Texas. This address book had writing in both the English and Russian languages. The following names, addresses and/or phone numbers were obtained from the aforementioned address book:

Flyleaf 1

English

Louisiana employment
5241741
Extension 28
Rachal

Russian Translation

Today wedding (?).

Flyleaf 3

Russian Translation

Top of page: Lee Harvey Oswald.

English

Freef 12.00.

Elbeth, Apartment No. 2 (Note: Oswald's Dallas residence.)

Beckly (Note: Oswald's Dallas residence.)

Industrial Mich Co.

2400 South Main

Mr. Clnn

Ros Page (?)

WA 7-8441

Midland 2550

To Hemphill (Oswald usually wrote names of streets in this fashion.)

Oswald.

*Page 1**English*

Wm. B. Rely and Co.

610 Magizane

Gen. Ofes. 524-0131

*Page 3**English*

Wolke or Volke

LA 1-4115

No. 1 1147

Monday 2, 600 Balley

Room 208

Mon.

State Em. Agency

Elbeth, Apt. 2

SMU Hillcrest

Bank

Daniels to Dickens

Russian Translation

Rough street plan of Moscow, Russia, with the Kremlin in the center.

*Page 4**English*

7313 Davanport St.

PE 2-3245

3124 W. 5th

ED 6-0820

757 French St.

HU 8-4326

Quinn Murret

1612 Hurley

John B. Connally

Fort Worth, Texas

Sec. of Navy

Mrs. M. Oswald

Box 982

Vernon (presumably Vernon, Texas)

Vernon, Texas 2-2080

S. S. 433-54-3937

Russian Translation

Aleksey (Lenya) (after the name Quin, Murret).

*Page 5**Russian Translation*

1. Application 2 cop.
2. Autobiography 2 cop.
3. Reference from work
4. Reference from residence
5. Characteristic
6. A copy of birth certificate
7. A copy of marriage certificate
8. A request from the husband
9. Photograph 8 copies

*Page 7**English*

Mrs. M. Oswald
 Box 982
 P. H. RI 2-6519 home
 (Work) LI 2-2212
 "Vernon Convalescent Home"
 Box 477
 Crowell, Texas
 684-3271
 Imm. & Nat. Service
 1402 Rio Grande Bldg.
 251 No. Field St.
 Dallas, Texas
 American Pass 1733242
 11 Sept. 1959
 Criner (?)
 Blewley Bldg.
 Con. Con. Service

Russian Translation

-- citizenship
 Mosgorispolkom
 (Executive Committee of the Moscow City Soviet of Workers' Deputies)
 Issued January 4, 1960 (No. 811479)
 Residence permit for a foreigner
 (AA N. 549666)

*Page 8**English*

At Embassy
 1. Include June—pass. 8 fotos
 2. Regls, Jun at Embass Birth cert.
 3. Travel arrange.
 4. Passport extention
 Mrs. Cunningham
 Texas State Employment
 RI 7-2071
 X 320
 N. Y. Russ. Em.
 Worker
 Socialist Party
 Re typing papers
 Buy shoes (W)
 Socks (M)
 Pants (M)
 Crowell
 316 E. Donal
 Bus 4 ??
 (Presumably Crowell, Texas.)
 907 Burk Burnett Bldg.
 Pauline Bates
 ED 2-8901 or ED 2-8997
 ED 5-5006

*Page 9**English*

U.S. Department of Justice
 Immigration and Naturalization Service
 P. O. Box 2539
 San Antonio, Texas
 F.1E A12 530 645
 Class. Section 101(A)
 27 (A)
 Date pet. filed
 Oct. 9, 1961

Russian Translation

Russ. Am.
 Mikhail A. Menskikov
 New York
 Sec. Navy
 Fort Worth
 Fred Korth
 Washington, D. C.
 Soviet Embassy
 Ofc. 1125 16th N. W.
 Sec'y to Ambassador
 NA-8-8549
 Ofc. 1706 18th N. W.
 AD 2-3002
 FE 8-1951
 Ft. Worth T. V. Sta.

*Page 12**Russian Translation*

Znanya (Znanie) (Knowledge) (believed to be Russian bookstore in San Francisco.)

*Page 13**Russian Translation*

Wedding (ring)
 (Crossed out.) Bank 30 5 rubles—
 pol. (?)

English

Ed. Toraz or Editor Director
 P. O. Box 2119
 U P O
 New York, N. Y.
 Account No. 38210
 Camera U S
 Gun
 Watch
 Ring
 Rail tickets

*Page 14**Russian Translation*

Zakharova B-1.4365
 12./Gorkova No. 15
 (Translator's note: The above is an address.)

English

Out of work 2nd 178.50
 June 2nd
 171.00 June 10th
 Leaves Moscow 1645
 Arr 11.30
 Hou—Tram n
 Left to right
 Mathenesser (phonetic)
 Marina's visa
 No. 1-1220544
 Imm. visa no. 52
 issues on 24 May 1962
 Russian pass no. K U 37700
 From 11 January 1962
 To 11 January 1964
 Entrance visa 1959, 14 Oct.
 No. 40339

*Page 15**English*

Exit visa—305002
 Given 22 May, 1959

Russian Translation

Following the words, "Given 22 May, 1962":
Militia Administration of Minsk

English

U.S. Renewal May 24, 1962, to June 24, 1962
Service No. 1152001
U.S. Embassy, Moscow
Dallas Rooming House
Mrs. M. Bledsoe
WH 2-1985
WH 3-8903
ED 2-4101 -- 272 Acme Brick
"Worker"
P. O. Box 28
Madison Square Station
New York 10, N. Y.
Imm. Card No. A 12 530 045
Immigration and Naturalization Service
1402 Rio Grande Bldg.
251 No. Field St.
Dallas, Texas
Riverside 8-5011, Ext 2044
Texas State Board of Pharmacy
Littlefield Bldg.
Congress & 6th St.
Austin, Texas
Ph. GR. 8-8140

*Page 19**English*

George Boube
4740 Homer
TA 7-2288
Anna Meller
5930 1/2 La Vista
TA 3-2219
RI 7-4011
Station 521
Paul Gregory
3513 Dorothy Lane
PE 1-1630 (possibly PE 1-1630)
R. Harten
Hawtorn
3000 Barnett
JE 6-1981
KUTV
PE 8-7951

Russian Translation

Following letters "KUTV" are words of a popular Russian song.

*Page 21**English*

Jaggars-Chiles-Stovall
522 Browder
RI 1-5501
News U.S. Passport
D 002526
June 25, 1963

Russian Translation

Bereshchagin (Russian translator's note: possibly a man's surname.)

*Pages 22 and 23**Russian Translation*

Calendar dates for March, April, October, November, December, January, 1960,
and February, with Russian abbreviations for days of the week.

Russian Translation

Consist of Russian words pertaining to grammar, Soviet Socialist Republics, and etc.

*Page 27 (A1)**Russian Translation*

Rosa Agadonova
 Hotel "Berlin" Mak (?)
 (Sovoy) (Savoy?)
 Amer. Embassay Moscow
 Tel. 52-00-08/Chaikovsky St. 19/21
 9-6—business (?)
 Allzberg, Vera V.—(illegible)
 Aksonov, Colonel
 Ministry of Internal Affairs of the USSR

English

Russ. for foreln AA 540060
 Amer. pass. 1733242
 W/ORussian 1131147(8?)

*Page 28 (A2)**English*

ACLU-Box 2251
 Dallas
 A. Ex.
 K-42000
 384
 1-Z Dinner
 Room 384
 Jelsavcic
 "MAASDAM"
 Holl-Amer.
 Am. Ex.
 92 Meent
 120200
 Rotterdam
 Debovy or Debooy¹

*Page 29**English*

West Berlin F. R. G.
 Tempelhofer damm
 Lee H.

Russian Translation

Vneshtorg Bank
 Bank for Foreign Trade
 Moscow
 Negl'naya U1. 12
 Kozlova (woman's surname)
 K-03400 (telephone number)
 (792) (possibly telephone extension)

*Page 31**English*

Dr. Harvey Allen
 TA 1-1927
 Baylor Un. Coll. of Den.
 Alex Kleinrer
 "Loma" Industrips
 George De Mohrenschildt
 6628 Dickens
 EN 3-1365
 (Aunt Alice)
 A. P. Barre
 New Orleans

¹(Translator's Note : Significance of above is unknown.)

Russian Translation

Vis(a) and Reg(istration ?) Office
 Kolachny Per. 9 (9 Kolpachny Lane)
 Moscow
 (2 lines crossed out, writing illegible)
 Colonel (?) Petrikov
 — Dobromyslenski
 Lane 5
 Citizen Demushkina

*Page 33**English*

Norman, Ok.
 1318½ Garfield
 Everett Glover
 LA 8-3001
 George's friend

Russian Translation

14 (?) Zhdanova
 Hotel Savoy (?) K 41980 (possibly telephone number)
 U1 (Street) Zakharova
 House No. 11, Apt. 72
 Glovachev, Pavel (man's name)
 Ella German
 Ul. Lavsko-Naberezhnaya (Embankment)
 No. 22, Apt. 2
 Gdr. (?) Ul. Stanislavskogo 20
 (Crossed out: also Sastan (?) Minsk)
 Ela German
 ul. Lavskaya Embankment
 No. 22, Apt. 22
 To America

*Page 35**English*

Peter Gregory
 Continental Life Bldg.
 ED 6-8440
 1508
 Mrs. Max Clark
 WA 4-9377
 Russian speaker
 Elena Hall
 4760 Trail Lane Dr.
 WA 6-3741
 Garry & Alex Taylor
 3519 Fairmont
 Apt. 12
 LA 1-0892
 Mother of U.S. Embassy doctor
 Mrs. HAL DAVISON
 404 F Tuxedo Road
 Atlanta, Georgia
 Natalia Alekseevna

Russian Translation

Lyudmir (Lyudmila ?) Dmitrievna
 Hotel "Berlin" (Savoy)
 Gomam Demka (?) 20244 (Business (phone ?))
 Following "Atlanta, Georgia"
 Natalia Alekseevna
 Children's Polyclinic
 B- 9-31 92 Petrov, Vorot
 (Petrovskie Gate ?)

Page 41*Russian Translation*

Aleks. Romanovich Ziger
 Krasnaya Ul., Minsk (?)
 House 14, Apt. 42
 West German Embassy
 B. Grumluskaya
 Ul. 17
 Miss Kaisenheim
 Kalashnaya
 Lane 6
 Dutch Embassy
 Van Hattun

Page 43*English*

Inter. Rescue Comm.
 251 Park Avenue South
 New York
 OR 4-4200

Russian Translation

Sovnarkhoz (Council of the National Economy)
 of Minsk for a job
 Gorsoviet (City Council) for a flat
 Inderedko (Inter. Rescue Committee ?)

Page 45*English*

Jaggers-Chiles-Stoval
 Typograhya
 522 Browder
 RI 1-5501
 miro dots

Russian Translation

7/18 Moscow, K 31 (?), Ul. Zhdanova
 (above is an address)
 Minsky Ul. Karla Marksa No. 35
 Kon. Narokhsov. (?) Tel. 206311
 Comrade Dyadev Room 279 (illegible)
 20575 Sharapov
 Minsk
 House No. 4, Apt. 24
 Ul. Kallnina
 Kuznetsova, Rosa
 Inter. (Intourist ?) Hotel "Minsk" 02-403
 House 20, Apt. 8
 Ul. Kola Miskneva (?)
 Nel Norodovskvln (?)
 112 In(stitute) of Foreign Languages

Page 46*English*

Ruth Kloefer
 306 Pine St.
 New Orleans 18, La.
 H. Warner Kloepfer
 UN 6-0389
 UN 6-2741, Ex. 276

Russian Translation

Communist Party U.S.A.
 23 West 26th St.
 New York

*Page 47**Spanish Translation*

Mexico City
 Consulate of Cuba
 Zamora and F. Marquez
 11-28-47
 Sylvia Duran
 Embassy of the Union of Soviet Socialist Republic
 15-61 55 (15-60 55)
 Department of Consular Matters
 Cubano Airlines
 Paseo de la Reforma 56
 35-79-00
 U.S. Embassy
 Lafragua 18
 46 94 00
 Blits 1-5-10-20
 12.5 Pesos=\$1.00
 1 Peso=.08¢. Coins 1-5 pesos.

*Page 51**Russian Translation*

Medical Institute
 LUCIA 31890
 Ul. Kallina 14.

*Page 52**Russian Translation*

smola (?) 14
 stova (?)

*Page 53**Russian Translation*

Merezhkinsky (man's surname)
 Prospect Stallina 12, Apt. 26
 veogde (?) 7-14-53
 (Aunt Palina)
 Kharkov
 Vezed Trinklera
 House 5, Apt. 7
 Mikhaylovich
 M
 MID (Ministry of Foreign Affairs) Metro Smolenskaya

*Page 55**English*

Nat. Sec. Dan Burros
 Lincoln Rockwell
 Arlington, Virginia
 American Nazi Party
 (American National Party)
 Hollis sec. of
 Queens, N.Y.
 (Newspaper)
 International Socialist Bulletin

Russian Translation

Notary Office Ul. Zakh.
 from 9 to 18:30
 Recess 13-14
 Saturday 9-13
 Closed Sunday

*Page 57**English*

Robert Oswald
Route 5, Box 140
Malven, Ark.
W. S. Oswald
136 Elmer St.
Metrice
R. Oswald
1009 Stara Dr.
Denton, Texas

Russian Translation

OVIR (?) Moscow
Ul. Ogareva
VZhA D.A. Vlgeda (?)
K 45026
DD 10206
DD 19106
Ostaukino (residence of Russian writer Boris Pasternak)
—(illegible) "B"
OVIR, Moscow
Kolpachny Lane 9

*Pages 58 and 59**English*

Mr. Phillipps
LI 2-2-2080 (Probably LI 2-2080)
(Possibly Vernon, Texas)

Russian Translation

Kharkov
V'ezd Trinklera (Trinkler's Gate ?)
House 5, Apt. 7
the Mikhaylovs
(for Marina)
Registry Office K-78545
Passport No. P311479 Jan. 4 (?) 60
Minsk 25994 Ex-39
Vidim (Vadim ?) Petrovich
Teacher, Moscow, IN. OR. Yak.
Riga
Ul. Pernovas
House 39, Apt. 1
Pogorelskaya,
Lena (Lena Pogorelskaya is a woman's name)
Tel. 70540
Prusokova, Maria
Kalinina 30 (?)
House 39, Apt. 20

*Page 60**English*

Ruth Paine
2515 W. 5th St.
Irving, Texas
BL 3-1628

Russian Translation

Petrikov
Ul. Lunacharskogo 8
Argentine Embassy
Polsky (Polish ?)
Ul. A. Myskogo, (?)
30.

*Page 61**English*

Johnson-Moscow
 Miss Moshey
 The Ass. Pr.
 726430
 Unit. Pr.
 726681
 With Mosby
 Mr. Goldberg

Russian Translation

(Two first lines crossed out:
 "Comrade Roman
 Works (at) Karl Marx Technical Library")
 Radio Factory "Communar"
 Experimental Shop
 3-29-56

*Page 63**Russian Translation*

Lev Setyaev—Radio Moscow
 Lev Setyaev
 Leo Setyaev
 V 3-65-88 (work)
 Novo-Prechnanaya 23/7
 Apt. 65
 Skrylev, Elsa and Gri—
 Ul. Cherkogo, House 13
 Apt. 1 (at the wedding) Nov. 6
 Rimma—(Translator's Note: woman's name)

*Page 64**English*

Special Services
 42 Franklin St.
 New York 13, N.Y.
 Worth 4-6363
 Mr. Isaacs
 Washington, D.C.
 1125 16th N.W.—NA 8-7550
 1706 18th N.W.—AD 2-3092

*Page 69**English*

N. O. T.V.—W.D.S.V. (New Orleans TV Station WDSV)
 1. Burns Rottman—523-5033
 Bill Stuckey
 529-2274

Russian Translation

Ina Takhagoeva (?) (woman's name)
 House 4, Apt. 19, in Minsk
 Ninsk
 Leningradskaya
 House 1, Apt. 11
 Ernst Titovets (man's name)

*Page 70**English*

Horace Twiford
 7010 Sunley
 Houston, Texas
 MI 9-8500
 WA 3-5492
 Texas School Depository
 Mr. Truly
 RI 7-3521

*Page 73**English*

Katya Ford
Delean Ford
AD 9-5642
14057 Brookcrest
Dallas, Texas

Russian Translation

Ministry of Finances of the USSR
U1. Kuybysheva, 9
792

*Page 74**English*

Burton
Dixie
HA 8-1581
Mr. Hodson

*Page 75**English*

Elena Hall
4760 Trail Dr.
WA 6-3741
Dallas, Texas State
Robert Adams
RI 7-2071
Randau at Jobco
RI 8-7604

*Page 81**Russian Translation*

Rimma Sherakava (Shirokova) (woman's name)
"Intourist" Moscow
Sherakov 2-05-75 (man's name)
Shirokova,
Rimma S.
U1. Korova
Main Post Office
General Delivery

*Page 82**English*

Philadelphia
Russ.-Amer. Citizenship
Club 2730
Snyder Av.
Russ. Lan. School
1212 Spruce
Russian Daily Paper
Jefferson Bldg.
Russian lan. trn.
216 S. 20
Russ. Broth-Hood
Organ.
1733 Spring Grdn.
Typing
Appointment with tv
Greg
Crystal
Typing
Watch
Add. Em. in N.Y.
Job
Plug for Radio

Finger Prints
Bank Acc.
Mail
Barber shop

*Page 83**English*

Cuban Student
Directorate
107 Decatur St.
New Orleans, La.
Carlos Bringuler
N. O. City address "Cowan"
David Crawford
Reporter
Cuban exile stores
117 Camp
107 Decatur
1032 Canal
Nat. Progressive Youth Organization
80 Clinton St.
N.Y. 2, N.Y.
Advance Youth Organ.

*Page 84**English*

Mos.-N.Y.—381.80
Mos.-Par.—149/89
Mos.-Lon.—106.40
Minsk-Berlin—48.38
Lon.-N.Y.
by train } 55.71 p. to Paris
all 10 days }
Embassy
Newspapers
Ruth LA 8-1700
RI 7-2071 employ
Box 2015
ED 2-8187
Leslie Welding Co.
FR 5-5501
Tom
Ruble (P. 34220)
(L. 135.)
(149.40)
Lee H. Oswald
Cards

*Rear Flyleaf 1**English*

W. S. Oswald
(City hall or Federal medical certificate)
Imm. and naturat
DD 293
Marine Corps
Blank application for discharge
Library newspapers
Book 1984--Oswald
Employment
Type papers
Cradle for watch
Hair cut
TV station
Socks--25
Hat--50
Overcoat--48
Shoes--40-41
Shirts--37

Russian Translation

Stanislav Shushkevich—Teachers
 Aleksandr Rudenchek (or Rubenchek)
 P. Vorosholov (?) Protilimsky (?)—Teachers
 Khill Dit (?) near movie theater "Pobeda"
 (Possibly meaning "near the Pobeda movie theater")
 Rosa (woman's name) House 130, Apt. 8
 Karla Oginkneta (Liebknecht ?) Street (?)
 Sweat shirt—48
 Ellis
 Lida 32109 (woman's name and phone number)
 Maria 3-38-53 (woman's name and phone number), Apt. 20 House (sic)

*Cover**English*

L. H. Oswald, Stove Rd.
 Leonard Calverley
 Personal Labdell
 Mrs. M. Oswald
 From Mrs. Hall N. White
 Special
 Howell Instr.
 3829 W. Vickory
 RI 7-2071
 Mr. Bargas
 200 E. N. Vacey
 Louv-K-
 P 1316

The second report apparently referred to in this request is a letter dated January 27, 1964, sent by the FBI to the Honorable J. Lee Rankin, General Counsel, The President's Commission. Information pertaining to Special Agent Hosty's name, office telephone number, and automobile license number (one digit off), appearing in Oswald's address book is found on pages two and three. A copy of this letter follows:

JANUARY 27, 1964.

HON. J. LEE RANKIN,
 General Counsel, The President's Commission, 200 Maryland Avenue, N.E.,
 Washington, D.C.

DEAR MR. RANKIN: We have been advised that authorities of the State of Texas, including District Attorney Henry Wade and his assistant, William Alexander, appeared before the Commission concerning the article which appeared in "The Nation" magazine in which it is alleged that Lee Harvey Oswald was an informant of the FBI.

We have previously made available to the Commission full information concerning our contacts with Oswald. So that there may be no doubt as to our relations, here are the facts:

Our first interview of Lee Harvey Oswald took place June 26, 1962, at Fort Worth, Texas, shortly after Oswald returned from Russia. This interview was conducted by Special Agents B. Tom Carter and John W. Fain and was for the purpose of ascertaining whether Oswald had been given any Soviet intelligence assignments in this country. Oswald was requested to advise this Bureau in the event he was contacted in this country by an individual under suspicious circumstances suggesting that it was a Soviet intelligence approach. Oswald agreed to do so. Results of this interview are set out in the report of Special Agent John W. Fain dated July 10, 1962, at Dallas, Texas, captioned "Lee Harvey Oswald, Internal Security—R," copies of which have been furnished to the Commission.

Our next interview of Oswald took place on August 16, 1962, at Fort Worth, Texas. This interview was conducted by Special Agents Arnold J. Brown and John W. Fain and it was for the purpose of again alerting Oswald to the possibility that the Soviet intelligence service might, at any time attempt to use him or obtain information through him. Oswald stated he could see no reason why the Soviets would desire to contact him; however, he promised his cooperation in reporting to the FBI any information coming to his attention in this regard. Results of this interview are set out in the report of Special Agent John W.

Fain dated August 30, 1962, at Dallas, Texas, captioned "Lee Harvey Oswald, Internal Security—R," copies of which have been furnished to the Commission.

Our next interview of Oswald took place on August 10, 1963, at the First District Station, New Orleans Police Department, New Orleans, Louisiana, at his request. During such interview Oswald furnished details concerning his arrest by the New Orleans Police Department on August 9, 1963, on a charge of disturbing the peace by creating a scene. He also furnished data concerning his background and activities in regard to the Fair Play for Cuba Committee. Results of this interview are set out in the report of Special Agent Milton R. Kaack dated October 31, 1963, at New Orleans, Louisiana, captioned "Lee Harvey Oswald, Internal Security—R—Cuba," copies of which have been furnished to the Commission.

The above interviews are the extent of our contacts with Lee Harvey Oswald prior to the assassination of President John F. Kennedy. We did not interview Oswald in Dallas, Texas, or in Irving, Texas, prior to the assassination of President Kennedy.

In regard to the data in "The Nation" article which alleges that Oswald had Agent Hosty's home phone and office phone numbers and car license number in his possession, you are advised that Special Agent James P. Hosty's name, office telephone number and automobile license number, one digit off, appeared in Oswald's address book. For your information, Special Agent Hosty furnished his name and office telephone number to Mrs. Ruth Paine when Agent Hosty interviewed her concerning the whereabouts of Lee Harvey Oswald on November 1 and 5, 1963. Agent Hosty did not give Mrs. Paine the license number of his automobile and presumably Mrs. Paine may have jotted such number down on her own initiative unknown to Agent Hosty.

Following the arrest of Lee Harvey Oswald in connection with the assassination of President John F. Kennedy, Agents of this Bureau interviewed Oswald at the Dallas Police Department, Dallas, Texas. The purpose of these interviews was to obtain from Oswald any admissions he might make concerning the killing of the President or other data pertinent to the assassination, as well as to obtain any information Oswald might furnish of a security nature. Results of these interviews of Oswald were set out in the report of Special Agent Robert P. Gemberling dated November 30, 1963, at Dallas, Texas, captioned "Lee Harvey Oswald, also known as L. H. Oswald, Lee Oswald, Lee H. Oswald, Leslie Oswald, A. Hidell, A. J. Hidell, Alek J. Hidell, Alek James Hidell, O. H. Lee; Assassination of President John Fitzgerald Kennedy, 11/22/63, Dallas, Texas, AFO," copies of which have been furnished to the Commission.

Lee Harvey Oswald was never used by this Bureau in an informant capacity. He was never paid any sums of money for furnishing information and he most certainly never was an informant of the FBI. In the event you have any further questions concerning the activities of the FBI in this case, we would appreciate being contacted directly.

Sincerely yours,

This information was also set out in a report prepared by Special Agent Gemberling, dated February 11, 1964, which was also sent to the Warren Commission. The portion of that report pertaining to Oswald's address book is contained on pages 278-283.

E. SUBJECT'S ADDRESS BOOK

ADDRESS BOOK OF LEE HARVEY OSWALD

On November 27, 1963, Captain WILL FRITZ, Dallas, Texas Police Department, made available to SA JAMES P. HOSTY, JR., an address book found at the residence of LEE HARVEY OSWALD, 1026 North Beckley, Dallas, Texas, on November 22, 1963. This address book contains names, addresses, phone numbers and other writings in the English and Russian languages. The following are names, addresses, notations and data that have not been previously reported. The pages of the address book are not numbered but for clarity and reference purposes, the pages are referred to by page number, same referring to their numerical sequence as they are contained in the book, being numbered from front to back:

Front Cover

(Contains initials and dates of law enforcement officers, same being for identification purposes.)

Inside of Front Cover

(Blank)

Front Flyleaf 1

(Previously reported except for letters "BA".)

Front Flyleaf 2

602 Elsbeth
 Surmsers ww. (partially illegible)
 Hemphill to Page
 N. 715
 Oswald
 25
 29
 16
 16
 19

 105

25

29

43

16

15

16

53

2

80 w/o

W II

Front Flyleaf 3

433-54 (remaining marked-out)

310 ÷ 50 = 6

1200 ÷ 75 = 160

75,000 ÷ 1200 = (?)

(Other unintelligible figures.)

Front Flyleaf 4: (Blank)**Page 1: (*)****Page 2**

185

10

18,50

40

50

68.00

Page 3: (*)**Page 4:**

(The page contains the name "Mrs. M. OSWALD, Tel. 2-2080, Box 082, Vernon" and immediately above there appears a rough sketch of what appears to be a floor plan of a three or four room structure. Following the "Mrs. Oswald" name and address there is a marked out note that appears to be "L12 6?19".)

Pages 5 through 12: (*)**Page 13:**

E-3 8754

(?)-N-3 8880

K-00850

(and other illegible words and figures.)

Pages 14 through 18: (*)**Page 19:**

SPASEEBA (which means "Thank You".)

Pages 20 through 23: (*)**Pages 24, 25 and 26:**

Russian Translation

(List of Soviet Socialist Republics, names of chess pieces, miscellaneous words, German alphabet, Russian-German dictionary, followed by Gothic German alphabet.)

Pages 27 through 35: ()*

Page 36: (Blank)

Page 37: ()*

Page 38: (Blank)

Pages 39 through 43: ()*

Page 44: (Blank)

Pages 45 through 47: ()*

Page 48: (Blank)

Pages 49 through 55: ()*

Page 56: (Blank)

Pages 57 and 58: ()*

Pages 59 and 60: (Blank)

Pages 61 and 62: ()*

Pages 63 and 64: (Blank)

Page 65: ()*

Page 66: (Blank)

Page 67: ()*

Page 68:

Gundy or Gondy
Nov. 1, 1903
FBI Agent (RI-11211) -
JAMES P. HOSTY
MU 8605
1114 Commerce St.
Dallas

Pages 69 and 70: (Blank)

Page 71: ()*

Page 72: (Blank)

Pages 73 through 77: ()*

Page 78:

OMBI
RIMMA
1800-100=28
Post Office (?)
15.
22 10.45
3 2000
1 1172
1 1122

Rear Flyleaf 1:

0245
9
1625
22182
300-25=15

Rear Flyleaf 2: ()*

Inside Back Cover: ()*

(*)—Contents have been previously reported in its entirety.

Back Cover:

(Contains identifying initials and date of a law enforcement officer.)

Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary

By letter of February 27, 1964, to J. Lee Rankin, the FBI advised the Warren Commission of the circumstances of the omission of the information relating to Special Agent Hosty from the December 23, 1963 report. That letter explained that entries in the address book which required investigative attention were included in the December 23, 1963 report. The entry regarding Special Agent Hosty did not require investigation, since the FBI quite obviously knew the identity of Special Agent Hosty, knew he had been investigating Oswald, and knew he had given his name, office address, and office telephone number to an acquaintance of Oswald, Mrs. Ruth Palne.

The February 27, 1964 letter to J. Lee Rankin and its attachments, the affidavits of Special Agents Robert P. Gemberling and John T. Kesler, follow:

FEBRUARY 27, 1964.

Hon. J. LEE RANKIN,
Gen. Counsel, The President's Commission,
200 Maryland Avenue, N.E., Washington, D.C.

DEAR MR. RANKIN: Reference is made to your letter of February 20, 1964, wherein you requested to be advised of the circumstances surrounding the omission of Special Agent James P. Hosty's name and related data as appearing in Lee Harvey Oswald's address book in our report of Special Agent Robert P. Gemberling dated December 23, 1963, at Dallas, Texas, in the Oswald case. You indicated it would assist the Commission in appraising the significance of this matter if it knew the names of the agents, including supervisors, who prepared this portion of the report or made any decision to omit information from the report.

You indicated also that you would like a full explanation.

For your information, I have determined that Special Agent Robert P. Gemberling made the decision as to what information should be included in his report of December 23, 1963. I also determined that Special Agent John T. Kesler had responsibility for reviewing photographic copies of the pages of Lee Harvey Oswald's address book to determine which items needed investigative attention. Such items were set forth as investigative leads to be covered and it was such lead material that was incorporated in Special Agent Gemberling's report of December 23, 1963.

I am enclosing herewith affidavits executed by Special Agents Robert P. Gemberling and John T. Kesler wherein each sets forth his explanation regarding his handling of Lee Harvey Oswald's address book.

I want you to know that I feel our reporting procedures in this matter are completely logical and sound. This Bureau never purported that Special Agent Gemberling's report of December 23, 1963, contained the complete listing of Lee Harvey Oswald's address book and, as you know, additional items in Oswald's address book not previously reported were furnished to the Commission in the report of Special Agent Robert P. Gemberling dated February 11, 1964, at Dallas, Texas.

This Bureau from the beginning of this investigation has developed and reported all available and relevant facts and it will continue to do so.

I trust that this letter and the enclosures thereto will satisfy the requirements of the Commission.

Sincerely yours,

Enclosures (2).

AFFIDAVIT

I, ROBERT P. GEMBERLING, being duly sworn, depose as follows:

In the performance of my duties as a Special Agent of the Federal Bureau of Investigation, U.S. Department of Justice, I have been acting as a coordinator in connection with the investigation into the assassination of President JOHN FITZGERALD KENNEDY on November 22, 1963, at Dallas, Texas.

In connection with this assignment the following information is set forth with respect to my instructions and the subsequent handling of the contents of the address book of LEE HARVEY OSWALD.

On approximately December 14, 1963, I instructed Special Agent JOHN T. KESLER of the Houston FBI Office, who was on special assignment at Dallas, to review photographs of the pages of OSWALD's address book for leads. He was instructed to extract all names and telephone numbers, the identities of which were unknown, together with any other lead information, and to prepare a memorandum for use in setting out such leads.

In connection with this review of the contents of OSWALD's address book, Special Agent JOHN T. KESLER prepared a thirty-page memorandum on Multilith, the first page of which was on office memorandum form. The information appearing in this address book :

"Nov. 1, 1963
FBI Agent (RI 11211)
JAMES P. HOSTY
MU 8605
1114 Commerce St.
Dallas"

was not included in this thirty-page memorandum inasmuch as the identity of Special Agent HOSTY was known to both Special Agent KESLER and myself and was not lead information .

In connection with the preparation of my report dated December 23, 1963, it was my decision to have page one of Special Agent KESLER's memorandum retyped on plain Multilith in order that the retyped page one and the subsequent 29 pages of his memorandum could be used as an insert in my report. This was done solely to avoid necessity for retyping the contents of the entire memorandum for a report. It was recognized that as a result of setting out of leads based on Special Agent KESLER's memorandum that results of investigation pertaining to such leads would be forthcoming and it was considered feasible to have the contents of the address book on which leads were based included in a report in order that when the subsequent results of the leads were reported, such basis would have been previously set forth in a report. No other Agent or supervisory personnel was involved in this decision.

In this connection it should be noted that pages 672 through 701 of my report of December 23, 1963, contain the contents of Special Agent KESLER's memorandum and that pages 673 through 701 bear the typewritten page numbers of Special Agent KESLER's original memorandum.

I had no discussion with Special Agent KESLER concerning the inclusion or exclusion of the data pertaining to Special Agent HOSTY in OSWALD's address book, but Special Agent KESLER was merely following my instructions to extract information which was lead material.

It is pointed out that a report of Special Agent WARREN C. DE BRUEYS at Dallas, Texas, dated December 2, 1963, reflects that Special Agent HOSTY interviewed Mrs. RUTH PAINE at Irving, Texas, on November 1, 1963, and November 5, 1963. Also, the report of Special Agent WARREN C. DE BRUEYS dated December 8, 1963, on page 389 there is set forth the contents of a letter from OSWALD to the Russian Embassy in Washington, D.C., dated November 9, 1963, in which letter OSWALD made reference to Special Agent HOSTY as "Agent JAMES P. HASTY" and his visit of November 1, 1963.

The additional contents of OSWALD's address book which had not previously been reported were included in my report of February 11, 1964, on pages 279 to 283, and it should be noted that none of the information appearing on these pages was lead information.

At no time during the course of the preparation of my reports and the coordinating of the investigation in this matter did I intentionally exclude any material from any report. As explained above, the fact that Special Agent HOSTY had conducted investigation at the PAINE residence on November 1 had been previously reported, his name, office telephone number and license number of his vehicle were not lead information, newspapers and other news media had given much publicity to the fact that Special Agent HOSTY's name and office telephone number were in OSWALD's address book, and the fact that it was not included in my report of December 23, 1963, was solely because it was not

lead material and had not been included in the memorandum prepared by Special Agent JOHN T. KESLER for that reason.

ROBERT P. GEMBERLING
Special Agent
Federal Bureau of Investigation

Sworn to and subscribed before me on this 25 day of February, 1964.

MATTEY STEVENS
Notary Public
Dallas County, Texas

AFFIDAVIT

THE STATE OF TEXAS,
County of Harris, ss.

BEFORE ME, the undersigned, a Notary Public in and for said County, State of Texas, on this day personally appeared John Thomas Kesler, to me well known, and who, after being by me duly sworn, deposes and says that:

In the performance of my duties as a Special Agent of the Federal Bureau of Investigation, U.S. Department of Justice, I was assigned on special assignment to the Dallas office in connection with the investigation of the assassination of President John Fitzgerald Kennedy on November 22, 1963, at Dallas, Texas.

In connection with this assignment on approximately December 14, 1963, I was instructed by Special Agent Robert P. Gemberling, who was coordinating the investigation, to review photographs of the pages of Lee Harvey Oswald's address book for leads. In connection with this review I prepared a thirty page memorandum on multilith, the first page of which was on office memorandum form. I thereafter used this memorandum for purposes of setting out leads to identify individuals and telephone numbers which were previously unknown in the investigation. In the preparation of this memorandum I did not include data from the address book which was not lead material. I did not include the information appearing in this address book with respect to Special Agent Hosty's name, office telephone number and automobile license number because the identity of Special Agent Hosty was known to me and this was not lead material. I had no discussion with Special Agent Gemberling or anyone else with respect to the exclusion or inclusion of Special Agent Hosty's name in my memorandum.

At the time I prepared the memorandum I did not know that same would be included in a subsequent report.

JOHN THOMAS KESLER.

Subscribed and sworn to before me, this 25th day of February, A.D. 1964.

KATHLEEN HEINRATT.

Notary Public in and for Harris County, Tex.

RESPONSE TO QUESTION 2 OF SUBCOMMITTEE LETTER OF OCTOBER 29, 1975

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,

Washington, November 11, 1975.

Re: Agreement by which FBI furnishes threat information to the United States Secret Service.

To: Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary.

By letter of October 29, 1975, the Honorable Don Edwards, Chairman of the above-captioned Subcommittee, requested to be furnished certain information to augment the record regarding the testimony of FBI Deputy Associate Director James B. Adams on October 21, 1975.

Mr. Edwards asked that readily available information be immediately furnished to the Subcommittee without waiting for a compilation of a response to each question.

Item Number 2 of Mr. Edwards' letter requested "agreement (Guidelines) by which FBI furnishes information to the Secret Service regarding individual or group threats to the Executive."

In response to that request, there follows a copy of the "Agreement Between the Federal Bureau of Investigation and the United States Secret Service Concerning Protective Responsibilities." This agreement is reviewed periodically and updated. This latest revision was made in July, 1973.

"AGREEMENT BETWEEN THE FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES SECRET SERVICE CONCERNING PROTECTIVE RESPONSIBILITIES

"PURPOSE OF AGREEMENT

"The Federal Bureau of Investigation (FBI) originates, and receives from other sources, large numbers of reports on individuals and organizations. One purpose of this agreement is to define that portion of the information on file with, or received or originated by, the FBI which the United States Secret Service (USSS) desires to receive in connection with its protective responsibilities.

"The USSS has statutory authority to protect, or to engage in certain activities to protect, the President and certain other persons. (Certain other persons, as used in this agreement, refers to those persons protected by the Secret Service under Title 18, U. S. Code, Section 3056.) The authority of the USSS to protect the President or certain other persons is construed to authorize it to investigate organizations or individuals and to interview individuals who might constitute a threat to the President or certain other persons. The FBI has statutory authority to investigate assault, killing or kidnaping and attempts or conspiracies to kill or kidnap the President and other designated individuals.

"The FBI will make available to the USSS information it may request or information which by its nature reveals a definite or possible threat to the safety of the President and certain other persons.

"A second purpose of this agreement is to insure the most effective protection for the President and certain other persons by establishing a clear division of responsibility between the FBI and the USSS. Such division will also avoid compromising investigations or sources and needless duplication of effort.

"II. GENERAL RESPONSIBILITIES

"The USSS is charged by Title 18, U. S. Code, Section 3056, with the responsibility of protecting the person of the President of the United States, the members of his immediate family, the President-elect, the Vice President or other officer in the order of succession to the office of President, and the Vice President-elect; protecting the person of a former President and his wife during his lifetime and the person of a widow of a former President until her death or remarriage, and minor children of a former President until they reach 16 years of age, unless such protection is declined; protecting persons who are determined from time to time by the Secretary of the Treasury, after consultation with the Advisory Committee, as being major Presidential and Vice Presidential candidates who should receive such protection (unless the candidate has declined such protection); protecting the person of a visiting head of a foreign state or foreign government and, at the direction of the President, other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad (unless such persons decline protection).

"The Executive Protective Service, under the control of the Director, USSS, is charged by Title 3, U. S. Code, Section 202, with protection of the Executive Mansion and grounds in the District of Columbia; any building in which Presidential offices are located; foreign diplomatic missions located in the metropolitan area of the District of Columbia; and foreign diplomatic missions located in such other areas in the United States, its territories and possessions, as the President, on a case-by-case basis, may direct.

"The FBI is charged under Title 18, U. S. Code, Section 1751, with investigative jurisdiction over the assault, killing or kidnaping, and attempts or conspiracies to assault, kill or kidnap the President of the United States and other designated individuals.

"The FBI has responsibility for Federal investigations of all violations of Title 18, U. S. Code, Sections 112, 970, 1116-1117 and 1201, relating to the 'Act for the Protection of Foreign Officials and Official Guests in the United States.'

"The FBI has investigative jurisdiction over violations of a wide range of the criminal statutes of the United States including primary jurisdiction over matters affecting the internal security of the United States.

"III. EXCHANGE OF INFORMATION AND COORDINATION OF RESPONSIBILITIES

"The USSS undertakes to identify individuals or groups who because of their propensities or characteristics, may be dangerous to the President of the United States and certain other persons. To assist the USSS in identifying such individuals and groups the FBI agrees to furnish to the USSS, information (other than public source information or information originating with other U.S. agencies) from its files or which may come to its attention which by its nature reveals a danger or possible danger to the President or certain other persons, or which can be construed as falling within the categories of information desired by the USSS as set forth in Section IV of this agreement.

"The FBI will inform the USSS of the identity of individuals or organizations who come to the attention of the FBI as knowingly and willfully advocating, abetting, advising, or teaching the duty, necessity, or propriety of overthrowing or destroying the Government of the United States, or the Government of any state, territory, or possession, or political subdivision therein, by force or violence, or by the assassination of any officer of any such government. The FBI will furnish the USSS with reports on such individuals or organizations as requested. During investigation by the FBI of such individuals or organizations, the FBI will be alert and promptly notify the USSS of any information indicating a possible plot against the person of the President and certain other persons.

"The USSS agrees that it will conduct no investigation of individuals or groups identified or suspected of being threats to the internal security of the United States without notifying the FBI. However, when time for consultation is not available, and an indication of immediate danger exists, the USSS may take such action as is necessary with respect to carrying out its protective responsibilities. Any information obtained by the USSS during such action will be furnished to the FBI as expeditiously as possible.

"The FBI will not conduct investigation of individuals or groups solely for the purpose of establishing whether they constitute a threat to the safety of the President and certain other persons unless there is an indication of a violation of Title 18, U.S. Code, Section 1751, or other statute over which the FBI has jurisdiction.

"It will be the responsibility of the FBI to advise the USSS when investigation is being initiated under Title 18, U.S. Code, Section 1751 and thereafter to furnish the USSS with copies of the FBI investigative reports as they are prepared. It will be the responsibility of the USSS to furnish the FBI any information in its possession or which may come to its attention which reasonably indicates that a violation of Title 18, U.S. Code, Section 1751, has been or is being committed.

"The USSS also agrees to furnish the FBI any information in its possession or which may come to its attention indicating a violation of any other statutes over which the FBI has investigative jurisdiction.

"The FBI, under its responsibility for investigation of violations of Title 18, U.S. Code, Sections 112, 970, 1116-1117, 1201 and 1751 will take cognizance of the protective responsibilities of the Treasury Department under Title 3, U.S. Code, Section 202 and Title 18, U.S. Code, Section 3056 and thus does not limit or interfere with the authority of the Secretary of the Treasury in the discharge of his statutory protective responsibilities. This is not to be construed as vesting concurrent investigative jurisdiction with the Treasury Department with respect to investigations of individuals or organizations engaged in activities affecting the national security including terrorism, treason, sabotage, espionage, counter-espionage, rebellion or insurrection, sedition, seditious conspiracy, neutrality matters, Foreign Agents Registration Act, or any other Statute or Executive Order relating to national security. Any investigations of such groups or individuals for any reasons other than in connection with protective responsibilities must be closely coordinated with and have the concurrence of the FBI in order to minimize interference with national security responsibilities of the FBI.

"IV. INFORMATION TO BE FURNISHED TO THE UNITED STATES SECRET SERVICE BY THE FEDERAL BUREAU OF INVESTIGATION

"A. When an individual or group is referred by the FBI to the USSS, the following information will be furnished to the extent available:

"*Individual.*— Identification data including name or names, addresses, photo-

graph (or statement as to availability of such), physical description, date and place of birth, employment, and marital status.

"Organization.—Name or names, address or addresses, officers, size, purpose or goals of organization, source of financial support, background data and such other relevant information as may be available.

"Reason for referral.—Statement of the class or classes of information described in Section IV B under which the individual or organization belongs.

"Information in FBI files.—A summary, as appropriate, of pertinent portions of any FBI file on an individual or organization referred.

"FBI identification records.—The USSS will make specific requests in each instance where a check of the FBI identification records is desired.

"B. Types of information to be referred :

"1. Information concerning attempts, threats, or conspiracies to injure, kill, or kidnap persons protected by the USSS or other U.S. or foreign officials in the U.S. or abroad.

"2. Information concerning attempts or threats to redress a grievance against any public official by other than legal means, or attempts personally to contact such officials for that purpose.

"3. Information concerning threatening, irrational, or abusive written or oral statements about U.S. Government or foreign officials.

"4. Information concerning civil disturbances, anti-U.S. demonstrations or incidents or demonstrations against foreign diplomatic establishments.

"5. Information concerning illegal bombings or bomb-making; concealment of caches of firearms, explosives, or other implements of war; or other terrorist activity.

"6. Information concerning persons who defect or indicate a desire to defect from the United States and who demonstrate one or more of the following characteristics: (a) Irrational or suicidal behavior or other emotional instability; (b) Strong or violent anti-U.S. sentiment; and (c) A propensity toward violence.

"7. Information concerning persons who may be considered potentially dangerous to individuals protected by the USSS because of their background or activities, including evidence of emotional instability or participation in groups engaging in activities inimical to the United States.

"V. PROVISION OF FEDERAL BUREAU OF INVESTIGATION PERSONNEL TO PROTECT THE PRESIDENT AND OTHER PROTECTED PERSONS

"The USSS may, in accordance with Title 18, U.S. Code, Section 3056 request FBI Agents be detailed to the USSS in order to augment the capacity of the USSS to perform its protective duties. Such requests should be addressed to the Director of the FBI.

"FBI Agents detailed to the USSS are under the direction and exclusive operational control of the Director of the USSS for the period of their assignment. The FBI Agents so detailed may perform an armed or other protective function.

"VI. IMPLEMENTATION OF AGREEMENT

"In order to effect the best possible security of the President and certain other persons and places whose protection is the responsibility of the USSS, the FBI and the USSS will construe the terms of this agreement liberally and will take such steps as are necessary to insure the proper exchange and coordination of information.

"The agreement shall be reviewed annually by representatives of the FBI and the USSS, or at such other times as the FBI or the USSS may request, to insure that the agreement is both practical and productive. Revisions may be made on the authority of the Director of the FBI and the Director of the USSS.

"This agreement supersedes all prior agreements between the FBI and the USSS.

July 10, 1973.

(S) CLARENCE M. KELLEY,

Director, Federal Bureau of Investigation.

July 30, 1973.

(S) JAMES J. ROWLEY,

Director, United States Secret Service".

Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary

There follows a copy of FBI Form FD-376, which is used to forward threat information to the United States Secret Service (USSS). It summarizes the terms of the agreement.

DIRECTOR,
U.S. Secret Service,
Department of the Treasury,
Washington, D.C.

DEAR SIR: The information furnished herewith concerns an individual or organization believed to be covered by the agreement between the FBI and Secret Service concerning protective responsibilities, and to fall within the category or categories checked.

1. Threats or action against persons protected by Secret Service.
2. Attempts or threats to redress grievances.
3. Threatening or abusive statement about U.S. or foreign official.
4. Participation in civil disturbances, anti-U.S. demonstrations or hostile incidents against foreign diplomatic establishments.
5. Illegal bombing, bomb-making or other terrorist activity.
6. Defector from U.S. or indicates desire to defect.
7. Potentially dangerous because of background, emotional instability or activity in groups engaged in activities inimical to U.S.

Photograph has been furnished enclosed is not available.

Very truly yours,

CLARENCE M. KELLEY, *Director.*

Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary

At the time of the assassination of President Kennedy, FBI instructions regarding dissemination of threat information to the USSS were not as specific or as far reaching. The then existing instructions, as they were contained in the "FBI Handbook for Special Agents," are set forth on page 432 of the "Report of the President's Commission on the Assassination of President Kennedy," a copy of which follows:

Handbook, which is in the possession of every Bureau special agent, provided:

Threats against the President of the U.S., members of his immediate family, the President-elect, and the Vice-President.

Investigation of threats against the President of the United States, members of his immediate family, the President-Elect, and the Vice-President is within the exclusive jurisdiction of the U.S. Secret Service. Any information indicating the possibility of an attempt against the person or safety of the President, members of the immediate family of the President, the President-Elect or the Vice-President must be referred immediately by the most expeditious means of communication to the nearest office of the U.S. Secret Service. Advise the Bureau at the same time by teletype of the information so furnished to the Secret Service and the fact that it has been so disseminated. The above action should be taken and no evaluation of the information should be attempted. When the threat is in the form of a written communication, give a copy to local Secret Service and forward the original to the Bureau where it will be made available to Secret Service headquarters in Washington. The referral of the copy to local Secret Service should not delay the immediate referral of the information by the fastest available means of communication to Secret Service locally.

The State Department advised the Secret Service of all crank and threat letter mail or crank visitors and furnished reports concerning any assassination or attempted assassination of a ruler or other major official anywhere in the world. The several military intelligence agencies reported crank mail and similar threats involving the President. According to Special Agent in Charge Bouek, the Secret Service had no standard procedure for the systematic review of its requests for and receipt of information from other Federal agencies.

The Commission believes that the facilities and procedures of the Protective Research Section of the Secret Service prior to November 22, 1963, were inadequate. Its efforts appear to have been too largely directed at the "crank" threat. Although the Service recognized that its advance preventive measures must encompass more than these most obvious dangers, it made little effort to identify factors in the activities of an individual or an organized group, other than specific threats, which suggested a source of danger against which timely precautions could be taken. Except for its special "trip index" file of 400 names, none of the cases in the PRS general files was available for systematic review on a geographic basis when the President planned a particular trip.

Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary

Briefly, any information indicating the possibility of an attempt against the person or safety of the President, members of the immediate family of the President, the President-Elect, or the Vice-President, was to be referred immediately to the nearest office of the USSS.

On December 26, 1963, the FBI on its own initiative issued new instructions to its Agents regarding dissemination of threat information to the USSS. These broadened instructions, which are set forth on pages 461 and 462 of the "Report of the President's Commission on the Assassination of President Kennedy," formed the basis for each of the future agreements between the FBI and USSS. They required FBI Agents to report immediately information concerning subversives, ultrarightists, racists, and fascists:

- (a) Who possess emotional instability or irrational behavior,
- (b) Who have made threats of bodily harm against officials or employees of Federal, state, or local governments, or officials of a foreign government,
- (c) Who express or have expressed strong or violent anti-United States sentiments and who have been involved in bombing or bomb-making or whose past conduct indicates tendencies toward violence, and
- (d) Whose prior acts or statements depict propensity for violence and hatred against organized government.

RESPONSE TO QUESTION 3 OF SUBCOMMITTEE LETTER OF OCTOBER 29, 1975

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,
Washington, D.C., November 26, 1975.

House Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary.

Reference is made to the October 29, 1975, request by the Subcommittee for certain documents.

Question three requested the Oswald file of 69 documents which existed at the time of deliberations of the Warren Commission, including a designation of those documents reviewed by the Commission.

Enclosed herewith is a copy of a letter from the then Director of the Federal Bureau of Investigation (FBI), J. Edgar Hoover, to Mr. J. Lee Rankin, General Counsel, The President's Commission, dated May 4, 1964, which identifies the 69 documents in the FBI Headquarters' file concerning Lee Harvey Oswald prior to the assassination of the late President John F. Kennedy.

It is noted this letter is set forth as Commission Exhibit 834, p804-813, Volume XVII, in the "Hearings Before The President's Commission On The Assassination of President Kennedy."

Enclosure.

MAY 4, 1964.

HON. J. LEE RANKIN,
General Counsel, The President's Commission,
200 Maryland Avenue, N.E., Washington, D.C.

DEAR MR. RANKIN: Reference is made to the discussion between staff members of the Commission and Mr. A. H. Belmont of this Bureau, May 4, 1964.

In accordance with this discussion, there are listed below the contents of the FBI headquarters file concerning Lee Harvey Oswald up to the time of the assassination of the late President John F. Kennedy on November 22, 1963:

1. A newspaper clipping from the "Corpus Christi Times," dated October 23, 1959, indicating another American citizen had defected to the Soviet Union.
2. A United Press Release dated October 31, 1959, at Moscow advising that Lee Harvey Oswald had gone to Russia and had applied to renounce his American citizenship and become a Soviet citizen for "purely political reasons."
3. A memorandum dated October 31, 1959, from E. B. Reddy to A. H. Belmont reporting that a check of this Bureau's files disclosed no information identified with Lee Harvey Oswald. It was noted a military service fingerprint card was located in the files of the Identification Division which appeared to relate to Oswald.
4. A State Department Telegram classified "Confidential" dated October 31, 1959, from Moscow to the Secretary of State reporting that Oswald appeared at the American Embassy in Moscow, to renounce his American citizenship.

5. A copy of an Office of Naval Intelligence memorandum dated November 2, 1959, containing the results of a check of the U.S. Marine Corps file regarding Oswald.

6. A Navy Department communication classified "Confidential" from Moscow to the Chief of Naval Operations dated November 3, 1959, advising of Oswald's request for Soviet citizenship.

7. A Navy Department communication classified "Confidential" from the Chief of Naval Operations to the Naval Attache in Moscow dated November 4, 1959, furnishing background information regarding Oswald.

8. A memorandum from W. A. Branigan to A. H. Belmont dated November 4, 1959 summarizing agency checks regarding Oswald and recommending that no further action was warranted by this Bureau concerning Oswald at that time. It was also recommended that a stop be placed against the fingerprints of Oswald in the files of the Identification Division should Oswald re-enter the U.S. under any other name.

9. A copy of a State Department Despatch from the American Embassy, Moscow, to the Department of State, Washington, D.C., dated November 2, 1959, classified "Confidential," which set forth results of Oswald's contacts with the American Embassy in Moscow.

10. A copy of a telegram classified "Confidential" from the American Embassy, Moscow, to the Secretary of State dated November 9, 1959, advising of efforts to relay a personal message from John Pic, half brother of Lee Harvey Oswald, to Oswald.

11. A copy of a telegram classified "Confidential" from the American Embassy, Tokyo, Japan, to the Secretary of State dated November 9, 1959, setting forth results of an interview with John E. Pic regarding Lee Harvey Oswald.

12. A copy of the Identification Record Number 327 925D regarding Lee Harvey Oswald. This record disclosed Oswald was fingerprinted by the U.S. Marine Corps on October 24, 1956.

13. A copy of an airtel from the New York office to this Bureau dated May 23, 1960, captioned "Funds Transmitted to Residents of Russia, Internal Security—R," which sets forth results of an interview with Marguerite C. Oswald regarding Oswald's plans to attend the Albert Schweitzer College in Switzerland.

14. A letter from this Bureau to the Department of State dated June 3, 1960, furnishing the State Department data in the possession of the FBI concerning Lee Harvey Oswald and requesting the State Department to furnish this Bureau any information it may have concerning Oswald.

15. A letter to this Bureau from the Legal Attache in Paris dated July 27, 1960, setting forth results of his inquiries through his sources to locate Lee Harvey Oswald.

16. A letter to this Bureau from the Legal Attache in Paris dated September 27, 1960, setting forth results of his efforts to determine if Oswald was enrolled in the Albert Schweitzer College in Switzerland.

17. A letter to this Bureau from the Legal Attache in Paris dated October 12, 1960, advising that information from his sources indicated Oswald was not in attendance at the Albert Schweitzer College in Churwalden, Switzerland.

18. A letter to this Bureau from the Legal Attache in Paris dated November 3, 1960, which set forth additional data developed from officials of the Albert Schweitzer College regarding Lee Harvey Oswald.

19. A letter to this Bureau from the Office of Naval Intelligence dated November 15, 1960, advising that Lee Harvey Oswald was given an undesirable discharge from the U.S. Marine Corps Reserve on August 17, 1960.

20. A letter from this Bureau to the State Department dated February 27, 1961, advising the State Department that Oswald had not shown up at the Albert Schweitzer College in Switzerland and also advising that Oswald had been given an undesirable discharge from the U.S. Marine Corps Reserve.

21. A letter from the Washington Field Office to this Bureau dated May 23, 1961, setting forth results of a review of the files of the Passport Office, Department of State, concerning Oswald.

22. A letter from the Department of State to this Bureau dated May 25, 1961, advising that the State Department possessed no information which indicated that Oswald had renounced his nationality of the U.S. and that if he had not expatriated himself in any way, the American Embassy was prepared to furnish Oswald a passport for travel to the U.S.

23. The report of Special Agent (SA) John W. Fain dated July 3, 1961, Dallas Texas, which set forth results of investigation of Oswald.

24. A routing slip from the Legal Attache, Paris, to this Bureau dated July 28, 1961, advising that the Leal Attache had informed one of his sources as to the present status of Lee Harvey Oswald.

25. A letter from the Washington Field Office to this Bureau dated September 1, 1961, which set forth results of a review of the records of the Passport Office regarding Oswald.

26. A copy of a State Department name check regarding Oswald's wife, Marina Nicholaevna Oswald, dated September 12, 1961. This Bureau responded to such name check "no investigation conducted by FBI pertinent to your inquiry." We also referred State Department to date previously disseminated to the State Department on July 13, 1961, regarding Lee Harvey Oswald. (Report of SA John W. Fain dated July 3, 1961, at Dallas.)

27. A letter from the Dallas office to this Bureau dated September 29, 1961, setting forth results of inquiries in Dallas made in an effort to obtain data regarding the status of Lee Harvey Oswald in Russia.

28. A letter from the Dallas office to this Bureau dated November 20, 1961, setting forth results of an interview with Marguerite C. Oswald, subject's mother, regarding plans of Oswald to return to the U.S.

29. A copy of Identification Division Record Number 327 925D regarding Oswald.

30. A letter from the Washington Field Office to this Bureau dated February 19, 1962, which set forth results of a review of the records of the Passport Office regarding Oswald.

31. A copy of a communication classified "Confidential" from the Director of Naval Intelligence to the Naval Attache in Moscow dated March 3, 1962, which set forth information in Office of Naval Intelligence files regarding Oswald.

32. A copy of a communication from the Office of Naval Intelligence to the Department of State dated March 3, 1962, which enclosed results of an interview of John Edward Pie by the Department of the Air Force on February 12 and 16, 1962.

33. A letter from the Office of Naval Intelligence to the Bureau dated April 26, 1962, enclosing a copy of a letter Oswald sent to Brigadier General R. McC. Tompkins, U.S. Marine Corps, dated March 22, 1962. In this letter, Oswald indicated that General Tompkins should consider his letter a request by Oswald for a full review of his case.

34. A letter from the Washington Field Office to this Bureau dated May 11, 1962, which set forth results of a check of State Department files regarding Oswald.

35. A letter from this Bureau to the Dallas office dated May 31, 1962, advising that Oswald planned to return to the U.S. and instructing the Dallas office to be alert for his arrival in this country and thereafter to interview him to determine whether Oswald was recruited by Soviet intelligence or made any deals with the Soviets in order to obtain permission to return to the U.S.

36. A letter to this Bureau from the State Department classified "Confidential" dated May 17, 1962, entitled "American Defectors: Status of in the USSR." Included in the list of defectors named was Lee Oswald.

37. An airtel to this Bureau from the Washington Field Office dated June 6, 1962, which set forth results of a check of State Department records regarding Oswald.

38. An airtel from the New York office to this Bureau dated June 12, 1962, which set forth results of a check of the records of the Immigration and Naturalization Service (INS), regarding Oswald and which enclosed two newspaper clippings regarding Oswald.

39. An airtel to the New York office from this Bureau dated June 14, 1962, advising the New York office as well as the Washington Field, Dallas and Newark offices to be alert for Oswald's arrival and destination in the U.S.

40. A letter from the New York office to this Bureau dated June 26, 1962, which set forth results of a check with INS concerning Oswald and a check of the records of the Holland America Line regarding Oswald and his family.

41. A report of SA John W. Fain dated July 10, 1962, at Dallas, which set forth results of investigation regarding Oswald and his wife, Marina. This report also set forth results of the interview of Oswald on June 26, 1962, by SAs John W. Fain and B. Tom Carter.

42. A letter from the Dallas office to this Bureau dated July 25, 1962, entitled "Marina Nikolaevna Oswald," which placed the FBI investigation of Marina

Oswald in a pending inactive status. It was pointed out that it was felt her activities could be sufficiently followed at that time in connection with the case on her husband, Lee Harvey Oswald.

43. A report of SA John W. Fain dated August 30, 1962, at Dallas, Texas, set forth results of additional investigation of Oswald. This report also set forth the results of the interview of Oswald on August 16, 1962, by SAs John W. Fain and Arnold J. Brown.

44. A letter from the Dallas office to this Bureau dated March 25, 1963, advising that information had been received from a confidential source on September 28, 1962, that Oswald's name was contained on a list of names and addresses of subscribers maintained by "The Worker," an east coast communist newspaper.

45. A copy of the Identification Division Record Number 327 925D regarding Oswald which set forth the fact he had been arrested in New Orleans, Louisiana, on August 9, 1963.

46. A newspaper clipping of the "Times Pleayune," of New Orleans, Louisiana, dated August 13, 1963, which reported that Oswald had been arrested in New Orleans for passing out Fair Play for Cuba Committee (FPC) literature.

47. A letter from this Bureau to the New Orleans office dated August 21, 1963, instructing the New Orleans and Dallas offices to conduct additional investigation of Lee Harvey Oswald as a result of his distribution of literature in New Orleans on August 9, 1963.

48. An airtel from the Dallas office to this Bureau dated August 23, 1963, which set forth results of its investigation to establish the residence and employment of Oswald in New Orleans.

49. A letter from the Dallas office to this Bureau dated September 10, 1963, which changed the office of origin of our investigation concerning Lee Harvey Oswald from Dallas to New Orleans.

50. A letter from the Dallas office to this Bureau dated September 10, 1963, which changed the office of origin in our investigation entitled "Marina Nikolaevna Oswald" from Dallas to New Orleans.

51. A copy of the Identification Record Number 327 925D regarding Lee Harvey Oswald.

52. The report of SA James P. Hosty dated September 10, 1963, at Dallas which set forth results of investigation of Oswald. This report indicated that Oswald was then residing and working in New Orleans, Louisiana.

53. A letter from this Bureau to the Dallas office dated September 25, 1963, furnishing an Appendix page regarding the FPC.

54. An airtel from the New Orleans office to this Bureau dated September 12, 1963, requesting that the New York office furnish an appropriate characterization of Corliss Lamont. It was noted that Oswald, in addition to disseminating material from the FPC in New Orleans, also passed out booklets entitled "The Crime Against Cuba" by Corliss Lamont.

55. An airtel from the New Orleans office to this Bureau dated September 24, 1963, which enclosed copies of a memorandum dated September 24, 1963, concerning Oswald which set forth data surrounding Oswald's arrest in New Orleans on August 9, 1963. Such data was obtained from the New Orleans Police Department.

56. A copy of the Identification Division Record Number 327 925D concerning Oswald.

57. An airtel from Dallas to this Bureau dated October 22, 1963, reporting that INS in Dallas had received a communication classified "Secret" from Mexico City, which indicated that an individual, possibly identical with Lee Harvey Oswald, was in contact with the Soviet Embassy in Mexico City.

58. Release dated October 10, 1963, which was sent to the FBI, Department of State and Department of the Navy classified "Secret" which reported that an American male who identified himself as Lee Oswald had contacted the Soviet Embassy, Mexico City, on October 1, 1963. The Release indicated Oswald may be identical to Lee Henry Oswald, born October 18, 1939, in New Orleans, Louisiana.

59. An airtel from the New Orleans office to this Bureau dated October 25, 1963, advising that Oswald left a forwarding address in New Orleans on September 20, 1963, showing his new address to be 2515 West Fifth Avenue, Irving, Texas.

60. An airtel from the New Orleans office to this Bureau dated October 24, 1963, requesting the Dallas office to locate subject and his wife.

61. A cablegram to this Bureau from our Legal Attache in Mexico dated October 18, 1963, which furnished information from third agency classified "Secret—Not To Be Further Disseminated," reporting that Lee Oswald had contacted

Soviet Vice Consul Valeriy V. Kostikov of the Soviet Embassy, Mexico City, Mexico, on September 28, 1963. Our Legal Attache indicated he was following this matter with CIA and was attempting to establish Oswald's entry into Mexico and his current whereabouts.

62. A cablegram to the Legal Attache, Mexico, from this Bureau dated October 22, 1963, furnishing a brief summary of data in the files of this Bureau concerning Oswald.

63. The report of SA Milton R. Kaack dated October 31, 1963, at New Orleans, Louisiana, which set forth results of additional investigation regarding Oswald.

64. An airtel from the Dallas office to this Bureau dated October 30, 1963, wherein SA James P. Mosty, Jr., reported a pretext interview in the vicinity of 2515 West Fifth Street, Irving, Texas. Such interview revealed Marina Oswald was residing with Mrs. Michael R. Palne and that Lee Harvey Oswald visited Marina at this address but was not living there.

65. An airtel from the Little Rock office to this Bureau dated November 5, 1963, which furnished a change of address regarding Robert Oswald, brother of Lee Harvey Oswald.

66. A letter from the New Orleans office to this Bureau dated November 15, 1963, entitled "Marina Nikolaevna Oswald" which changed the office of origin from New Orleans to Dallas.

67. An airtel from the Dallas office to this Bureau dated November 4, 1963, reporting results of the contact with Mrs. Michael R. Palne on November 1, 1963.

68. A letter from the New Orleans office to this Bureau dated November 19, 1963, changing the office of origin of the Lee Harvey Oswald investigation from New Orleans to Dallas.

69. An airtel from the Washington Field Office to this Bureau dated November 19, 1963, reporting that an informant advised on November 18, 1963, that Lee Harvey Oswald had been in contact with the Soviet Embassy, Mexico City, Mexico.

Sincerely yours,

J. EDGAR HOOVER.

DEPARTMENT OF JUSTICE,
Washington, D.C., September 27, 1976.

Hon. DON EDWARDS,

Chairman, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In response to the request of Congressman Dodd I attach a memorandum prepared by the Federal Bureau of Investigation concerning the Lee Harvey Oswald file. This memorandum is a supplement to the FBI's response of November 26, 1975 to the Subcommittee's request of October 29, 1975.

Sincerely,

LAWRENCE A. CALLAGHAN,
Special Assistant to the
Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,
Washington, D.C., September 17, 1976.

House Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary.

Reference is made to the October 29, 1975, request by the Subcommittee as it pertained to the Lee Harvey Oswald file of 69 documents which existed at the time of the deliberations of the Warren Commission and as to which of these documents were reviewed by the Commission and which were not so reviewed. Further reference is made to the response of the Federal Bureau of Investigation (FBI), dated November 26, 1975, which enclosed a copy of a letter dated May 4, 1964, from the then Director of the FBI, J. Edgar Hoover, to Mr. J. Lee Rankin, General Counsel, the President's Commission, identifying the 69 documents constituting the Oswald file prior to the assassination of President John F. Kennedy.

As a supplement to the above-referenced response of the FBI, dated November 26, 1975, the following information is being furnished:

Records of the FBI disclose that the aforementioned letter to Mr. Rankin was prepared following a discussion between former assistant to the Director

Alan H. Belmont and staff members of the Warren Commission regarding the contents of the Oswald file up to the date of President Kennedy's assassination. When advised by Mr. Belmont that all pertinent information had previously been furnished to the Commission, it was agreed that a letter from the FBI should be directed to Mr. Rankin describing the 69 documents contained in Oswald's file, following which a Commission staff member would review the file for an item by item comparison with the documents listed in the letter.

On May 4, 1961, Mr. Samuel Stern of the Commission made such a review and on the same date Mr. Belmont introduced Mr. Hoover's letter to Mr. Rankin before the Commission. Mr. Belmont offered to make Oswald's file available for review by the full Commission; however, that option was not exercised.

Records of the FBI further disclose that the pertinent information concerning Oswald as furnished to the Commission consisted of the following reports which incorporated the results of the FBI investigation of Oswald up to the date of President Kennedy's assassination:

Report of Special Agent (SA) John W. Fain, dated July 3, 1961, at Dallas, Texas.

Report of SA John W. Fain, dated July 10, 1962, at Dallas, Texas.

Report of SA John W. Fain, dated August 30, 1962, at Dallas, Texas.

Report of SA James P. Hosty, dated September 10, 1963, at Dallas, Texas.

Report of SA Milton R. Kaack, dated October 31, 1963, at New Orleans, Louisiana.

RESPONSE TO QUESTION 4 OF SUBCOMMITTEE LETTER OF OCTOBER 29, 1975

(4) Internal rules of the FBI relating to the procedures for reporting misconduct of personnel are located in the Bureau's Manual of Rules and Regulations, Part I, Section 9, captioned "Disciplinary Matters." Basically, the rules require that any information pertaining to allegations of misconduct or improper performance of duty coming to the attention of any Bureau employee be promptly and fully reported to the Bureau. The method of communication to be utilized in advising the Bureau will depend upon the circumstances of each case but there must be no delay in notification. The rules further require that any investigation necessary to develop complete essential facts regarding any allegation against Bureau employees must be promptly and thoroughly handled. Division heads must advise the Bureau of the facts pertaining to the misconduct or improper performance, obtain written explanations from the employee involved and submit this information to FBIHQ along with his recommendation for administrative action. There has been no substantive change in this policy between 1963 and 1975. It is also noted that the Handbook for FBI Employees (non-investigative personnel) page 32 also contains the statement that any misconduct, neglect of duty or allegations of such nature must be promptly reported to the Bureau by any employees learning of it. Above mentioned regulations are available for review if desired.

RESPONSE TO QUESTION 5 OF SUBCOMMITTEE LETTER OF OCTOBER 29, 1975

(5) In connection with the Kennedy assassination 17 Bureau employees (5 Field Investigative Agents, 1 Field Supervisor, 3 Special Agents in Charge, 4 FBIHQ Supervisors, 2 FBIHQ Section Chiefs, 1 Inspector and 1 Assistant Director) were disciplined in December, 1963, for shortcomings in connection with the investigation of Oswald prior to the assassination. The disciplinary action taken was as follows:

(1) A Special Agent in Dallas who had investigative responsibility for the Oswald case was censured and placed on probation for inadequate investigation, failure to interview Oswald's wife until after the assassination, delayed reporting, failure to place Oswald on the Security Index, and for holding investigation in abeyance after being in receipt of information that Oswald had been in contact with the Soviet Embassy in Mexico City.

(2) The Field Supervisor in Dallas with supervisory responsibility for this matter was censured and placed on probation for failing to insure that the case was more fully investigated and reported, for not placing Oswald on the Security Index and for concurring with decision to hold investigation in abeyance.

(3) A Special Agent in Dallas was censured for failing to have the Oswald

case reopened after being informed that Oswald subscribed to "The Worker," an East Coast Communist newspaper, 9/28/62.

(4) A Special Agent in New York was censured for failing to promptly disseminate Fair Play for Cuba information to Dallas concerning Oswald.

(5) Another Special Agent in New York was censured for failing to insure that Fair Play for Cuba information concerning Oswald was more promptly disseminated to Dallas.

(6) A Special Agent in New Orleans was censured for delayed reporting and failing to have Oswald placed on the Security Index.

(7 and 8) Two Special Agents in Charge who were assigned to Dallas during periods covering the Oswald investigation were censured for their overall responsibility in this matter.

(9) The SAC in New Orleans at that time was censured for failing to insure that there was no delay in reporting this matter and for failing to put Oswald on the Security Index.

(10) An FBIHQ Supervisor was censured and placed on probation for failing to instruct the field to conduct background investigation concerning Oswald upon his return from Russia, failing to have Oswald's wife interviewed, failing to put Oswald on Security Index and for not reopening Bureau file to follow on this matter.

(11) Another FBIHQ Supervisor was censured and placed on probation for failing to take action on a teletype advising that Oswald had been in contact with the Soviet Embassy in Mexico City, failing to completely review file until after the assassination, failing to instruct field to press more vigorously after obtaining knowledge of contact with Soviet Embassy, Mexico, and for failure to have Oswald placed on Security Index.

(12) Another FBIHQ Supervisor was censured for failure to place Oswald on the Security Index in spite of considerable Fair Play for Cuba committee activity and previous Soviet defection background.

(13) An FBIHQ Supervisor was censured for delay in handling a cablegram from Mexico City and for not putting Oswald on the Security Index.

(14, 15, 16 and 17) Two Section Chiefs, an Inspector, an Assistant Director, all at FBIHQ, were censured for overall responsibility in this matter.

In September, 1964, as a result of the Warren Commission Report, additional administrative action was imposed on 8 of the above mentioned employees who were previously disciplined in 1963. That disciplinary action was as follows:

(1) The case Agent in Dallas was censured, placed on probation and suspended for 30 days for inadequate investigation, failure to interview Oswald's wife until after the assassination, delayed reporting, failure to place Oswald on the Security Index, and for holding investigation in abeyance after being in receipt of information that Oswald had been in contact with the Soviet Embassy in Mexico City. It is noted this Special Agent was also ordered transferred from Dallas to a non-preference office 9/28/64.

(2) The Supervisor of this matter in Dallas was censured, placed on probation and transferred for failing to insure the case was more fully investigated and reported, for not placing Oswald on the Security Index, and for concurring in decision to hold investigation in abeyance. He was also removed from supervisory duties in April, 1964, as a result of his derelictions in the Oswald case.

(3) A Special Agent in Dallas was censured and placed on probation for failing to have the Oswald case reopened after knowledge that he subscribed to "The Worker," an East Coast Communist newspaper, 9/28/62.

(4) An FBIHQ Supervisor was censured, placed on probation and transferred to the field for failing to instruct the field to conduct background investigation upon Oswald's return from Russia, failing to have Oswald's wife interviewed, failing to put Oswald on the Security Index, and for not reopening Bureau file to follow on this matter.

(5) Another FBIHQ Supervisor was censured, placed on probation, removed from supervisory duty, demoted from GS-14 to GS-13, and transferred to the field for failing to take action on a teletype advising of Oswald's contact with the Soviet Embassy in Mexico City, failing to completely review file, failing to instruct field to press more vigorously after Oswald's contact with Soviet Embassy, Mexico, and failure to have Oswald placed on Security Index.

(6) An FBIHQ Supervisor was censured and placed on probation for failing to place Oswald on Security Index in spite of considerable Fair Play for Cuba activity and previous defection background.

(7) An FBIHQ Supervisor was censured and placed on probation for delay in handling a cablegram from Mexico City and for not putting Oswald on the Security Index.

(8) The SAC in New Orleans was censured and placed on probation for failing to insure that there was no delay in reporting this matter and for failing to place subject on Security Index.

In addition to the above 8, 3 other employees who had not been disciplined as a result of the Oswald case in 1963 were disciplined as follows:

(1) A Special Agent in Dallas was censured and placed on probation for failing to properly handle and supervise this matter in relationship to the submission of evidence to the Bureau.

(2) An Inspector at FBIHQ was censured for not exercising sufficient imagination and foresight to initiate action to have Security Index material disseminated to Secret Service.

(3) An Assistant to the Director at FBIHQ was censured for his overall responsibility in this entire matter.

RESPONSE TO QUESTION 6 OF SUBCOMMITTEE LETTER OF OCTOBER 29, 1975

U. S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,
Washington, D.C., November 24, 1975.

Re Copies of 302 (Report of Interview) or any other reports referring to each FBI contact with Lee Harvey Oswald.

To: Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary.

By letter dated October 29, 1975, the Honorable Don Edwards, Chairman of the supra Subcommittee, requested certain information to augment the record regarding the testimony of FBI Deputy Associate Director James B. Adams on October 21, 1975.

Mr. Edwards requested that readily available information be furnished to the Subcommittee without waiting for a compilation of a response to each question.

In response to item number six of Mr. Edwards' supra letter, a review of the central and Dallas, Texas, FBI files reveals only eight 302s (Interviews) with Lee Harvey Oswald were conducted, on the dates shown below. These interviews were furnished to the Warren Commission and were shown as exhibits. The following is a list of these 302s and where they are found in the Commission report.

Dates and Warren Commission references

June, 26, 1962:

Volume XVII, page 728, exhibit 823.

Volume XXVI, page 26, exhibit 2080.

August 10, 1962:

Volume XVII, page 736, exhibit 824.

Volume XXVI, page 143, exhibit 2758.

August 10, 1963:

Volume XVII, page 758, exhibit 826.

November 22, 1963:

Volume XVII, page 758, exhibit 832.

Report, pages 612-613.

November 23, 1963:

Volume XXIV, pages 20-22, exhibit 1980-1991.

Report, pages 614-618.

November 22, 1963:

Report, pages 619-620.

November 23, 1963:

Volume XXIV, pages 18-20, exhibit 1988.

November 23, 1963:

Report, page 625.

Information on the alleged note Oswald delivered to the Dallas, Texas, FBI Office prior to President Kennedy's assassination, is being handled separately as referred to in item nine of supra letter.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,
Washington, D.C., November 24, 1975.

Re Copies of 302 (Report of Interview) or any other reports referring to each FBI contact with Jack Ruby.

To: Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary.

By letter dated October 20, 1975, the Honorable Don Edwards, Chairman of the supra Subcommittee, requested certain information to augment the record regarding the testimony of FBI Deputy Associate Director James B. Adams on October 21, 1975.

Mr. Edwards requested that readily available information be furnished to the Subcommittee without waiting for a compilation of a response to each question.

In response to item number six of Mr. Edwards' supra letter, a review of the central and Dallas, Texas, FBI files revealed only three 302s (Interviews) with Jack Ruby were conducted, on the dates shown below. These interviews were furnished to the Warren Commission and were shown as exhibits. The following is a list of these 302s and where they are found in the Commission report.

Dates and Warren Commission References

November 24, 1963: Volume XX, pages 37-40, exhibit-Hall 1.

November 25, 1963: Volume XX, pages 41-46, exhibit-Hall 2.

December 21, 1963: Volume XX, pages 47-62, exhibit-Hall 3.

In addition, Ruby was also contacted by an Agent of the Dallas Office on March 11, 1959, in view of his knowledge of the criminal element in Dallas. He was advised of the Bureau's jurisdiction in criminal matters, and he expressed a willingness to furnish information along these lines. He was subsequently contacted on eight other occasions, April 28, 1959, June 5 and 18, 1959, July 2 and 21, 1959, August 6 and 31, 1959, and October 2, 1959, but he furnished no information except for descriptive information on himself and further contacts with him were discontinued. Ruby was never paid any money, and he was never at any time an informant of the FBI.

RESPONSE TO QUESTION 7 OF SUBCOMMITTEE LETTER OF OCTOBER 20, 1975

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,
Washington, D.C., November 25, 1975.

Re Chicago Police Department, report number 55513.

To: Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary.

By letter of October 29, 1975, the Honorable Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, requested certain material and information to augment the record of the testimony before the Subcommittee on October 21, 1975, of James B. Adams, Deputy Associate Director of the FBI. Mr. Edwards requested that readily available information be forwarded immediately without waiting for a compilation of a response to each question.

Item Number 7 of Mr. Edwards' request is as follows: "Chicago Police Department Report #55513 for an offense on or about December 9, 1939 and detective report dated on or about December 8, 1939. Reports involve the shooting of a union official referred to in the testimony of Mr. Adams. Please advise if there is now or ever has been a 'tickler' or other notation on any of the subject files asking that the FBI be notified if any inquiries or requests were made concerning such files."

It is noted that the request is for a check of Chicago Police Department Report Number 55513. The Chicago Police Department advises that it would be impossible to attempt to retrieve a file based on its number, as report numbers are recurrent annually and are not used for indexing purposes. Their Report Number 55113 was located, however, on October 22, 1975, in a packet assembled in response to a November 25, 1963, letter from the Dallas, Texas, Police Depart-

ment. This Report Number 56113 applies to the substance of the inquiry. The detective report is also included in this packet. No "tickler" or other notation was found on any of the files of the Chicago Police Department in this matter asking that the FBI be notified if any inquiries or requests were made concerning the files. Additionally, James McGuire, Director of Records, Chicago Police Department, has advised that he is unaware of any such stop or notation.

No information pertaining to any such "tickler" or notation ever being placed on the Chicago Police Department files pertaining to this matter is known to FBI Headquarters or the Chicago Field Office.

Director McGuire was advised that the FBI had caused Chicago Police Department records to be checked on November 27, 1963, regarding John Martin, Jack Ruby (and Rubenstein), and the murder of Leon Cooke; and no record had been found identifiable with any of them. He stated the reason a record check regarding Martin was negative on November 27, 1963, was that Martin was not arrested and therefore would not have been indexed. Ruby (Rubenstein) and Cooke would not have been indexed since names of witnesses and victims were not indexed in 1939.

**RESPONSES TO QUESTIONS IN EXHIBIT A OF SUBCOMMITTEE LETTER OF
OCTOBER 29, 1975**

Question No. 1. What are the FBI procedures for processing information delivered to a field office in November, 1963?

Answer. The following is the procedure for handling mail received in an FBI office, which includes the procedure for establishing a file:

Mail received by a field office is opened in the Chief Clerk's Office where it is searched through the field office indices to determine if it should be placed in an existing file. If there is an existing file that pertains to the subject matter of the mail, the file number is written on the mail and it is forwarded to a supervisor for review and appropriate routing to the employee responsible for taking the required action. If there is not an existing file on the subject matter being searched, relevant index references will be listed on the mail which is then forwarded to a supervisor who will designate the classification for the mail, indicate action to be taken as well as name of the employee whom he wants to handle the matter. The mail is then forwarded to the Chief Clerk's Office where a file will be opened as necessary. It is given the next sequential case number within the appropriate classification. The original copy is sent to the employee designated to handle the matter and the other copy is maintained in the office file. The Chief Clerk's Office also prepares appropriate index cards and case assignment cards.

Question No. 2. Are files initiated on the basis of a message delivered to such an office?

Answer. Files are not initiated on the basis of a message delivered to a field office. Mail directed to the personal attention of an FBI employee by name is considered to be personal in nature and is not automatically opened in the Chief Clerk's Office. Mail hand carried by any individual to an FBI field office which is accompanied by a request that it be delivered to a named employee would not be processed by the Chief Clerk's Office, but would be delivered to the employee in accordance with the request.

It would then depend on the judgment of the recipient as to whether the message should: 1. be added to an existing file, 2. be designated as the first document in a new file, or 3. require other or no official action at all.

Question No. 3. Would such a message be treated differently if the author was known to the FBI? If so, how?

Answer. The message delivered to a field office for an FBI employee would be given to that employee. The author of the message whether known or not would be immaterial.

Question No. 4. Are FBI procedures for handling messages delivered to field offices any different today than in 1963?

Answer. No. Mail received by a field office today is processed in the same fashion it was in 1963. The procedures are basically explained in the answer to the first question.

Question No. 5. Are field offices authorized to destroy documents without headquarters approval?

Answer. Field offices may not destroy record material without headquarters

approval. The policy on this is no different today than it was in 1963. The disposal of all FBI records is controlled by regulations of the National Archives and Records Service (NARS), General Services Administration. The regulations relating to this is in Title 44, Chapter 33 of the U.S. Code and additional guidelines for the maintenance and destruction of records are included in the Code of Federal Regulations, Title 41, Chapter 101 entitled "Federal Property Management Regulations." The destruction of all record matters has been in accordance with these regulations.

However, until a document is designated for retention by filing, it is not considered a record. Thus, a personal note never designated by the recipient for filing is not considered ever to have become part of FBI record holdings.

Question No. 6. What are FBI regulations regarding unauthorized destruction of documents?

Answer. FD-201 (copy attached) is the employment agreement signed by all employees as they enter on duty in the FBI. This relates to the misuse or unauthorized disclosure of FBI documents. Misuse would imply destruction. Title 44, Chapter 33 of the U.S. Code sets forth regulations regarding the destruction of documents and the destruction of all FBI records have always been in accordance with this statute. Chapter 31 of Title 44 relates to the unlawful removal and destruction of records.

EMPLOYMENT AGREEMENT

As consideration for employment in the Federal Bureau of Investigation (FBI), United States Department of Justice, and as a condition for continued employment, I hereby declare that I intend to be governed by and will comply with the following provisions:

(1) That I am hereby advised and I understand that Federal law such as Title 18, United States Code, Sections 793, 794, and 798; Order of the President of the United States (Executive Order 11652); and regulations issued by the Attorney General of the United States (28 Code of Federal Regulations, Sections 16.21 through 16.26) prohibit loss, misuse, or unauthorized disclosure or production of national security information, other classified information and other nonclassified information in the files of the FBI;

(2) I understand that unauthorized disclosure of information in the files of the FBI or information I may acquire as an employee of the FBI could result in impairment of national security, place human life in jeopardy, or result in the denial of due process to a person or persons who are subjects of an FBI investigation, or prevent the FBI from effectively discharging its responsibilities. I understand the need for this secrecy agreement; therefore, as consideration for employment I agree that I will never divulge, publish, or reveal either, by word or conduct, or by other means disclose to any unauthorized recipient without official written authorization by the Director of the FBI or his delegate, any information from the investigatory files of the FBI or any information relating to material contained in the files, or disclose any information or produce any material acquired as a part of the performance of my official duties or because of my official status. The burden is on me to determine, prior to disclosure, whether information may be disclosed and in this regard I agree to request approval of the Director of the FBI in each such instance by presenting the full text of my proposed disclosure in writing to the Director of the FBI at least thirty (30) days prior to disclosure. I understand that this agreement is not intended to apply to information which has been placed in the public domain or to prevent me from writing or speaking about the FBI but it is intended to prevent disclosure of information where disclosure would be contrary to law, regulation or public policy. I agree the Director of the FBI is in a better position than I to make that determination;

(3) I agree that all information acquired by me in connection with my official duties with the FBI and all official material to which I have access remains the property of the United States of America, and I will surrender upon demand by the Director of the FBI or his delegate, or upon separation from the FBI, any material relating to such information or property in my possession;

(4) That I understand unauthorized disclosure may be a violation of Federal law and prosecuted as a criminal offense and in addition to this agreement may be enforced by means of an injunction or other civil remedy.

I accept the above provisions as conditions for my employment and continued

employment in the FBI. I agree to comply with these provisions both during my employment in the FBI and following termination of such employment.

(Signature)

(Type or print name)

Witnessed and accepted in behalf of the Director, FBI, on -----

-----, 19 ----, by -----

(Signature)

Question No. 7. Has the FBI experienced any cases, other than the Oswald case, where one or more of its personnel may have destroyed or otherwise mishandled a document?

If so: (a) What were circumstances? (b) What were the dispositions? (c) What personnel action was taken?

Answer. Although we have no system of retrieval that would insure infallibility against missing a certain instance, it is the recollection of those experienced in this field that there is no other instance in Bureau history where a case involving the destruction of a document such as in the Oswald case has occurred. We point out, of course, that it is a matter of public record in connection with the Watergate hearings that then Acting Director L. Patrick Gray destroyed pertinent documents relating to that matter. In addition, we have several instances of clerical personnel who have mishandled documents and/or disposed of certain material in order to alleviate their work load. In all recollected instances these employees were given the opportunity to and did resign as a result of their dereliction.

Question No. 8. Has the FBI devised any plans or procedures to further limit the possibility of unauthorized destruction of documents in its possession?

Answer. The FBI regulations regarding the destruction of documents are quite clear and are in accordance with Archival regulations as set forth in Chapter 33, Title 44, U.S. Code and the Code of Federal Regulations, Title 41, Chapter 101. There are no known instances regarding the unauthorized destruction of FBI documents which were part of FBI files and the existing safeguards regarding the possibility of such unauthorized destruction are believed to be adequate.

Question No. 9. What are the procedures for advising the Attorney General of an internal investigation by the FBI of its own personnel?

Answer. Normally, the Attorney General is not apprised of internal investigations by the FBI of its own personnel in matters involving misconduct and/or violations of Bureau rules and regulations. Administrative inquiries are conducted, appropriate investigation carried out, statements obtained and a determination reached within the FBI. Serious matters may be referred to our Inspection Division for additional inquiry and in any instance where investigation develops information which could involve criminal activity the matter is then referred to the Attorney General.

Question No. 10. Are all such investigations routinely referred to the Attorney General regardless of the disposition?

Answer. As pointed out above, all such investigations are not routinely referred to the Attorney General, however, when there is any indication that our employee has violated a law within the jurisdiction of the FBI or the Department of Justice, this is promptly reported to the appropriate agency and/or the Attorney General. When matters involving criminal violations within our jurisdiction, as set forth hereinafter, are brought to our attention they are promptly referred to the appropriate United States Attorney for prosecutive opinion.

Question No. 11. Are the facts and circumstances of an internal investigation of FBI personnel maintained in the personnel file of the individual involved?

Answer. In all instances where administrative action is taken against an employee as a result of an internal investigation, information relating to that matter is maintained in the personnel file of the individual involved. There are circumstances, however, where allegations could be made against an employee in the performance of his or her duties in connection with substantive investigation and that material filed only in the substantive case file. This could occur

when an allegation of misconduct is made by a subject of an investigation concerning the Agent's handling of the substantive case, his conduct during the investigation, the possibility that he denied the subject certain rights, etc. In all such instances, affidavits are obtained from the Agent involved and the complete material is filed in the substantive case file, and a copy is furnished to the appropriate U.S. Attorney which is available to the courts.

Question No. 12. Are separate investigative files initiated at the time of such an incident? (This refers to question No. 11 which is: Are the facts and circumstances of an internal investigation of FBI personnel maintained in the personnel file of the individual involved?)

Answer. Reports of inquiries conducted regarding personnel are maintained in the personnel file. If it involves a violation of a statute for which the FBI has investigative responsibility, a separate case file would be established with a copy placed in the personnel file.

Question No. 13. According to FBI rules, what are the possible personnel actions which can be taken against an employee who violates a rule or procedure of the FBI?

Answer. Except in certain technical work, i.e. fingerprint examinations, the FBI does not have or apply a precise table of penalties for violations of its rules and regulations. The circumstances of each case involving misconduct or violation of rules are judged on their individual merits and disciplinary measures taken range from oral reprimand up to and including dismissal. Specifically, we have in order of ascending severity oral reprimand, letter of censure, letter of censure and probation, letter of censure, probation and suspension, and dismissal.

Question No. 14. Have any matters involving FBI personnel ever been referred to the Attorney General for prosecution or for review for possible prosecution?

(a) If so, what were the nature of the offenses and what action was taken?

Answer. Although we have no retrieval system which would insure including all matters involving FBI personnel which have been referred to the Attorney General for prosecution or for review for possible prosecution, following are some recollected instances where such action has been taken. (1) A Special Agent was accused of falsifying his expense vouchers for his own personal gain. This matter was presented to the local United States Attorney who declined prosecution in lieu of administrative action. The Agent was permitted to retire. (2) A Special Agent was accused of not making full payment to an informant and recording that he had made such payment. He resigned during administrative inquiry. This matter was referred to the local United States Attorney who declined prosecution in view of insufficient evidence. (3) An allegation was received that a Special Agent had accepted a bribe. An administrative inquiry determined that the allegation was without substance and the entire matter was subsequently referred to the Department for review. (4) In another instance a Special Agent was accused of violations of Bureau rules relating to his association with certain members of organized crime, and this matter was referred to the Department of Justice Strike Force Attorneys handling organized crime in that area. (5) A clerical employee was accused of theft of Government property, i.e. taking U.S. Government supplies for his own use. This matter was presented to the local United States Attorney who declined prosecution. The employee resigned. (6) In a recent case we had an admission from a Special Agent that he altered the serial number on a handgun. This matter was referred to the local United States Attorney who declined prosecution. (7) Also, recently in Richmond we had three Special Agents, an Assistant Special Agent in Charge and a Special Agent in Charge accused of the mishandling of a matter involving a wiretap by local police. The matter is currently before a grand jury and is being handled by the U.S. Department of Justice. There are also two recalled instances where the Attorney General was advised by letter of violations of Federal law regarding former FBI personnel. Both involved these former employees having made unauthorized disclosures of certain items and information from Bureau files. Both matters are pending. In addition, in the recent past we have investigated allegations of misconduct and accepting gratuities concerning one of our Special Agents in Charge. The allegations were determined to be without foundation, and we furnished the Attorney General with the results of our inquiry. The Attorney General was also made aware of information pertaining to a charge of violating the income tax laws, i.e. inflating medical and dental expenses, concerning one of our Assistant Special Agents in Charge. This employee retired and was subsequently convicted of this violation and fined.

RESPONSES TO QUESTIONS 1 THROUGH 7 OF LEGAL ISSUES SET FORTH IN EXHIBIT A
OF SUBCOMMITTEE LETTER OF OCTOBER 29, 1975

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., December 4, 1975.

HON. DON EDWARDS,
Chairman, Subcommittee on Civil and Constitutional Rights, Committee on
the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN EDWARDS: This is in further response to your letter to the Attorney General dated October 29, 1975, in which you asked various questions in order to supplement the testimony given by FBI Deputy Associate Director James B. Adams before the Subcommittee on October 21, 1975.

Attached is a memorandum which is responsive to the first five questions which were under the caption *Legal Issues Regarding Violations of FBI Rules*. With regard to questions six and seven, your staff has informed me that the Subcommittee is not concerned with Watergate-related cases which may have involved destruction of tapes or documents. With that in mind the Criminal Division of the Department has informed me that it is unaware of any cases involving destruction of documents where the circumstances are similar to those surrounding the destruction of the Oswald note.

Sincerely,

STEVEN BLACKHURST,
Assistant Special Counsel for
Intelligence Coordination.

U.S. GOVERNMENT MEMORANDUM

DECEMBER 3, 1975.

Subject: Request of Subcommittee on Civil and Constitutional Rights.

This is in response to the list of questions entitled *Legal Issues Regarding Violations of FBI Rules* which were submitted to the Attorney General by the House Subcommittee on Civil and Constitutional Rights.

I & II. 18 U.S.C. 2071, in pertinent part, prohibits the unlawful concealment, removal, mutilation, obliteration or destruction of any record, paper, document or other thing filed or deposited in any public office or with any public officer of the United States. *McInerney v. U.S.*, 143 F. 729 (D. Mass. 1906)

Conduct violative of 18 U.S.C. 2071 may also constitute a violation of 18 U.S.C. 1505 (obstruction of justice) if the destruction, or other prescribed treatment of the subject record or paper, is for the purpose of influencing, obstructing or impeding the due and proper administration of the law under which a proceeding is being had before a department or agency of the United States, or the due and proper exercise of the power of inquiry under which an inquiry or investigation is being had by either House, or any committee of the Congress. *U.S. v. Fruchtman*, 421 F. 2d 1019 (6th Cir. 1970), cert. denied 400 U.S. 849.

III. Any individual who, having taken an oath, knowingly submits a false statement or testifies falsely concerning some material fact, may be charged, depending on the forum, with a violation of 18 U.S.C. §§ 1621 (perjury) or 1623 (false statement). *Holy v. U.S.* 278 F. 2d 521 (7th Cir. 1921); *Gebhard v. U.S.* 422 F. 2d 281, 287-288 (9th Cir. 1970); *U.S. v. Nicoletti*, 310 F. 2d 350 (7th Cir. 1962)

Perjured testimony or false statements which obstruct, or attempt to obstruct proceedings before departments, agencies and committees may constitute a violation of 18 U.S.C. 1505 (obstruction of justice) even if the gravamen of the obstruction is that the individual perjured himself. *U.S. v. Ato*, 439 F.2d 751 (2nd Cir. 1971), cert. denied 404 U.S. 850.

An individual, under oath, has the duty to testify truthfully concerning any matter regardless of whether or not that matter [or conduct] is punishable by the federal criminal law. *U.S. v. Worchester*, 190 F. Supp. 548, 569 (D. Mass. 1960).

IV. 18 U.S.C. § 3282 provides that for non-capital offenses "no person shall be prosecuted, tried or punished for any offense . . . unless the indictment is found or the information is instituted within five years next after such offense shall

have been committed. The statute of limitations begins to run when the crime is complete; i.e. from the date of the last overt act. *U.S. v. Andreas*, 374 F. Supp. 402 (D. Minn. 1974). The statute is not tolled by the non-discovery of the offense during the statutory five-year period.

V. To constitute a violation of 18 U.S.C. § 4 (misprison of felony) it is necessary that an individual take "some affirmative act of concealment . . . or other positive act designed to conceal from the authorities that a crime has been committed. *Bratton v. U.S.*, 73 F.2d 975 (10th Cir. 1934); *U.S. v. King*, 402 F.2d 694, 697 (9th Cir. 1968); *Neal v. U.S.*, 102 F.2d 643 (8th Cir. 1839). Under existing judicial constructions it is not sufficient for the purposes of an 18 U.S.C. § 4 violation that an individual has knowledge of a crime committed by another and remains silent.

DECEMBER 15, 1975.

Hon. EDWARD H. LEVI,
Attorney General of the United States,
Department of Justice,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: At our recent hearings with respect to FBI oversight, James P. Hosty, Jr., Special Agent, Federal Bureau of Investigation, assigned to the Kansas City Field Office, testified under oath regarding, among other matters, his role in the Lee Harvey Oswald investigation. During his testimony, he stated that certain information in his personnel file was erroneous. The substance of the issue involved his responding to questions propounded to him regarding the pre-assassination handling of the Lee Harvey Oswald investigation. Mr. Hosty responded in writing to the questions. He stated that a memorandum drawn in the Dallas Field Office, where he was then assigned, represented the substance of at least two of his answers in a manner not consistent with his written response.

The implication is that Mr. Hosty's answers were intentionally misrepresented for purposes of allowing appropriate censure. We would like to be able to review the appropriate portions of Mr. Hosty's file for the purpose of determining if such a misstatement occurred.

I would appreciate your advising me as to how, and under what circumstances, the determination of these facts may be accomplished.

In this same vein, much of the testimony at our most recent hearings involved the policy and procedures employed by the FBI in personnel matters. It appeared, for instance, that the fact that an FBI employee had military service gave that person different rights with respect to administrative punishment. We therefore would appreciate the opportunity to review the personnel procedures of the Bureau. It would be helpful if the Bureau could supply for our use a copy of these procedures.

Thank you for your continuing assistance to the work of the Subcommittee.

Sincerely,

DON EDWARDS,
*Chairman, Subcommittee on Civil
and Constitutional Rights.*

DEPARTMENT OF JUSTICE,
ASSISTANT ATTORNEY GENERAL, LEGISLATIVE AFFAIRS,
Washington, D.C., February 5, 1976.

Hon. DON EDWARDS,
*Chairman, Subcommittee on Civil and Constitutional Rights, Committee on
the Judiciary, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: In response to your December 15, 1975 letter to the Attorney General, I am enclosing a memorandum prepared by the Federal Bureau of Investigation.

If I can be of additional assistance, I hope you will call upon me.

Sincerely,

MICHAEL M. UHLMANN,
Assistant Attorney General.

Enclosure.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
OFFICE OF THE DIRECTOR,
Washington, D.C., January 15, 1976.

SPECIAL AGENT JAMES P. HOSTY, JR., INFORMATION CONCERNING FBI POLICY AND PROCEDURES RELATING TO PERSONNEL MATTERS

In response to a request from the U.S. House of Representatives Committee on the Judiciary December 15, 1975, relating to information contained in the personnel file of SA James P. Hosty, Jr., it is noted that among the documents in question are two copies of a memorandum from Special Agent Hosty to Special Agent in Charge, Dallas, dated December 6, 1963. Each copy contains handwritten notations, corrections or additions thereon. These copies were previously made available to the committee by SA Hosty.

The only other document involved was an undated letterhead memorandum prepared by the Special Agent in Charge in Dallas and transmitted to the Bureau on December 8, 1963, and contained the names of Lee Harvey Oswald and Marina Nikolaevna Oswald in the caption. This document contained explanations from individuals involved in the investigation of Lee Harvey Oswald and is available for your review with appropriate excisions to protect the privacy of individuals other than SA Hosty mentioned therein.

In connection with the committee's request for information pertaining to policy and procedures employed by the FBI in personnel matters the following is noted. By statute, all positions in the FBI are excepted from the competitive service and, therefore, our administrative actions relating to disciplinary matters are not governed by the requirements of the Civil Service Commission for the competitive service. We do, however, adhere closely to guidelines set forth by the Commission and have a two-step system wherein employees who are non-veterans and are the subjects of adverse action, which action is taken by the Assistant Director in Charge of the Administrative Division, have the right to appeal this action to the Director. It should be noted that an adverse action case is one involving more than thirty days' suspension, reduction in rank or compensation, or dismissal.

It should be noted that the two-step appeal system within the FBI, relating to both veterans and nonveterans was formalized in 1974 as a result of Civil Service Commission revisions relating to adverse actions in September, 1974, which stressed that the final action on an adverse action case should be taken by a higher official than the one that took the initial action. Prior to that time all administrative action of this nature was handled by the Director and appealable only to the Director except for the veteran who had the right of additional appeal to the Civil Service Commission.

In the case of veterans of the military service, however, all such employees are afforded all rights available to them in accordance with the Veterans Preference Act of 1944. A veteran must be given thirty days' advance written notice of the proposal of any of the above-mentioned adverse actions (Title 5, Section 7512, U.S. Code) and may also appeal an adverse decision to the Civil Service Commission (Title 5, Section 7701, U.S. Code). The veteran is entitled to his rights under the provisions of 5 Code of Federal Regulations (CFR), Part 752.201 et seq (Adverse Actions by Agencies) and under Federal Personnel Manual, Section 752.202 (revised September 9, 1974).

Information concerning veterans' rights in such matters appears in the FBI's Manual of Rules and Regulations, Part I, Section 9-E-7, and Part I, Section 10-D 1. Although the veteran has the added protection of the advance written notice and a right of appeal to the Civil Service Commission, all employees are treated in the same manner in relation to other aspects of disciplinary policy. Each employee is fully advised of the specific nature of any allegation pertaining to that employee, is afforded an interview, has the right to reply to specific charges, and is given every opportunity to furnish explanations and refute allegations. Matters involving possible disciplinary action are handled in a thorough manner, including extensive investigation where warranted and no action is taken until all facts have been firmly established. All employees, of course, have the right to contest adverse action in Federal court.

cc MICHAEL E. SHAFEREN, Jr.,
Special Counsel for Intelligence Coordination.

FBI OVERSIGHT

Attorney General's Guidelines for FBI Activities and Additional Legislative Proposals

WEDNESDAY, FEBRUARY 11, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND
CONSTITUTIONAL RIGHTS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, Badillo, Dodd, and Butler.

Also present: Alan A. Parker, counsel; Thomas P. Breen, assistant counsel; and Kenneth N. Klee, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

The gentleman from New York.

Mr. BADILLO. Mr. Chairman, I move that the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary permit coverage of this hearing in whole or in part by television broadcast, photography, or any other method pursuant to the rules.

Mr. EDWARDS. Without objection the resolution ordered by the gentleman from New York is adopted.

A little over a year ago the Attorney General and Mr. Kelley were here discussing with the House Judiciary Committee the subject of domestic intelligence. This area of work done by the FBI is a very large part of the FBI's activities. I believe that one estimate is that it represents 18 percent of the work, perhaps \$70 or \$80 million a year in FBI budgetary expenditures. The General Accounting Office estimated that in 1974 in 10 field offices there were perhaps 17,000 to 18,000 either open cases or files, or something along that order, in domestic intelligence in the 10 field offices that the General Accounting Office examined.

This subject and this responsibility also is the stickiest thing the FBI must contend with. It is fraught with danger, not only to the FBI, but to the public. One of the problems is that there is no explicit law that delineates its responsibilities and designates the FBI as the official organization that shall be in charge of domestic intelligence within the United States. And perhaps because of the lack of congressional guidelines, congressional law, the domestic intelligence pro-

gram over the years has done great damage to the FBI and the public's opinion of it. The COINTELPRO, of course, was a part of the domestic intelligence activities of the FBI, and some other unfortunate things that happened such as the persecution of Dr. Martin Luther King was a part of the domestic intelligence activity of the FBI.

So the preparation of the guidelines that we are going to talk about today is a welcome step. Because it is terribly important that we somehow define and limit the domestic intelligence activities which are very important, very essential in this country. Both Congress and the Department of Justice have been most negligent over the years in their responsibilities to be interested in the problem.

Now, it is the intention of this subcommittee of the House Judiciary Committee to write law on this subject. And undoubtedly the guidelines will be of great help. Indeed, important questions about the guidelines might well be included in the laws. We are looking forward to the statements of Mr. Kelley and the Attorney General today. Again, we appreciate the attitude and spirit of cooperation that has been shown all the time by both the Attorney General and the Director of the FBI.

Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

This is, of course, but another hearing in a series by our subcommittee on FBI oversight designed to examine the appropriate legislative options with reference to the Federal Bureau of Investigation.

It occurs to me that during the course of these hearings we will develop a jurisdictional basis for the FBI, and once having defined the jurisdiction, it will be necessary for this subcommittee to demonstrate the scope and the mode of the oversight to insure that the FBI operates within its jurisdictional mandate. Of course, of fundamental importance is the decision concerning the FBI oversight that should be spelled out in a statute as opposed to that which will be left to executive order or guidelines.

And with regard to the chairman's comments in this area, of course, exactly where we will draw the line between those two remains to be decided. But I hope that the members of the subcommittee, Mr. Chairman, will bear in mind that flexibility is necessary also to effective law enforcement. The statutory limitations serve to limit the activities of the FBI, but it also serves as a potential source of future litigation. So I am confident that we will do our utmost to strike a proper balance.

I welcome the gentlemen today and appreciate their cooperation in being with us.

Mr. EDWARDS. Mr. Badillo.

Mr. BADILLO. Thank you, Mr. Chairman.

I want to thank you for having called these hearings.

You remember, when the guidelines were issued, I requested hearings, and I said then that I was going to introduce a resolution to disapprove the guidelines. I am reintroducing the resolution now based upon the new draft of the guidelines that is being proposed.

I discussed the resolution with some of the members of the subcommittee. But basically the reason I believe this committee and this Congress should disapprove these guidelines is because they are so broad as to give license to exactly the same kind of activity that the

FBI has carried on up until now without the benefit of guidelines. For example, during the past few months we have been shocked by the revelations surrounding the COINTEL operations against Martin Luther King. But if the new guidelines are ever propagated, exactly the same kind of activities could be given the sanction of respectability, and that sanction could include the sanction of this committee. That is because the guidelines suggest that investigations can be initiated to secure information on the activities of individuals and groups of individuals acting in concert which would involve the use of force and violence in violation of the Federal law.

We know that the activities of the Southern Christian Leadership Conference did indeed lead to violence because of the reaction of the communities in the South and so, if those activities were to be carried out, the same actions against Dr. Martin Luther King could be taken in these guidelines.

I would like to have the Attorney General and Mr. Kelley address themselves to the guidelines especially, because so many of the activities that are permitted under the guidelines are the normal activities which have to do with the protest against action of the Government. For example, on the question of B(3), the opening up of files, when an organization is doing something that would impair, for the purposes of influencing the U.S. Government policies or decisions, the functioning of the government of a State. Well, in New York State we now have people who are thinking of sitting in in the offices of the Emergency Financial Control Board because they are protesting the cuts that are being made in the City University and in hospitals. But that sitting in would impair the activity of the State government, and under those broad guidelines you could open up a file on them, too.

On the question of the mail coverage, the same situation that led to Bella Abzug's mail being surveilled could take place if this was some communication with an organization that was carrying on activities that would lead to disruption of the State or Federal Government.

So I believe, Mr. Chairman, that these guidelines should be rejected by this Congress, and I believe that, if we are going to have effective oversight of the FBI, we need to write legislation in this subcommittee and have that legislation approved by the House and by the Senate.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman.

I have no opening statement.

Mr. EDWARDS. Mr. Levi, I believe you have with you Deputy Assistant Attorney General Mary Lawton. We welcome Ms. Lawton.

And we will now hear from the Attorney General of the United States, the Honorable Edward H. Levi.

Mr. Attorney General, you may proceed.

TESTIMONY OF HON. EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES ACCOMPANIED BY DEPUTY ASSISTANT ATTORNEY GENERAL MARY LAWTON, OFFICE OF LEGAL COUNSEL

Attorney General LEVI. Mr. Chairman, I welcome the opportunity to talk again with this subcommittee. During the months since I last testified here there has been much discussion about various incidents

which I described to you last February 27 involving the Federal Bureau of Investigation.

The FBI's domestic security investigations have received the most attention. And much of it has centered on COINTELPRO, which was revealed to this subcommittee before I arrived at the Department of Justice and about which I provided further details by letter on May 17, 1975, when they came to my attention.

From the beginning, this subcommittee has been interested in the FBI's domestic security investigations. But it has also been concerned with the whole range of FBI practices. During my last appearance before this subcommittee I promised to start work preparing guidelines to govern FBI practices in the future. The preparation of those guidelines has been slow and difficult—much slower and more difficult than I had realized. The problems are complex and important, as important as any now facing the Department of Justice. I had hoped when I first appeared before this subcommittee that I would be able to present to you at my next appearance a complete set of guidelines. This has proven impossible. But progress has been made in drafting guidelines in several areas. You have been provided with the most recent drafts of proposed guidelines covering the White House inquiries, investigations for congressional staff, and judicial staff appointments, the handling of unsolicited mail, and domestic security investigations. These draft guidelines cover many of the areas that have been of greatest concern to this subcommittee.

Because the statutory base for the operation of the FBI is not satisfactory, I know the members of this subcommittee have been considering what changes it should enact. The guidelines may be helpful in these deliberations. Before discussing briefly each of the draft guidelines you have seen, I would like to make a few points about the question of statutory changes.

The basic statutory provision concerning the FBI is 28 U.S.C. 533 which provides that the Attorney General may appoint officials:

(1) To detect and prosecute crimes against the United States; (2) to assist in the protection of the President; and (3) to conduct such investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

In addition, 28 U.S.C. 531 declares that the Federal Bureau of Investigation is in the Department of Justice. There are other statutes, such as the Congressional Assassination, Kidnapping and Assault Act, which vest the Bureau certain special responsibilities to investigate particular criminal violations. There are also Executive Orders and Presidential statements and directives placing investigatory responsibility upon the Bureau.

In some areas—such as domestic security—the simple statutory base I have just described is overlaid with a series of executive orders—for example, Executive Order 10450 concerning the Federal loyalty program—and directives dating back decades. The simplicity of the statute vanishes when placed in this setting. Moreover, the authorized work of the Bureau in terms of crime detection must be seen in the context of statutes passed by Congress such as the Smith Act, the Seditious Conspiracy Law, and the Rebellion and Insurrection Statute. I would like to begin the discussion today by suggesting a few considerations

that should be taken into account in deciding what statutory changes should be made to define more clearly the areas of the Bureau's jurisdiction and the means and methods which the Bureau is permitted to use in carrying out its assigned tasks.

First, there is a temptation to resort to having the courts make many difficult day-to-day decisions about investigations. When a fourth amendment search or seizure is involved, of course, recourse to a court for a judicial warrant is in most circumstances required. But the temptation is to extend the use of warrants into areas where warrants are not constitutionally required. For example, as you know, it has been suggested that the FBI ought to obtain a warrant before using an informant. Extending the warrant requirement in this way would be a major step toward an alteration in the basic nature of the criminal justice system in America. It would be a step toward the inquisitorial system in which judges, and not members of the executive, actually control the investigation of crimes. This is the system used in some European countries and elsewhere, but our system of justice keeps the investigation and prosecution of crime separate from the adjudication of criminal charges. The separation is important to the neutrality of the judiciary, a neutrality which our system takes pains to protect.

There is another related consideration. To require judges to decide whether particular informants may be used in particular cases would bring the judiciary into the most important and least definable part of the investigative process. Even disregarding the problem of delay to investigations and the burden that would be placed upon courts, we must ask ourselves whether the control of human sources of information—which involves subtle, day-to-day judgments about credibility and personality—is something judges ought to be asked to undertake. It would place an enormous responsibility upon courts which either would be handled perfunctorily or, if handled with care, would place a tremendous burden of work on Federal judges.

In drafting statutory changes, it must be remembered that rigid directions governing every step in the investigative process could sacrifice the flexibility that is necessary if an investigative agency is to adapt to the diverse factual situations it must face. Rigid statutory provisions would invite litigation at every step in the investigative process. Such litigation could very well be used by clever individuals to frustrate legitimate law enforcement efforts without achieving the measure of control for which the statutes were enacted. As Lord Devlin has said:

As soon as anything has been codified, there is a lawyer-like—but sometimes unfortunate—tendency to treat the written word as if it were the last word on the subject and to deal with each case according to whether it falls on one side or the other of what may be a finely drawn boundary.

These considerations do not in any way mean that Congress ought not act to clarify the FBI's statutory base. I want to emphasize my belief that Congress should do so. The problems I have mentioned are surmountable. The Department of Justice is ready to work with Congress in drafting statutes that will meet the issues that have been raised about the responsibilities of the FBI.

The proposed guidelines are part of our effort to cooperate with Congress in meeting its legislative responsibility. Some of what has been

proposed in the guidelines may be useful in drafting statutes. Other parts of the guidelines may best be left to regulations or Executive orders. As I said in my earlier testimony before this subcommittee, consultation with you and with other congressional committees is an important part of the process by which these guidelines can be perfected. There will not be complete agreement about what has been proposed—indeed, within the Department of Justice there is some disagreement about some provisions—but this is inevitable and is a necessary part of the road we must travel. We welcome discussion, which is also essential. Let me then briefly describe the four proposed guidelines that have been substantially completed and have been provided to you. Others—which will cover criminal investigations, use of informants, counterintelligence investigations and other areas—are currently being drafted by a committee within the Department chaired by Mary Lawton, Deputy Assistant Attorney General in the Office of Legal Counsel, who is here with me, and composed of representatives of the Civil Rights and Criminal Divisions, the Office of Policy and Planning, the Federal Bureau of Investigation, and the Attorney General's Office. As new guidelines are drafted in these areas they, too, will be made available to you.

When I testified before this subcommittee last February I described a number of incidents which occurred in a period dating back more than a decade in which the FBI was misused for political purposes. I noted that in most cases we discovered where the White House was involved the initiation of an improper request was made by a White House staff member—acting in the President's name—to a counterpart in the FBI. These requests were often made orally. White House staff members in a number of different positions were involved.

As you know, the FBI conducts background investigations of persons being considered for appointment by the President either to positions in Government departments or agencies or to the White House staff. The FBI also checks its files and sometimes conducts further investigations of persons who will be in contact with the President or who will be given access to classified information. The guideline concerning White House inquiries sets up a procedure—which is already substantially being followed—which requires that requests for all such investigations be made in writing by the President or the Counsel or Associate Counsel to the President. Under the proposed guidelines the request for an investigation would have to certify that the person to be investigated has consented to the investigation with the knowledge that information gathered in the investigation would be retained by the FBI. The consent provision is important as a mechanism for preventing investigations in fact sought for political or other investigations. It is also important as a protection of the privacy interests of persons to be investigated. There are provisions requiring that access to information provided to the White House be strictly limited to those directly involved in the matter for which the investigation was initiated. Custodians of the files in the White House would be required to keep a list of all persons who were given access. The proposed guidelines concerning congressional staff and judicial staff appointments take the same basic approach as the guidelines concerning White House inquiries.

In addition the White House has been following the practice, which

perhaps should be embodied in the guidelines, of directing through the Attorney General's Office all requests for investigation or for material from Bureau files except routine background checks. This was not the policy in the past. It reflects the Attorney General's role, which I described to you last year, as a lightning rod to deflect improper requests.

The proposed guidelines on the White House inquiries and on other matters, accept the proposition that FBI files should be destroyed after a reasonable length of time. The deadlines for destruction of files have not yet been specified, however, because for administrative reasons these deadlines must be coordinated throughout the FBI file system.

The last time I appeared before this subcommittee many members were concerned about the handling of unsolicited derogatory information received by the FBI. Unsolicited information can be very valuable in law enforcement, as you know, but the concern has been that allegations about the private lives and habits of individuals have found their way into FBI files where they may remain for great lengths of time as a silent but troublesome invasion of individual privacy. In my testimony of last February 27, I suggested that on balance it would be desirable to devise some procedure under which some information in Bureau files would be destroyed.

The guidelines concerning unsolicited information set up a procedure for the early destruction of such information when it does not relate to matters within the jurisdiction of the Federal Government or does not make an allegation of a serious crime within the jurisdiction of State or local police agencies. The draft guidelines provide for destruction of such unsolicited information within 90 days. The period after which other files would be required to be destroyed may vary. Information collected in background investigations might be retained long enough to avoid the need to repeat investigative steps as an individual moves from job to job within government or out of government and later back in. On the other hand, destruction of files developed in preliminary domestic security investigations may be required quite quickly if information indicating criminal conduct is not developed.

Finally I come to the proposed guidelines concerning the controversial area of domestic security investigations. I have already testified about these guidelines before the Senate Select Committee on Intelligence. Since that testimony, several changes have been made in the draft. You have been provided with the latest draft to these guidelines. There are several important features I would like to describe.

First, the proposed domestic security guidelines proceed from the proposition that Government monitoring of individuals or groups because they hold unpopular or controversial political views is intolerable in our society. This is the meaning of the warning issued by former Attorney General Harlan Fisk Stone, as I read it. Stone said, "There is always the possibility that a secret police may become a menace to free government and free institutions, because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood * * *. It is important that its activities be strictly limited to the performance of those functions for which it was created and that its agents themselves be not above the law or

beyond its reach * * *. The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish."

The proposed guidelines tie domestic security investigations closely to the violation of Federal law. I realize there is an argument as to whether the guidelines tie domestic security investigations closely enough or too closely to the detection of criminal misconduct. But the main thing in my opinion is that the purpose of the investigation must be the detection of unlawful conduct and not merely the monitoring of disfavored or troublesome activities and surely not of unpopular views.

This is accomplished in the guidelines by requiring some showing that the activities under investigation involve or will involve the use of force or violence and the violation of Federal law. I must admit there is a problem--in part a drafting problem but perhaps more than that--of how to describe or set forth a standard which further specifies what is meant by "some showing."

Because investigations-into criminal conduct in the domestic security area may raise significant first amendment issues, the proposed guidelines provide for compendious reporting on such investigations to the Department of Justice. In general the guidelines provide for a much greater involvement by the rest of the Department of Justice and the Attorney General in reviewing FBI domestic security investigations. The emphasis upon departmental and congressional review is important, but it must be recognized that the Bureau must have primary responsibility for controlling itself. The guidelines attempt to strike an appropriate balance. Periodic reports by the Bureau of preliminary investigations would be required. All full investigations would have to be reported to the Attorney General or his designee within 1 week of their opening. The Attorney General or his designee could close any investigation. FBI Headquarters would be required to review the results of full investigations periodically and to close any when it appears that the standard for opening a full investigation is nonsatisfied and all logical leads have been exhausted or are not likely to be productive.

Each open case would be reviewed annually in the Department of Justice and would be closed if no longer justified under the standards. The personal approval of the Attorney General would be required when such sensitive techniques as title III electronic surveillance or preventive action are to be used, and the Attorney General would be required to report to Congress periodically on the instances, if any, in which preventive action was taken.

Preliminary investigations- which would not involve the infiltration of informants into organizations or groups or such techniques as electronic surveillance or mail covers-- would be authorized only on the basis of information or allegations that an individual, or individuals acting in concert, may be engaged in activities which involve or will involve the use of force or violence and the violation of Federal law for one of five designated purposes. Those criminal purposes are:

- (1) Overthrowing the government of a State;
- (2) Interfering, in the United States, with the activities of a foreign government or its authorized representatives;
- (3) Impairing for the purpose of influencing U.S. Government policies or decisions (a) the functioning of the Government of the United States; (b) the functioning of the government of a State; or (c) interstate commerce;
- (4) Depriving persons of their civil rights under the Constitution, laws, or treaties of the United States; or
- (5) Engaging in domestic violence or rioting when such violence or rioting is likely to require the use of the Federal militia or other armed forces.

May I interrupt to say that this meant engaging in these activities, not inducing them.

Preliminary investigations would be limited to inquiries of public record and other public sources; FBI files and indices; Federal, State, and local records; and existing informants and sources. Interviews and physical surveillance undertaken for the limited purpose of identifying the subject of the investigation would be allowed, but interviews or surveillance for any other purpose would require the written authorization of the special agent in charge of the appropriate Bureau field office.

The draft guidelines provide that such intrusive investigative techniques as infiltration of informants into organizations and use of electronic surveillance and mail covers may only be initiated as a part of full investigations. The guidelines set out the following standard for the opening of a full investigation: Full investigations must be authorized by the FBI Headquarters. They may only be authorized on the basis of specific and articulable facts giving reasons to believe that an individual or individuals acting in concert are or may be engaged in activities which involve or will involve the use of force or violence and the violation of Federal law for one or more of the five purposes I mentioned earlier.

A provision is also included to allow the FBI to investigate for limited periods of time in situations in which domestic violence or rioting not violating Federal law is likely to result in a request by a Governor or legislature of a State under 10 U.S.C. 331 for the use of Federal troops.

You will recognize, I assume, that the standard for opening a full investigation proposed in the guidelines is the equivalent of the standard for a street stop and frisk enunciated by the Supreme Court in *Terry v. Ohio*. There the Supreme Court wrote that in justifying a street search a police officer "must be able to point to specific and articulable facts which, when taken together with rational inferences from these facts, reasonably warrant the intrusion." In his summation of the holding of the Court, Chief Justice Warren wrote:

We * * * hold today that where the police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

This standard was adopted because it requires a strong showing of criminal conduct before a full investigation is authorized. I should point out that a change was made in this part of the guidelines since my testimony before the Senate select committee. Originally the standard had required a showing of specific and articulable facts giving reason to believe that the subjects of the investigation are engaged in activities that involve or will involve force and violence and the violation of Federal law. The change to the phrase "are or may be" brings the formulation of the standard more closely in line with the *Terry* standard. The previous language of the guidelines proved to be too close to the arrest standard—that is, too restrictive as a standard for the opening of an investigation. The close correspondence of the revised draft's standard with the *Terry* language gives the guidelines' formulation a foundation in the Supreme Court's analysis of an analogous constitutional problem which, while it involves a different area of law enforcement, does provide a definition for the standard which is to control Bureau activities.

The proposed guidelines go on to require an additional consideration before a full investigation is opened. The guidelines state:

The following factors must be considered in determining whether a full investigation should be undertaken:

- (1) The magnitude of the threatened harm;
- (2) The likelihood it will occur;
- (3) The immediacy of the threat; and
- (4) The danger to privacy and free expression posed by a full investigation.

This listing of factors, which has been added in the latest draft, gives the standard a dimension and explicitness it did not have in earlier drafts. For example, the balancing of the factors would require officials of the FBI and the Department of Justice to close any full investigation even if there is clear threat of a violation of Federal law if the threatened harm is de minimis or unlikely or remote in time.

Finally, the draft guidelines provide a procedure to be followed in emergency situations when action by the FBI to intervene to prevent the use of illegal force and violence may be required. This section of the proposed guidelines, I am glad to say, has proven to be controversial, in part for fear that it seeks to allow the FBI to engage in activities of the sort that were involved in COINTELPRO. As I have said many times before, the activities that went under the name COINTELPRO as far as I am concerned were either foolish or outrageous, and the preventive action section of the guidelines was not intended to legitimize such activities, nor in my view, would it do so.

It was included in the draft guidelines in the recognition that emergency situations may arise in which human life or the essential functioning of Government may be threatened. In such situations law enforcement officials would be expected to act to save life or protect the functioning of Government. Indeed, law enforcement officials would be condemned if they did not act. The preventive action section of the guidelines was designed to provide a procedure for the Attorney General to authorize and report to Congress such activities. It was designed to set up an orderly and careful procedure to be fol-

lowed in the case of emergency. It could be supplemented by further rules developed by the Attorney General. Under the proposed guidelines the Attorney General could authorize a preventive action only when there is probable cause to believe that illegal force or violence will be used and that it threatens the life or the essential functioning of Government. Under the proposed guidelines the Attorney General could authorize preventive action only when it is necessary to minimize the danger, that is, when other techniques will not work. In the latest draft of the guidelines several specific prohibitions were included to make clear that new COINTELPRO are not to be sanctioned. Prohibited are the commission or instigation by the FBI of criminal acts; the dissemination of information for the purpose of holding an individual or group up to scorn, ridicule, or disgrace; the dissemination of information anonymously or under false identity; and the incitement of violence.

It may be that Congress will choose to prohibit any FBI efforts to intervene to prevent force or violence. But to do so carries with it a risk and a responsibility.

The proposed guidelines are still in the process of revision. They are tentative. As the guidelines have been developed they have been shown to the chairman of this subcommittee. We must enunciate the differences among us about the best words to use and then seek to resolve those differences. But the main thrust of the guidelines is surely the most important thing, their recognition of the need for a program for destruction of files in the interest of privacy, their requirement of consent from the subject of background investigations, their requirement of progressively higher standards and higher levels of review for more intrusive investigative techniques, their requirement that domestic security investigations be tied closely with the detection of crime, and their safeguards against investigations of activities that are merely troublesome or unpopular. Upon these main themes I hope we all agree.

The Department of Justice has undertaken other steps to meet some of the issues of concern to this subcommittee. We have created an Office of Professional Responsibility to investigate allegations of improper conduct by Department personnel and to review the investigations done by internal inspection units of agencies within the Department. We have been trying to work out a legislative proposal to bring national security wiretapping and microphone surveillance under a judicial warrant procedure. On June 24, 1975, I provided the Chairman of the House Judiciary Committee with statistics concerning the use of national security electronic surveillance instituted without prior judicial approval. Before the Church committee I recounted the history of national security electronic surveillance since 1940, revealing a year by year count of the number of telephone and microphone surveillances. The latest figures in this area show that in 1975 a total of 122 telephone wiretaps and 24 microphone devices were used to overhear conversations.

We have tried to be cooperative with this and other committees of Congress about other aspects of the past history of the FBI and other agencies within the Department. We have tried to reveal as much as possible about the past of a sense of comity and a feeling that the past problems must be discussed in the process of creating new policy. But

we have tried also to recognize that the past is not always the best guide to the future. As we review recent history we may be so overwhelmed by it—and by our failure of memory about the social and political forces that shaped recent history—that we will read its lessons more broadly than we ought to. If there was a lack of humility in the past about the perfection of our vision of what was proper, I hope we cannot fail to recognize that the flaws in our vision about the past and the future today, may be of concern.

It is a challenging and interesting time, and I hope together we can prepare ourselves wisely for the future. We cannot escape from the responsibility of looking at the problems we face today and are likely to face in the future.

When I testified almost a year ago I stated to this committee—and I want to emphasize most strongly again today—that I have both a personal and official concern for the issues which face us in this area. Those issues are close to the basic duties of the Attorney General to protect the society—its values, and the safety of its members. I am sure that Director Kelley will agree with me that we must clarify for the present and for the future the kind of course to be followed, meticulously and candidly. I believe we have already made considerable progress in this regard. Together with Congress legislation can be worked out and wise policy achieved.

Thank you.

Mr. EDWARDS. Thank you very much, Mr. Attorney General.

Before we have questions we will hear from the Honorable Clarence Kelley, Director of the FBI.

Mr. Kelley.

TESTIMONY OF HON. CLARENCE M. KELLEY, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ACCOMPANIED BY JAMES B. ADAMS

Mr. KELLEY. Thank you.

I wish to thank the committee for the opportunity to contribute my views for your consideration on legislative policies and guidelines for the FBI.

My understanding is that your primary concern at this time is the FBI's investigative responsibilities in the domestic security area.

We must consider first that these investigations deal with activities posing a threat to orderly and legally constituted government—interests which the Government has a special obligation to protect.

As the Supreme Court has observed: “* * * unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.”

As a practical matter, the line between domestic security work and investigations of ordinary crime is often difficult to describe. What begins as an intelligence investigation may well end in arrest and prosecution of the subject.

I want to emphasize that these investigations are not undertaken for the purpose of collecting information on those who hold unpopular or controversial political views. Their focus is on conduct, not ideas—conduct that involves or is likely to involve a violation of Federal law.

But the important distinguishing characteristic of a successful domestic security case is prevention—they are undertaken primarily to thwart illegal activities, not to prosecute. As a consequence, intelligence work involves the gathering of information, not necessarily evidence. The purpose is to insure that the Government has enough information at its disposal to either frustrate or minimize the consequences of the intended harm. As the Supreme Court put it, “the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government’s preparedness for some possible future crisis or emergency.”

If we are to accomplish these objectives, the FBI must initiate the investigation in advance of the crime. The ability of Government to prevent criminal acts threatening domestic security is dependent on our anticipation of their occurrence. Anticipation, in turn, is dependent on advance information—that is intelligence. Moreover, the interests involved are too important for the Government to wait until the crime is imminent or an attempt is made before it begins its investigative activity.

Let’s consider, for the moment, the problem of terrorism.

Terrorist acts are increasing globally; but more to the point, terrorist activity is growing in the United States.

There were 89 bombings attributable to terrorist activity in 1975—an average of seven a month. That was almost double the number in 1974 (45) and more than three times the number in 1973 (24).

Eleven people were killed in terrorist acts in 1975—six of them in bombings. Seventy-six persons were injured in these bombings. Property damage amounted to more than \$2.7 million.

Who is responsible for these brutal and destructive acts?

The New World Liberation Front, a revolutionary group operating primarily in California, boasted of committing 19 bombings. A public utility company was its primary victim.

The Armed Forces of Puerto Rican Liberation, or FALN, claimed 18 bombings and one unsuccessful attempt. The group’s favorite targets were Government and corporate facilities—especially banks—in New York City, Chicago, and Washington, D.C.

The FALN took credit for the bloodiest terrorist bombing last year, the explosion that killed four people and injured 53 others on January 24, 1975, at Fraunces Tavern in New York City. Fraunces Tavern was where George Washington said farewell to his troops in 1783, and it is the former home of the New York Stock Exchange.

The FALN’s destructive capabilities were amply demonstrated on October 27, 1975, by its claimed responsibility for its coordinated, simultaneous attacks on Government and business buildings in New York, Chicago, and Washington, D.C. The explosions marked the observance of the first anniversary of the FALN’s existence.

Other destructive bombings were claimed by the Continental Revolutionary Army, Red Guerilla Family, George Jackson Brigade, Emiliano Zapata Unit and the Chicano Liberation Front.

The Weather Underground claimed three bombings and one attempt in 1975. One of the blasts was at the State Department in Washington; an attempt fizzled at a Department of Defense facility in Oakland, Calif.

Four recently published issues of the Weather Underground’s newsletter, “Osawatomic,” contained this threat regarding our Nation’s

Bicentennial, July 4, 1976: "The rulers have set the time for the party; let us bring the fireworks."

It should be obvious from this appalling list of violence that we are not as successful as we would hope to be in dealing with such matters. But there have been numerous cases where information gathered in domestic security investigations made it possible to thwart or minimize violence or to make prompt arrests, preventing further incidents of violence. Let me give you a graphic example.

In August of 1974, a bomb was discovered at the United Nations. Two days after the occurrence, the Louisville FBI Office received information that an attempt had been made to recruit a resident of Kentucky to participate in a crime to be committed at the United Nations.

Information gathered during a prior domestic security investigation made possible the identification of the individual making the attempted recruitment. As a result of continued investigation, this same individual was convicted and sentenced to serve 25 years.

In addition to terrorist groups, we are also faced with individuals or organizations who are dedicated to the eventual violent overthrow of this Government. I know there are those who feel that the Government ought not to concern itself or expend its investigative resources on the prevention of what might be a remote or highly unlikely occurrence. Reasonable people can differ on the proper governmental response to these situations.

Suppose an organization openly espouses revolutionary doctrine, that is to say, the use of force and violence to overthrow the Government. But it is clear that they will not take immediate action, or if they did, that they would not be successful. In the meantime, they actively recruit new members, and attempt to strengthen their financial resources—and wait for the proper moment. I recognize that advocacy alone is not a violation of Federal law, nor am I suggesting that we make it one. I am aware also of the special constitutional problems that are presented by these cases. As Justice Powell put it, the investigative duty of the Executive may be stronger in such matters, but "so also is there greater jeopardy to constitutionally protected speech."

It has always been my philosophy as a law enforcement officer that the Government should strive at all times to meet its obligations for the maintenance of security with the least possible intrusion on the affairs of its citizens.

But what would you have us do about the presence of revolutionary organizations in our society? Should they be totally ignored on the premise that somehow Government will receive an adequate warning that violence is imminent and will be able to take the necessary measures to prevent the crime or at least to minimize its consequences? Where is the warning to come from, if not even the most preliminary and minimal kind of inquiry is permitted?

As the head of the principal Federal law enforcement agency in the country, I feel that I would be remiss in my duties if I were to ignore any group that advocates violence to accomplish its objectives. Indeed, the Congress has passed a number of Federal statutes over which the Bureau has investigative responsibilities, all of which are designed to secure the internal security of this Nation.

It may well be that the Government's investigative response in such matters should be carefully measured and need not be as exhaustive or

intrusive as our investigations into completed crimes, particularly those of terrorist groups. But I submit it would be unrealistic to prevent the Government from obtaining information needed by the Executive for sound judgments about the nature and extent of the threat posed at any given time by such organizations.

However secure we may feel today about the strength and durability of this Nation—and we have every reason to feel that way—no one among us can claim any special knowledge about what tomorrow will bring. Legislation adopted in today's climate which severely limits the ability of Government to respond effectively to such matters may well prove too restrictive to meet the needs of the future.

I recognize that congressional concern in the area of domestic security investigations has been prompted by past mistakes or errors in judgment. My own view is that there is no institutional mechanism that can guarantee integrity in Government. In the final analysis, we must place our trust in individuals. But I realize that more must be done—it is not enough to rely on self-restraint.

We have made a commitment to review past FBI procedures and practices. Investigations in the domestic security area have been reduced significantly since July 1973.

As you are aware, the FBI is participating with other representatives of the Department of Justice in the drafting of guidelines to govern various areas of FBI operations including domestic security investigations. These guidelines represent a positive response to the need for a delineation of the FBI's proper role and will provide for control and review of the FBI's performance.

Those portions of the guidelines dealing with the jurisdictional basis of domestic security investigations are an appropriate subject for legislation. Other sections might be put into effect by regulation or Executive order. Views may differ on the precise form or content of the guidelines. Whatever the outcome, they represent a conscientious effort to deal with one of the most difficult and complex areas of our investigative responsibilities.

The resolution of these matters will demand extensive and thoughtful deliberation by the Congress. In that regard I pledge the complete cooperation of the Bureau, and assure you that we will carry out both the letter and the spirit of such legislation as the Congress may enact.

Mr. EDWARDS. Thank you very much, Mr. Kelley.

Mr. Kelley, do you approve of the guidelines?

Mr. KELLEY. I would say that they are generally acceptable. There are still things that we need to work out. And we are working closely with those developing them. I think we are going to be able to come up with something that is mutually acceptable.

Mr. EDWARDS. Mr. Attorney General, do you detect a difference in the views of the FBI and the Department of Justice on domestic intelligence? Mr. Kelley states on page 2 that—

The important distinguishing characteristic of a successful domestic security case is prevention—they are undertaken primarily to thwart illegal activity, not to prosecute them.

Isn't that a description of preventive action?

Attorney General LEVI. There is a sense in which all criminal law enforcement is intended to be preventive. I think what Director Kelley

had in mind, although he must speak for himself, is that when one is concerned about groups which are engaged in terrorist activity, the important thing is to prevent the execution of the terrorist activity. Groups are attempting to take serious violent steps toward the overthrow of the Government. The problem is not to arrest them after they have done that, but to try to prevent the action from taking place.

Mr. EDWARDS. So the actual investigative techniques are designed to do damage to the organization so that they won't operate effectively?

Attorney General LEVI. As I say, Director Kelley has to answer for himself. What he has said, as I am sure the chairman knows, is that the explanation that is always given for the difference between that kind of criminal investigation which is defined as domestic security investigations and those which are defined as organized crime or ordinary criminal investigation. And it is always said that there are two differences. One is the preventive aspect of seeing to it that one knows enough about it so that through the detection of beginning criminal acts, I would say, one may prevent the completion of many of them. So I am sure that there is this difference between us. And I am not sure that it is preventive action in the sense that you say. But it is always said that prevention is important in the domestic security field. And also the time element is much longer.

Now, Director Kelley knows a great deal more about some of these matters than I do. I think that many of the organized crime investigations take a long, long time. So that I am not sure that this is a rule that can just automatically be applied. And as far as the preventive action is concerned, I think it goes without saying, as courts have said, that the full completion of the major crime of overthrowing the Government or terrorist activities is something where there is a special need to try to prevent it. But to prevent prevention may take many forms, including the nipping of the thing by detecting criminal actions as the effort proceeds.

So I don't think it is the same as the preventive action which is strictly limited and subdued in the guidelines.

But Director Kelley has to speak for himself.

Mr. EDWARDS. I think you're right, Mr. Attorney General, in your statement that the provision in the guidelines for preventive action is very controversial. And I think that you are going to have to explain to the committee just what kind of a situation would arise where covert action- and this is also another word for dirty tricks- will be taken to thwart an activity that the FBI does not think should happen and yet ordinarily under American law you would arrest the person.

Mr. KELLEY. May I respond to that?

Mr. EDWARDS. Yes.

Mr. KELLEY. As I see law enforcement generally, its primary mandate is prevention. If we in law enforcement were to concern ourselves solely with an after-the-fact situation, we would indeed be in a precarious position. We have, for example, at the local level the patrolling of the streets- which is prevention by virtue of the presence of the officer and by virtue of the imminent danger to the criminal if he commits a crime that he may be apprehended. There is within that procedure a great deal of prevention.

I have likened those who develop procedures and methods to overthrow the Government by force and violence as criminals. The ter-

rorist is a criminal. We investigate these matters, and perhaps may end up with a conspiracy violation, in which case we will prosecute. We do not by any means let it be brought, if at all possible, to the climax, where the action is actually taken. It is nothing more than to try to protect, as you would in a bank robbery, when you learn through information given you that a crime is going to be perpetrated. Rather than let it go through, you stop it before it happens—a prevention of what might be carnage within the bank—and results in a solution of the matter without that danger and that harm.

Mr. EDWARDS. Mr. Kelley, I only have a few more seconds here. Under that definition what happened in August of 1970 would be appropriate. Mr. Brennan, former Assistant Director at the FBI, testified before Senator Church that in August 1970 the Bureau ordered investigations of 6,500 members of the SDS and 4,000 members of black student unions.

Now, this rhetoric would make one uneasy. And yet under the formula that you are suggesting, opening all of these files and following these people around and investigating them would be entirely appropriate, because they might some day do an act of violence, they might threaten the Government.

Mr. KELLEY. I think that were something of this type to arise today, and if it were felt that they presented, as set out in the guidelines, a very definite threat to the Government, to overthrow it by force and violence, that the emphasis would be placed on the leaders. You have many followers. And it is inconceivable that there would be every one in the group who is as completely committed to this type of thing as are the leaders. We would in such an event have definitely under the guidelines consulted with the Department of Justice and arrived at some sort of a workable solution to this type of an investigation.

Mr. EDWARDS. Thank you.

Mr. Butler?

Mr. BUTLER. Thank you, Mr. Chairman.

Mr. Attorney General, I congratulate you on your assumption of control by the Department over the FBI and the manner in which you are going about it. And I also appreciate the cooperation that you have given this committee, and your candor about the prior indiscretions.

But I think the thing that concerns me as I listen to the presentation here today is that the publicity which has attended revelations of prior indiscretions in the whole intelligence field has caused what appears to be maybe an overreaction.

I like the philosophy of guidelines. But I am real apprehensive in my own mind as to whether we are not tightening this thing up too much. You, of course, represent the Department view. But isn't there a strong view somewhere within your Department that the guidelines you present are too tight?

Attorney General LEVI. I really don't think the matter has been approached that way. There are some serious questions and we all recognize them, and we are trying to work them out. And then there are language questions. And sometimes the language is put down one day and looks a certain way and then when one looks at it a few days later, and thinks of the consequences of the language, there will be a difference of view. And that is why this is an area where it is difficult

to frame a statute, it is difficult to frame a guideline. I think the most important point that I would keep pressing is that the domestic security investigations have to have a nexus with the detection of crime, except for those special assignments by which the Bureau has been tasked in connection with such matters, for example, as the employment, suitability investigations, and things of that kind where it is really doing things for other intelligence agencies.

Now, once one accepts that, if one does, then the question of how close the relationship to the detection of crime has to be, and how to state it and not make it too strict and not too loose, is a very serious problem.

And as my testimony reported, since the prior draft in one respect we have loosened them and in one respect we have tightened it. And this process really has to go on. And it is a matter of considerable discussion. And I have to say, it is not a question of Director Kelley and me disagreeing or people within the Department disagreeing—it might be a question of my disagreeing with myself from one day to the next.

It is a very difficult and very serious problem. And I think we have to first try to agree on the spirit and direction of what we are trying to do, and then find the words.

Mr. BUTLER. I appreciate that. And I would like, along those lines—of course, you are apprehensive about locking these things in concrete in legislation. I am concerned, for my own understanding, as to exactly what would you view as the legal effect of guidelines in terms of—do you think it has any problem for admissibility if there is a violation of the guidelines?

Do we have any problems of civil liability in connection with the guidelines? How much flexibility is available to change the guidelines from time to time? What would be the procedure to do that?

Attorney General LEVI. It depends on how the guidelines ultimately get put into place. If they are put into place partly by statute—

Mr. BUTLER. I am referring to not by statute.

Attorney General LEVI. Some will be by executive order and some will be by departmental guidelines. And there I should think that it would affect the reasonableness of the action, the belief that the action was justified. And, therefore, it undoubtedly would have some relationship. But one would have to see it in the particular context of a case on liability.

Mr. BUTLER. How about the admissibility problem?

Attorney General LEVI. I think in that case they would be.

Mr. BUTLER. Mr. Attorney General, let me be sure I understand what would happen if we had a hypothetical.

I am interested in this publication which says:

The rulers have set the time for the party; let us bring the fireworks.

Suppose we had no history of prior misconduct of a group of people who got together and advanced that philosophy, and that is all we heard. It might be a group of flower girls or something. And yet that was called to the attention of the Department. Would an investigation be opened, or could it be opened under your guidelines, on the basis of that in advance?

Attorney General LEVI. I should think that a preliminary investigation which would involve seeing to what extent the Bureau knows who

these people are, or the newspapers know who these people are, and what generally is known about them, would be an appropriate step.

I think one has to move from that kind of consideration of what you know about them to a judgment as to how serious this is. And the guidelines this time have tried to set forth the kind of considerations one would have in mind. We all know that inflammatory language is sometimes used where the only threat really is the language, and other times where it is really something more. And I really don't see how one can answer such a question automatically without looking to see who signed it and who knows about it.

Mr. BUTLER. Mr. Kelley, do you feel inhibited under those circumstances by the guidelines? If this came to your attention do you think the guidelines as proposed would inhibit the FBI in an appropriate matter?

Mr. KELLEY. I think we could properly under the guidelines present this to the Department and have a resolution of it. I am confident that it, as Mr. Levi has said, would be necessary—I would say that it would be mandatory—to get a little more, perhaps, than just a statement before we engage in any preliminary. But in the absence of anything more than just this, without knowing who they are, I would doubt very much that we would do anything at all.

This is perhaps rhetoric, and rhetoric is used frequently by some of these groups. But if there is anything further, we can together, I am sure, arrive at a conclusion about whether a preliminary might well be needed.

Mr. BUTLER. I guess my question basically is, you don't feel like your ability to act in circumstances similar or slightly more aggravated than this is inhibited by the proposed guidelines?

Mr. KELLEY. I am comfortable under this.

Mr. BUTLER. My time has expired.

Mr. EDWARDS. Mr. Badillo.

Mr. BADILLO. Thank you, Mr. Chairman.

Mr. Attorney General, you say that the guidelines are still in the process of preparation. What is your present intention as to when these guidelines that you have given us today would be put into effect?

Attorney General LEVI. Well, I don't know when the guidelines will be finished. They are, I think, in influence somewhat in effect now, that is to say, the very fact of the discussion and the attempt to work them out has sharpened the direction of the Department and of the Bureau. But I don't think they should be put into effect as a formal matter until they are further completed, because there are interrelationships between areas where guidelines are still being worked on and haven't come to this point of completion, which isn't a final completion.

Now, I am sorry that I can't give a definite date. I have learned by experience that the dates I give on this turn out to be incorrect.

Mr. BADILLO. Would you agree to give the members of this subcommittee at least 2 weeks notice before you have the intent to put the final guidelines in effect so that we may review what the final guidelines are going to be prior to the time that they will become effective?

Attorney General LEVI. So far as I am concerned, I would be glad to give the members of this committee that much time to review them.

Mr. BADILLO. Thank you very much.

I have to ask you about the guidelines that have to do with investigations by the White House.

As I understand it, they limit the investigations to be initiated by the White House only to those circumstances where the White House is seeking to consider someone for a Presidential appointment or for access to classified information in the service of the White House or the U.S. Secret Service. In other words, having to do with employment or access to information. Is that correct?

Attorney General LEVI. That is what that particular guideline is about.

Mr. BADILLO. This guideline.

Now, if that is the case, then why don't you provide that in order to initiate the investigation, that you should get the consent of the individual to be appointed rather than merely the statement by the White House employee that they intend to appoint someone? Because it has happened in the past that the Attorney General and the FBI do not intend to violate the law, but that somebody in the White House wants to investigate a reporter, a newsman, television fellow, and they say that they want to appoint them, and they assure you that they have an intention of appointing them, and actually they never did.

And then this is an investigation of this individual really without his consent. And had you gotten in touch with him he would have told you that he had no intention of accepting an appointment with the White House.

Why can't you provide that the consent of the individual to the investigation must be secured?

Attorney General LEVI. That is the intention of the guideline.

Mr. BADILLO. But it doesn't say that, sir, it says, it shall merely contain an assurance by the White House that they intend to do that. Why don't you change that, if that is the intention, to provide that that individual must give his consent? It is on page 2 of the guidelines, item 4. I think we would all feel much better about it if you did that.

Attorney General LEVI. The intention is to have the consent of the individual. The Privacy Act requires that in any event

Mr. BADILLO. But that is only if he doesn't know, if the fellow doesn't know that he is being investigated. And we have the example of the television reporter.

Attorney General LEVI. If the guidelines don't cover it specifically you are making a good point, because the purpose of the guidelines is to get the consent of the individual.

Mr. BADILLO. Thank you, I would appreciate it if that would be made specific.

Now, with respect to your other guidelines, the one on the handling and dissemination of unsolicited information, I certainly welcome the guidelines that provides that information shall be destroyed within 90 days after being received if it is unsolicited information, and it does not allege wrongdoing. But what stirs me is that upon reading it I am not sure that it really accomplishes very much, because it says:

When unsolicited information alleging wrongdoing or immoral conduct not amounting to a violation of law by elected or appointed officials or public employees is received by the FBI, the FBI shall destroy it within 90 days.

The problem is that most immoral conduct tends to be illegal, too. And that from a practical point of view, if you say not amounting to a

violation of law, it really means that you are not going to destroy it.

To use this simple example, let's say that Congressman *x* smokes pot. And that is illegal just about every place. So that under this guideline you would not be required to destroy it. And yet it would be unsolicited information with reference to everything else.

Attorney General LEVI. Again, I don't know whether there should be a specification of the kind that is on page 3 as to those matters which are not regarded as sufficiently serious. And I think this is something we ought to consider.

Mr. BADILLO. I think there should be a specification, because when we get charges against people that have to do with minor matters of the type I mentioned, or having to do with extramarital affairs or something like that, for which in fact, although it is illegal in most jurisdictions, there haven't been prosecutions in decades, if you go by the wording of the guideline, the FBI would not be—I think there should be some category—perhaps violation of the law which would be a felony, or some indication of the seriousness of the crime.

Attorney General LEVI. That may well be.

Mr. BADILLO. With respect to domestic security investigations, based on the basis of the investigation, I certainly understand the section that has to do with overthrowing the Government of the United States.

But then when you get into the question of impairing for the purposes of influencing U.S. Government policies or decisions the functioning of the Government or the functioning of the State, then the question comes up of what is the intent.

For example, just 2 weeks ago there was a group of drug addicts from my district who invaded the field office here in Maryland because they were trying to insure that the Federal Government would continue the drug addiction program. Now, they sat in the office. And they definitely impaired the functioning of that agency. And they were certainly guilty of trespass.

But on the other hand, all they were trying to do was to get the Government to continue a drug addiction program.

Now, under these guidelines they would be subject to investigation. Is that your intent, sir?

Attorney General LEVI. It is not my intent. And I think the problem is that this language comes, as I understand it, from basic statutes passed by the Congress mandating the FBI and the Department to be active in making such activities crimes. I think the language actually comes from those statutes.

Mr. BADILLO. Do you think that the Congress intended that you would open up a file on these addicts that wanted to continue the drug program?

Attorney General LEVI. I don't know—of course, this doesn't speak to drug addicts, you did.

Mr. BADILLO. I am saying, the words "the functioning of the Government and the functioning of the government of a State," and interfering with this, clearly that is interfering and impairing.

Whenever you had a demonstration-- in other words, the basic problem is whether we have criminal intent to overthrow the Government, or whether they just want to change the policies of the Government, and they want to call attention to it. The television people will go

down and dramatize it for us. It is the technique of sitting in, it is not for the purpose of overthrowing the Government, but merely to call attention so that you can get some publicity so that perhaps the bureaucrat will take action under the program.

Attorney General LEVI. May I say as an ex-university president that I am somewhat familiar with the technique. But this describes the use of information or violence and the violation of Federal law.

Mr. BADILLO. That can happen, too, sir. Because in the process of sitting-in they have refused to budge, and it may cause violence, if a policeman says get up and they won't get up, there may be a fight. And this happens all the time.

Attorney General LEVI. I will walk down the path a way with you, but not all the way.

Mr. BADILLO. How far will you go?

Attorney General LEVI. I do not think that the good intentions of those who engage in force or violence is always sufficient to say that it really wasn't force or violence, and that the actions did not constitute a considerable jeopardy.

Mr. BADILLO. I didn't say that it was always force and violence, all I said that it was not a question of threatening the domestic security of the country. Under this threat of force and violence, nobody challenges that, it is a violation of law. All I am saying is that that is not a threat to the domestic security of our Nation.

Attorney General LEVI. Well, it can be. And again I don't know how one would draft a guideline which talks about mini sit-ins and major sit-ins and so on.

Mr. BADILLO. I am afraid my time is up.

But I want to get back to the question, the word "impairing," and the question behind the impairment.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman.

I wonder if, Attorney General Levi, you could tell me basically what you have said on page 2 of your testimony that you recognize, and I think it is normal to do, that the Attorney General is responsible for the activity of the FBI.

Mr. KELLEY, do you have any problem with that at all?

Do you recognize that your supervisor, your immediate supervisor and boss is the Attorney General of the United States?

Mr. KELLEY. I can certainly say that I recognize that. And I can also say unequivocally that I have had a very pleasant relationship with Mr. Levi. And I have not at any time come to the point of being rebellious or argumentative, hopefully to an intolerable amount. We get along very well.

Mr. DODD. I ought to give the Attorney General equal time.

Is that a fair assessment of the relationship, Mr. Attorney General?

Attorney General LEVI. I think it has been a very good relationship. But I do want to say that I think it is a very dangerous idea—it is like the guidelines—to say that the Attorney General is running the FBI. The FBI has to have considerable autonomy. And the Director's responsibility is a very great one.

So, that the Attorney General has the responsibility. It is an oversight responsibility of a general nature. And, of course, what the guidelines attempt to do is to specify those things which particularly

have to be brought to his attention, or particularly have to have his approval. But if the Attorney General were to say that he was running the FBI and everything that was going on in it, I don't know what else that Attorney General would be able to do.

Mr. Donn. I didn't mean to state that I thought the Attorney General was running the FBI. But certainly in the final analysis the Attorney General would have to accept the responsibility—correct me if I am wrong—the responsibility of a violation of law or a problem that arose as a result of the violations of some of the procedures of the guidelines that had been set out by the Attorney General.

Is that a correct interpretation?

Attorney General LEVI. The Attorney General accepts the responsibility for the delegation or for the jurisdiction of the Director, and has to exercise his own responsibility and concern about what goes on.

But there is a distance between the responsibility of the Director and the responsibility of the Attorney General.

Mr. Donn. But in the final analysis you are responsible, is that correct or not correct?

Attorney General LEVI. I am responsible for some things, but I am not responsible for others. There are going to be misdeeds in any large organization. There are going to be violations of rules in any large organization. And there are going to be matters of judgment. And I think it would be quite wrong, if not for myself at least for my successors, to say that the Attorney General can be responsible for all those acts.

But I would insist that I am not responsible either.

Mr. Donn. What I am trying to get at is that I detect a clear disagreement in your two statements today over the kind of activity wherein the FBI would begin to conduct an investigation.

I can appreciate where Mr. Kelley is coming from on this. I refer to page 7, for instance, of your statement, Mr. Kelley, getting down to the last sentence of the last paragraph where you say:

“Where is the warning to come from, if not even the most preliminary and minimal kind of inquiry is permitted”?

And then I see on page 11 of your statement, Mr. Attorney General:

“The purpose of investigation must be the detection of unlawful conduct and not merely the monitoring of disfavored or troublesome activities, and surely not upon popular views.”

I detect there a clear distinction between your views as to the role of the FBI.

Mr. Edwards, the chairman, brought this out in his initial questioning. And I wasn't really convinced by your response that there is a complete understanding between the Attorney General and the Director of the FBI as to when in fact an investigation should be initiated.

I frankly have a tendency to agree with you, Mr. Attorney General, based on your statement, but I am concerned, based on your last statement when you say, that there is a larger distance than I thought existed between the Attorney General's office and the Director of the FBI as to exactly what role the FBI should take into the investigation of activities of people who may be considered subversive.

Attorney General LEVI. There are several answers.

One answer is that in dealing with the full investigations, the guidelines are constructed so that the Attorney General has to know about them, and the Attorney General can order that they be discontinued.

So, that there is that kind of control. I don't want the Attorney General put in a position where he is covered by so much information and detail that he will be ineffective. And I keep making that point.

Second, I prefer my language, and the Director no doubt prefers his. The fact of the matter is that when a specific question is raised as to whether a preliminary investigation could be opened, I said that I thought there could be some kind of a preliminary investigation, and the Director, if I understood him correctly, said he didn't think enough had been shown to have one.

So, that if you take those answers, the Director is being more careful at this moment than I am. And I think these are matters that would show how difficult it is, when one has a hypothetical case, and when one has to find out more about it, and so on, to decide what the precise determination is going to be.

But that is a case where the Director, as I understood him, is being more cautious than I am.

Mr. Dobb. Mr. Kelley, did you have a hand at all in drafting these draft guidelines during the drafting process, were you involved, were you invited in to participate and make recommendations?

Mr. KELLEY. We have a representative who is working with the committee drawing those up. And from time to time I get reports and know what the thrust of the guidelines is, yes.

Mr. Dobb. Do you feel that the guidelines are too restrictive, based on the Attorney General's last statement, or in fact, they are too loose?

Mr. KELLEY. I don't think you can categorize them that broadly. There is still some consideration of these various guidelines. But I don't think at this point that we can say that they are too restrictive. We think we can work them out.

Mr. Dobb. I think my time is up.

Thank you, Mr. Chairman.

Mr. EDWARDS. Let's get back to the preventive action which I think will cause more discussion than almost any other part of the guidelines.

Mr. Kelley, you pointed out that preventive action is taken by a policeman on patrol. And I would agree that a policeman on patrol has much to do with law and order in the community.

I don't know of any local or State law that would license or authorize a policeman on patrol to look at a suspicious character coming down the street and tell the man to go in his house because he thinks that this man looks like he might be a criminal. That is preventive action that a policeman wouldn't be authorized to do.

Mr. KELLEY. I don't know of any restrictions insofar as his capability to make at least some preliminary inquiries — if only to follow him for a while, or to determine, as a result of his suspicion about the situation, to take some action. There are many things which make a person or an automobile suspicious to the officer. And as a matter of fact, he would be somewhat remiss if he didn't respond to some extent, in other words, with what we would title in our guidelines a preliminary. He is not going to stop the man, probably. But he is going to at least make a few preliminary inquiries.

Mr. EDWARDS. Yes, that is all taken care of in the ordinary criminal law and precedent in the common law.

You are not actually writing it out like you are doing in these guidelines.

For instance, let's take a specific example. We have an unpopular war, and 100,000 young people and middle-aged people announce that they are coming to Washington to demonstrate. It is very clear that there will be some violence, because if you get 100,000 people there is always something that happens, unfortunately. And the demonstration threatens the essential function of the Government, because people might not be able to get to work.

Tell me what kind of preventive action the FBI would be licensed to undertake under the guideline with 100,000 people coming to Washington to demonstrate very enthusiastically against an unpopular war.

Mr. KELLEY. Under the prevailing dissemination rules, such information would in all probability be to advise the local authorities that there is a report that has been brought to us, and the control of what action is to be taken vested entirely in them, and no action on our part, it being just a preponderance of people which in itself might be a problem. But we do notify the local people when information of that type comes to us. But we don't conduct any investigation.

Mr. EDWARDS. Didn't someone from the FBI testify that if the group that I referred to might be marching in the direction of the White House, someone in the FBI might change the sign or something so that they would go in another direction, is that correct?

Mr. KELLEY. Such a thing was done at one time, I think, yes.

Mr. EDWARDS. So that would be a typical preventive action?

Mr. KELLEY. That could be a preventive. And I think that is what it was at that time.

Mr. EDWARDS. Mr. Attorney General, can you give us some idea of what kind of activities this preventive action would be designed to enjoin or what it would thwart?

Attorney General LEVI. For example, when you have a group of marchers on one side of an unpopular war exercising their constitutional rights, witnessing their views, and you have another group also marching, and they are on the other side of this, and they are also witnessing and exercising their rights, and they have planned their line of march so that they are likely to clash, and there is likely to be a great deal of violence and bloodshed, it seems to me that it might be appropriate to see to it that one goes down one street and the other goes down the other street. That would be one example.

Mr. EDWARDS. But that is a policeman's job, is it not, and not the FBI's job?

Attorney General LEVI. There is also the problem of the Federal jurisdiction. And this assumes that there is Federal jurisdiction.

Another example would be where it is known, for some strange reason, that a Congressman or a Senator is a target of an assassination plot, and it is not known precisely who is involved in it. Steps might be taken to protect and make more difficult reaching that Congressman or Senator. Or I suppose that where one knows that there are problems about terrorist activities which might involve the location of bombs in particular places, one might try through one means or another to make those inoperable.

Mr. EDWARDS. To make that inoperative?

Attorney General LEVI. To make the bombs inoperative if one knows where they are----

Mr. EDWARDS. We are talking about criminal activity. I am wondering where you have to have the guidelines, because what you and Mr. Kelley have described don't need any guidelines.

Attorney General LEVI. The section on preventive action, much argued about, was put in for the reason that with the background of the COINTELPRO, the committee wanted to make it clear that that kind of activity was not to be engaged in in the future. But you can't just write a provision that says no preventive action will ever be taken. I think that is quite unworkable from any human organization.

There are incipient and actual duties on the part of all of us to engage in preventive action at various times.

So, the decision was made—and maybe it was the wrong one—to try to specify that narrow area. And it is very narrow. And it requires not only the approval of the Attorney General, but it requires a report to Congress. And to call it dirty tricks is really unfair when one has all the statements about the things that can't be done.

Now, it may be that the best remedy is just to remove it. And if it is removed from the guidelines—and we have thought about that—then one has to think about what are the implications of that and what is it saying about the prior COINTELPRO activities which we want to say should not be resumed.

This is the problem of the drafting, really. And as I say, there are alternatives. One can just take it out, knowing that reasonable people will agree that at times preventive action is necessary.

That, of course, would take out also the reporting to Congress and the approval of the Attorney General.

So, that is not an easy problem. And I assure you it is one which the committee has worried about enormously, and I have worried about enormously.

Mr. EDWARDS. If you are going to keep that provision in there you are going to have to come up with a lot better example of when it might be used, because the examples that have been thrown around in this testimony and in previous testimony, such as the marchers, have been adequately taken care of by local and State and Federal law.

Mr. Butler?

Mr. BUTLER. Thank you, Mr. Chairman.

I am interested in the way in which the drafts have developed.

Have you got a development—does your record indicate the manner in which proposals have been circularized, and your comments that you have received internally, and what has come out of—are we in draft No. 18, or where are we? Would your file reveal that?

Attorney General LEVI. By your leave, I will ask the chairwoman to reply.

Ms. LAWTON. Mr. Butler, in domestic security it happens to be draft 24 at the moment. The others have various numbers I don't have with me. But what has been done is, the committee itself will first seek a briefing on what is existing policy, and all documentation on what is existing policy, and then discuss among itself what changes in existing policy ought to be made, what new areas ought to be addressed that have never been addressed by existing policy statements, by existing documents, and then begin drafting, circularize the draft to those both within the division of the department, or within the

Bureau who have the specific operating experience, get comments back, and work out new drafts, float new drafts, and when we think we have something, send it to the Attorney General, and then start over again when we hear back from the Attorney General again, circularizing drafts, discussions.

We have consultants that have been asked for their views. Earlier drafts have been given to the Congress. Indeed, in this one area made public there are bar association committees that are looking at them that have promised to get their views to them. They haven't been received yet.

But it is a constantly evolving process.

So that this is basically the method of operation.

Mr. BUTLER. Are you proceeding this way with each one of your guidelines?

Ms. LAWTON. Yes, sir.

Attorney General LEVI. I should say that we rewrote one of the guidelines, namely, the one we are talking about, because we thought it was too loose. The committee then rewrote it.

Mr. BUTLER. At what stage do you share it with this subcommittee, with our chairman—when do you feel is the appropriate time to send one to the Hill for our review?

Ms. LAWTON. It has been going on—the first time that the chairman saw the domestic security guidelines was actually incidental to a discussion of an entirely separate piece of legislation, to illustrate one of the problems in that legislation. We showed him the kind of dichotomy we made between preliminary and full investigations here. But essentially, when its committees are beginning to focus on specific problems, in advance of the Attorney General's testimony he has sent up copies of the guidelines, if those are the matters under discussion in a particular hearing. There has been no systematic method of decision, if the Congress is holding hearings on a subject that one of the guidelines covers.

Attorney General LEVI. The problem is, I think we are all anxious to have them, I know I am, made public as soon as possible for the purpose of discussion. It is also true that that can have two effects.

One, it can appear to bind the Department or a part of the Department to a position to which it objects. And I don't really want to be in that situation.

And second, it can be subject to great misunderstanding as the guidelines have been already. So that I think we haven't made them public as soon as the first or second draft has appeared.

So that as it seriously develops the problem and exposes them, we have tried to make them available.

Mr. BUTLER. I guess my problem is, I am having trouble focusing it on just exactly what particular provisions have created the greatest discussion within your internal organization.

Attorney General LEVI. I suppose the provisions that have caused the most difficulty as far as I know—and I am not on the committee—are when you can open a preliminary investigation, when you can open a full investigation, the techniques that may be used and the permission necessary, and what kind of special permission, and finally, the preventive action.

But there are other guidelines which we have not made public.

Mr. BUTLER. Would it be possible from time to time to bootleg a little information up here to the Republicans to tell us what is going on?

Mr. EDWARDS. Since a partisan note has been put into this, I learned about the guidelines through the Senate. They were first presented to the Senate committee.

Is that correct, Mr. Attorney General?

Attorney General LEVI. Well, I think that in a most bipartisan way I first talked about the guidelines before the American Bar Association last summer.

Mr. BUTLER. I am mad at them, too.

Attorney General LEVI. I had no idea then that it would take so long.

Mr. EDWARDS. Mr. Badillo?

Mr. BADILLO. Going back to the opening of an investigation, do you have any further thoughts on the question of impairing U.S. Government policies, and how far you can go, so that we are not opening files on people who are protesting.

Attorney General LEVI. Well, I had thought that that was taken account of by the kinds of statements that are made on pages 3 and 4. But since those relate specifically to full investigations, probably some kind of a statement of that sort ought to be written more generally.

Mr. BADILLO. Fine. I would appreciate seeing what you come up with.

Now, on the question of preventive action, Mr. Kelley, let's take a hypothetical example of a group of people in New York City who want to protest at the Democratic National Convention. Let's say it is a group of Puerto Ricans who would like the Democratic Party to include in its platform a provision that Puerto Ricans shall have the right to vote for independence, they are not talking about violent overthrow, they are trying to get independence through the ballot. And they plan to disrupt the convention until the party agrees to have such an item on the platform, and they plan to try to block the entrances so that the convention cannot proceed, so that that might lead to violence.

And let's say you get authority to take preventive action. Would that in your understanding include the right to get FBI men to try to infiltrate that group and to try and be elected to be members of that group and try to alter the plans in that fashion?

Mr. KELLEY. As the Attorney General has said, we agree that any expression of political dissent should not be attacked, and would be intolerable under the democratic form of government.

You speak of a situation which probably, by virtue of the activities contemplated, became a local problem, one to be controlled by the police department. And preliminarily I cannot give you a complete answer at this point. But I would say preliminarily it would not authorize us to try to develop informants within the group or infiltrate it.

Mr. BADILLO. In the past did not the FBI get involved in some of the conventions, such as the 1972 convention, and some of the activities taking place there?

Mr. KELLEY. In some cases they may have had some informants working in groups which had clearly established themselves as revolutionary in nature.

Mr. BADILLO. But you do not foresee that in the future, unless the group is revolutionary in nature, that the FBI would be involved?

Mr. KELLEY. If it is a possibility, based on some investigation and reports given us that this may be a revolutionary group, yes, we may feel the need for some investigation or the development of informants, yes. This is one of the areas where I would certainly feel free to discuss this with the Department, and not proceed precipitously, but to go carefully. Because this is a gray area.

Mr. BADILLO. I understand your position with respect to revolutionary groups. But I am trying to get your position with respect to the question of force or violence. Because, you see, you have two standards. One is the revolutionary groups of overthrowing the Government, and the other one is just the mere fact that the activities may lead to force and violence, and under those circumstances, as I understand the guidelines, no showing of an attempt to overthrow the Government is required, merely the fact that it might lead to force or violence.

Also you are saying that you would only consider the force or violence situation where there would be a showing of revolutionary activities.

Attorney General LEVI. It has to be both.

Mr. BADILLO. It has to be both?

Attorney General LEVI. Yes, sir.

Mr. BADILLO. If you could clarify the guidelines—as I understand it, I see item No. 1, overthrowing the Government is a totally separate item from items Nos. 2, 3, 4, and 5.

If you mean item No. 1, overthrowing the Government of the United States, and impairing, then it is a different thing.

Attorney General LEVI. I didn't mean that. It has to be force and violence, a violation of Federal law, and then one of the other items. It always has to be force and violence, plus the other items.

Mr. BADILLO. You mean if it was just force and violence—

Attorney General LEVI. That would be insufficient.

Mr. BADILLO. Interfering of the convention, then there is no violation of Federal law. But don't you say that they are interfering with the functioning of the government of a State?

Attorney General LEVI. I think if it makes a convention impossible, you have a serious question of depriving persons of their civil rights.

Mr. BADILLO. That is right. So, that is why I thought you are not just talking about the overthrow of the Government.

Attorney General LEVI. That is correct.

Mr. BADILLO. Tell me, how far did you go along in terms of other people who might be involved when you have an investigation of the particular group? And let's say that that group is involved in a demonstration along with other groups.

Do you plan that the investigation would include the other groups as well? Let's say there is a march in Washington, and there are 20 groups involved, one of which you are investigating, but the one goes along with the other 19: is it intended that the investigation would then be open to include the other groups as well who are participating in this group?

Mr. KELLEY. I don't visualize that it would go to the other 19, I just can't visualize that at all.

Mr. BADILLO. My time is up.

Mr. EDWARDS. Mr. Dodd?

Mr. DODD. Thank you, Mr. Chairman.

Mr. Levi, I wonder if we could spend a couple of minutes talking about the standards that are used for a full investigation. You point out in your statement that you use the guidelines or the tests as was used in *Terry v. Ohio*, the stop-and-frisk case.

Attorney General LEVI. Yes.

Mr. DODD. I am a little intrigued by it. I would be led to believe that a shop-and-frisk, which is intruding, as *Terry v. Ohio* declared, would certainly have to be considered—and you may disagree with me if you wish—would have to be considered much less of an intrusion than a decision to conduct a full investigation of someone?

On page 16 of your statement you say:

"The standard was adopted because it requires a strong showing of criminal conduct before a full investigation is authorized."

And yet it would seem to me that actually the standards—or the standard in *Terry v. Ohio*—ought to be more aptly used, possibly as the basis for conducting a preliminary investigation. And the standards you use in conducting a preliminary investigation are used to conduct the full investigation. I wonder if you might comment on that.

Attorney General LEVI. I must say I think the sentence on page 16 which says:

"It requires a strong showing of criminal conduct before a full investigation is authorized" is in itself too strong a statement. And I meant as I said it to comment on that point. And I am glad you raised it. Because what I think it has to be taken to mean is something in the neighborhood of a reason to think there is, or some such thing. Because if you really know there is, then you don't need the full investigation, and you proceed with the course.

And on the other end of it, I don't know how one is going to get to this place where there is reason to believe, or as you once said, likelihood, and so on, unless there has been some preliminary investigation to find out. We can't use the same standard which is involved in bringing a case, because this is before one brings a case.

This is the investigation which makes the case possible which develops the case. So that the standard has to be less than that. And I think it also has to be less than the arrest standard.

Now, what kind of words define it I am not sure. "Likelihood" was regarded as not a good word. But I don't think that "probable cause to believe" is the right phrase. And this is really a problem. It is a problem of trying to set one standard for beginning the investigation, that is, preliminary, where you can't do very much. One concern that I have about these guidelines is that perhaps one can do so little that perhaps the preliminary wouldn't be extremely helpful.

But I have been reassured on that. And then a higher standard for the full, where you can use different investigatory techniques. But that is still less than the standard where you get an indictment.

Mr. DODD. It just sort of seemed to me, looking at 1 (b) of the guidelines, that those are the basic outlines, or steps, or whatever one would

look to in order to make a determination as to conducting a preliminary investigation. They are pretty stringent.

It seems to me that you have got to pretty much make a decision that the conduct, as you say here, would involve, the use of force or violence and would be a violation of Federal law. It is pretty strict, I would say, in order to make that determination.

Attorney General LEVI. It says, in order to ascertain information. So it is an attempt to find out. And I think as long as one accepts the importance of an investigating agency, and recognizes that for all kinds of criminal cases one needs an investigating agency, and not just for the one case, but for a continuity, one has this problem. And we are trying to tighten it, and to state the steps. But it is a new area. And we went to the *Terry* case because we thought it was as analogous as we could find.

But this is the area where there have been changes since the prior draft, and maybe we can work out something better in the next one.

Mr. DONN. I believe that almost every member of the committee has raised this point this morning. And I believe both of you recognize it as well. And that is the setting up of some sort of procedure for this committee and other committees of Congress that have jurisdiction over the investigatory agencies, specifically, the FBI, for setting some sort of a system where you have a better line of communication.

You testified before the Senate last month. And it seemed to me that, reading that testimony—and you correct me if I am wrong—that you said that you didn't believe that ongoing oversight need be as extensive or as comprehensive as was conducted by the Senate Select Intelligence Committee.

I am wondering, the Watergate atmosphere sort of created that, and now that that is over with, you don't need to have that kind of intensive investigation.

One of the great problems, I feel—and I would like your feeling on it as well—is that we shouldn't have to get to another kind of Watergate situation to have the kind of good communications between the Bureau and the FBI and sitting committees of Congress charged with the responsibility of conducting oversight and working out problems such as setting up a set of guidelines.

Do you really feel that we shouldn't have a kind of extensive and comprehensive oversight that the select or ad hoc committee should have?

Attorney General LEVI. I don't remember commenting actually on whether the kind of investigations that were conducted by the select committees were the kind of things that should always be expected or continued or whatever. Those are very different kinds of investigations. It is an incredible problem if one approaches a department and decides to look at documents which flow over a 20-year period which couldn't possibly really be read or analyzed by either the people giving the documents, or to a considerable extent by the people receiving them. That is a very, very different kind of operation which can highlight problems. And I am not being critical, all I would say is that that is not what I would call a typical oversight function.

Of course, there should be oversight. And there should be continuing oversight. As a matter of fact, I think what I said to the Senate

committee—and not the Church committee, but the Government Operations Committee—was that my concern was that—and I don't know how to handle it—that if the Congress were to create a special committee for the oversight of the intelligence function, just intelligence, that might split the Bureau.

So, that it is intelligence functions before one committee, and it is other functions before a different committee. And this bothers me. I don't think, for various reasons, that the Bureau's functions should be looked at by one committee. And I rather thought it was the same committee that was looking at the Department of Justice.

So, in any event, I certainly accept the notion of a continuing oversight.

I don't think continuing oversight should be regarded as continuing management. I do not think that continuing management is the function of the Congress, or do I think that that would be an efficient way of doing things, or an effective way.

So, that one has to work together the kind of recording and information systems which will keep the committees informed. And I don't believe there is any argument about that from our standpoint.

Mr. Dobb. I know my time is up, but I wonder, Mr. Kelley, if you would comment as well.

This is from your testimony before the Senate :

We must ask whether the same degree of latitude should be allowed as is essential to an ongoing oversight committee. The Select Committee came into being in a Watergate atmosphere. Issues were raised that needed to be resolved. Most of them have been resolved.

I wonder if you could give us your comment as well on that same basic point.

Mr. KELLEY. We have to date, since April of 1975, devoted 4,500 agent days to the development of the information that has been desired by the committees and 2,221 clerical days. This, of course, is quite a number of days in time, and so forth. And it is expensive. We, however, do not construe this as lost. We construe it as very necessary, in that there should be oversight. And I have never said that we should not have oversight. In other words, the system is not one we feel should be objected to, but the effects of that are quite, on occasion, damaging to us. We are running into situations where the very heart of our capabilities, informants and sources—and I don't mean informants exclusively, but sources—are reluctant to talk with us because of the wide disclosures that have been made. Again, I am not complaining about the system of oversight. I am talking about the effects of it—can we balance this with what is necessary in order for us to do the job as it should be done. We seek guidance. We are willing to work within the framework of a set of guidelines and legislation. We don't quarrel about that. What we are saying is that we must keep intact as much as possible the capabilities that we need to do the job the way it should be done, capabilities which are still legal, but nonetheless they are very essential. And we must preserve them as best we can.

We have been working under oversight. The Senate Judiciary Committee has heard me and the former Attorney General. And certainly knowing Mr. Levi as I do, we do not together have any

complaint about this oversight. We would hope that it would be done in an atmosphere where it would be constructive, beneficial, and would not to any extent destroy those capabilities.

Mr. DODD. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Parker.

Mr. PARKER. Mr. Attorney General, the guidelines are entitled "Domestic Security Investigations." Is that terminology meant to include all of the similar or same type of cases that we formerly called domestic intelligence cases?

Attorney General LEVI. I think so.

Mr. PARKER. I didn't mean to be overly suspicious, I was just wondering whether the Bureau was carving out a new terminology which would exclude certain areas of domestic intelligence which would not be covered by the guidelines.

Attorney General LEVI. No. I am probably responsible for the use of the word "security," because I thought that so far as the public was concerned, the public was much more familiar, and probably much more concerned about internal security investigations, and I thought the word "security" was probably a more candid use of words than intelligence. But I didn't feel strongly about it.

Then there was some discussion as to why the words were changed, and whether there was a suggestion that this was a change in the direction of the Bureau. I don't think it is a change in the direction of the Bureau. But as I have already stated, in my own view of the direction of the Bureau has to be to keep these investigations very closely related to the detection of crime.

Mr. PARKER. Thank you very much.

Would you say that the Department of Justice and the Federal Bureau of Investigation are presently operating within the limitations of the guidelines as presented?

Attorney General LEVI. Well, in general I think so. I cannot be certain, because the only way you can be certain is to put them into effect and see where it runs.

Mr. PARKER. Is it your understanding or your intention that they would presently operate under the limitations, or at least the outlines of the guidelines?

Attorney General LEVI. I think it is my intention that they flag problems for all of us, and where there is some deviation, which conceivably there might be, because just as we are not sure of the guidelines, that that is a matter that will be discussed. And we have frequent discussions.

Mr. PARKER. Director Kelley, you indicated that the number of domestic security cases has been reduced significantly since July 1973. Is that reduction the result of fewer people who meet the criteria that would begin an investigation under that term, or is it the result of policy changes within the Bureau?

Mr. KELLEY. It is quite a lengthy response that I will have to make. But generally speaking, it is that certain people do not meet the criteria.

Mr. PARKER. There are fewer people in the country involved in what you call domestic security cases?

Mr. KELLEY. As we have now defined it, yes.

Mr. PARKER. Mr. Attorney General, one of your significant accomplishments, among many, has been the realignment of the relationship between the Department of Justice and the Bureau. Someday the cast will change. Do you have any suggestions as to how that will be perpetuated in the future? Do you think it ought to be institutionalized, and if so, how can it be institutionalized?

Attorney General LEVI. I hope it is institutionalized. And I think I speak for the Director as well as myself. How it should be institutionalized I am not sure, because partly it is statutory, and partly it is a matter of writing down such things as these guidelines. And it is partly going to be a matter of oversight.

Mr. PARKER. I was going to ask if you saw congressional oversight as a part of this equation.

Mr. EDWARDS. Mr. Klee.

Mr. KLEE. Thank you, Mr. Chairman.

Mr. Attorney General, on page 19 of your statement you specify some main themes on which you express the desire that there should be general agreement. One of the themes is a requirement that domestic security investigations be tied closely with the detection of crime. Do you mean to exclude domestic security investigations that are tied closely with the prevention of possible future criminal activity but which are in no way related to the detection of a crime which has already occurred?

Attorney General LEVI. No; because I think—I don't like to get into the kind of consideration which inevitably leads to a suggestion of the law of conspiracy, which doesn't happen to be an area in which I find favor. But the fact is that what I am talking about is that, it is tied sufficiently closely so that it is the detection of a crime that either has been committed or an awareness that it is likely to be committed, or there is a reasonable probability that they said those words, and one is looking for and being violent about a violation of law which is either coming or has come. Now, if it is coming, and the statutes of the Congress are apt to talk this way, you can talk about it as a conspiracy. But I find that a very full net which may not disclose what is involved. So I would rather put it this way.

Mr. KLEE. Is the standard that you propose to set different from the standard set by the Supreme Court which Director Kelley referred to on page 3 of his statement, where the Supreme Court said: "The emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some posture crisis or emergency."

Attorney General LEVI. I don't think the standard is different. One has to be a little careful about these sentences from cases. One would like to know what the prior sentence is and what the following sentence is and what the Court actually held.

Mr. KLEE. My final question relates to the fifth criteria in section 1 (b) of your outline under bases of investigation. You emphasize when you read your statement that the word engaging in domestic violence was different from the words "inducing domestic violence," and indeed an old draft that I have seen talked about creating domestic violence. Why the limitation to engaging in domestic violence and not inducing domestic violence?

Attorney General LEVI. For the very reason that the question was put earlier in the session, that it may be that a group, exercising their given constitutional rights, might be met with violence on the other side. But I don't think that that is the reason for investigating those who are engaging in their constitutional rights.

Mr. KLEE. Director Kelley, do you feel that a group that is inciting to riot but does not itself intend to engage in domestic violence should be the subject of a preliminary investigation?

Mr. KELLEY. Yes; if they are inciting others to do that which they do not want to do themselves, I think certainly that we should at least make some preliminary inquiries. Now, as to whether or not this is inducing, I am not here to engage in any debate about what is meant by inducing or engaging. But this can well be construed as engaging. For example, when you hire a killer, it is both who are then engaging and not just then inducing.

Attorney General LEVI. I would regard that as engaging.

Mr. KELLEY. There you are. We are together now.

Mr. KLEE. Thank you very much.

Mr. Chairman, I have no further questions.

Mr. EDWARDS. Mr. Badillo.

Mr. BADILLO. Mr. Levi, is it your intention that the criteria of the guidelines for White House investigations be applied to investigating at the request of any executive agency or any Cabinet member?

Attorney General LEVI. Mary Lawton has just said, for Presidential appointments, yes. But I think there would be other restrictions on—and there are other restrictions—on requests by Cabinet officers.

Mr. BADILLO. Do you intend to have separate guidelines for those?

Attorney General LEVI. I don't know how the guideline committee is going to handle that. But it has to be included. And we do have separate procedures.

Mr. BADILLO. Would you let us know?

Just so we understand each other, in the White House guidelines you will change it so it is clear that it is the intent that the consent of the individual be secured.

Two, in the destruction of information you have some criteria by which unsolicited information which is a violation of the law may be destroyed if it is something that really has to do with victimless crimes, as we would call them, or generally some violation of law.

Attorney General LEVI. That is my position. You must understand that there is a committee—

Mr. BADILLO. I understand.

And three, that you will fight for the basis for opening up a basis to distinguish a criminal group trying to overthrow the Government and a group that is merely trying to persuade the Government to revise its decisions?

Attorney General LEVI. I would make that distinction. But if the persuasion is by force and violence, I am not likely to.

Mr. BADILLO. You are going to look into how far you go down the road.

Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman.

Just a couple of questions addressed to you, Mr. Attorney General. Is it correct that a preliminary investigation can be conducted in the field office without the authorization of headquarters, the Attorney General's office, or headquarters of the FBI in Washington?

Attorney General LEVI. That is what the guidelines say.

Mr. DODD. On page 5 of these draft guidelines, section 3, "Terminating investigations," paragraph (a) says—

Preliminary and full investigations may be terminated at any time by the Attorney General or his designee or FBI headquarters.

If the headquarters is not even aware that a preliminary investigation is going on, how are they going to terminate it?

Attorney General LEVI. That is an excellent question for the Director.

Mr. DODD. Mr. Director?

Mr. KELLEY. By notification that a case has been opened.

Mr. DODD. If you didn't know it was opened?

Mr. KELLEY. Well, we are supposed to.

Mr. DODD. Well, you don't have to, according to this, preliminary investigations can be opened.

Mr. KELLEY. We don't have to know of the opening of a preliminary in the field in our headquarters.

Mr. ADAMS.

Mr. ADAMS. They do have to notify us, but we don't have to authorize it.

Mr. KELLEY. We are notified of it.

Mr. DODD. You are notified of it, but you don't have to authorize it?

Mr. ADAMS. That is right.

Mr. DODD. What does that mean in terms of procedure? A file slip goes in that we are going to conduct an investigation?

Mr. ADAMS. No; a special agent in charge of the office authorizes the initiation of a preliminary inquiry. He has to furnish to headquarters the basis upon which he authorizes it. The headquarters is in a position then to take issue with his decision. But he doesn't have to await initiating it, he makes the basic authorization. And therefore headquarters is in a position to take issue.

Mr. DODD. But in effect they are involved in the authorization process even?

Mr. ADAMS. Yes; on a post basis.

Mr. DODD. On page 9 of the guidelines under section (c) "Retention." I don't know if it is just my copy or not, but in paragraph 1 you have—

The FBI shall, in accordance with a record retention plan approved by the National Archives and Records Service, within blank years,

and so forth. That explanation, you just haven't made up your mind as to how long a period of time that should be, or the Archives hasn't made up its mind?

Attorney General LEVI. I think the committee hasn't made up its mind. And really this requires more consultation with the Bureau. The period of time is not yet settled.

Mr. DODD. At the bottom of that page your second note says—

It may also be possible to establish a scaling procedure to reserve investigative records for an indefinite period of time prior to destruction.

I have a difficulty—and we have been over this, I guess before—but after a preliminary investigation has been conducted, and it is concluded by the field office, and there is no reason to proceed, there is no merit—let's go to the most extreme cases—there is absolutely no merit for continuing any further investigation as to the initial reasons or reports that we receive from informants or sources that will be unreliable, that the information was specious, it was unfounded, it is absolutely without merit, and you have got yourself a bunch of information that is absolutely worthless, it is lies, why is there any hesitation at that particular point in completely destroying that file?

Mr. KELLEY. I think one of the problems is that you have difficulty in this field in saying absolutely no basis. And it might be that subsequent reports made by informants or sources might give fortification for the original allegation.

I would say that the harm is not so much in the retention—and I don't think forever, for a reasonable period of time—the harm is not retention but the abuse of this information. And we would like to have it considered as a viable system that we have at least a reasonable period of time for retention so that if anything does come up we may use it. Now, this may not be construed by the committee or Congress as a sensible, reasonable system. And we would not quarrel about that. Because we would revive the investigation if subsequent information comes up. It is just one of the devices that will assist us and prevent a de novo type of investigation. If it is not the construction of the Congress and the committee, we are not going to argue about it. It is just one of the devices that might be helpful.

Mr. DODD. On the other side of that question it came to me, going over this last evening, that while there may be an effort or desire on the part of some to see those records destroyed once, you could have a situation where, for historical purposes, in the investigation a person they cease to maintain certain information that might otherwise be destroyed. Will any consideration be given to that in discussions with the National Archives to maintain historical documents that may have absolutely no merit in being retained from an investigatory standpoint but may have merit in terms of being preserved from a historical standpoint, is that being considered?

Mr. KELLEY. I don't know. But I know that on occasion some of those investigated might even request that it be retained. And I know of one such instance—in other words, that if anything ever came up, he would be able to say, this has been investigated and this file is in a certain place preserved at my request, so that I might show my innocence. I don't know whether the historical matter has been pursued.

Attorney General LEVI. The National Archives would have control over it.

Mr. DODD. Of maintaining historical data?

Attorney General LEVI. Yes.

Mr. DODD. Would they have control over—would they make the determination that it is historical and that it should not be destroyed, even though you had determined that it should be?

Attorney General LEVI. Yes; as I understand it.

Mr. DODD. Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, gentlemen, and Ms. Lawton, very much for excellent testimony. And I personally think you are doing very

well in those guidelines. I have reservations about the preventive action provision, but we will discuss that at a later time. And I think you should not have that provision in the guidelines. But it is also subject to further discussion.

I would suggest that you testify before the Rules Committee of the House, they are getting ready to report some kind of a bill that I think would do great damage to the legislative oversight responsibilities of the House of Representatives. And unless there is opposition expressed at the appropriate time, you are liable to find yourselves in an entirely different situation, and one that might not work very well.

We intend to have further hearings on the matter of guidelines as they are developed with other witnesses, too. They should be helpful to you and to us. And I am sure that private organizations and private attorneys and knowledgeable people in this area will have their say on this important matter.

The next hearing on the subject of the FBI would be the General Accounting Office's full report, which is a huge document, on February 24.

Again, we thank the witnesses for appearing.

[Whereupon, at 12:20 p.m., the subcommittee adjourned, subject to the call of the Chair.]

FBI OVERSIGHT

Attorney General's Guidelines for FBI Activities and Additional Legislative Proposals

THURSDAY, MAY 13, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, Thursday, May 13, 1976, in room 2237, Rayburn House Office Building, at 9:35 a.m., Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, Dodd, and Butler.

Also present: Alan A. Parker, counsel; Thomas P. Breen and Catherine LeRoy, assistant counsel; and Roscoe B. Starek III, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee intensifies its focus on determining what legislation should be drafted regarding the domestic intelligence activities of the Federal Bureau of Investigation.

The work of the various House and Senate committees in disclosing past abuses is just a part of our responsibilities. The revelations of the past more than demonstrate the need for proper legislation. In addition, we have the clear agreement of the Department of Justice that legislation is imperative. Given such a setting, the mandate of this subcommittee is clear.

It is our intention to expose ourselves to a wide range of informed views during our hearings in the next month. My fellow members and I will not fail to consider all of the issues in a most serious manner, for we know our policy decisions will have both immediate and long-range effects on the functions of the Department of Justice and on the public at large.

Each has legitimate interests to be protected, and our policy should indicate that the varying interests are compatible.

The Constitution provides no special status to any citizen because of that person's title, position, or agency affiliation. While it is true that lawbreakers must be quickly and fairly dealt with—a duty given by the people to the Government—those who are rude, impolite, different, objectionable, offensive, or whose morals or mores do not please us are entitled, in the absence of illegal activity, to be left alone by our Government.

It should also be made clear that at the same time we focus our attention on this specific area, this subcommittee will be continuing its

oversight responsibility with respect to other facets of the FBI so that other functions of the Bureau will also be dealt with in turn by the legislative process, if we determine that such action is necessary.

Mr. Butler, do you have a statement?

Mr. BUTLER. Yes, sir, Mr. Chairman.

Today we reconvene for several additional days of hearings pursuant to our oversight jurisdiction of the FBI. I look forward to these hearings because it is with serious concern that I read the portions of the Senate select committee's report concerning the activities of the FBI during its long, and in many respects, meritorious service to this country and to the preservation of the freedoms enjoyed throughout this Nation.

We have been provided recently with the committee reports filed in the Senate. I look forward to reviewing the additional volumes, which are scheduled to be released next week.

Portions of the material are awesome and ominous, but I am convinced that we have seen the last of these actions which were carried out by an overzealous Bureau that occasionally placed its dedication to duty above the law. No organization, particularly a law enforcement agency of this country, will ever again be permitted to conduct itself in this manner.

This brings me to a point, Mr. Chairman, which I hope we will give serious study and careful consideration. During this past month, the Department of Justice has released guidelines which clarify the FBI's conduct for three specific types of investigations: White House personnel security and background investigations, domestic security investigations, and reporting on civil disorders and demonstrations involving a Federal interest.

By June 1, we expect the long-awaited counterintelligence guidelines. It is my understanding that long hours of thoughtful deliberation by dedicated Department of Justice attorneys was accorded these guidelines.

If legislation is necessary, Mr. Chairman, then let us act swiftly and responsibly. Yet in light of this serious effort for reform, I am not convinced at this point that restrictive legislation is the answer. I hope we will hear again from Attorney General Levi and Director Kelley on this very issue.

In any event, the long history of excellence within the FBI was reconfirmed to many this past weekend when Director Kelley apologized to the American people for the Bureau's mistakes.

With people of the caliber of Director Kelley, who are willing to admit to error, I have strong feelings that the Bureau will once again be held to the same high esteem that it enjoyed for decades.

I look forward to the testimony from the several distinguished witnesses who are scheduled to appear before us over the next few weeks.

Mr. EDWARDS. Thank you, Mr. Butler.

The gentleman from Massachusetts?

Mr. DRINAN. I have no comment. I want to thank the witnesses for coming. I have read their statements and I am most interested.

Thank you.

Mr. EDWARDS. Today we have two witnesses who have been deeply involved in the study and the analysis of the lawful role of Federal investigative agencies in the life of our country.

Our first witness is Mr. Jerry J. Berman, who is the director of the domestic security project of the Center for National Security Studies. Mr. Berman is an attorney and a member of the bars of the District of Columbia and my home State of California. He has been involved in public interest laws since 1968.

Mr. Berman is coauthor of the book "The Administration of Justice Under Emergency Conditions" and of articles for a number of newspapers and journals.

We welcome you here, Mr. Berman.

I will introduce Mr. Halperin in a minute.

Mr. Berman, you may proceed.

TESTIMONY OF JERRY J. BERMAN, DIRECTOR, DOMESTIC SECURITY PROJECT OF THE CENTER FOR NATIONAL SECURITY STUDIES

Mr. BERMAN. Yes; Mr. Chairman.

I believe that I have a very long statement, as you can see before you, and I would like to have the whole statement inserted into the record. And, then, I would like to read a condensed version here today.

Mr. EDWARDS. Very well, without objection, both statements, in full, will be made a part of the record.

You may proceed.

Mr. BERMAN. Yes; my second point is that Mr. Halperin and I have a joint presentation and I think that they flow together and I think that we ought to present our views, as a whole and then open it up for questions. And I think, that then we can proceed more expeditiously that way.

Mr. EDWARDS. Very well. Then I will introduce Mr. Halperin after you make your statement.

Mr. BERMAN. Mr. Chairman, members of this subcommittee, Congress must enact a comprehensive legislative charter to govern the FBI. No more important business is before the Congress. At issue is the rule of law and the future of constitutional democracy. I therefore welcome this opportunity to state my own views on key issues that must be deliberated and resolved.

I believe the need for a comprehensive FBI Charter is beyond debate. Before the FBI can be made to obey the law, it must have a law to obey. The present statutes governing the investigative responsibilities of the FBI are silent on intelligence investigations aimed at American citizens.

Congress has allowed the executive branch to conduct intelligence operations as a matter of executive discretion and the executive branch has authorized and expanded the FBI's intelligence mission at will. This is not law but license.

Allowing the executive branch to claim as an "inherent power" to direct FBI intelligence has led to widespread abuse. Rule by Executive order, subject to modification at any moment, has placed our liberties on anything but a firm foundation. Only a legislative charter can put to rest the doctrine of inherent power and place all of the investigative activities of the FBI within a framework of positive law. After 40 years of executive disorder, only public covenants can begin to restore

public trust in our investigatory agencies. The new domestic security guidelines which Attorney General Levi promulgated in April of this year are a case in point.

They may be more restrictive than previous executive directives, but they have been established under questionable authority and can be changed tomorrow or by the next Attorney General. They were put into effect in April but they are tentative.

I do not think that Congress should any longer defer to the Executive. A legislated charter should set forth precisely under what circumstances and to what extent the Bureau may investigate the political activities of American citizens. This poses a basic issue that must be resolved during these deliberations: Should Congress authorize, limit, or prohibit domestic intelligence investigations?

While I sense growing support for a charter to define and clarify the investigative jurisdiction of the FBI, I do not believe the proponents of legislation agree on how Congress should resolve this vital issue.

The FBI and the Justice Department want the Congress to authorize domestic security investigations.

The Senate Select Committee on Intelligence has made a series of recommendations that if adopted would limit but not prohibit intelligence investigations.

The House Intelligence Committee has called for prohibition by recommending the abolition of the Internal Security Branch of the FBI. My own opinion, and one that has been endorsed by a number of public interest organizations, such as Common Cause, ACLU, and UAW, is that the FBI should be prohibited from conducting domestic intelligence investigations targeted at American citizens.

There is no reason why investigations limited to criminal illegal acts will not take care of our security interests.

Today, I would like to explain why I have reached this conclusion.

It is the duty of Congress to devise a legal structure for the FBI that will curtail FBI intelligence activities in order to avoid a repetition of the past. I also believe it is incumbent that Congress "make no law abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Congress can only accomplish both by enacting a charter that prohibits all domestic intelligence investigations by the FBI, and specifically limits the FBI to initiating investigations only to "detect * * * and prosecute crimes against the United States."

By definition intelligence investigations are initiated without reasonable cause to believe a crime has been committed, to gather information on the plans, activities, beliefs, associations and memberships of individuals and groups.

Investigations intrude on speech and associational privacy protected by the first, fourth, and the fifth, and ninth amendments to the Constitution. They chill speech by subjecting citizens to the fear of investigation, exposure, and reprisal if they engage in unpopular political activity.

Acting under Executive orders to investigate subversive activities, and prevent violence, the FBI has not only intruded upon the privacy of innumerable individuals and groups, but has engaged in systematic illegal activities.

As the committee is well aware, the FBI has not confined its investigations to individuals or groups engaged in illegal conduct. It has investigated members of Congress, peace groups, civil rights organizations, the women's liberation movement, and delegates to political conventions.

It has routinely initiated and conducted investigations and maintained files on nearly one million associates and members of organizations that espouse revolutionary doctrine but whose activities have posed no clear and present danger to the security of the country. That kind of spilling over is inherent when not limited by legislative action.

And it has engaged in FBI "smear campaigns" against civil rights leaders, including Dr. Martin Luther King, Jr., involving illegal wiretapping, dissemination of derogatory information and an anonymous letter urging King to commit suicide; FBI programs of warrantless wiretapping dating back to 1940; directed at citizens and groups in the United States; FBI political intelligence programs conducted at the request of the Executive to keep Presidents informed about their enemies and opponents—usually persons who have done no more than dissent from Administration policy.

I believe this public record of abuse places a heavy burden of proof upon the Executive to show both the legitimacy and the propriety of allowing the FBI to continue to direct intelligence investigations at American citizens.

This burden of proof relates directly to the debate over the future role of FBI intelligence. Today, the Justice Department and the FBI seek authorization to conduct intelligence investigations in order to anticipate and prevent violence.

The Department and the Bureau cite statistics which show that acts of violence and terrorism are on the rise in the United States to justify the continuing need for FBI intelligence investigations, despite the fact that the Senate Select Committee has concluded that the FBI should be authorized to conduct limited intelligence investigations for this purpose.

Two assumptions underly these recommendations: (1) that intelligence investigations play a useful role in anticipating and preventing violence; and (2) that carefully drawn guidelines together with executive and congressional oversight can prevent serious abuse.

These assumptions are simply not supported by the evidence on the public record. The facts strongly indicate the contrary and lead to the conclusion that this grant of authority is both unwarranted and dangerous.

I want to make it clear that I think violence and terrorism pose a danger to our society and I believe we must step up our efforts to find ways to reduce the instances of violence in our society.

However, I do not believe intelligence investigations provide a meaningful solution to this problem and in fact may exacerbate it. I think the evidence makes this clear.

First, the public record demonstrates the FBI intelligence has been all but useless in anticipating or preventing acts of violence or illegal conduct.

According to the Senate Select Committee, between 1960 and 1974 the FBI conducted over 500,000 separate investigations of persons and groups under the "subversive" category, predicated on the pos-

sibility that they might be likely to overthrow the Government of the United States. Yet, not a single individual or group has been prosecuted since 1957 under the laws which prohibit planning or advocating action to overthrow the Government and which are the main alleged statutory bases for such FBI investigations.

According to the GAO audit of FBI intelligence investigations, the Bureau has not been able to anticipate violence through its vast intelligence operations. Investigations of sabotage, certain bombings, and riot violations, and protection of foreign officials, although handled as part of the FBI's domestic intelligence operations, usually involved criminal acts committed before the investigations were initiated.

In fact, the FBI rarely anticipates significant activity of any kind, including violent acts. According to the GAO audit of 19,700 cases, involving a random sample of 898 cases in 10 FBI field offices, the FBI anticipated activity in only 17 cases. Only six cases involved potential violence.

In the 1960's one of the main reasons advanced for expanded collection of information about urban unrest and antiwar protest was to help responsible officials cope with possible violence.

However, as the Senate Committee reports, a former White House official with major duties in this area under the Johnson administration has concluded, in retrospect that in none of these situations would advance . . . intelligence about dissident groups [have] been of much help, and that what was needed was physical intelligence about geography of major cities, and that the attempt to predict violence was not a successful undertaking.

Moreover, much FBI information is useless to other agencies concerned about violent political acts. The GAO report notes that while the FBI disseminates over 89 percent of its intelligence case reports to the Secret Service, responsible for protecting the lives of high government officials, the agency retains only 6 percent of the information received. The Secret Service said it received "too much not always useful information." A specific Defense Department directive DOD Directive 5200.27 requires the destruction of a great deal of information it receives from the FBI about civilians considered "threatening" to the military.

The civil disorders of the 1960's, the Capitol bombing, the political assassinations, and the attempts, the activities of the SLA, and other instances, were not anticipated and obviously not prevented by FBI intelligence gathering.

I believe this record not only undercuts the FBI's case for conducting intelligence investigations in order to anticipate and prevent violence, but suggests why intelligence investigations are all but useless for this purpose. First, the FBI collects facts, but the record shows that we do not know that this collection of facts is relevant in predicting violence.

Second, intelligence agencies depend on prior notice, yet, most political violence is spontaneous. As three Presidential commissions have concluded, "the larger outbreaks of violence in the ghettos and on the campuses were most often spontaneous reactions to events in a climate of social tension and upheaval."

Third, the FBI assumes there is a causal connection between speech

and action, but as random bombings demonstrate, terrorists do not follow rational patterns.

And, finally, the FBI relies on a network of established informants for information, but true terrorists know this and operate underground.

Under these circumstances, massive intelligence coverage is relatively useless and will continue to be unless we adopt the unacceptable alternative of putting everyone under surveillance. I think that the problem must be addressed differently.

My second major point is that the Justice Department guidelines and the Senate committee recommendations, designed to limit the FBI, actually authorize continuing coverage of lawful political activity. They pose a grave risk to our civil liberties.

I do not want to get entangled in the guidelines today, but, as my longer statement indicates, I have analyzed these guidelines and recommendations, and have come to the following conclusion: That to anticipate violence under these standards, the FBI would be authorized to investigate the same individuals and groups that it has always investigated.

The Comptroller General has stated "the language in the draft guidelines would not cause any substantial change in the number of and the type of domestic intelligence investigations initiated." In 1974, there were over 30,000 on-going investigations.

In the Senate Select Committee's final report it is pointed out FBI officials inside the Department, interpret the guidelines as permitting continuing investigations of "subversives."

In effect, the Senate Committee adopted the Justice Department guidelines, but attempted to make the rules more strict to prevent the Bureau from investigating lawful political activities. I think that the Committee failed and it expressed its own frustration at trying to draft language that maintains the fine line between surveillance of lawful activity and violent conduct. I believe that frustration is warranted, because that fine line cannot be drawn. There is no way around the fact that intelligence investigations are based on a predicate short of criminal conduct and unavoidably lead to investigation of lawful activity.

I think that to focus on standards ignores the two central lessons of the recent investigations. One, that they were useless in preventing violence.

The second is that narrow programs tend to grow. As the Senate committee itself observed, "We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses characterized as 'vacuum cleaners,' sweeping in information about lawful activities of American citizens." It is the nature of intelligence activities and investigations to grow and to expand, especially in times of crisis and turmoil, so why authorize it?

As I remarked earlier, the problem of political violence must be addressed differently. The FBI should be allowed and required to attack the problem of violence by conducting criminal investigations leading to prosecution and conviction of those engaged in violent crimes.

MR. DRINAN. I wonder if I could interrupt at this point and say that the very term "intelligence investigation" has never really been defined.

Would you assume that preventive would have to be included, that every intelligence investigation is also preventive in the minds of the FBI and in the minds of some in the Senate Select Committee?

MR. BERMAN. Yes; I think that they have read in the term "preventive" and that this is the predicate for intelligence gathering under the present guidelines.

Both the Guidelines and the Senate committee recommendations are based on the idea that intelligence is needed to prevent and anticipate violence, sir.

However, I believe that instead of employing 1,000 agents and 1,000 informers and the apparently fruitless exercise of identifying ahead of time the lone assassin, the person who is likely to engage in political violence, the FBI should concentrate its efforts on deterrence.

This can only be accomplished by detecting and prosecuting those who have committed violent crimes and not only the politically violent.

Out of over 1900 bombings in 1975, only 89 were attributed to political terrorists. This is further evidence that this is a police problem and not an intelligence problem.

This approach, I think, would lead the FBI to focus on conduct rather than advocacy. It would limit the FBI to the collection of evidence, instead of all information about the plans and the activities and beliefs of political groups.

By making successful prosecution the goal, the FBI would refrain from employing illegal means, such as warrantless wiretapping, that could taint important evidence.

I believe that this is the only way to solve the problem of violence without risking our civil liberties and democratic values. Certainly before we authorize the Government to conduct intelligence investigations to anticipate violence, we need to know more about the causes of violence and whether intelligence serves a useful purpose in preventing violence or anticipating it.

I would recommend that although the record before Congress argues for prohibition, a further study of this issue is in order and that perhaps a commission should be—

MR. EDWARDS. May I interrupt you?

MR. BERMAN. Yes.

MR. EDWARDS. Is that not the problem that you mentioned earlier? And that is that in most of these cases, the thousands of cases that they had under investigation in 1974, 19,000 cases, there were no crimes involved?

MR. BERMAN. That is correct.

MR. EDWARDS. That is right. Otherwise, if there was any probable cause for a crime, they would take it to the U.S. attorney and try to get a conviction, but they had practically no luck.

MR. BERMAN. Correct.

MR. EDWARDS. As a matter of fact, none. Of the three or four crimes that were charged and prosecuted those were processed in the State courts for non-Federal offenses.

Mr. BERMAN. That is right. With all of this massive intelligence gathering, which was not predicated on crime and not specifically focused on violence, they had a far reaching and vast network—and still could not successfully prosecute.

Mr. EDWARDS. To a certain extent, that shoots down what you said, that they should concentrate on crimes, because if they had found any criminal activity in 1974 in the 19,000 cases they would have gone to court.

I am not taking a contrary position, but I do point out that that was what the evidence showed.

Mr. BERMAN. I am trying to make them concentrate on crimes to prevent this broad scale coverage of political groups without any predicate based on crimes.

Mr. DRINAN. Very relevant to that, Mr. Chairman, have you ever discovered any regulations or guidelines to these spooky informants out there? You say on page 13 out there there are 1,000 informants and 1,000 agents. But in the GAO studies, I recall, 85 percent of all of the information that they got was done by informants. Is there any guidelines or are there regulations given to those informants?

Mr. BERMAN. No, there are not. Both the GAO study and the Senate Select Committee point out that while the FBI relies primarily on informants to gather information, the Manual of Instruction has no guidelines for the use of informants.

They have been able to use them at will. The Senate Select Committee has recommended tighter procedures. Mr. Halperin will speak to that, but there have been no rules for informants. The informants are simply operated by the Bureau and told to "obey the law."

That has led to agent provocateurs and their interpretation of what the law involves. That has been dangerous and has led to violence on the part of the Government.

Mr. DRINAN. Would you say that that is possibly illegal, to employ informants, these people who disguise themselves as a member of the group. Is there some illegality in the very concept of using this for intelligence?

Mr. BERMAN. Yes, I believe that informants are a form of general search and I think it already has been analogized as a walking microphone, yet with the added and dangerous capacity to alter events within an organization and also intrude on first amendment rights. They are the vacuum cleaners within the organizations.

Mr. EDWARDS. Will the gentleman yield?

The GAO report reported over and over again that the informants and the infiltration and the activity of domestic intelligence served in itself to do damage to the people and the organizations under investigation, thereby achieving a result that the Bureau desired.

Mr. BERMAN. In my testimony I recommend the creation of a commission, one task of which would be to look at the relationship between intelligence gathering and anticipation of violence, and also to consider whether an intelligence agency by its tendency to itself engage in political activities does not exacerbate and start violence of its own.

The reports of the Senate Select Committee on the informants, on COINTELPRO operations, on the Black Panther Party, indicate that

informants became involved in violence, often at the instruction of the Bureau that they prevent violence.

I don't know if this problem can be handled by regulations; it may be rooted in how intelligence agencies view the world.

Mr. DRINAN. Mr. Berman, I wonder if you have thought of the possibility of bringing an action in the Federal court for injunctive relief against the very use of informants. What could a judge do? He would have to say, it seems to me, that this is illegal, receiving money for unaccountable actions.

Mr. HALPERIN. There has been such a case that was set aside by the court of appeals, by one of the justices on the Supreme Court on the grounds that it was premature. But there has been a suit, and if it is successful, it will be followed, I assure you, by a number of other requests for a similar injunction.

Mr. BERMAN. My point in recommending the commission is that we do not yet know enough about this and other such problems to reach definite conclusions.

I was surprised that the Senate Select Committee made the same statements that I have made, and then, at the end, turned its recommendations around and said that the Attorney General had convinced it that the FBI is useful in anticipating and preventing violence. Therefore, it adopted the Justice Department guidelines. Yet, the Senate's Committee offers no real documentation or support for that adoption. Its whole report goes the other way. I would very much like to know what the Attorney General said to this committee to turn it around. I know, for instance, that the FBI withheld information from the GAO and this committee knows that problem well. Those omissions from the FBI could have established what their role was in preventing violence.

The examples of the FBI's preventing violence that the Senate Select Committee found, I think there were eight mentioned in a footnote, were from submissions that came out that were requested after the GAO study.

But those eight investigations, as Senator Philip Hart points out in his following remarks in the Senate report, would not have been covered under the guidelines that the Senate has proposed. They were picked up out of these 1 million investigations that the FBI conducted.

Thus, I believe that the record indicates that Congress should make it clear that it wants the FBI to operate only as a criminal investigatory agency.

By charter, it should establish that in the future the FBI may only initiate an investigation of a person when it makes a showing of specific and articulable facts giving it reason to believe that an individual or individuals acting in concert are engaged in or imminently likely to engage in a specific criminal act in violation of Federal law.

To insure that the FBI will investigate only specific punishable acts, I also recommend, as does the Senate Select Committee, the repeal of the speech crime statutes, such as the Smith Act, which the FBI continues to use as a predicate for intelligence investigations, even though they have been ruled unconstitutional as written and the courts will not enforce them.

I believe that a criminal standard should also apply to all forms of possible espionage engaged in by American citizens.

Today, I have focused on violence and terrorism, but I am also concerned by the Senate Select Committee's recommendation that would authorize the FBI to conduct preliminary and full preventive intelligence investigations against Americans who may soon engage in hostile forms of intelligence activities.

Again, an allegation by someone is sufficient to trigger an intelligence investigation, even if the espionage is not punishable by law, because the Senate includes in its recommendations something which is called "clandestine intelligence activities" which are not criminal violations.

Congress should establish a criminal investigative standard because the intelligence investigations in this area have also led to massive surveillance of the lawful activities of citizens. For example, Operation Chaos, the FBI-CIA mail opening program and NSA's communication intercept programs were operated to determine whether antiwar activists were supported by hostile foreign powers, based only on the allegation that this was the case.

A reasonable suspicion standard would prevent such investigations. And by making the forms of espionage that are now defined as "clandestine intelligence activity" specific violations of law, Congress would make it clear that the FBI only investigates crimes.

Finally, I urge rejection of proposals to allow the FBI to engage in so-called preventive action. New authority can only serve to legalize conduct which is currently beyond the law, including techniques employed by the FBI in its COINTELPRO operations.

I realize that the Attorney General has struck these from the guidelines, but the press release accompanying the guidelines said that it was because of the controversy that those rules had provoked.

The Attorney General also said in "extreme circumstances" that he anticipates that agents would be able to continue such preventive actions. We must know what this means and what extreme circumstances would warrant this.

I think that it is up to the Congress to make clear that the COINTELPRO operations—many of which were labeled preventive action—cannot be continued or engaged in again.

I say here that I am calling for a fundamental change in the FBI. But I really am asking for the return of the FBI to agency investigating criminal activity. That is what it was in 1924 and until 1939 when President Roosevelt issued the Executive orders.

And I do not think that the Attorney General's guidelines or the Senate committee's recommendations accomplish this return to the original intent. I do not believe the guidelines and recommendations will check the Bureau's excesses. It is a bureaucracy that will not be checked by intelligence guidelines.

I think that if we look at the record, when Roosevelt issued his guidelines, he said, it was not clear that the Bureau should investigate subversive activities, yet the Bureau investigates subversive activities.

Under the manual of instructions, in 1973, when it became questionable as to what authority enabled the Bureau to engage in intelligence investigations, it simply switched to the speech crime statutes, even though the courts would not enforce them.

The guidelines make distinctions between preliminary and full-scale investigations, yet the GAO study shows that FBI agents do not make such distinctions and apply the same techniques in both.

Files are considered closed by the FBI but information is still inserted in its dead files.

And while the Justice Department and Congress try to write intelligence guidelines to restrict the FBI to investigations to anticipate violence, the current Director resists such restrictions. He states in a memorandum to the GAO that :

Limiting domestic investigations to preventing force and violence could restrict the gathering of intelligence information useful for anticipating threats to national security of a more subtle nature.

And I don't know what that means.

As the Senate committee reports point out, the agents inside the Bureau interpret the guidelines to allow them to investigate subversives.

If intelligence guidelines have not worked to date, why will they work now?

Those who argue that they can be enforced rely on oversight. But can Congress or the Justice Department or both oversee the thousands of investigations undertaken each year? I understand that the Attorney General has three monitors appointed to oversee all intelligence investigations in the field, but how can the Department or Congress hold the Bureau accountable if the standards for investigation are as vague and flexible as those proposed in the guidelines?

Is Congress with its capacity to create a House Un-American Activities Committee, as well as an Intelligence Oversight Committee, a better guarantee of Bureau propriety?

Will the Justice Department or the FBI act as a restraining influence on agents, when the facts indicate that they are often the ones urging the agents to intensify their intelligence activities to meet the crisis of the moment?

I think not. Although oversight in certain circumstances can be an effective and a necessary means to control the FBI and other investigative agencies, oversight can never be relied upon in the absence of a charter that explicitly states the limits of FBI activity.

I think it is time to draw the line and call the halt to intelligence investigations. And it is time to enact a charter that defines the FBI's mission as an investigator, upon reasonable cause, of the commission of a crime against the United States.

The purpose of a charter is to define the proper role of the FBI in the free society. That role was best articulated by Harlan Fiske Stone in 1924 when he said that the "FBI investigates conduct in violation of the laws of the United States and is not concerned with the political or other opinions of individuals."

I believe my recommendations incorporate this concept and should be adopted in legislation. Enactment of a legislative charter for the FBI is essential in a society based on the rule of law and committed to eliminating official lawlessness.

I make two additional points in conclusion: One, Harlan Fiske Stone announced that standard after the Palmer raids, when Congress had before it a charter and was considering enacting a prohibition against intelligence investigations. But, because they believed in the Attorney General, as we may believe in Attorney General Levi, Congress did not. It took only 10 years to turn the whole thing around—secret orders were issued and the Bureau was on its way.

Finally, what I think we are really calling for is a statute for the whole Government, not just for the FBI, to serve as a reminder for Congress, the Executive, and the people that the democratic ideals we are committed to must be a standard that we look at in the next time of crisis and that we have to ponder why we set it down before we make any efforts to change it and start us on this lawless track again.

Thank you very much.

Mr. EDWARDS. Thank you very much, Mr. Berman.

[The prepared statement of Mr. Berman follows:]

STATEMENT OF JERRY J. BERMAN*

Mr. Chairman, Congress must enact a comprehensive legislative charter to govern the FBI. No more important business is before the Congress. At issue is the rule of law and the future of constitutional democracy. I therefore welcome this opportunity to state my own views on key issues that must be deliberated and resolved.

I believe the need for a comprehensive FBI Charter is beyond debate. Before the FBI can be made to obey the law, it must have a rule of law to obey. The present statutes governing the investigative responsibilities of the FBI are silent on intelligence investigations aimed at American citizens.¹ Congress has allowed the Executive Branch to conduct intelligence operations as a matter of executive discretion and the Executive Branch has authorized and expanded the FBI's intelligence mission at will. This is not law but license. Allowing the Executive Branch to claim an "inherent power" to direct FBI intelligence has led to widespread abuse.² Rule by executive order, subject to modification at any moment, has placed our liberties on anything but a firm foundation. Only a legislative charter can put to rest the doctrine of inherent power and place all of the investigative activities of the FBI within a framework of positive law. After forty years of executive disorder, only public covenants can begin to restore public trust in our investigatory agencies. The new Domestic Security Guidelines which Attorney General Levi promulgated in April of this year are a case in point.³ They may be more restrictive than previous executive directives, but they have been established under questionable authority⁴ and can be changed tomorrow or by the next Attorney General.

Congress must no longer defer to the Executive. It must enact a Charter that sets forth precisely under what circumstances and to what extent the Bureau may investigate the political activities of American citizens. This poses a basic issue that must be resolved during these deliberations: Should Congress authorize, limit, or prohibit domestic intelligence investigations?

While I sense growing support for a Charter to define and clarify the investigative jurisdiction of the FBI, I do not believe the proponents of legislation agree on how Congress should resolve this vital issue. The FBI and the Justice Department want the Congress to authorize domestic security investigations.⁵ The

*Mr. Berman is an attorney and directs the Domestic Security Project of the Center for National Security Studies of the Fund for Peace. The views presented are his own.

¹ See primarily 28 U.S.C. 533, the basic investigatory authority of the FBI.

² For the most broad interpretation of the President's inherent power, see Testimony of Former Assistant Attorney General William Rehnquist in "Federal Data Banks and Constitutional Rights", a study prepared by the staff of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 93rd Congress, 2d Session (Committee Print: 1974), pp. 598-604.

³ Justice Department Guidelines on Domestic Security Investigations and Reporting on Civil Disorders and Demonstrations Involving a Federal Interest, as released to the press on March 10, 1976. (Hereinafter The Justice Department Guidelines)

⁴ The Attorney General claims authority to issue intelligence guidelines under a subsection of 28 U.S.C. 533, which provides that the FBI may conduct "such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." See Attorney General Edward H. Levi, Address to the American Bar Association, August 13, 1975. The question, however, is in reality whether intelligence investigations are "official matters" under the control of the Attorney General. No other statute provides such explicit authority, unless the section of this same statute which authorizes the FBI to "detect" crimes is read to cover intelligence matters. Such a reading would mean that the FBI and the Justice Department can put all Americans under surveillance "to detect" crimes.

⁵ The Attorney General and the Director of the FBI have articulated this position in innumerable statements. The latest will suffice: See Testimony of Attorney General Edward H. Levi before the Subcommittee on Civil and Constitutional Rights of the House Com-

Senate Select Committee on Intelligence has made a series of recommendations that, if adopted, would limit but not curtail intelligence investigations.⁶ The House Intelligence Committee has called for prohibition by recommending the abolition of the Internal Security Branch of the FBI.⁷ My own opinion, and one that has been endorsed by a number of public interest organizations,⁸ is that the FBI should be prohibited from conducting domestic intelligence investigations targeted at American citizens. Today, I would like to explain why I have reached this conclusion.

The duty of the Congress is to devise a legal structure for the FBI that will curtail FBI intelligence activities in order to avoid a repetition of the past. I also believe it is incumbent on Congress to make no law "abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Congress can only accomplish both by enacting a Charter that prohibits all domestic intelligence investigations by the FBI, and specifically limits the FBI to initiating investigations only to "detect * * * and prosecute crimes against the United States."⁹

The record of FBI intelligence activities over the last 40 years leads to the inescapable conclusion that our country does not need and can no longer afford to permit the FBI to engage in ongoing intelligence investigations targeted at those who are not actually suspected of having committed crimes. Moreover, there is no reason why FBI criminal investigations of illegal acts will not take care of our real security interests; I can think of no other limitation on the FBI that can guarantee our constitutional liberties and democratic values.

By definition intelligence investigations are initiated, without reasonable cause to believe a crime has been committed, to gather information on the plans, activities, beliefs, associations and membership of individuals and groups. Investigations intrude on speech and associational privacy protected by the First, Fourth, Fifth, and Ninth Amendments to the Constitution. They "chill speech" by subjecting citizens to the fear of investigation, exposure, and reprisal if they engage in unpopular political activity.¹⁰

Acting under Executive Orders to investigate "subversive activities",¹¹ and "prevent violence",¹² the FBI has not only intruded upon the privacy of innumerable individuals and groups, but has engaged in systematic illegal activities. As the Committee is well aware, the FBI has not confined its investigations to individuals or groups engaged in illegal conduct. It has investigated members of Congress, peace groups, civil rights organizations, the women's liberation movement, and delegates to political conventions. It has routinely initiated and conducted investigations and maintained files on nearly one million associates and members of organizations that espouse revolutionary doctrine but whose activities have posed no clear and present danger to the security of the country.¹³ And it has engaged in extensive illegal activity.¹⁴

FBI "black bag jobs" or illegal burglaries carried out against hundreds of citizens and groups;

mittee on the Judiciary, February 11, 1976; and the Statement of Clarence M. Kelley, Director of the FBI, before the same Subcommittee on February 11, 1976.

⁶ See Recommendation 44 in "Intelligence Activities and the Rights of Americans", Book II of the "Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities", United States Senate, 94th Congress, 2d Session, Report No. 94-755 (Government Printing Office: April 26, 1976). (Hereinafter Senate Final Report)

⁷ Recommendations of the House Committee on Intelligence, February 11, 1976, House Report 94-838.

⁸ See Letter To Senate Intelligence Committee on FBI Charter Recommendations from the American Civil Liberties Union, Americans for Democratic Action, Center for National Security Studies, Committee for Public Justice, Common Cause, and United Automobile Workers, March 11, 1976.

⁹ 18 U.S.C. 638.

¹⁰ A line of cases develops these propositions, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960).

¹¹ See Executive Directives first issued by President Roosevelt orally in 1936 and by way of a press release in 1939; reissued in 1943 by the Justice Department; in 1950 by the Justice Department; and in 1952 by President Truman. See also discussion in Senate Final Report, note 6 *supra*, pp. 25-28.

¹² I refer particularly to the order issued by Attorney General Ramsey Clark in 1967 to gather intelligence relative to civil disorders; Memorandum from Attorney General Ramsey Clark to J. Edgar Hoover, Director FBI, September 14, 1967. See also discussion in Senate Final Report, note 6 *supra*, pp. 82-84.

¹³ Senate Final Report, note 6 *supra*, p. 6.

¹⁴ See generally Senate Final Report, note 6 *supra*. See also Jerry J. Berman and Morton H. Halperin, eds., "The Abuses of the Intelligence Agencies" (Center for National Security Studies: 1975), pp. 14-50.

FBI mail opening programs conducted in contravention of statutes and postal regulations and mail opening programs, also illegal, conducted in cooperation with the CIA, eventually resulting in the opening of 13,000 letters annually;

FBI COINTELPRO operations conducted to "disrupt or otherwise neutralize" political groups, 2,411 actions that included harassment, dissemination of derogatory information from investigative files, dissemination of false and anonymous materials to breed dissension among groups, agents provocateur and interference in the political and judicial process;

FBI "smear campaigns" against civil rights leaders, including Dr. Martin Luther King, Jr., involving illegal wiretapping, dissemination of derogatory information and an anonymous letter urging King to commit suicide;

FBI programs of warrantless wiretapping dating back to 1940, directed at citizens and groups in the United States;

FBI political intelligence programs conducted at the request of the Executive to keep Presidents informed about their "enemies" and opponents (usually persons who have done no more than dissent from Administration policy).

I believe this public record of abuse places a heavy burden of proof upon the Executive to show both the legitimacy and the propriety of allowing the FBI to continue to direct intelligence investigations at American citizens. Certainly the intrusions into individual and associational privacy that are inherent in intelligence gathering make this burden of proof substantial.

This burden of proof relates directly to the debate over the future role of FBI intelligence. Today, the Justice Department and the FBI seek authorization to conduct intelligence investigations in order to anticipate and prevent violence. The Department and the Bureau cite statistics which show that acts of violence and terrorism are on the rise in the United States to justify the continuing need for FBI intelligence investigations.¹⁴ In its Final Report, the Senate Select Committee also recommends that the FBI should be authorized to conduct limited intelligence investigations to prevent violence and terror.¹⁵ Two assumptions underly these recommendations: (1) that intelligence investigations play a useful role in anticipating and preventing violence; and (2) that carefully drawn guidelines together with executive and congressional oversight can prevent serious abuse.¹⁶ These assumptions are simply not supported by the evidence on the public record. The facts strongly indicate the contrary and lead to the conclusion that this grant of authority is both unwarranted and dangerous.

I want to make it clear that I think violence and terrorism pose a danger to our society and I believe we must step up our efforts to find ways to reduce the instances of violence in our society. However, I do not believe intelligence investigations provide a meaningful solution to this problem and in fact may exacerbate it. I think the evidence makes this clear.

First, the public record demonstrates that FBI intelligence has been all but useless in anticipating or preventing acts of violence.

According to the Senate Select Committee, between 1960 and 1974, the FBI conducted over 500,000 separate investigations of persons and groups under the "subversive" category, predicated on the possibility that they might be likely to overthrow the government of the United States. Yet not a single individual or group has been prosecuted since 1967 under the laws which prohibit planning or advocating action to overthrow the government and which are the main alleged statutory basis for such FBI investigations.¹⁷

According to the GAO audit of FBI intelligence investigations, the Bureau has not been able to anticipate violence through its vast intelligence operations. "Investigations of sabotage, certain bombings, and riot violations, and protection of foreign officials, although handled as part of the FBI's domestic intelligence operations, usually involved criminal acts committed before the investigations were initiated."¹⁸

¹⁴ See Statement of Clarence Kelley, Director, FBI, before the Civil Rights and Constitutional Rights Subcommittee of the House Judiciary Committee, February 11, 1976.

¹⁵ Recommendation 44, and discussion in Senate Final Report, note 6 supra, pp. 318-323.

¹⁶ Senate Final Report, note 6 supra.

¹⁷ Senate Final Report, note 6 supra, p. 19.

¹⁸ Comptroller General of the United States, "Report to the House Committee on the Judiciary, FBI Domestic Intelligence Operations . . . Their Purpose and Scope: Issues That Need to be Resolved" (General Accounting Office: February 24, 1970), pp. 3-4. (Hereinafter cited as GAO Report)

In fact, the FBI rarely anticipates significant activity of any kind, including violent acts. According to the GAO audit of 19,700 cases, involving a random sample of 898 cases in 10 FBI field offices, the FBI anticipated activity in only 17 cases. Only 6 cases involved potential violence.¹⁹

One of the main reasons advanced for expanded collection of information about urban unrest and anti-war protest was to help responsible officials cope with possible violence. However, as the Senate Committee reports, a "former White House official with major duties in this area under the Johnson administration has concluded, in retrospect that 'in none of these situations . . . would advance intelligence about dissident groups (have) been of much help,' and that what was needed was 'physical intelligence' about geography of major cities, and that the attempt to 'predict violence' was not a 'successful undertaking.'" ²⁰

Moreover, much FBI information is useless to other agencies concerned about violent political acts. The GAO report notes that, while the FBI disseminates over 80% of its intelligence case reports to the Secret Service, responsible for protecting the lives of high government officials, the agency retains only 6% of the information received. The Secret Service said it received "too much not always useful information."²¹ A specific Defense Department Directive, DOD Directive 5200.27, requires the destruction of a great deal of information it receives from the FBI about civilians considered "threatening" to the military, including reports on civilian subversion.²²

While citing acts of violence and terrorism as a justification for intelligence activities, it is common knowledge that the FBI did not anticipate any of them. The civil disorders of the 1960s, the Capitol bombing, the political assassinations and attempts, the activities of the SIA, and other instances, were not anticipated and obviously not prevented by FBI intelligence gathering.²³

I believe this record not only undercuts the FBI's case for conducting intelligence investigations in order to anticipate and prevent violence, but documents why intelligence investigations are all but useless for this purpose. First, the FBI collects "facts", but the record shows that we do not know what facts are relevant in predicting violence. Second, intelligence agencies depend on prior notice, yet most political violence is spontaneous. As three presidential commissions have concluded, "the larger outbreaks of violence in the ghettos and on the campuses were most often spontaneous reactions to events in a climate of social tension and upheaval."²⁴ Third, the FBI assumes there is a causal connection between "speech" and "action", but as random bombings demonstrate, terrorists do not follow rational patterns. And finally, the FBI relies on a network of established informants for information, but true terrorists know this and operate underground. Under these circumstances, massive intelligence coverage is relatively useless and will continue to be unless we adopt the unacceptable alternative of putting everyone under surveillance. The problem must be addressed differently.

My second major point is that the Justice Department Guidelines and the Senate Committee recommendations, designed to limit the FBI, actually authorize continuing coverage of lawful political activity. They pose a grave risk to our civil liberties.

To allow the FBI to anticipate violence, the Justice Department Guidelines authorize the FBI to initiate an investigation against an individual or individuals acting in concert on the basis of a mere allegation that they are engaging or will

¹⁹ GAO Report, pp. 140-144. In reviewing 101 organization files, the GAO found only 110 instances where activities were anticipated by the FBI. Only 12% of these activities could conceivably involve violence. There is no record of whether the FBI prevented any of this potential violence. The FBI contends that these statistics may be unfair because they concentrate on investigations of individuals rather than groups (GAO Report, Appendix V). In response, GAO states that its "sample of organizations and control files were sufficient to determine that generally the FBI did not report advance knowledge of planned violence." In most of the 14 instances where such advance knowledge was obtained, it related to "such activities as speeches, demonstrations or meetings—all essentially non-violent." (GAO Report, p. 144).

²⁰ Senate Final Report, note 6 supra, p. 19. Testimony of Joseph Califano.

²¹ GAO Report, note 18 supra, pp. 125-126.

²² Senate Final Report, note 6 supra, p. 254.

²³ See the examples cited by Director Kelley in his statement of February 11, 1976, cited in note 14 supra and in his Memorandum to the Comptroller, GAO Report, note 18 supra, pp. 212-217.

²⁴ Senate Final Report, note 6 supra, p. 68. See "Report of the National Commission on Civil Disorders" (1968), chapter 2; "Report of the National Commission on the Causes and Prevention of Violence" (1969); "Report of the President's Commission on Campus Unrest" (1970).

engage in violence at some time to achieve political ends. Within ninety days, if the FBI finds "specific and articulable facts" to indicate that such persons "may be" engaging in activities that will involve violence at some time in the future, a full scale investigation may be conducted until "all leads are exhausted."¹⁵

At no point do the Justice Department Guidelines specify what kinds of facts justify investigation. Earlier drafts mentioned advocacy, membership, and support of groups that engage or may engage in "violent" political activities. Later drafts state that the FBI must look to facts that indicate a "likelihood" that an individual or group will resort to violence, but do not specify what this means.¹⁶ Past practice is instructive, and the FBI has always interpreted such authorizations to mean that it should conduct anticipatory, ongoing, and perhaps never ending investigations of the members of organizations who espouse "revolutionary" doctrine; those who associate with such organizations, even though they may only attend meetings or receive literature; those who offer support to such groups, even if it is only support of their right to association; and those non-revolutionary organizations who might be infiltrated or co-opted. It is clear from past FBI conduct that the effect of such guidelines would be to permit the Bureau to inhibit individuals from dissenting publicly on matters of program and policy.

To anticipate violence, the FBI would be authorized to investigate the same individuals and groups it has always investigated. As the Comptroller General has stated, "the language in the draft guidelines would not cause any substantial change in the number and type of domestic intelligence investigations initiated."¹⁷ (In 1974, according to Senate documents, there were over 30,000 ongoing intelligence investigations.¹⁸) As the Senate Select Committee Final Report points out, intelligence officials inside the FBI interpret the Guidelines to authorize continuing investigations of "subversives".¹⁹

If these Guidelines had been in effect in the 1960s, the Bureau could have justified most if not all of the investigations that have since become the subject of public concern: all antiwar groups, including the American Friends Service Committee and Women Strike for Peace, because anti-war demonstrators might resort to violence; all members and associates of the Communist Party because it advocates the violent overthrow of the government; employees of the Institute for Policy Studies because of the suspicion that they were in contact with the violent Weatherpeople; and all civil rights organizations, including the Southern Christian Leadership Conference, because civil rights protesters interfered with interstate commerce to influence public policy. The newest guidelines require that there be "substantial" interference, but can FBI agents draw the line between substantial and trivial interference?

The Senate Select Committee also provided standards for the conduct of preventive intelligence investigations. The Committee adopts the framework of the Justice Department Guidelines but attempts to make the rules more strict to prevent the Bureau from investigating lawful political activities. I do not think the Committee succeeded and it expressed its own frustration at trying to draft language that maintains the "fine line" between surveillance of lawful activity and violent conduct.²⁰ I believe that frustration is warranted, because that line cannot be drawn. There is no way around the fact that intelligence investigations are based on a predicate short of criminal conduct and unavoidably lead to investigation of lawful activity.

Under the Senate standards, the FBI may conduct a preliminary preventive intelligence investigation for as long as ninety (90) days "when it has specific

¹⁵ The latest guidelines were issued on March 10, 1976. Although the guidelines state the purpose of investigations as ascertaining "information on the activities of individuals, or individuals acting in concert which involve or will involve the use of force or violence and the violation of federal law," the "involve or will involve" standard is diluted by following sections which authorize the FBI to initiate preliminary investigations on the basis of mere "allegations" and full investigations if persons or groups "may be" engaged in activities that involve or will involve violence. The Attorney General admitted that a more "flexible" standard was required to explain the choice of "may be" over "are involved." See Testimony cited in note 5 supra.

¹⁶ I refer to earlier drafts of the guidelines issued in November and December of 1975.

¹⁷ GAO Report, note 18, supra, p. 150.

¹⁸ Hearings before the Select Committee to Study Governmental Operations With Respect to Intelligence Activities of the United States Senate, 94th Congress, 1st Session, Volume 8, Federal Bureau of Investigation (Government Printing Office: 1976), pp. 340-250 (Exhibits 3 and 4).

¹⁹ Senate Final Report, note 6 supra, p. 318.

²⁰ Senate Final Report, note 6 supra, p. 321.

allegation or substantiated information that an American will soon engage in terrorist activity."⁵¹

In reading this standard, I see no difference between it and the standard proposed by the Justice Department. What is the difference between an allegation and a specific allegation? Or between likelihood and soon? Or between violence and terrorists activity? As Senator Philip Hart (D-Mich) points out in his additional comments at the end of the Final Report, "The Recommendation would preclude mere advocacy or association as a predicate for investigating Americans. In practice, however, that would simply require specific allegations that an unpopular dissident group was planning terrorist activity."⁵² Senator Hart points out the problem with examples:

"Of course, if the FBI receives a tip that John Jones may resort to bombing to protest American involvement in Vietnam, the Bureau should not be forced to sit on its hand until the blast. But our proposals would permit more than review of federal and local records on John Jones and interviews of his associates, even in a preliminary investigation. On the basis of an anonymous letter, with no supporting information—let alone any indication of the source's reliability—the FBI could conduct secret physical surveillance and ask existing informants about him for up to three months, with the Attorney General's approval.

"The Committee was concerned about authorizing such extensive investigations before there is even a 'reasonable basis of suspicion' the subject will engage in terrorism. The Report offers examples of how this recommendation would work, and indicates our desire to insulate lawful political activity from investigation of violent terrorism. But these very examples illustrate how inextricable the two may be at the outset of an inquiry into an allegation or ambiguous information. The task of finding out whether a dissident is contemplating violence or is only involved in vigorous protest inevitably requires investigation of his protest activities. In the process, the FBI could follow the organizers of a Washington peace rally for three months on the basis of an allegation they might also engage in violence."⁵³

The Senate opens the intelligence door further by proposing that the FBI be allowed to conduct a full preventive intelligence investigation if there is "reasonable suspicion" that an American "will soon engage in terrorist activity."⁵⁴ In effect, any factual basis beyond allegation (such as a meeting at which violent acts are discussed) can trigger an investigation that can continue for a year or longer if the Attorney General finds "compelling circumstances."⁵⁵ There is no definition of "compelling circumstances" and the standard of "soon will engage in" begins to have that indefiniteness that would allow the Bureau to investigate any possibility of future violence. I think this standard invites a repetition of long-term surveillance of lawful political activity, and a resort to familiar covert techniques such as informer plants and inspection of bank records, tax returns, trash covers, and the like. All may be employed in a full investigation under the Senate's recommendations.⁵⁶

What the Senate effort demonstrates is that the issue cannot be resolved by standards but only by prohibition. Even narrower standards will not suffice. To focus on standards ignores the central lesson of the recent investigations. As the Senate Committee itself observed, "We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence, or identifying foreign spies, were expanded to what witnesses characterized as 'vacuum cleaners', sweeping in information about lawful activities of American citizens."⁵⁷ It is the nature of intelligence investigations to grow and expand, especially in times of turmoil and crisis.

As I remarked earlier, the problem of political violence must be addressed differently. While the Justice Department and the FBI continue to engage Congress in a dialogue over how to control FBI intelligence activities, they have failed to justify these activities; or to argue convincingly that legitimate security interests cannot be protected by conducting criminal investigations of individuals and groups limited to the gathering of evidence rather than "information", and aimed at prosecution rather than "prevention of violence".

⁵¹ Senate Final Report, note 6 supra, p. 320 (Recommendation 44).

⁵² Senate Final Report, note 6 supra, p. 360.

⁵³ Senate Final Report, note 6 supra, p. 360-361.

⁵⁴ Senate Final Report, note 6 supra, p. 320 (Recommendation 44).

⁵⁵ Senate Final Report, note 6 supra, p. 320 (Recommendation 44).

⁵⁶ Senate Final Report, note 6 supra, pp. 328-329 (Recommendations 55-59).

⁵⁷ Senate Final Report, note 6 supra, pp. 3-4.

I believe the FBI should be required to attack the problem of violence by conducting criminal investigations leading to prosecution and conviction of those engaged in violent crimes. Instead of employing 1000 agents and 1000 informers⁴⁰ in the apparently fruitless exercise of identifying ahead of time the lone assassin or persons "likely" to engage in political violence, the FBI should concentrate its efforts on deterrence. This can only be accomplished by detecting and prosecuting those who have committed violent crimes—and not only the politically violent. Out of over 1900 bombings in 1975, only 89 were attributed to political terrorists. This is further evidence that this is a police problem and not an intelligence problem.⁴¹

This approach would lead the FBI to focus on conduct rather than advocacy. It would limit the FBI to the collection of evidence instead of "all information" about the plans, activities, and beliefs of political groups. By making successful prosecution the goal, the FBI would refrain from employing illegal means (i.e., warrantless wiretapping) that could "taint" important evidence.

I believe this is the only way to solve the problem of violence without risking our civil liberties and democratic values. Certainly before we authorize the government to conduct intelligence investigations to anticipate violence, we need to know more about the causes of violence and whether intelligence serves a useful purpose in preventing violence. I would recommend that although the record before Congress argues for prohibition, a further study of the issue is in order. Perhaps a commission should be created to study terrorism and how to combat it without sacrificing democratic values. The Commission, among its other duties, would be required to study political violence from a broader perspective than the Commissions set up to study the civil disorders and campus outbreaks during the 1960s. It would also explore in depth whether—and under what circumstances—the intelligence agencies can play a useful role in preventing or anticipating violence. I would also charge that Commission with the responsibility to explore the relationship between police tactics and the occurrence of violence. As we know, the FBI engaged in violent acts in order to prevent violence. It sponsored and directed agents provocateur and carried out COINTEL-PRO operations to "prevent" violence. Perhaps the Commission might conclude that an intelligence agency, prone to engage in covert activities of its own is not the proper agency to investigate terrorist acts. Perhaps a new agency is necessary that works on different assumptions than those of the intelligence community.

While this study is conducted, I believe the Congress should make it clear that it wants the FBI to operate as a criminal investigatory agency. By Charter, it should establish that in the future the FBI may only initiate an investigation of any person when it makes a showing of "specific and articulable" facts giving it reason to believe that an individual or individuals acting in concert are engaged in or are imminently likely to engage in a specific criminal act in violation of federal law.⁴²

To insure that the FBI will investigate only specific, punishable acts, I also recommend—as does the Senate Committee⁴³—the repeal or revision of Sections 2383-2386 of Title 18 to conform to constitutional standards. As written, these statutory speech "crimes" serve no other purpose than to authorize the FBI to investigate the speech, membership, and associational activities of persons and groups under the pretext of conducting criminal investigations. Although there have been no prosecutions or convictions under these statutes for two decades and the Supreme Court has construed them narrowly to prohibit only "imminent lawless action" involving violence⁴⁴, the FBI routinely relies on these statutes as a basis for investigation, and interprets them as a justification for prying into protected activities.⁴⁵ The Justice Department's Guidelines make these activities the basis for preliminary investigations. By repealing these statutes—and rejecting all intelligence Guidelines—Congress will make it clear that the FBI cannot and must not investigate conduct which the government cannot punish.

⁴⁰ GAO Report, note 18 supra, pp. 132 and 135.

⁴¹ Senate Final Report, note 6 supra, p. 20 (fn. 112).

⁴² See *Terry v. Ohio*, 392 U.S. 1 (1968). "Reasonable suspicion" means specific and articulable facts which taken together with rational inferences from those facts give rise to a reasonable suspicion that specified activity has occurred, is occurring, or is about to occur.

⁴³ Senate Final Report, note 6 supra, p. 339 (Recommendation 93): Smith Act and Voorhis Act.

⁴⁴ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), in which the Court held that political groups are within their legal rights to advocate any course of action including the "use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

⁴⁵ GAO Report, note 18 supra, pp. 28-31.

I believe a criminal standard should also apply to all forms of possible espionage engaged in by American citizens. Today, I have focused on investigations of violence and terrorism, but I am also concerned by the Senate Select Committee's recommendation that would authorize the FBI to conduct preliminary and full preventive intelligence investigations against Americans who "may soon engage in . . . hostile foreign intelligence activities."⁴⁵ Again, an allegation that an American is conspiring with a hostile foreign power is sufficient to trigger an intelligence investigation, even if the espionage is not punishable under law (e.g. clandestine intelligence activities). Congress should establish a criminal investigative standard because intelligence investigations in this area have also led to massive surveillance of the lawful activities of citizens. For example, Operation CHAOS, the FBI-CIA mail opening program, and NSA's communications intercept programs were operated to determine whether anti-war activists were supported by hostile foreign powers based only on "allegations" that this was the case. A "reasonable suspicion" standard would prevent such investigations. And, by making the forms of espionage that are now defined as "clandestine intelligence activities" specific violations of law, Congress would make it clear that the FBI only investigates crimes.

Finally, I urge rejection of proposals to allow the FBI to engage in so-called "preventive" action. FBI agents already have the power to warn potential victims, to arrest, to obtain a judicial warrant to search for or seize dangerous contraband such as bombs or weapons. New authority can only serve to legalize conduct which is currently beyond the law, including techniques employed by the FBI in its COINTELPRO operations. Now that the Attorney General has expressed similar reservations with respect to preventive action, Congress has even more reason to prohibit such activity and to focus its deliberations on specific recommendations to outlaw COINTELPRO techniques.⁴⁶

I am calling for a fundamental change in the FBI, I have already pointed out that the Guidelines and Senate Recommendations as drafted will not alter Bureau jurisdiction or practice. And I do not believe that stricter guidelines can accomplish this. When we speak about FBI intelligence, we are really referring to a large bureaucracy which have developed an intelligence mentality. For nearly forty years it was under the sole direction of J. Edgar Hoover, and agents have been trained to believe that dissenters are enemies of the people and are therefore subject to wholesale investigation.⁴⁷ How can guidelines be expected to re-educate a bureaucracy so ingrained with this attitude? Director Hoover may be gone, but many of the unprosecuted agents who initiated the investigations and carried out, without question, systematic programs of criminal activities remain. It is a bureaucracy that will not be checked by intelligence guidelines.

When Roosevelt issued his directives in 1939, they did not authorize the Bureau to investigate subversives. Still, the Bureau interpreted them in that manner.⁴⁸

When the "Manual of Instruction" was revised in 1973 to require a criminal statute as a predicate for investigation, the FBI simply cited the speech crime statutes of the U.S. Code, and interpreted them to allow investigations of political advocacy and associational activity, which the courts refuse to punish.⁴⁹

Although the Manual, like the guidelines, distinguishes between preliminary and full scale investigations, Bureau agents make no distinction, and employ the same investigative techniques in both.⁵⁰

⁴⁵ Senate Final Report, note 6 supra, p. 329 (Recommendation 44).

⁴⁶ Statement of Attorney General Edward H. Levi, Justice Department Press Release, March 10, 1976. It should be noted that while the Attorney General removed preventive action sections from the Guidelines issued by the Department, his press release appears to authorize them on an "informal basis." He states: "There also may be situations of great human peril in which the FBI might seek to take steps to prevent enormous violence from taking place. In such situations, the FBI would undoubtedly go to the Attorney General for permission to take such affirmative steps rather than to wait passively for the disaster to occur." To avoid misinterpretation, Congress should enact the Recommendations of the Senate Select Committee that would ban COINTELPRO-type activities. See Senate Final Report, note 6 supra, p. 317 (Recommendations 40-41).

⁴⁷ See "The Development of FBI Domestic Intelligence Investigations", a supplementary report issued by the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate (May 1, 1976).

⁴⁸ GAO Report, note 18 supra, Appendix IV.

⁴⁹ GAO Report, note 18 supra, pp. 28-31.

⁵⁰ GAO Report, note 18 supra, p. 111.

Although the Manual also calls for the termination of investigations within 90 days, the Bureau extends investigations on a routine basis, and continues to insert new information in "dead files."⁴⁸

While the Justice Department and Congress try to write intelligence guidelines to restrict the FBI to investigations to anticipate violence, the current Director resists such restriction. He states, in a memorandum to the GAO, that limiting domestic intelligence investigations to preventing force and violence could restrict the gathering of intelligence information useful for anticipating threats to national security of a more subtle nature. This is the case because, in my view, such a limitation would undermine our institutions during their preliminary stages of organization and preparation and thus inhibit the development of an intelligence collage upon which to base meaningful analyses and predictions as to future threats to the stability of our society.⁴⁹

If intelligence guidelines have not worked to date, why will they work now? Those who argue that they can be enforced rely on oversight. But can Congress or the Justice Department or both oversee the thousands of investigations undertaken each year? Can they hold the Bureau accountable if the standards for investigation are as vague and flexible as those proposed in the guidelines?

Is Congress, with its capacity to create a HUAC as well as an Intelligence Oversight Committee a better guarantor of Bureau propriety? Will the Justice Department or the FBI act as a restraining influence on agents, when the facts indicate that they are often the one urging the agents to intensify their intelligence activities to meet the crisis of the moment? I think not. Although oversight, in certain circumstances, can be an effective, indeed necessary, means to control the FBI and other investigative agencies, oversight can never be relied on in the absence of a charter which explicitly states the limits of FBI activity.

It is time to draw the line and call a halt to unnecessary intelligence activities. It is time to enact a Charter that :

(1) defines the FBI's mission as investigating, upon reasonable cause, the commission of crimes against the United States ;

(2) repeals 18 U.S.C. 2383 (Rebellion and Insurrection) ; 18 U.S.C. 2384 (Seditious Conspiracy) ; 18 U.S.C. 2385 (Advocating the Overthrow of the Government) ; and 18 U.S.C. 2386 (Voorhis Act) ;

(3) limits the collection (and dissemination) of information to that relevant to criminal investigation and prosecution ;

(4) provides for the destruction of irrelevant information and insures that files will be sealed once an investigation is terminated ;

(5) prohibits COINTELPRO-type activities ;

(6) prohibits the FBI from encouraging, assisting, or directing state and local police agencies in doing any investigative work for the FBI, which the FBI itself is not entitled to do, except criminal investigations within their state jurisdiction ;

(7) and provides criminal penalties for the violation of any provision of the Charter, and assures civil redress for the victims of such violations.

The purpose of the Charter is to define the proper role of the FBI in our free society. That role was best articulated by Harlan Fiske Stone in 1924: The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty. . . ."

I believe that my recommendations incorporate this concept and should be adopted in legislation. Enactment of a legislative Charter for the FBI is essential in a society based on the rule of law and committed to eliminating official lawlessness.

Mr. EDWARDS. Our second witness is Mr. Morton Halperin, who is the director of the Project on National Security and Civil Liberties. Mr. Halperin formerly directed a study for the 20th Century Fund on Information, National Security and Constitutional Procedures.

He has been a senior fellow with the Brookings Institution, a senior staff member with the National Security Council, and a Deputy Assistant Secretary of Defense, subsequent to being an assistant professor of government at Harvard.

⁴⁸ GAO Report, note 18 supra, pp. 111-116 and 121.

⁴⁹ GAO Report, note 18 supra, p. 213.

Mr. Halperin is a prolific author of books and articles on the subject before us and many other subjects within his areas of interest.

Mr. Halperin brings with him the dubious distinction of having been the subject of activities by our Government which many of us believe have no place in a free society. We welcome you, Mr. Halperin.

TESTIMONY OF MORTON H. HALPERIN, DIRECTOR, PROJECT ON NATIONAL SECURITY AND CIVIL LIBERTIES

Mr. HALPERIN. Thank you very much, Mr. Chairman, I am very pleased to be with you. I would like to just simply summarize the points made in my statement.

I really begin where Mr. Berman left off. He told you that we need legislation which limits the FBI to the investigation of criminal conduct based on a reasonable suspicion that that conduct has occurred.

And I want to go on to suggest that that is not enough, as difficult as that will be to do, I think it is not sufficient. It is not sufficient because there is the first amendment problem as well as the problem of the fourth amendment, that the Supreme Court has made it clear on many occasions and I think that the Constitution is clear that where first amendment rights are involved, there needs to be further restrictions on what the Government can do.

The Government's ability to investigate crime or to regulate conduct of other crimes is much more limited where it may intrude upon the first amendment rights of American citizens.

The reason for this is clear, namely, that where the government investigation intrudes upon speech or on assembly or on the press, then it runs the danger of casting a chilling effect on that behavior.

The Supreme Court has held, and I believe that any of us who have been involved in the critical process know that the rights guaranteed by the first amendment depend, in part, on the right of privacy. We need to be able to engage in secret political association. We need to be able to meet in private and people need to be able to contribute to political organizations without having that information public.

We need to be able to plan for political activities without the Federal Government being there. And it is this right of secret political association that has been affirmed by the Supreme Court time and again in a long series of cases beginning with *NAACP v. Alabama* and coming down to *Buckley v. Valeo* where the Court struck down, as you know, a number of the provisions of a statute which was designed to prevent corruption, where there was a clear record of corruption and where there was no argument that the statute in fact would contribute to limiting corruption, precisely because it would limit the right of free and secret political associations.

Chief Justice Burger, writing partly in dissent, and indeed dissenting to some of the disclosure provisions, has really written quite eloquently in the statement that I quote on page 5 of my statement about the need for secrecy, about the fact that a free society depends on enabling its citizens to meet together in private associations and that the record of harassment of private groups, of particularly unpopular private groups, adds weight to the importance of permitting secret associations.

And, thus, it seems to me that if there is a possibility that investigation of a criminal activity is going to intrude upon first amendment rights and lead to the release of information, the citizen has the right to keep secret, that very special problems arise.

If the Congress cannot enact the statute requiring the NAACP to list its members, then, it does not have the right to get that information by a theft or a burglary or even by an informer. The right of keeping members' lists secret is no less violated if they are written down by an informer, as has happened on many occasions, than, if that information is obtained by the use of a subpoena which compels the publication of the list.

So, in my view we need special restrictions, special procedures, even where there is a lawful criminal investigation if it might intrude upon first amendment rights.

I think the principles that need to be included here are the following: First, there cannot be an investigation of lawful political activity; and second, that any investigation that might intrude upon first amendment rights, must be based upon what the Supreme Court has called in numbers of cases a compelling State interest.

Third, that investigations that might involve an intrusion into areas protected by the first amendment need to be curtailed so that the intrusion is the minimum one necessary to carry out the lawful political activity.

Finally, that no group or individual should be singled out for investigation of criminal behavior because of his beliefs or activities.

The courts have said that you cannot make the decision to prosecute based upon a suspect criteria, that you cannot prosecute, for example, antiwar groups who pray in the Pentagon lobby, when you don't prosecute prowar groups or nonpolitical groups which pray in the Pentagon lobby.

And it seems to me that this principle of no selective prosecutions based on first amendment standards should be applied as well to selective investigations.

Now, if you accept these principles, you then have the very difficult problem of putting them into guidelines which direct the Bureau to use special standards if first amendment rights are involved.

There are two issues: What should trigger these new standards; and second, what should these additional standards be.

I think that some of the triggers are pretty clear. It should be clear that if a criminal investigation is going to give us information about a candidate for political office, clearly, the special procedures should be followed.

If the criminal investigation is going to involve a party or an organization which runs candidates for political office, the special procedures should be involved. If the criminal investigation is going to involve organizations or yield information about organizations which exercise first amendment rights, by lobbying for legislation supporting political candidates or taking stands on public issues, the new procedures should be involved.

And, then, too, if the criminal investigation is going to require the gathering of information about lawful political views or activities, then these standards should be involved.

Beyond that, I would say that the presumption should be in the favor of applying these standards and that any doubt about whether these new standards need to be applied should be resolved either by applying the standards or by submitting the issue to higher authority; from the field to the Bureau, from the Bureau to the Justice Department, if there is any doubt as to whether or not there is any doubt as to the violation of first amendment rights possibly being violated by the investigation.

I would also put special restrictions on any such investigation requiring the careful plan to insure that there is a minimum intrusion in first amendment rights. And, it seems to me that there is a special problem raised by the use of informers.

The Supreme Court has held that here it is constitutional to use informants in the *Hoffa* case, which, of course, did not involve any claim of first amendment rights.

The issue as to whether informers are constitutional where first amendment rights are at stake is now being adjudicated in the *Socialist Workers Party* case, but it seems to me it is the responsibility of the Congress to say what the Constitution requires and to protect the rights of American citizens and not to leave that decision to simply the decisions of the Supreme Court, even if the Supreme Court were to say that it is lawful and constitutional to have informers in political organizations, Congress, clearly, has the right, and I would argue the responsibility to enact legislation that prevents that.

Now, in my view, the use of informers in political organizations poses very pressing, very special and very dangerous problems, because an informant in a lawful political organization even if he is there to find out whether they are planning a bombing, can not simply sit there and when a vote is taken say "I abstain because I am an FBI informer and I am only here to gather information." And, when asked his views on what the organization can do, he cannot say that he has no views. He has to participate, he or she has to participate actively in the organization: Voting, advocating, taking stands, and carrying out the activities of that organization.

And, even if there is no attempt to manipulate, even if he is not operating on instructions to sow dissent or to cause violence, inevitably those individuals who are fake members of the organization interfere with the members of that organization.

The right of really free association is a mockery when senior officials of the organization are FBI informants in there posing as bona fide members of the organization.

So, I would urge that the Congress enact a ban on any use of informants who pretend to be members of political organizations and that Congress require judicial warrants for the use of any informant where that informant may be in a position where he gathers information which is in fact protected by the first amendment.

There are a number of other restrictions that I think should be applied and these, I think, need to be worked out in detail.

My basic point is that it seems to me that the Bureau's record suggests that it cannot be depended upon to avoid gathering information that it should not gather, even in the course of legitimate criminal investigations.

But, beyond that, Congress has an obligation, as Mr. Berman has said, not to say as we said before to the previous Attorney General, we have got a good Attorney General and a good FBI Director, and they will do right.

I think that Congress has an obligation to say what the law should be, what intelligence agencies ought to do and what the rights of American citizens are, and that we should not leave that—as I think the Founding Fathers understood very well—one should not leave those judgments simply to the will and the whim of the executive branch officials.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Halperin follows:]

STATEMENT OF MORTON H. HALPERIN*

Mr. Chairman: No more urgent task faces the Congress than to enact legislation firmly bringing the FBI under the rule of law and the mandates of the Constitution. There seems to be broad agreement on the need for a legislated Charter for the FBI. I am grateful for this opportunity to present my own views on this question to the Committee.

My testimony follows that of my colleague, Jerry Berman, and seeks to pick up where his presentation leaves off. Mr. Berman has, I believe, presented a persuasive argument for abolishing all domestic intelligence investigations. All persons in the United States have the right to be left alone, free of governmental surveillance unless they have broken a criminal law enacted by the Congress. Investigations of lawful political activities have no place in a free society.

But saying that and enacting it into law is important, but not sufficient. There remains the danger that the zeal to investigate and manipulate the political process will find other outlets.

For the past several years, in fact, the FBI has predicated most of its intelligence investigations on possible violations of the criminal law. It has, however, conducted extensive investigations based on the mere probability that the ideas of an organization or an individual may lead ultimately to criminal activity. Legislation must not only limit the FBI to investigating crimes but it must limit investigations to situations in which there is "reasonable suspicion" that a crime has been, or is about to be committed.¹

A second problem arises from the presence in the criminal code of statutes which appear on their face to punish mere advocacy, in violation of the First Amendment. Such statutes, including the Smith Act (18 U.S.C. 2385) and the Voorhis Act (18 U.S.C. 2386), should be repealed among other reasons to ensure that they are not used as a pretext by the FBI to continue domestic intelligence investigations under a different guise.

There is a third problem which would persist even if the FBI were limited to investigating crimes. It is a more serious problem and one to which the remainder of my remarks are directed.

Normally, the investigation of a violation of a constitutional criminal statute is limited only by the Fourth Amendment and whatever constraints Congress chooses to place on Federal investigative agencies. However, an additional and much more restrictive set of restraints must come into play if the investigations may intrude upon areas protected by the First Amendment. The Supreme Court has often and recently mandated additional constraints when First Amendment rights are at stake.²

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¹The phrase "reasonable suspicion" and its definition comes from the Supreme Court decision in *Terry v. Ohio*, 329 U.S. 1 (1968). The phrase means "specific and articulable facts, which, taken together with rational inferences from those facts, give rise to a reasonable suspicion that specified activity has occurred, is occurring or is about to occur."

²This distinction was most recently reaffirmed in April of 1976 in a decision upholding a subpoena for bank records. Writing for the Court, Justice Powell noted that "[t]he petitioner does not contend that the subpoenas infringed upon his First Amendment rights. There was no blanket reporting requirement of the sort we addressed in *Buckley v. Valeo*, — U.S. — (1976), slip op., at 54-74, nor any allegation of an improper inquiry into protected associational activities of the sort presented in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1955)" *United States v. Miller*, — U.S. — (1976), slip op., at 9 n. 6.

The reasons why there is a need for special vigilance when the First as well as the Fourth Amendment values are involved were well articulated by Justice Powell writing for a unanimous Supreme Court holding that domestic intelligence wiretaps without a warrant are unconstitutional:

"National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. 'Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power,' *Marcus v. Search Warrants* etc., 367 U.S. 717, 724, 81 S. Ct. 1708, 1712, 6 L. Ed. 2d 1127 (1961). History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

"The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society."³

The First Amendment, of course, guarantees freedom of speech, of the press, of assembly, and of the right to petition for a redress of grievances. The Supreme Court has correctly observed that the effective exercise of these rights often requires secrecy. People must be able to gather together in secret to discuss their political beliefs and to consider what lawful actions they propose to take in support of those beliefs.

The right of secret political association was firmly established by the Supreme Court in repelling the effort of the government of Georgia to compel disclosure by the NAACP of its membership lists, *NAACP v. Alabama*, 357 U.S. 449 (1958). It was sustained and emphasized most recently by the Court in its decision striking down many of the provisions of the Campaign Reform Act, *Buckley v. Vallee*, — U.S. — 96 S. Ct. 612, 656 (1976). Even in the face of a compelling requirement to end corruption in presidential election campaigns, the Court emphasized the need to protect the secrecy of political association, particularly where disclosure could lead to harassment. Chief Justice Burger put the issue as follows:

"The public right-to-know ought not be absolute when its exercise reveals private political convictions. Secrecy, like privacy, is not *per se* criminal. On the contrary, secrecy and privacy as to political preferences and convictions are fundamental in a free society. For example, one of the great political reforms was the advent of the secret ballot as a universal practice. Similarly, the enlightened labor legislation of our time has enshrined the secrecy of choice of a bargaining representative for workers. In other contexts, this Court has seen to it that governmental power cannot be used to force a citizen to disclose his private affiliations, *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed2d 405 (1963), even without a record reflecting any systematic harassment or retaliation as in *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). For me it is far too late in the day to recognize an ill-defined "public interest" to breach the historic safeguards guaranteed by the First Amendment."⁴

If the First Amendment prevents the states and the federal government from compelling the disclosure of information related to lawful political activity, it must also restrain the use of covert intelligence techniques to ferret out such information. The First Amendment is in no less measure violated if the FBI obtains a copy of the membership list of the Socialist Workers Party by surreptitious entry, theft, or the use of informers or a grand jury subpoena, than if the Party is compelled to release the list by a campaign reform law. In the latter case, it often does not know that its rights have been violated.

All of this suggests the need for special restrictions and additional administrative and approval procedures where a bona fide criminal investigation might intrude on First Amendment rights.

³ *U.S. v. U.S. District Court*, (Keith), 407 U.S. 315, 92 S. Ct. 2125, 2135 (1972).

⁴ *Buckley v. Vallee*, — U.S. —, 96 S. Ct. 612, 735 (1976). Opinion of Chief Justice Burger concurring in part and dissenting in part.

The principles which must apply in such situations are as follows:

There may be no investigation of lawful political activity.

Any investigation which might intrude into a First Amendment area must be based on a compelling state interest.

Any investigation must be carefully controlled so as to involve the minimum possible intrusion into areas where First Amendment rights might be violated.

No group or individual may be singled out for investigation of violation of a criminal law because of its political beliefs or activities.⁵

If these principles are accepted, there are two very difficult problems for the legislative draftsman and Administrative-order writer. The first is to develop useable and effective criteria for determining when the special procedures required by the First Amendment are to come into play. The second is to specify precisely what those procedures should be. These are complicated matters which can only be worked out in close collaboration with those familiar with the procedures of the FBI. It might be useful, however, to present a few tentative ideas.

Some situations should automatically trigger the special procedures required when First Amendment issues are involved. These include:

Any investigation which is likely to yield information about a party running candidates for election.

Any investigation of a candidate for elective office.

Any investigation which is likely to yield information about an organization which exercises First Amendment rights e.g. by lobbying for legislation, supporting political candidates, or taking stands on public issues.

Any investigation in which information about the political views or lawful political activities of one or more individuals is to be sought or obtained.

Any investigation of a crime in which one or more elements of the offense involves political beliefs or intentions.

In applying these specific categories (and perhaps others) as well as the more general rule relating to determining if any First Amendment rights are involved, there should be a presumption in favor of invoking the tighter procedures. One way to do this is to require any doubts to be resolved by referring the issue to a higher authority. For example, decisions to open or expand an investigation that might otherwise be made in the field should be sent to FBI headquarters if there is any doubt about whether the special First Amendment procedures should apply. Any doubts in the FBI should be resolved by applying the stricter standards or referring the matter to the Attorney General.

The special standards to be applied should include a more careful review of the necessity of the investigation, a determination outside the FBI that a "selective investigation" is not being proposed, and tailoring of investigative techniques so that there is a minimum intrusion into the area of possible First Amendment activity. Special restrictions should be put on various investigative techniques.

The use of informers who pose as members of political parties or associations raised, in my view, very special problems. An informant who pretends to be a member of a political group cannot simply gather information. He or she must participate actively in the decisionmaking process of the organization, taking stands on issues and seeking to influence the positions the organization takes and the actions it engages in. Wholly apart from any use of informants in COIN-TELPRO-type efforts to manipulate and sow dissent, there is an improper interference by the state in lawful political association. The right of free association is a mockery when FBI informants participate in private organizations posing as bona fide members of the organization and influencing its decisions.

Congress should, I suggest, ban the use of informants who pretend to be members of political organizations. It should also require a judicial warrant for the use of any informant in First Amendment-restrained investigations.

Mr. Chairman, this subcommittee is engaged in an effort whose results will determine whether we move closer to or away from Big Brother as we approach 1984. I am pleased and honored to have been invited to participate in these hearings and would, of course, be happy to answer any questions or to provide other assistance.

Mr. EDWARDS. Thank you very much, Mr. Halperin. Both of your statements are very challenging and well thought out.

The gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman.

⁵ The courts have held that selective prosecution based on political beliefs or other constitutionally suspect criteria will not be tolerated. It seems equally clear that "selective investigations" based on such grounds should be prohibited.

-Mr. Halperin, do you think that the repeal or the revision of the Smith and the Voorhis Acts are essential to reform in this area? If we leave in those sections that are cited on Mr. Berman's page 15, if we do not touch them, can the FBI despite guidelines, despite what we might do, still say that in order to carry out and to enforce this law, we have to do this intelligence gathering?

Mr. HALPERIN. I think that it is absolutely essential that at the very minimum the statutes be aimed at and consistent with what the Supreme Court says that is constitutional.

I think that the thing to do is to wipe them off the books, but at the very least, they should be rewritten consistent with what the Supreme Court has said is constitutional.

Mr. DRINAN. Is that what you mean by "revision" on page 15? What did the Senate committee recommend, repeal or revision?

Mr. BERMAN. Both. They called for the revision or the repeal of those statutes.

Mr. DRINAN. When you say revision, what do you mean?

Mr. BERMAN. Revision would be to rewrite the statutes, for instance the Smith Act, which punishes membership in or advocacy of an organization dedicated to violent overthrow of the Government. According to the Supreme Court, you can only prevent or prohibit imminent lawless action involving violence, which means that you would have to strike that statute and say the violent overthrow of the Government when it is imminently likely that it would occur.

It would have to be written in terms of the Supreme Court standard.

Mr. DRINAN. But, even if we hold that, could not the FBI say that we have to do all of this intelligence gathering in order to look to find the imminent lawlessness?

Mr. BERMAN. I think that is going to be a problem and I would be for repeal.

Mr. DRINAN. That is easy to say, but—

Mr. HALPERIN. But then you do want to make it with reasonable suspicion, though, that is, if the FBI, for example, is investigating the Socialist Workers Party for 20 years and because they say something and they may think about doing something illegal, but for 20 years they have heavily infiltrated that organization, but there is no evidence that they are even thinking about anything.

Mr. DRINAN. Would you say that the guidelines, if there are any, should apply to all investigations of all crimes across the board? Should there be no special guidelines for the investigation of a subversion or extremism?

Mr. HALPERIN. We are saying that there should be no investigation of political activity, that the only investigation should be of crimes and that here those should have special restrictions to make sure that those investigations do not subvert the first amendment.

Mr. DRINAN. OK, you people bring out, for the first time, the Smith Act and the Voorhis Act, as the fallback position of the FBI. If we really begin to get tough, would you then both feel that the repeal is almost essential, or is essential?

Mr. BERMAN. Since it has been the predicate for a vast number of these investigations, I think that repeal of these statutes that is part of getting the FBI out of the business of anticommunism. Those

statutes were passed when the whole country was engaged in counter intelligence programs.

Mr. DRINAN. Well, in a related point, when the Attorney General and the Director of the FBI come to the Congress and say to us that you have to make guidelines and laws, is it not ultimately the Attorney General, who—after all the FBI is a creature of the Justice Department, of the Attorney General—must control the FBI? Should we not say—you have to do this, why come to us?

Mr. BERMAN. Well, I think that the Attorney General should be mandated by this statute, that he has responsibility for—

Mr. DRINAN. Well, he does. The FBI is a total creature and the FBI does only that what the Attorney General says that they should do. That is very, very true.

Mr. HALPERIN. Have you talked to the FBI about this?

Mr. BERMAN. That is clear in the statute, but it is not the practice of the agency.

Mr. DRINAN. Before we get into the statute why can we not simply insist that the Attorney General control the creature?

Mr. BERMAN. Yes; but you have to give him the standard by which he can control this creature. At present that standard, is a changing one, depending on who is in-power.

Mr. DRINAN. Well, all right.

Is *Terry v. Ohio*, standard enough?

Mr. BERMAN. I think that is a rational standard.

Mr. HALPERIN. The FBI investigates only under that standard.

Mr. DRINAN. Has that been modified?

Mr. HALPERIN. I don't believe so.

Mr. DRINAN. Well, thank you, you have raised my consciousness and I am very grateful.

I yield back the balance of my time, Mr. Chairman.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

I was diverted during your testimony, but it has been very helpful and I appreciate having it in the record. I am not sure that I am qualified to pursue these points to the degree that you have at this moment, but let us begin with a few points just to help me understand when an informant is an informant? How do you define an informant for purposes of outlawing their use by the FBI?

Mr. HALPERIN. I think an informant is somebody who, at the request of the Bureau either becomes or remains a participant in a set of associations for the purposes of gathering of and reporting of information.

Mr. BUTLER. So it is the entering into a relationship with the intention of revealing what you find that defines an informant.

Mr. HALPERIN. I think that a different problem arises when the FBI starts getting letters from somebody that says that I am a member of the Democratic Party in Illinois and let me tell you what they plan.

Mr. BUTLER. That is what I want to be clear on. That does not disturb you a bit, that is the infiltration aspect, then, is what disturbs you?

Mr. HALPERIN. I think that there is a separate question of whether the Bureau should keep those letters or destroy them.

Mr. BUTLER. But pursue that for just a second. Certainly, you realize that when the Bureau gets a letter that says that Mr. Halperin is going to talk at the Capital on Tuesday morning, they will be able to act on that information?

Mr. HALPERIN. But if the letter says that the Democratic Party of Illinois is going to try to win the election by vigorous advocacy of its position, I think that that letter should be destroyed.

Mr. BUTLER. Then, it is the crime element that permits the FBI to trigger action at that point?

Mr. BERMAN. But I think that they are going to need more than that anonymous letter. That allegation, that unsubstantiated letter, should not trigger a Bureau investigation. There needs to be more.

Mr. BUTLER. But that will be a preliminary investigation?

Mr. HALPERIN. Based on such a letter, an informant should not be able to infiltrate a group.

Mr. BUTLER. I am agreeing with you that it is not altogether fair-play to infiltrate an organization on the possibility that you may have a subversive activity developing in the future. And, yet, there may very well be organizations which have made up their minds that they are going to have a program of violence or commit crime. It may be organized crime. It does not have to be subversive. It does not have to be related to a national defense or anything else. And, yet, if there were the possibility that we should get information by the use of informants as to just what this organized general activity was going to do, it does not disturb me a bit that the FBI should do that, because they should, if they can and are that clever.

That is precisely why I have trouble with this effort to protect these—"nice guys"—who pass legislation to blanket the FBI's effect.

Mr. HALPERIN. I think the question is whether it is a lawful political organization where the purpose of informers is that the Bureau thinks they may pick up information about crime.

In my view, no such informers should be permitted. Now, if you have a situation where a group of people are getting together and they are planning a crime and you have in addition a reasonable basis, reasonable suspicion that that is what they are doing, then I think that it is possible that you should be permitted to have an informer. But I would like to suggest that in that case you require a warrant; an informer is the same kind of intrusion that planting a bug in an office is, that is the same kind of an intrusion that a wiretap is. Use of an informer, therefore, should be based on a reasonable suspicion that a crime has been or is about to be committed. The Government should bring those facts before a magistrate, who can authorize a bug or a wiretap or an informer.

I would not want to leave that decision to the Bureau itself, based upon simply a letter saying, hey, these guys out in Chicago are going to commit a crime.

Mr. BUTLER. I see what you are saying, and, of course, I understood that from your statement. What standards would you propose?

Mr. HALPERIN. The fourth amendment. Reasonable suspicion that a criminal activity is being engaged in and that you can learn about this criminal activity by the use of this technique.

But I would still prohibit the informer from acting as a member of a lawful political organization.

Mr. BUTLER. You think that is an association violation?

Mr. HALPERIN. Yes; I think that it violates the first amendment right to private association.

Mr BUTLER. My time is up, and I thank you very much.

Mr. EDWARDS. There really is not any statutory authority for the intelligence work that is done on this massive scale on a day-to-day basis, is there?

Mr. BERMAN. Absolutely none. The Bureau assumes they can do it under Executive orders; the basic statute for the FBI, 18 U.S.C. 533, mentions nothing about intelligence investigations. It says that the FBI is a criminal investigatory agency.

The Attorney General has talked about conducting intelligence investigations under the authority of that statute which says that the FBI may detect and prosecute crime. That is a very indefinite standard upon which to base intelligence investigations.

I think that the clear meaning of the statute is that the Bureau is required to look for reasonable cause that a crime is being committed.

The other sections of the statute the Attorney General relies upon and passes the new guidelines under say that the Attorney General may instruct the Bureau to conduct such other investigations as are within the jurisdiction of the Justice Department and the Department of State.

The question there is what such other investigations are under his jurisdiction. Does he have intelligence jurisdiction? I do not think that he can read that in. You are going to have to pin this down by statute because it is not there now.

Mr. EDWARDS. Well, the Smith Act would be some underpinning even though the courts have declared it inoperative and unconstitutional, still it is there and this would be, I suppose some kind of argument for a revision of the Federal Criminal Code which really should leave out those statutes that have been declared unconstitutional.

Mr. HALPERIN. I think that there is a technical problem here that the committee should think about: namely, that the Bureau does not receive in any regular way the decisions of the Supreme Court narrowing and interpreting criminal statutes, so that if the Bureau decides that somebody is violating the Smith Act it opens up the Smith Act and determines after reading it that they have been violating it.

The committee, as part of its oversight responsibilities should look at the Bureau's use of the Smith Act. This use should be clearly limited to those parts of the act which the Supreme Court has said are constitutional.

You cannot expect the field agent out in Pittsburgh to read the Supreme Court report and then get out his copy of the United States Code and then change it. Somebody has to issue a directive saying that for purposes of criminal investigation the scope of the Smith Act is now limited to X, Y, and Z. And that has to be incorporated into Bureau management. There is no evidence that that has been done.

This is not only true for the Smith Act, but in general, Supreme Court interpretations are not incorporated into the Bureau's interpretations.

Mr. EDWARDS. Well, it is a very dangerous business to legislate a new Smith Act, or whatever it might be, even though it is very—

Mr. HALPERIN. I think that you should repeal the Smith Act.

Mr. EDWARDS. I think any legislation is perilous, any legislation designating any Federal agency as a counterintelligence group, which the guidelines do, except that the guidelines are not a statute.

Mr. BERMAN. They are asking for those guidelines to be made a part of the statute. I think there is some uncertainty in the Justice Department as to under what authority they are acting.

It is necessary for Congress to establish a standard for the Bureau's jurisdiction. Up until now it has been a shifting standard.

Mr. EDWARDS. But why should you establish standards that really are not necessary since there is no law to support what they are doing except the Smith Act and some rather vague Executive orders and Attorney General's directives and so forth.

Mr. HALPERIN. I think that the Bureau should not be conducting investigations of people's lawful political views and that a statute authorizing this would also be unconstitutional. It would be a great mistake to legislate an authority to infiltrate organizations.

This committee should simply say that the Bureau's responsibility is that at the directive of the Attorney General, it can examine and investigate crimes.

Mr. BERMAN. I think, Mr. Chairman, that you have to speak to the issue, because what the Executive has done over the last 40 years is to interpret Congress silence as a gap in the law, something that Congress does not address, like the National Security exemption under the wire-tapping statute. The Executive fills in that gap with Executive orders and relies on the inherent power of the Executive to protect "domestic tranquility."

Until Congress has legislated comprehensively in the field, even if it is to say that this is a criminal investigative agency and we need it, the Executive will continue to interpret the silence as authority and that is the problem.

Mr. EDWARDS. What kind of an investigation do you think should have been carried on by the FBI during the stormy days of the early 1960's in the Deep South with the Ku Klux Klan?

Mr. BERMAN. Well, I think there should have been more criminal investigations.

Unlike the broad reading of the Smith Act, the FBI read the civil rights statute making it a crime to violate civil rights very narrowly and said that it therefore did not have jurisdiction or had very limited jurisdiction to investigate. Still, criminal investigations were proper.

I think that the Bureau should have been stopped at the point where they decided that the way to get the Klan was not to prosecute them, but to engage in counterintelligence programs in order to disrupt and destroy the Klan. This involved the FBI taking law enforcement into its own hands. That trail of authority goes all the way up to the Attorneys General of the United States.

Mr. HALPERIN. May I just add a word if I may. It seems to me conceptually that the problem under the Constitution is very simple. If there is behavior that is illegal and the Federal criminal laws are violated, then the FBI should investigate it. If people are doing things that the FBI thinks are dangerous to our society which are not criminal, the President should come to the Congress and say that this behavior should be made criminal. If the Congress agrees, then it becomes law, somebody is convicted under it, the Supreme Court says

that the statute is constitutional, and then the FBI investigates that criminal behavior. I think that a separate and parallel system which justifies investigations having to do with subtle threats to the survival of the Nation or with political activity which we do not like is a violation of our whole constitutional system.

There is always a way to deal with the problem. The Attorney General today talks about foreign governments spying on American businesses, and he says that there is no crime and therefore we need wiretaps and domestic intelligence investigations for noncriminal behavior.

But that seems to me to have it backwards. If that behavior threatens our society we should make it a crime and I do not see any problem that we say that it is unlawful for agents of foreign powers to claim clandestinely to gather trade secrets from American businessmen.

To say that because it happens now not to be a crime that the remedy is intelligence investigation is wrong. The remedy is to make the behavior a crime and then investigate it under statutory authority.

Mr. EDWARDS. Someone working for a foreign government and getting lawful information and transmitting it to his employer is——

Mr. HALPERIN. I think that the court of appeals said that you cannot make that a crime. Presumably, what the Attorney General is talking about is these plannings of burglaries or posing as employees or stealing trade secrets which probably is a State crime. But I guess what he is saying is that some of this may not be a Federal crime, so we need wiretaps.

But the Federal Government, if it wants to investigate an agent of the Soviet Union who is conducting burglaries of industrial plants in the United States, then I think that such acts should first be made a crime.

Mr. EDWARDS. Well, if this type of tight rein is put on the FBI, what about the local police forces throughout the country? Would they not engage in similar activity on an accelerated scale?

Mr. BERMAN. I don't know how far Congress can go in legislating these powers and activities for the local police. One of the recommendations I made in my paper that I have not really spoken to is that any statute should prohibit the FBI from cooperating with any kind of police force in any kind of investigative activity which the Bureau could not itself conduct. There is considerable cooperation between the Bureau and local police. There is an exchange of information and encouragement to conduct wiretaps that the Bureau cannot conduct, to place informants when they could not have informants and to engage in harassment. For instance, there were COINTELPRO-type operations conducted by other Federal and local agencies at the request of the Bureau. They all swim together and the Bureau is at the center of the pool.

Mr. EDWARDS. What is the Bureau going to do about an Oswald. Say that there is a fellow by the name of Oswald who has a Russian wife and might be a Castro agent or a Russian agent. We have no problem there, or I should think not. Maybe there should be an investigation conducted there to see if he is or is not spying.

Mr. BERMAN. Well, they are going to have to have reasonable cause or some factual basis to show that he is a foreign agent.

Just because someone says that Mr. Oswald is a foreign agent, I do not think that the Bureau should put him under investigation. I don't

know what the Bureau should do about Oswald. I don't know what the Bureau is going to do about anyone who engages in political assassination and violence. The Secret Service has an enormous list of people that it keeps under watch; it was reported in the paper this morning that that list has 1 million names on it.

I don't know how you could conduct an intelligence investigation and come up with the lone assassin. I don't think that it works that way. I don't know what the Bureau can do about a small terrorist organization operating and throwing bombs at Soviet organizations and embassies because a real terrorist organization applies polygraph tests to its members. You cannot penetrate it with an informant organization. It may be beyond intelligence. The record indicates that the mission that the Bureau has set up for itself in this area is one that intelligence is pretty useless in solving.

Mr. EDWARDS. Well, you obviously think that the country has to properly protect itself from foreign agents. There is no doubt about that?

Mr. BERMAN. No doubt.

Mr. EDWARDS. OK, let us get back to Oswald. That matter has tantalized this subcommittee for a long time. The FBI gets a report that he becomes an expatriot, gives up his American citizenship, goes to Russia, marries a Russian woman, comes back to the country, and has some kind of connection with Castro, Fair Play for Cuba pamphlets and all of that. Now, sometime should he not become the subject of an investigation to determine whether or not he is working for another country?

At what time would an investigation start or at the least what guidelines would have started an investigation and then how in an orderly way should we bring it to a close?

Mr. HALPERIN. I think that this is a question of what techniques you permit. It seems to me that if you reach a level where there is a combination of facts leading to a reasonable inference that this person is working for a government or a foreign power, it seems to me that that should begin an initial investigation consisting of talking to him, checking his records or his files, or just watching to see if the suspicion increases or whether you reach the standard that he has committed a crime or is about to commit a crime, at which point you can open a full investigation. You obviously have to be able to do something to decide whether there is a reasonable suspicion and so that you can open a full investigation. And I think that what we are into here is the hard question of what kinds of investigative techniques should be permitted at what stage of the process, as the suspicion goes that the person is in fact engaged in breaking some kind of criminal rules.

Mr. BUTLER. But Oswald had not reached that threshold. He was just, as I view it, accepting this approach, he was probably lying in wait, waiting for his orders. He was not about to commit a crime. He was just in readiness, should the occasion arise. So, we have not met the threshold of your standards.

As I view your testimony, you would say that the FBI would have had to lay off Oswald and not surveil him. Is that what you are saying?

Mr. HALPERIN. I think one would have to look at exactly what we knew and exactly what the hypothesis was on what he was doing.

If you do not have a reasonable basis for concluding that person is violating the law, then simply because he went to the Soviet Union and

came back and is in the Fair Play for Cuba Committee, does not call for issuing a warrant.

Mr. BUTLER. He had no visible means of support.

Mr. HALPERIN. Well, then you are getting involved in saying that there is more evidence here and beyond that—

Mr. BUTLER. We would not have information as to whether he had any visible means of support unless we have had an investigation going. That is what disturbs me.

Mr. HALPERIN. No: I am saying that as I view it, the degree of intrusion has to be determined both by whether you are intruding in the first amendment areas and by the degree to which you already have some basis for believing that there is a reason for investigating. You can become more intrusive in your investigation as your suspicion grows, which is the normal criminal standard. The police can investigate somebody, but they cannot get a warrant to search your house until they have a reasonable basis for concluding that they are going to have a crime. It does not mean that they cannot come and talk to you or talk to your neighbors or use other kinds of investigations, but what we are really talking about here is a continuum here based upon the reasonable suspicion that something is going to happen.

Mr. BUTLER. Is it your view that the authority for the FBI, or the police, includes unlimited inquiries of your neighbors?

Mr. HALPERIN. No: I think that it is limited by the first amendment. That is, they cannot inquire into your lawful political activities and it is limited under—

Mr. BUTLER. What part of the first amendment are you talking about?

Mr. HALPERIN. The right of free speech and free assembly in which the Supreme Court has said many times that —

Mr. BUTLER. Well, you cannot inquire of your neighbor about it?

Mr. HALPERIN. I don't think that the FBI can go to my neighbor and ask was this man against Goldwater. I don't think that you have the right to ask that question.

Mr. BUTLER. I think that it is far more damaging to ask about Goldwater.

I thank you.

Mr. EDWARDS. I want to make one more comment on the Oswald thing that supports your testimony and that is that there is a possibility that Oswald's actions in Dallas, shooting President Kennedy, could have come from the investigation that had taken place of Mrs. and Mr. Oswald before the day of the assassination. We know that because he was highly irritated at the visit of an agent to Marina Oswald and walked into the FBI office several weeks, or whenever it was, before the day of assassination, with a very hostile note saying "Stay out of my business" and so forth.

So, for all we know it might have had a connection with a state of mind that made him do what he did.

Mr. HALPERIN. I think that the final point that we are making is that the assumption that the Bureau makes these kinds of statements is that if you will let us do what we are doing is that we will stop these things. The evidence is that they do not. They have not stopped these things. What they have done is to focus their attention on the groups that you can observe and the groups that have nothing to hide.

Real terrorist organizations, the SLA, the groups that are throwing bombs at Russian embassies, the Bureau cannot get into these.

Mr. EDWARDS. The Bureau would answer that we cannot tell what we have done, there are a number of areas that we have stopped this and we have stopped that and this certain plot and this allegation.

I have taken too much time. I yield to the gentleman, Mr. Dodd.

Mr. DODD. I have no questions, I yield to Mr. Parker.

Mr. PARKER. I was fascinated with your outline about what was in the domestic security guidelines issued by Attorney General Levi. But I am not clear as to whether you disagree with those guidelines. The principles that you just enunciated about when you would start an investigation and under what conditions and how you would continue it if you found that there might be reasonable suspicion is really the same as involved in these guidelines. Could you speak about those guidelines.

Mr. HALPERIN. Those guidelines, as I understand them, permit you to investigate lawful political behavior but they do not limit you to criminal conduct.

Mr. PARKER. Let me read:

Domestic and security investigations are conducted when authorized under these various sections to ascertain information on the activities of individuals or the activities of groups which involve or which will involve the use of force or violence, and which involve or will involve the violation of Federal law.

It then goes on to list those laws which have been violated, such as overthrowing the Government, substantially impairing the functioning of the Government of the United States, the functioning of interstate commerce, the private rights of the citizens under the treaties of the United States and the laws of the United States. Preliminary investigations then can begin on the basis of allegations. You cannot proceed from that to the intermediate step without finding certain facts out and you cannot proceed to the full-scale investigation without really applying these different standards and it also limits the techniques at each of those different levels.

For instance, it is very clear that at the first level the FBI can only examine their own files, public records or other public sources of information, Federal, State or local records, inquiry of existing sources of information. I assume that means information from informants and then there is the use of previously established informants and physical surveillance and interviews with persons not mentioned. That means that they are not going to be able to use the other so-called intrusive devices.

They cannot even insert an informant in anywhere. An informant has to have been previously established. Now, do you find anything really wrong with that?

Mr. HALPERIN. Well, I think that the problem is in the meaning of words. We are back here to Alice in Wonderland.

The GAO says and the FBI says that these guidelines do not change what we have been doing. We know that the FBI is still in the Socialist Workers Party and they are continuing to fight an injunction in that case against their informants. The Bureau says they have been investigating the Socialist Workers Party for 40 years, and they have found no evidence of crime or evidence that they are planning a crime. Then these guidelines are issued.

The Justice Department is not going to go to court the next day to say that they concede that they no longer have the right to infiltrate this organization. They are still in court saying that they have the right to infiltrate, which suggests that whatever the literal words are, the Bureau understands them and the Justice Department understands them as perfectly allowing the investigation of the Socialist Workers Party.

Mr. PARKER. My understanding of their interpretation of these guidelines would be that they would prohibit this activity in not just the Socialist Workers Party, but in the Communist Party USA. They say that these guidelines would restrict their activity and prevent their activities in those organizations.

Mr. HALPERIN. Well, then, if that is what they believe, then they should not object to what Mr. Berman and I are suggesting, which is to turn the problem around and start with the first principle that you only investigate a criminal activity which intrudes on the first amendment and then let us make sure that that is limited so that it does not violate the first amendment. If the Bureau understands these words and says that we understand these words differently, then we have simply an interpretation problem.

Mr. PARKER. I want to be sure that your approach to fashioning the charter for the FBI would be that you would limit them to the investigation of crime.

Mr. BERMAN. Right. Now, there may be a small area called the preliminary investigation where we might have a name check and so on. But the problem with the guidelines and with the Senate Committee recommendations is that although they permit these 90-day preliminary checks and established source checks, they do not meet the total standard when they follow the full flow of investigation. If they have any reason, specific and articulable facts which give them under the guidelines a reason to believe that an organization may sometime engage in criminal activities, then you can have intelligence investigations that may last a year or 2 years onward.

Similarly, the meaning of "soon" in the Senate Committee recommendations "soon will engage in" begins to take on that indefiniteness that the Bureau has been operating under for a long time.

If there is something, a name check, an established informant check, which cuts off further checking unless you have a criminal basis for investigation, maybe that is where we are headed. But I do not think that those guidelines distinguish between preliminary and full investigations, and as a consequence, you have the possibility of endorsing long-term, ongoing intelligence investigations. That is where we have got to draw this line. I think that we are talking about criminal investigations and changing the perception within the Bureau of how it does business.

As a criminal investigatory agency, the Bureau has done well and I would like to see that dual precriminal and criminal become a unitary vision.

Mr. HALPERIN. Why do you need domestic intelligence guidelines if what you are doing is investigating people who are blowing up buildings or planning to assassinate people or are engaged in other crimes?

The whole notion of a separate domestic intelligence investigating guideline seems to me to suggest that there is a part of the Bureau reserved and apart from the fact that they are engaged in investigating

crime. Bureau representatives have emphasized that they are not investigating to detect crime.

If you continue that organization, under the guidelines, it is going to continue to operate this very way.

Mr. EDWARDS. At what point would you have the Bureau start an investigation of the Symbionese Liberation Army?

Mr. BERMAN. I think the way that it did start, in the investigation of the Symbionese Liberation Army. That is one that engaged in bombings and that is when the Bureau became involved, when they bombed.

Mr. EDWARDS. When they engaged in bombing?

Mr. BERMAN. That is when the Bureau is going to find out about groups like the SLA. If we build this intelligence capacity to watch for the SLA, the Bureau is not going to discover the SLA, they are going to discover us.

Mr. PARKER. Do I understand correctly that you would not trigger any activity on the part of the Bureau until after a bombing?

Mr. BERMAN. No, I am making the distinction.

Mr. PARKER. What if information came to the Bureau that there was going to be a bombing, an anonymous tip. What do you as the Director of the FBI do with that, and in fact, let me go on and give you a hypothetical, if I may.

Let us assume that you receive a tip about some future violent conduct that is going to involve death and destruction. If it is true, the conduct and planning of this would be truly illegal and furthermore, the tip is anonymous. The tipster is in fact, as is true in a number of these cases, fearful for his life and is a disenchanted member of the organization, not somebody who has been trained and selected and placed in the organization. He is just disenchanted. And, he knows that if he gives too much information, then it is likely his life would be in danger because his terrorist friends are very aware of all of this and the other plotters are very firm in their purpose and there is no way of getting another informant in there.

Now, you have got some troublesome factors: one, you have an informant of unknown reliability and who might even be a crank who is calling up. Two, you have information that if true, poses a real threat to life and property and, three, you have only a fragment of a lead and the unlikelihood of cooperation. Now, what does the Bureau do with that information? Do they just hold it?

Mr. BERMAN. Under those circumstances with a criminal investigatory standard, as I said before, I think that there may be a preliminary investigation of short duration which should allow the Bureau to do some checking, check its records, check the local police and talk to people that they think know something. They are established informants, but they are going to have to come up with more than that allegation in that time and they are going to have to come up with reliable information to trigger anything beyond that.

Mr. HALPERIN. Could I just say that I do not think that this is a problem with domestic intelligence. I think that you do the same thing that you should do and would do if a teenager gives you a tip that he is in a teenage gang who are about to blow up the local high school.

I do not know what the Bureau does in that case. I would say that it is a very hard problem to address. I would say that they would do the same thing.

Mr. PARKER. Your statement has already made use of the word intelligence investigations, we couple those two words. Intelligence is the gathering of information and knowledge. Do you think that it would be impermissible to collect information, just gather data, so to speak, without any intrusive methods such as informants or wire-tapping, just gather data about organizations which might, in the future, have some likelihood of unlawful political activity?

Mr. HALPERIN. There, I think, I would say that it is subject to the first amendment, that is, either gather data about buying guns or recruiting people who have in the past engaged in criminal activity and so on or I do not think the FBI has the right to gather information about the lawful political activities, about the political views and associations of Americans, because the Bureau believes that people who have certain political views are more likely than other people to engage in political activities. That is really what the Bureau has been doing.

Mr. PARKER. I am talking about public sources now.

Mr. HALPERIN. I do not think that the Bureau has a right to have in its files the position that the Republican Party has taken on gun control.

Mr. PARKER. Is that not a different standard for the Bureau than we have for Congress? Congressional committees do that all the time.

Mr. BERMAN. What is the purpose of Congress gathering information and what is the purpose of the Bureau's collection of information? I do not see any reason why the Bureau could not read the newspapers if it wanted to and as a matter of fact, if you look at the Senate record what we have is not this special capability called intelligence over in the Bureau, but a considerably large amount of isolation, which, in tandem with the isolation of the executive branch has led to massive movements of people to find out information that they could have gotten in the Washington Post.

Mr. HALPERIN. You could probably save a lot of money if the Bureau read the newspapers.

Mr. PARKER. I think that I have probably exceeded my time.

Mr. EDWARDS. Mr. Starek?

Mr. STAREK. Thank you, Mr. Chairman. Do you contemplate any difference, from an enforcement point of view, if we were to enact a legislative charter to which you refer or if we were to simply approve the guidelines?

Mr. BERMAN. How do you mean approve of the guidelines?

Mr. STAREK. If the Congress does not enact a legislative charter for the Bureau?

Mr. BERMAN. You would be having the Attorney General coming in and saying here are the guidelines and Congress says those are nice guidelines, but tomorrow the Attorney General can rewrite those guidelines. Then there are going to be calls to the Attorney General on a continuing basis with Congress saying let us look any time you rewrite those guidelines. Then I think you are involved in the Executive function and you have not established any concrete basis for the Bureau to operate. I do not think that you can simply approve the guidelines.

Mr. HALPERIN. There is the question as to how detailed the legislation should be. It seems to me that Congress should establish some

basic principles and then go on to direct that the Bureau issue guidelines consistent with those principles. The guidelines should be public so that the Congress if it wants could pass additional legislation or say that those guidelines are not in conjunction with the principles we have established.

I would also urge the committee to add to the legislation criminal and civil sanctions for violations of rights. I think that it ought to be a crime for an official to willfully violate the statutes set out in statutory implemented guidelines. There also ought to be civil damages like there are now in the wiretap statutes.

Mr. STAREK. That is exactly what I was getting at with the first point.

But I want to pursue the second point. If we do enact criminal sanctions for violation of a legislative charter, how is that to be enforced? How are we to find out about abuses by a Federal law enforcement agency?

Mr. BERMAN. I am glad that you asked that question. We have found a lot of illegal activity right now and only Senator Church and Congressman Drinan have wondered why there have been no prosecutions of anyone for massive illegal conduct. I think that it is a problem of conflict of interest; it ought to be recognized that the FBI is an investigative agency of the Justice Department and the two work together. Under present circumstances, we are asking that agency to investigate itself. And this has caused a problem for the Attorney General, which I think he recognizes.

For example, the Justice Department conducted another investigation of the King assassination and concluded that the Bureau had not really done anything wrong.

But, then, Assistant Attorney General Pottinger called for an independent investigation because they sensed that no one was going to believe what is going on inside of the Department.

A second example is the counterintelligence program operation, when Petersen came before this committee and said, we have conducted an investigation and have decided not to prosecute. He said all of the Statute of Limitations had run out and most of the conduct was not illegal anyway. Yet, the Senate committee turns up that the Justice Department read the counterintelligence records in summary. They did not read the raw files of the FBI.

I think that it is just too close for the Justice Department to conduct an independent investigation. And I also think that there is a problem with the Attorney General and the Director of the FBI. They are trying to rebuild morale and cannot be prosecuting and cannot make a prosecutory statement within the agency at the same time. And for both of those reasons both of us have recommended the appointment of a separate special prosecutor to investigate special crimes that involve the FBI and the Justice Department.

We would like especially to see a special prosecutor to conduct an investigation of the past abuses and we would like to support long-term legislation which would have a special prosecutor trigger mechanism.

And I think it is an essential step if any of these criminal violation standards should be carried out.

MR. STAREK. I want to return to the question of warrants for informants. I am curious as to whether you could make any differentiation with respect to the fourth amendment requirements, which was what I understand you base your support of that recommendation on? I wonder if you would require that standard for the FBI accepting unsolicited informants?

MR. HALPERIN. I think there is a first amendment problem and a fourth amendment problem here and I would apply both to unsolicited information of informants. I would say that the Bureau can receive unsolicited information about criminal activity. It cannot receive, it cannot file, unsolicited information about private, political activity.

If the Congress cannot require the Socialist Workers Party to send in a list of members, if somebody sends in that list of members, it cannot go into an FBI file. Once the Bureau gets information from somebody and says that is terrific, go back, get some more, then they have overstepped.

I would apply the fourth amendment warrant standards for informants. I think that it is just as intrusive as a wiretap or a bug to send a person in.

I would say that as far as the first amendment standards, as I have suggested in my statement, that I would not permit a person to pretend to become a genuine member of a lawful political organization.

MR. BERMAN. I think that we are talking about unsolicited information that is going to be handled. The Attorney General has written guidelines for that too.

I think that what Mr. Halperin is trying to do is to draw the line between unsolicited information and informants operated by the Bureau.

I think that there should be agency principles. If an informant comes out of an organization and says I think I have got information that is really good, and the FBI says keep that up, that is really good, we will pay you, as they say, on a piecemeal basis, and the better the information and the more information, the more we will pay you. Then that person is an informant and he is instructed and operated by the Bureau and that should require a warrant to keep him in an organization.

MR. STAREK. Would your standard then be whether or not an informant is being paid?

MR. BERMAN. Paid or directed or operating under the instruction or the cooperation of the Bureau.

MR. STAREK. Thank you very much, sir, and thank you, Mr. Chairman.

MR. EDWARDS. There is a problem in having a police organization, which the FBI was established to be, also engaging in domestic intelligence.

There have been suggestions that, if it is indeed necessary to have an investigating arm of the Federal Government to handle domestic intelligence, whatever that is, it has never really been defined very well, then it should be a separate unit of the FBI and properly told to do criminal work for which it was set up to do and I would include in that sabotage and espionage.

MR. BERMAN. Well, I directed some comments to that. No. 1, I said that in terms of this violence and terrorism, which you have brought

up again that there possibly should be a different kind of an agency. I am not even sure whether it is an intelligence agency, maybe it is a different kind of criminal investigation agency, but before we have another intelligence agency, we need to know more about the function of that intelligence agency, what it is going to be, what do we need it for and I think that that would require a lot more study.

We have no evidence that the FBI's domestic intelligence has served a useful public purpose, except maybe in foreign counterintelligence activities. But, even there, I am not sure how good that record is.

Mr. EDWARDS. What we tried to do in the GAO investigation of 1974 domestic intelligence operations, is to determine this. One could say that it was inconclusive of the 19,700 open cases, perhaps 19,700 of them were opened and improperly remained opened.

Mr. HALPERIN. It seems to me that in the sense that the Bureau uses the term, that is, the gathering of information about lawful political activity about people who do not want you to have it, I do not think that there is any agency in the U.S. Government that is entitled to do that.

You are not entitled to have an office or an official of the Government agencies broadcast information about people who are not doing anything that is illegal.

Now, there is a separate problem, which I think is pressing. The President is certainly entitled to know what is going on in the country, and certainly he has got a lot of people who come and tell him that that information should not be gathered by a criminal investigatory agency nor by an organization that has files. I think that whatever information that is gathered should be public and open. I think that in all of the agencies of the U.S. Government, there is a lot of intelligence activity, and certainly no one wants to stop that.

But if the President comes in and says I don't really know enough about life in the ghetto and I want to know about if there are really rats in all the houses and therefore I want to have HUD gather this kind of information, you do it openly and you say what you are doing and say it is openly available to the people, then sure you have got a right to gather that information.

But what if he says what I want to know is whether the Conservative Party is planning to run a candidate in the next election, well, he does not have the right to gather that information.

Mr. EDWARDS. Well, thank you. I have not any further questions.

Mr. Dodd?

Mr. Dobb. No, I have no further questions.

Mr. EDWARDS. We have enjoyed your perceptions about this issue and these problems and perhaps what we ought to do is to ask the FBI to come in here and to justify the open files that they have, if they can. One of the difficulties has been that they have refused to let the GAO look at the files and provide summaries instead. I think the GAO has really done a pretty good job, considering the fact that they were not allowed access.

We are working on that and thank you very much.

[Whereupon, at 11:32 a.m. the committee adjourned.]

FBI OVERSIGHT

Attorney General's Guidelines for FBI Activities and Additional Legislative Proposals

THURSDAY, MAY 20, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m. in room 2237, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, and Butler.

Also present: Alan A. Parker, counsel; Thomas P. Breen, Catherine LeRoy, assistant counsel; and Roscoe B. Starek III, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today we continue our hearings regarding the nature and scope of legislation necessary to clarify the policy which should guide the Federal Bureau of Investigation, with a special focus on the field of domestic intelligence.

Our experience to date includes receiving, what has already become a historic work, a report by the General Accounting Office on current domestic intelligence activities of the FBI, and the reports of the select committees of both Houses, as well as views from the executive branch.

Last week the views of witnesses from outside of Government who are deeply interested in having the Congress assure the American people that the abuses of the past will not recur were presented.

Our search is to find a way to institutionalize both safeguards for the peoples' rights and the emerging spirit of openness and candor now characterizing the Attorney General and the Director of the FBI.

This morning we have two distinguished witnesses representing the American Bar Association. First, we have Mr. William B. Spann, who is a president-elect nominee of the American Bar Association, and who was chairman of a Special Committee to Study Federal Law Enforcement Agencies, created by the ABA.

Mr. Spann is a graduate of Harvard and a partner in the law firm of Alston, Miller and Gaines of Atlanta, Ga.

He is a former Chairman of the ABA's House of Delegates and a former director of the American Judicature Society.

Presently, Mr. Spann is a director of both the National and Atlanta Lawyers Committee for Civil Rights Under Law.

We welcome you here this morning, Mr. Spann.

Appearing with Mr. Spann is Herbert S. Miller, co-director of the Institute of Criminal Law at the Georgetown Law Center.

Professor Miller was the consultant/reporter to the special ABA committee chaired by Mr. Spann regarding Federal law enforcement agencies.

Professor Miller has had a longstanding interest in the development of our criminal justice system.

The report of the Institute of Criminal Law at Georgetown, entitled "The Closed Door," was directed by Professor Miller. That report dealt with the employment effects of a criminal record, another area of interest to this subcommittee.

Professor Miller's knowledge of the workings of the Department of Justice is well known and was acquired by having been an attorney in the Criminal Division of the Department of Justice and by participation in a number of studies of the structure and effectiveness of that institution.

I might add, in the paper this morning, there was a report of the great damage that the careless, negligent use of an arrest record or an investigative record, whatever it might be, can have on a private individual who had nothing to do with a crime, and had never been convicted of anything.

Yet, apparently, the Supreme Court has said that there is no liability there.

We appreciate your being with us today, Professor Miller.

Mr. Spann, I understand that you will give the formal presentation on behalf of the American Bar Association and then Professor Miller will join you in a panel to respond to questions from the subcommittee.

Is that correct?

Mr. SPANN. Yes, sir.

Mr. EDWARDS. Then you may proceed. We are delighted to have you both here.

TESTIMONY OF WILLIAMS B. SPANN, PRESIDENT-ELECT, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY HERBERT S. MILLER, GEORGETOWN LAW CENTER

Mr. SPANN. It is a privilege to appear before you today on behalf of the association to discuss oversight of the Federal Bureau of Investigation.

The association is the principal representative of the legal profession and has long had an interest in the administration of justice.

The views that I express today were formulated over the last 2½ years by the Special Committee to Study Federal Law Enforcement Agencies, which was created to examine the functioning of these agencies and formulate recommendations to prevent improper influences on them.

I have served as chairman of this special committee. With the assistance of its consultant, Prof. Herbert S. Miller, of the Georgetown Law Center, who is accompanying me today, the special committee published its final report, "Preventing Improper Influence on Federal Law Enforcement Agencies," in January of this year.

The recommendations for reform in the report were approved by the association's House of Delegates at its midyear meeting in Febru-

ary 1976, in their entirety. A copy of the final report was sent to each member of your subcommittee.

The committee and the bar association rejected the notion that abuses occur solely because of a few "bad apples." There has been a long and unfortunate history of the progressive politicization of the Department of Justice and the growing misuse of the FBI and the Internal Revenue Service and subsequent abuses of power by these organizations.

The ABA believes basic institutional and structural reform is essential to assure the public of the integrity of our Federal law enforcement agencies. We agree with the statement made by James Madison in the 51st Federalist Paper:

If men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on Government would be necessary . . . a dependence on the people is, no doubt, the primary control on the Government; but experience has taught mankind the necessity for auxiliary precautions.

I emphasize this consideration because we now have a Department of Justice headed by an Attorney General and Deputy Attorney General held in the highest repute in the legal profession and by the American Bar Association. Moreover, they are taking strong measures to assure that official corruption will be prosecuted fully and to assure that the FBI will be closely monitored to prevent abuses of its great power. The committee's recommendations, if implemented, would serve to preserve these measures against change under future administrations.

This point is fundamental to any discussion of how to prevent improper influences on our Federal system of justice. The ABA believes the measures recommended in its report will go a long way toward preventing future abuses and illuminating more quickly those which may occur despite such reforms.

The committee's original mandate was broad, but it was quickly narrowed down to the Department of Justice, the FBI, and the Internal Revenue Service. Although we lacked the time and resources to consider other agencies, we feel that many of our recommendations can be adopted for use for other law enforcement agencies.

I add also that there was no intention to point a finger at a particular agency, Justice or FBI or Internal Revenue, but that these were more in the public eye and frankly an area in which we had more expertise. We reduced our consideration to a few agencies. We found there were some 27 agencies we might have looked into if you are talking about major law enforcement agencies.

We began our deliberations without a full understanding of the nature and role of congressional oversight and its importance in preventing improper influence. Of the 20 recommendations in the entire committee's report, 17 focus on the role of Congress in legislating, confirming appointments, or appropriating moneys.

The important role Congress plays, or should play, in overseeing our Federal law enforcement agencies permeates the entire report. This role is illustrated by an examination of the bibliography of materials upon which the committee relied in the preparation of its report. The committee conducted no factual investigation of its own but relied on a host of congressional hearings and reports which acted

as a major source of information for the committee. Prominent among these materials were hearings on FBI domestic intelligence and FBI oversight held by this subcommittee.

It is startling to note that although these congressional materials refer to abuses beginning in the mid-1930's, all of the hearings on these matters took place in the last few years. It appears that Congress exercised little oversight over the FBI prior to the Watergate revelations.

The ABA report emphasizes the importance of congressional oversight and rejects the notion that there should be an independent outside review board for FBI operations. The Association believes oversight tools available to Congress and the executive branch have not been utilized sufficiently in the past and should be given the opportunity to function fully and effectively before extraordinary approaches are attempted.

The ABA believes oversight must occur on a continuous basis to illuminate at an early stage potential abuses and that oversight of the FBI must be part of oversight of the Department of Justice as a whole. Thus, a committee with primary responsibility for Justice Department oversight should have full and ongoing responsibility for FBI oversight. We do not say such oversight must be exclusive, but point out that oversight by too many committees can dissipate responsibility.

An important facet of oversight is the appropriations process and we believe the committee exercising oversight over the Department of Justice should be closely involved in appropriating funds for the Department. Congress could then monitor the priorities and performance of the Department, ensuring a proper allocation of resources. It is clear that the appropriations process has not been used effectively in the past as a means of oversight over the FBI.

A key part of such oversight relates to internal resource allocation within the Department. Congress would have difficulty exercising its oversight responsibility through the appropriations process unless the executive agency itself had a rational system for allocation of resources. The Department of Justice recently instituted a new program of resource allocation based upon the principles of "management by objective." This forces offices and divisions in the Department to examine their priorities and justify the continuance or initiation of programs. This should be encouraged and the appropriate congressional committee should use the appropriations process as a way of exploring with the Department the setting of priorities and the allocation of resources.

The Association believes the system of appointment of executive branch officials is an essential and critical aspect of Congressional oversight. Although the House of Representatives plays no direct role in the confirmation process, it can play a key role in enacting legislation to govern such process. Five of the last seven Presidents appointed as Attorney General are individuals who either managed or played a key role in their political campaigns. We therefore recommend legislation prohibiting the appointment of individuals who have played a leading partisan role in the election of a President to the posts of Attorney General and Deputy Attorney General.

The association also believes the Director of the FBI should have his performance periodically reviewed through a process of reconfirma-

tion and that his appointment should be for a statutory term of years. The reconfirmation mechanism would provide the opportunity for re-evaluation of the Director's performance on a periodic and routine basis rather than in the heat of controversy.

Perhaps the most important facet of congressional oversight of the FBI involves its jurisdiction. The Special Committee concluded that the present bases of jurisdiction are imprecise, vague, and historically contradictory, providing little or no guidance to the President, the Attorney General, and the Director of the FBI.

We think that there can be no effective oversight unless there are clear standards set forth by legislation and by regulations promulgated thereunder. The regulations recently promulgated by the Attorney General are an important first step but they should be responsive to a clearly defined congressional mandate. Finally, the development of such regulations should offer an opportunity for meaningful professional and citizen input prior to adoption.

Before effective oversight can be exercised, Congress must have access to departmental information. The present approach of ad hoc solutions or threats of contempt is not a viable substitute for an ordered procedure to resolve conflicts regarding the availability of such information. Therefore, we believe Congress must establish appropriate standards to guide congressional committees and the Department of Justice in this respect.

In conclusion, Mr. Chairman, I hope we have made clear our belief that congressional oversight has many facets and that standing committees should exercise such oversight on an ongoing, routine basis. Temporary select committees, as valuable as they have been and will continue to be, only provide oversight after extreme abuses have occurred. Proper congressional oversight should serve to prevent extreme abuses from occurring.

The ABA finds that Congress is the primary body under our Constitution for exercising oversight. We conclude our recommendation on FBI oversight with these words: "Outside review of FBI operations is opposed as unnecessary if the above recommendations are implemented and executed." We urge Congress to take the necessary steps to insure that it can exercise effective oversight over the FBI and thereby fulfill its proper constitutional role.

Thank you.

Mr. EDWARDS. Thank you very much, Mr. Spann.

Professor Miller, do you have a statement?

Mr. MILLER. No, sir.

Mr. EDWARDS. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Thank you, Mr. Spann.

I commend you for your statement and the ABA for its study. I have seen this study some months ago. I was happy to read the recommendations.

As a person who is very familiar with the way the ABA works, and as a member or former member, I am very active in the section on individual rights and responsibilities. I am glad that the ABA is involved.

I have some questions here as to why the ABA did not get into some other things. For example, in the statement here, I find nothing about informants. Unfortunately, the document does not have an index.

Did they get into the question of the FBI's use of informers or informants, these anonymous people that they pay the millions of dollars to report on American citizens?

Mr. SPANN. We got into that in discussion.

Mr. DRINAN. It seems to me this is a rather central question.

Mr. SPANN. I do not know that we had any information available to us to enlighten us a great deal on what we could say about informants. We recognize that they are used and perhaps they are a necessary evil.

Mr. DRINAN. Why are they necessary? Do you have any information that they are necessary?

Mr. SPANN. No; no statistical information.

Mr. DRINAN. All right. You have no information that they are necessary.

Mr. SPANN. No, sir.

Mr. DRINAN. They are not a necessary evil. You can't prove that.

On the whole question of the investigation by the FBI in the area of intelligence and counterintelligence, I see in the report here a rather vague affirmation that maybe the FBI should do something in that area.

As you know, from all the studies in the area, there are many people who feel that if an action is a crime or threatens to be a crime, it should be treated as a crime and there should not be even a separate section of the FBI.

How would you react to that?

Mr. SPANN. My individual reaction is that someone must be involved in internal counterintelligence. I see no reason why under a proper definition the FBI may not be so involved.

Mr. DRINAN. What justification, what statutory justification is there for the FBI to be involved?

Mr. SPANN. There isn't any at this point. We recommend that where they ought to be involved, there be guidelines established which would control the program.

In my mind, someone must be looking, under proper guidelines, to the foreign agents operating in this country.

Mr. DRINAN. What justification do you have for that, sir?

Mr. SPANN. I --

Mr. DRINAN. What statutory or historical justification do you have for that statement that FBI agents have to oversee the way people think.

Mr. SPANN. I did not say the way people think, sir. I said that with regard to foreign agents who may be active in this country, I think someone needs to conduct that surveillance. We do not say they have the statutory authority.

In my opinion, somebody must have the authority to look--to conduct surveillance of foreign agents in this country.

Mr. DRINAN. Foreign agents, all right.

Now therefore you would restrict the domestic surveillance by the FBI only to aliens, only foreigners. They may not do this on American citizens.

Mr. SPANN. They would do it on American citizens to the point where they are cooperating with foreign agents. I do not think you can say that because the foreign agents are employing American citizens surveillance of the foreign agent stops at the time he passes the money.

Certainly anyone in the conspiracy, to use the law term, with a foreign agent will be under the same surveillance. If you are talking about looking at what we call the radical left or the radical right organizations, I would not agree they ought to be under surveillance.

To my mind no agency has surveillance of foreign agents by statute that I know of. I think this ought to be defined and the extent of it ought to be defined.

Mr. DRINAN. Therefore, you would say that most of them---that goes on now---

Mr. SPANN. Yes.

Mr. DRINAN. I will say that you have gone beyond what I consider to be the appropriate issue and I thank you.

Mr. SPANN. I am speaking these answers to you in my own personal view. What is in the recommendations is the extent of what the ABA has approved.

Mr. DRINAN. I hope, sir, that you bring your convictions and make them the views and policy of the ABA, too.

Mr. SPANN. Thank you.

Mr. EDWARDS. The gentleman from Virginia.

Mr. BUTLER. Thank you, Mr. Chairman.

Mr. SPANN. I appreciate your testimony and the work that you have done. It is very helpful to us. I would like to inquire as to whether your special committee created in 1973, has now been discharged?

Mr. SPANN. No, sir, it is still available and functioning. It does not plan to meet further. It is up to the President-elect---Justin A. Stanley, to determine whether it will be continued next year. We have recommended it be continued on a standby basis to consider anything the association would want to refer to it.

Mr. BUTLER. I judge that the committee was triggered by Watergate disclosures.

Mr. SPANN. Yes; but told to go beyond Watergate.

Mr. BUTLER. Yes, sir, I understand that.

Mr. SPANN. Yes.

Mr. BUTLER. I know that you have reservations about an external, outside-of-Government oversight generally of FBI and the Department of Justice as a continuing thing.

I would say that from my own view, I think it serves a very useful function. It seems to me it would be appropriate if the ABA would, from time to time, review again where we have come after our guidelines are implemented for a period of time to test whether they are satisfactory or not.

I hope you will consider in deciding to discharge the committee finally or not, the possibility of reviewing this from time to time. It has been helpful to me. I thank you for your testimony.

Mr. SPANN. Thank you.

Mr. EDWARDS. I thank you very much too, Mr. Spann.

The problems that the FBI have had in most cases have to do with their domestic intelligence program, COINTELPRO.

Mr. SPANN. Yes.

Mr. EDWARDS. The harassment of Dr. Martin Luther King came out of the domestic intelligence program. The more we examine and the more the FBI and the Department of Justice examine their domestic intelligence programs, the less substance they seem to have.

I think in your discussions with Mr. Drinan that come out as well. What is the source of the jurisdiction? Now it is very clear in the case of foreign agents where the jurisdiction lies and the necessity for jurisdiction and the necessity for action. We cannot have foreign agents traveling around this country and spying and violating Federal law and not be under some sort of investigation or surveillance. And certainly the same is true insofar as terrorists are concerned.

Mr. SPANN. Yes.

Mr. EDWARDS. Organizations and people who are radical, whose words are disturbing to a lot of other people, whose mode of conduct and dress are different worry some people. We find the FBI has had organizations and people like that under investigation for many many years with no criminal conduct involved at all.

Professor Miller, what do you think the jurisdiction for domestic intelligence activities, if any, of the FBI should be. How do you think it should be defined?

Mr. MILLER. Well, one of the problems of oversight internally by the Department of Justice, as well as by congressional oversight stems from the fact that most FBI investigations do not come to the attention of the Department until they are to some extent largely completed.

We have tried to place this problem within a whole range of recommendations which would make it, if not impossible, extremely difficult for the FBI to go on a frolic of its own, both through internal oversight in the Department and oversight by Congress.

A number of people with whom I spoke believe it will cause extreme difficulties if in an initial investigation by the FBI into something involving domestic intelligence, you require at that point a specific statute.

Mr. Chairman, if you had a statutory requirement that at some point early in the investigation a specific crime be involved. Even if you have a willingness on the part of the investigators and the Department of Justice to go beyond that, they may stay within the statute.

Much of this will depend upon the integrity of the investigators, the integrity of the internal oversight exercised by the Department of Justice, and the further look at what's going on by Congress.

We stress that. The new management by objectives within the Department is not only a management tool, it is a way of checking on how they are using their resources. They are not going to be able to use their resources to an extensive degree on either illegal or unauthorized investigations if the Department uses the technique properly and if in the oversight appropriations process here you call the Department to account for how they are setting their allocation of resources.

So, that may be a very long and indirect answer, Mr. Chairman, but it is going to take more than just saying it has to be a statute. I do not think that that alone will really do the job.

Mr. DRINAN. If the chairman would yield.

Mr. EDWARDS. Yes.

Mr. DRINAN. Mr. Miller and Mr. Spann, during the deliberations of the committee, did the question arise of just abolishing the FBI

and letting the Attorney General and Department of Justice investigate what they want to? We have this sacred cow now. You yourself say we have to put a statute on it. It is not certain that they will be responsive. I wonder if somebody seriously said let's go back to square 1, abolish this agency, and give the same amount of money or more to the Department of Justice, to the U.S. Attorney General and say they are not bound by this organization that is such a runaway.

Mr. SPANN. I think we agree that the actual abolition was not discussed. The limitation of the FBI agents solely to engage in the investigation of crime, but not abolition.

Mr. DRINAN. Would you think that maybe that would be the only solution? Where you have people who are so defiant of their own regulations, and this is in their own regulations, Professor Miller, as you know, they cannot continue beyond 60 or 90 days.

Frankly, I think the Attorney General or the administration could just say that some agencies are obsolete. I am not impressed by the efficiency of the FBI.

Serious crime continues to escalate. They have really no adequate solution. They are not begging for more officials or more agents. They have 8,500 or 9,000 and there is a certain lethargy there.

Why can't we go back and use the sunset principle that the agency goes out of existence after a certain period.

Mr. SPANN. It may be one solution, but it may be a battle in semantics if you abolish the agency and then create a new one under the Attorney General for crime enforcement. I do not know that that cures the evil unless the new one has the same jurisdictional limits that we would put by statute on this agency.

Mr. DRINAN. It is already under the Attorney General.

Mr. SPANN. That is right. The regulations he has put them on recently, we feel ought to be mandated by Congress, because, to use an expression I employed earlier in talking about the special prosecutor provision to the Ribicoff committee, I think it ought to be carved in stone.

I think when the Attorney General changes, what happens in that office changes. But I think if you put it in a statute, a succeeding Attorney General cannot change it.

We emphasize that we are not criticizing, of course, what Attorney General Levi is doing and has done. We think he has done more than has been done in some time.

Mr. DRINAN. Well, I yield back to the chairman.

Mr. EDWARDS. Well, each year, and for many, many years, the Director of the FBI, and this includes the present Director with whom we have good relations, has come to the House of Representatives and described in some detail their domestic intelligence program. The Director advises that we have under surveillance, and we are continuing to investigate the Ku Klux Klan, the Socialist Workers Party, the Communist Party USA, Black Panthers.

They have a list of organizations that they have kept under some sort of surveillance for many, many years. So, certainly the Department of Justice knew about this. This is public knowledge and published in the hearings and printed and distributed. Are those investigations appropriate?

Mr. SPANN. Again, we come to what is really being investigated and the extent of it—whether it is a matter of simply trying to deter-

mine all of the activities of these groups, the Black Panthers or the Klan or what have you.

If the Klan in Mississippi is functioning as a group and sending out its hatchetmen, then you have a conspiracy of the whole group and each is as guilty as the one. This would require specific investigation in that case.

To come back and start investigating the Klan's activities in Atlanta, which consists usually of burning a cross on Stone Mountain on Easter Morning, or some such thing, I don't know, I think this would be uncalled for. There would be no relationship between the two.

I think in crimes committed by the Black Panthers, they must find out what that particular group did in order to implement that crime. That does not mean you investigate the organization from coast-to-coast, obviously, just because you investigate the group that you suspect of having planned and executed the particular crime in question. If you do this, of course, everyone is a member of some group. If you investigate the radical right, the radical left, the moderate right, the moderate left, and the middle left--try to keep them all under surveillance--it does not make any sense at all.

Mr. EDWARDS. I like that answer. I think it makes a lot of sense. The more we study this the more the jurisdiction for domestic intelligence seems to melt away. You cannot put your finger on it, because to be legitimate it has to have a connection with crime, somewhere along the line. If there is no crime involved, then there is no danger to the country, et cetera.

Certainly then where the Klan gets involved in crime then there are local laws against that, and that is really a matter for the local police generally.

Mr. SPANX. Correct.

Mr. EDWARDS [continuing]. Although there are some Federal statutes that would apply where civil rights are being violated.

As for terrorism, there is no jurisdictional problem there. Terrorism is a terrible problem in this country and worldwide. You have no objection to investigation being made with regard to a possible bombing that is about to take place.

Now, where does the FBI stop such an investigation? An organization is alleged to be terrorist such as the PLO. We will say they never bombed anything in the United States but they are alleged by some to be bombers. That is also a local crime. We certainly do not want to be getting into the jurisdiction of the local police. We are talking about the FBI's jurisdiction and whether such matters should be in the domestic intelligence or criminal division right now. Should that not be a matter for the criminal division of the FBI if it wants to conduct an investigation?

Mr. MULLER. I do not have a specific answer. A law enforcement agency has to make certain internal, discretionary decisions as to where they want to assign a particular crime. That may be the kind of crime which covers more than one jurisdiction.

Certainly, if they get that allegation and the allegation is in fact a crime, it is mandatory they investigate it, whether it be in the intelligence or the criminal division.

The real question is, at what point should they have to report to the Department. The kind of a decision to be made is whether the investigation is to continue and under whose auspices.

It seems to me at that point the Department of Justice should start exercising some control. I think we emphasize this in our report.

Mr. DRINAN. What do you mean investigate? It is clear they have to report within 60 to 90 days, but right now they use warrantless wiretaps against anybody suspected of this or that. Mr. Levi visited me the other day personally begging me for a vote for a bill that would still permit the President to have warrantless wiretaps, would authorize the President and the Attorney General to go into court, sometimes, if they so desire, to get a warrant. But the FBI now has that power, under the *Keith* decision. They go and do a warrantless tap on these alleged subversive foreign nationals.

So when you talk about investigating, what do you mean?

Mr. SPANN. I think we have simply not as a committee certainly, taken a position; we have not looked at that particular issue as a committee. I would not express any particular opinion other than the general views that the American Bar expressed several years ago on electronic surveillance which you are familiar with.

But to speak for the committee or individual on that in light of the views the American Bar has extended I think would probably be improper.

Mr. DRINAN. Mr. Spann, I hope that your committee will reunite, meet and come to the conclusion which I just suggested. It would be very helpful to us.

I yield back to the chairman.

Mr. EDWARDS. The gentleman from Connecticut, Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman.

I just have a couple of questions. I was interested in reading your statement, Mr. Spann. Recently we had the LEAA reauthorization which allows for the Judiciary Committee to have oversight over the authorization of funds for the Department of Justice. It is really something we really have not exercised in the past.

Mr. SPANN. I think Herb would be better equipped to answer that. My own very brief answer is we believe this would be a part of the oversight process. We feel the limitations must be largely through congressional oversight and enacted through statute.

Mr. MILLER. We really did address that problem in the special committee and the recommendations in the report reflect that consideration. We referred to the legislation or resolution introduced by the chairman of the full committee, Mr. Rodino, which would bring the House Judiciary Committee into the authorization process.

Mr. DODD. Yes.

Mr. MILLER. We came very close to endorsing the concept that the appropriate committee that is exercising in general oversight must be involved in that appropriation process.

Without that tool or that handle, you are going to have difficulty in exercising the kind of oversight.

Mr. DODD. I do not speak with the expertise of my colleagues here on the committee. There are so many committees claiming jurisdiction to one degree or another over the various agencies. It is a pretty effective tool for getting the kind of in-depth oversight we seek.

The Senate voted yesterday to set up a Standing Committee on Intelligence to monitor the activities of our intelligence agencies. I wonder if you would comment if you think the House should have a standing committee created or should existing committees handle oversight?

If you don't concentrate oversight in one or two committees the agencies can really avoid effective oversight very easily.

Mr. SPANX. This is in the written statement.

Mr. Dobb. You do not support the temporary committee?

Mr. SPANX. No; and we also caution in the statement which I made this morning that too many committees would dissipate the authority completely.

We still come back to saying the primary authority, oversight authority, because the FBI is part of the Department of Justice, ought to be in the committee that has the Department of Justice oversight, and that is the Judiciary Committee.

If there is to be a committee that would look over all intelligence—and we limit ourselves, of course, we did not concern ourselves with military intelligence and the CIA—if there is to be a committee that is involved with oversight of intelligence generally, I think that we would not take the FBI away from it.

We took no position on the creation of a new committee. We do say a temporary select committee, we do not think is the answer.

Mr. Dobb. We can sit here and conduct oversight. We can legislate and think we have accomplished something and these fellows go back downtown and we might as well forget they were ever here and that we have ever been on a committee, because they go their merry way. This seems to be true of most agencies. Maybe there is no answer for that. I am speaking in frustration, I suppose, and expressing it.

If there were some way there could be created a process whereby those people who violate the letter of the law, would be prosecuted in terms of what they say they are going to do and what they actually do. Talking about the Attorney General or Director of the FBI or some other high official should not there be some criminal sanctions?

Did you consider that at all?

Mr. SPANX. Yes; it was considered, but the committee divided, but not in this particular area, not in the failure to follow the jurisdictional standard laid down by Congress.

We thought simply if they have an appropriation to do this and they are doing that, next time we say, boys, we don't have any appropriations. Once this is done—you affect that agency substantially and make a fine object lesson then for the other agencies engaged in law enforcement.

The greatest sanction I know is to cut the funds off.

Mr. Dobb. That just hurts the people who are supposed to benefit from it. That doesn't bother them.

Mr. SPANX. People who are supposed to benefit are not benefiting if they are using money for purposes which are not intended to benefit the people.

If I give you money to help the poor and you spend money on riotous living, you are not helping the poor, so why give you the money at all, to use a ridiculous example.

But we did consider in certain aspects of this report certain criminal sanctions. The committee was divided on it, and they came out with what we have in the report.

Mr. MILLER. I would just like to expand on it. If you look at all the recommendations of the committee they impose a tremendously heavy burden to do things that Congress has not done in any full sense in the past.

We do comment in several places that having too many committees exercise jurisdiction over an agency, and I think over the IRS we have 12 or 13, and there may be more than that now, really disperses authority, dissipates the ability of Congress to exercise oversight.

I think the thrust of the report is that the Congress must fulfill that obligation. We make no attempt to tell Congress how to do that. We have suggestions on things that ought to be done, but in terms of the organization of Congress, we limited ourselves to saying there are too many committees.

It is very time consuming. If you are really going to use the authorization process as a way of checking if they did what they said they were going to do when the moneys were appropriated, it is not a short procedure. To have the agency go in with a pro forma statement that 10 different organizations are under surveillance without any real attempt to be analytical, without asking exactly what is being done, with all due respect, Mr. Edwards, does it constitute congressional oversight.

I want to speak as an individual, but I guess I can't.

Mr. SPANX. I think you can if you make it perfectly clear. I reserved speaking as an individual when appearing for the ABA on anything which I may disagree with that is ABA policy.

Mr. MILLER. I don't know what the situation is. My understanding is it is a substantial burden. I do not know all the in's and out's of the efforts to reform Congress that went on several years ago.

Apparently one of the keys of the reforms was a decrease in the number of committees and subcommittees on which your Members serve for exactly that reason.

I believe that some Congressmen who are retiring voluntarily have expressed that frustration with Congress, the inability to exercise their constitutional function, because of the way Congress is organized.

I speak solely as an individual now. Unless Congress has the will to exercise this oversight, the feeling I personally have is that nobody else can do it. Neither the American Bar Association nor an outside ombudsman can have the clout that Congress has through the appropriation process.

It seems to me that it is the ultimate weapon which you have in dealing with any agency, and the time it is going to take to really use that authorization process. I think, is going to be quite extensive.

Really, I think it is going to reflect whether Congress has the will to exercise this kind of oversight.

Mr. EDWARDS. Will the gentleman yield?

Mr. DODD. Certainly, Mr. Chairman.

Mr. EDWARDS. We have had oversight committees over the FBI and the CIA for generations. One of the problems is that there are a lot of well-meaning Members of Congress with whom we might disagree. They like the FBI to be involved in the surveillance of radicals in

the country, of the left or the right. They feel insecure in the country unless there is a Federal police agency doing that kind of work.

There was strong opposition in the Senate yesterday, to setting up a select committee, primarily for that reason.

So, when you limit the number of oversight committees, you run the chance of having chairmen and Members who do not care, who are not interested and would like the agencies to go their own way without congressional involvement.

Mr. SPANN. Yes; I can see the danger, of course. We have said we think the primary responsibility is in the Judiciary Committee for getting into the appropriations process and oversight.

We have not limited or said there will be x number or y number of committees.

Mr. EDWARDS. Well, the Attorney General has issued guidelines and certainly the proceedings of the FBI and domestic intelligence have improved immensely in the last few months.

The GAO audit reflected that in 10 field offices in 1974, there were 19,700 open domestic intelligence cases. I think we were told the other day that there are just a very few thousand that remain in the entire country, but if Congress were to pass a law with regard to the domestic intelligence guidelines, then for the first-time we would be institutionalizing the Department of Justice and the FBI as an agency to investigate in the domestic intelligence field and therein lies the danger.

Mr. SPANN. Well, I would be getting somewhat out of my element, I suppose, if we talk about other agencies and what they do, but I suppose to some extent it would seem Treasury investigators are involved in some of this, too, the use of the investigatory powers of the Internal Revenue Service for improper purposes.

We address ourselves to that in this report, in section 4. One advantage, of course, in defining it, at least you would know what agency was going to do it. You would not have this one picking it up and that one picking it up. The primary responsibility would be there and then if that responsibility is abused at least you have a direct shot at where we are going.

Whereas with a scatter shot approach where they are using investigators from various agencies for improper political purposes, it is much more difficult to put your finger on where the primary responsibility for that investigation would originate.

So, I still feel, recognizing what you say, that a specific definition and limitation of jurisdiction is highly desirable. I still feel there is an area in which you must have domestic intelligence. Someone has to keep track of foreign agents. Sometimes I think there is more bugaboo about foreign agents than there really is activity. I do not believe they are coming out of the woodwork and bugging everyone's hotel room, but I do not really know. Someone has to be authorized to be doing this, and we think that ought to be defined by statutory provision.

Mr. EDWARDS. You would agree that terrorists who are bombing should be arrested too?

Mr. SPANN. There is no problem on that. Sabotage is a crime. Again, conspiracy is a crime. If you get 100 people in this room and we all vote to go across the street and blow up the Capitol, why the whole group is guilty. I have to investigate the whole organization and determine who is in that conspiracy.

This does not mean that because of the activities of the local chapter that meets here, I have to go out and investigate the San Francisco chapter which may be just making speeches on street corners.

How you limit this I am not sure. If you asked me to draw that bill, I would be very reluctant to try. Maybe Herb could do it. I do not know.

I do think there can be limits on jurisdiction and definitions as guidelines which, under proper regulations of the Attorney General, would avoid much of the abuse that we have seen in the past.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. Mr. Spann, in your paper you state on page 3 that we have noticed that it is very clear, was to the special committee, that there is a "progressive politicization of the Department of Justice and a growing misuse of the FBI."

Then, on page 4, you absolve completely the present administration and you say, they, the Attorney General, and Deputy Attorney General Tyler, have taken and are taking strong measures to assure that official corruption will be prosecuted fully and to assure that the FBI will be closely monitored to prevent abuses of its great power.

With all due respect to those two gentlemen, I am not convinced that they are taking "strong measures." Do you think that they should prosecute some of the people or discipline some of the people in the FBI who have committed breakins, who have done other things clearly illegal?

To the best of my knowledge, not a single member of the FBI has even been disciplined.

Mr. SPANN. There again, incidentally, you said there is "progressive politicization"; that actually reads in our report "a long and unfortunate history."

Mr. DRINAN. But the implication, sir, is that that progressive politicization and that growing misuse, have not been interrupted. I am not persuaded of that.

Mr. SPANN. You mean——

Mr. DRINAN. I am challenging you.

Mr. SPANN. Yes, I understand.

Mr. DRINAN. Give me for instances, strong measures. What strong measure have they taken?

Mr. SPANN. Prospectively, we think the regulations they have adopted are valuable. We think that the Government Crimes Division is valuable. There are several things which they have done, which we think are definite steps in the right direction.

Mr. DRINAN. Sir, what have they done to assure that official corruption will be prosecuted fully? Official corruption by FBI agents. Not a single one has been disciplined.

Mr. SPANN. Yes.

Mr. DRINAN. I challenge you on the basic statement that you are making about this administration.

Mr. SPANN. Let Herb give you an example.

Mr. MILLER. One of the early recommendations in our preliminary report was the establishment of an Inspector General in the Department of Justice.

We subsequently met with officials, representatives of the Department, both Mr. Levi and Mr. Tyler, and discussed this with them. They

expressed very strong reservations at that time in the discussion, but they subsequently did establish a Counsel for Professional Responsibility.

Mr. Tyler said at the ABA meeting in February that the post was established as the direct result of the special committee recommendation and discussion with Mr. Spann and myself. They in effect reversed themselves.

The investigation of the FBI which is going on right now is being done under the coordination and under the general supervision of that Counsel for Professional Responsibility who is answerable to the Attorney General.

We feel this is a major step. The investigation is ongoing.

Mr. DRINAN. If you want to defend Mr. Spann, all right, but I still state that you have no proof that as you say that strong measures have been taken to assure that the FBI will be closely monitored to prevent abuses of its great power.

They have a commission. They are investigating. What specific measures have been taken? I do not want the president-elect of the ABA to be quoted as saying that everything is fine with the Department of Justice, and the FBI.

I want specifics or I want to say for my own part that that is untrue. Go ahead.

Mr. SPANN. Well, we have not said that they have cured everything. We have said they took strong measures.

Mr. DRINAN. Name one, sir. Name one strong measure.

Mr. SPANN. You are referring to a strong measure as prosecuting somebody. Now I cannot pass on that. I do not think you can pass on it; whether we can prosecute a particular individual, this is the job of the prosecutor.

I do not care what the newspapers say, you can't—

Mr. DRINAN. I did not say that.

Mr. SPANN. If you can't find the evidence; you can't prosecute. We have a great attack on plea bargaining. Well, a prime reason for plea bargaining is that you can get a compromise settlement where you couldn't convict for lack of evidence. Now the question is, should you or shouldn't you? But to say that every case must be fully prosecuted means that some crimes would go unpunished. I can't read the evidence without being the prosecutor.

When you say we should prosecute this person for breaking in, what is that evidence.

Mr. DRINAN. Mr. Spann, I do not want you to justify that. I just want you to give me a specific to justify your own statement or, if you want, you can retract it. They have taken strong measures to assure that the FBI will be closely monitored. I want you to name one, one strong measure to assure that the FBI will be closely monitored.

I do not know of one strong measure that Mr. Tyler and Mr. Levi have taken.

Mr. SPANN. What you think is strong, sir, and what we think is strong—

Mr. DRINAN. Name a weak measure, sir. I know of nothing that they have done.

Mr. SPANN. We think the establishment of regulations which were not there before is a strong measure. You may think that it is a very

weak one. The regulations were not there before. "Strong" is a relative word, and in that sense it is strong.

Mr. DRINAN. Well, it is strong only in the sense that Mr. Levi is telling the FBI to observe the law which they should have been doing all along. The guidelines just set forth implement the statutory law insofar as we know it.

Mr. SPANN. We do not agree that the statutory law is that clear, as our report indicates.

Mr. DRINAN. When you state that this is a strong measure, you are saying that Mr. Levi has done a bold, brave, strong thing when he has said to the FBI troops, "Well please obey the law." It is the law as we see it in the Supreme Court decision about arrests.

Mr. SPANN. We hope he said more than "please." I suppose that remains to be seen.

Mr. DRINAN. Are there any sanctions in the guidelines?

Mr. SPANN. No.

Mr. DRINAN. How can you say the guidelines assure people that the FBI will be closely monitored? They are just pious generalities. We would like you people to do these things. There are no sanctions there as to what happens if the FBI people overstep them.

Mr. SPANN. I think the sanctions are going to have to come from Congress.

Mr. DRINAN. On another point, Mr. Spann, I read the IRS section of the study here with the greatest interest. People on this subcommittee and people on the Judiciary Committee recall well the abuses of the IRS.

I am wondering whether the ABA copped out really on page 159 where they said, the question of IRS participation in the strike forces of the Department of Justice had not been considered by the Special Committee.

More and more as I study this—and I am also a member of a Subcommittee on Government Operations Committee that has direct oversight over IRS—more and more I feel this joinder leads to all types of abuses of the Department of Justice, when the Department of Justice cannot prosecute somebody on substantive crime, it gets him on his IRS default.

I wonder if the Special Committee expects to go into this question. Do they consider it as central and as crucial as I do?

Mr. SPANN. Herb, you may want to talk to what the committee considered its jurisdictional limitations to mean.

We had as the preface of the report indicates, the advice of a representative of the tax section of the ABA at every meeting—he did not miss one, was very faithful. There was a policy already adopted by the House that the Internal Revenue Service should not engage in activities other than the collection of taxes. We simply indicated that we agreed and passed on. We did not have an independent investigation to any great extent although it was discussed.

Mr. DRINAN. Would you feel therefore, that the Special Committee, at least by incorporating the other recommendation of the ABA would feel that the linkage of the IRS and the Department of Justice would be wrong. The IRS should just stay with its statutory task of collecting taxes.

Mr. SPANN. There again, since we endorsed the other recommendations in the report and passed on, my answer as an individual is that that would be my view.

If we polled the committee there might be some disagreement. I am not certain.

Mr. DRINAN. We have similar problems in the Congress.

Mr. SPANN. Yes, I think we all do in every legislative body so to speak.

I believe the consensus of the group was expressed.

Mr. DRINAN. Let me say finally that I have the hope that you would go forward with investigating this particular area because there are all types of abuses that derive from that particular joinder in the strike force and in the IRS and the Department of Justice.

There are many, many people who know that the civil liberties and the privacy of people are being violated in the name of law enforcement. Commissioner Donald Alexander has sought very diligently to have better guidelines about this area. He has not always been successful.

Thank you very much.

Mr. EDWARDS. Mr. Parker.

Mr. PARKER. Thank you, Mr. Chairman.

Mr. Spann, Professor Miller, this morning you used a word "regulations." The Attorney General has used the word "guidelines" and has in fact issued guidelines and the members of the committee have used the word "guidelines."

Do I understand your use of the word regulations because it comports with your recommendations, the ABA's Special Committee's recommendation which would be that Congress would set a policy by legislation, and the Department of Justice would issue regulations, not guidelines? I think there is a difference between regulations and guidelines. The Department of Justice would issue regulations which would include all of the requirements that are inherent in the issuance of regulations including notice and they can't be changed arbitrarily.

Is that the thrust of the ABA's recommendations?

Mr. SPANN. Yes. The Labor Board has legislated mightily under the heading of guidelines, and they are very clever about them. They call these things guidelines.

Mr. PARKER. You feel it ought to be included in the legislation that regulations are required to be issued.

Mr. SPANN. Yes.

Mr. PARKER. Thank you. I think it is fairly certain that the one-two punch of any legislative oversight committee would be authorization over appropriations or the budget of the agency it wishes to oversee and access to information. This becomes particularly important with the FBI, because there are some inherent problems there.

The problem initially is separation of powers with the Executive just not willing to share some information with the legislative branch. Also the problem of national security exists in that there is classified information which the Bureau maintains and there is a problem in giving access to legislative committees.

Have you addressed that problem at all in your committee and do you have any suggestions or solutions to this problem of access to classified information?

Mr. SPANN. It is addressed very directly in the first portion of the report on page 14, under the Department of Justice, under congressional oversight.

Mr. PARKER. The first step would be the internal regulation by Congress of how it handles material.

Mr. SPANN. Yes.

Mr. PARKER. Do you envision a role for the General Accounting Office, the GAO, in assisting Congress in carrying out its oversight functions?

Mr. SPANN. There is a provision in one respect in here, but I think this is under the logging requirements. I do not think it is under the general information provision. I think that is the only place we spoke of that. I would say that I think that would be appropriate here, also.

Mr. PARKER. Fine.

Mr. MILLER. In the report we do speak of the role GAO played and the testimony of Mr. Staats before this subcommittee.

Mr. PARKER. There is one other area in which there has been almost total unanimity and that involves the appointment and tenure of the FBI Director. Almost everyone has recommended, in fact a bill has already passed the Senate that calls for a fixed and single, nonreappointable term for the FBI Director. Your recommendation and study differs in that you would allow for reappointment. I wonder if you could discuss the reasons for your differences with us this morning.

Mr. SPANN. We felt a person doing a very good job should not be simply cut off because of that limitation any more than we would think there ought to be one term for a Congressman and one term for a Senator. I question some of the one-term Governor States. It depends again on the length of the term. Sometimes if you make the term long enough, perhaps one term is enough.

We felt it more advisable to permit reappointment and you will note the report does not define the length of the term.

Mr. PARKER. I have just one final question which touches on a recommendation in another part of your report which has to do with the limitation on eligibility to be appointed Attorney General or a Deputy Attorney General. You would prohibit appointment of a person who has had any active political role in the campaign for the Presidency.

Do you see any constitutional problems in restricting the right of the President to make that appointment under section 2, article 2, of the Constitution?

Mr. SPANN. Herb is my constitutional authority. I will turn the microphone over to him. We were asked about, say, the leader of the Texans for Eisenhower; you know, this of course, we are not approaching at all.

Mr. PARKER. The rule would have excluded Mitchell and Bobby Kennedy, I take it.

Mr. SPANN. Yes.

Mr. MILLER. There is much precedence for Congress setting forth a variety of qualifications. There are many cases which have held the ability of Congress to do this. This is simply a negative qualification.

I did look at the case law and discussed this with many people. We saw no constitutional problem in this kind of a requirement.

Mr. PARKER. Thank you very much. My time has expired.

Mr. EDWARDS. Mr. Starek.

Mr. STAREK. Thank you, Mr. Chairman.

Most of my questions this morning have been answered. I wanted to pursue one aspect of the guidelines versus the regulations that Mr. Parker raised.

I think in your prepared statement, Mr. Spann, you stated that one of the reasons for regulations as opposed to guidelines or legislation which would require regulations is a fear that the future Attorneys General could change these guidelines without notice or public hearing.

I just wonder if in fact that would actually envision that occurring. I mean, it is hard to speculate on that. What I am getting at, with these guidelines now, do you really think an attorney general would try to do that without the Congress immediately calling hearings?

Mr. SPANN. I would suppose that in the first place changing them -- I think the regulations once issued can be modified by proper processes. We would suggest to you the possibility that the guidelines could simply be done away with or ignored.

Let me give you an example. This goes to the present Attorney General. When Elliott Richardson became Attorney General, he did provide what our report recommends, a log book of communications with the Justice Department.

Under subsequent Attorneys General, Saxbe and Levi, this thing is still on the books, the guidelines, and it is not being enforced. Both Levi and Tyler told us they didn't like it. It is in the report.

The Richardson guideline has never been revoked. By admission, they just don't enforce it.

Mr. STAREK. Thank you very much.

I have no further questions.

Mr. EDWARDS. I thank both witnesses for their very helpful testimony. Mr. Spann, I think that you as chairman of this committee, that the ABA that made this study should be complimented and all the members. It is very realistic and modern thinking approach to this very sophisticated problem. It is difficult for the American people to evolve out of the fears of the Cold War of the 1950's and early 1960's and the passions that were involved. It seems to me you did a very well-balanced job in the report.

Mr. SPANN. Thank you very much. We appreciate that and we appreciate the opportunity of appearing before you.

Mr. EDWARDS. Well, we are probably going to ask you some more questions. Professor Miller is very close by. We are going to ask him to write us a ten line piece of legislation that will define ----

Mr. MILLER. Maybe 11.

Mr. EDWARDS. Maybe 11, less than 1 page, that will define the domestic intelligence jurisdiction, if any, of the Department of Justice and the FBI. It is still very perplexing.

We thank you very much.

[Whereupon, at 11 a.m., the subcommittee adjourned.]

FBI OVERSIGHT

Attorney General's Guidelines for FBI Activities and Additional Legislative Proposals

THURSDAY, MAY 27, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2226, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards and Drinan.

Also present: Alan A. Parker, counsel; Thomas P. Breen and Catherine LeRoy, assistant counsel; and Roscoe B. Starek III, associate counsel.

Mr. Edwards. The subcommittee will come to order.

Today we continue our hearings concerning legislation regarding the FBI's future role in the field of domestic intelligence activities.

We continue to explore alternative means to create enforceable standards of conduct for the FBI. We hope to be enlightened as to how we may best express congressional policy. The policy, when finally formulated, should be clear to all.

Our first witness today is Christopher H. Pyle, professor at John Jay College of Criminal Justice in New York City. Mr. Pyle received his law degree from Columbia in 1964 and his Ph.D. from that institution in 1974. His doctoral dissertation was on the subject of Army surveillance activities. Mr. Pyle served as a consultant to the Ervin Subcommittee on Constitutional Rights with respect to Army surveillance on civilians. In addition, Mr. Pyle was a consultant to the domestic task force of the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities.

Mr. Pyle is the author of an article in the most recent Nation magazine on wiretap legislation and has been active in the continuing discussion of the future of all domestic intelligence activities and techniques.

Professor Pyle, we are pleased to have you with us this morning.

Without objection your full statement will be made a part of the record, and you may proceed as you see fit.

TESTIMONY OF CHRISTOPHER PYLE, PROFESSOR, JOHN JAY COLLEGE OF CRIMINAL JUSTICE, THE CITY UNIVERSITY OF NEW YORK

Mr. PYLE. Thank you, Mr. Chairman.

Since my statement is 45 pages long, I propose merely to summarize it, and to move very quickly to the proposal for reform which I believe ought to be discussed at this stage.

From scanning Hope Eastman's testimony on behalf of the ACLU I see that she will be dealing primarily with the question of FBI investigations and the role of the FBI, if any, in the domestic intelligence area. What I have done in my prepared statement is to concentrate on about what happens after investigation--the conduct of COINTEL programs, preventive action, and what sometimes is referred to as FBI "dirty tricks."

In the beginning of my statement, I summarize the FBI's COINTEL programs to demonstrate what I think is the most important aspect of them and that is that constituted a concerted effort to affect the political process. I know the Justice Department disagrees with that judgment. But as I look at what the FBI did, it seems to me the FBI sought to define the limits of political defiance in the United States, and to enforce those limits by clandestine, often illegal means. I summarize some of those activities that I believe were illegal and then point out that the FBI, although Director Kelley has regrets for some of the COINTEL programs, would like to retain authority to conduct similar activities under the name of "preventive action."

Mr. EDWARDS. I don't believe these are in the new guidelines. Those were eliminated.

Mr. PYLE. Express authority for preventive action was left out of the new guidelines at the last minute, but the desire has not been renounced. The authority was left out because neither the Justice Department nor the FBI could find a way to define "preventive action." But leaving authority for preventive action out of the guidelines does not in any way prohibit its use. It merely puts the Justice Department on record as being silent about the FBI's authority, if any, to conduct COINTELPRO type activities. While the political context has changed, and I think it is unlikely that we will see anything like COINTELPRO for many years, there is nothing to prevent something like it from arising under the name of "preventive action" or "intensive investigation," or some other euphemism.

Mr. EDWARDS. If I may interrupt, the very fact of investigation is a sort of preventive action. That is what the GAO reports that many cases of domestic intelligence indicate. A police agency can, by the way it conducts investigations, visits neighborhoods and does the work that police agencies do, inhibit persons or organizations under investigation from criminal or political activity.

Mr. PYLE. I agree. What you have just described can best be called deterrent interviewing. J. Edgar Hoover boasted about it in connection with the investigation of the Ku Klux Klan in Mississippi in 1965. There were approximately 450 members of the Klan at that time in Mississippi, and the FBI visited every one of them, not to gather information, but just to let them know they were not anonymous.

It seems to me that when you have an organization like the Ku Klux Klan some deterrent interviewing might not be a bad idea. The problem I have with deterrent interviewing is that it can easily become a device for inspiring employers to fire people, or neighbors to shun them. I am not sure it can be controlled. But I would not be unwilling at this stage to say it should be banned completely. Sometimes when you have an organization that is clearly involved in a criminal conspiracy to bomb and murder people, letting its members know they are under investigation might not be a bad idea.

Mr. EDWARDS. Aren't you playing God, when you say that an investigation agency should do that? Let an agency make a moral and ethical judgment and say, while we are not going to charge these people with a crime, we just don't like what they are doing, so we are going to have sort of a mini-COINTEL program. Isn't that what you described?

Mr. PYLE. I hope not. I am thinking of deterrent interviewing in the context of a group like the Ku Klux Klan in Mississippi in 1964 and 1965, when there was considerable information that churches had been bombed, apparently some even from the air. There was a good deal of night-riding. And there were three murders. The FBI had a good idea who was involved in it, but it did not have witnesses to proceed with the prosecutorial process. It was under enormous political pressure to do something, and it decided that the wisest thing to do initially was to inhibit the activities of the members of the criminal conspiracy. So they tried deterrent interviewing.

The danger of that, of course, is that then you get on Jed Magruder's slippery slope. When you start deterrent interviewing to save lives you also run the risk that it will be used to get people fired from their jobs, or at least transferred out of town, or defamed in their reputations. Then we are back to COINTELPRO. I would ban virtually everything but deterrent interview from the COINTEL repertoire. But I would not be quick to ban deterrent interviewing in the case of groups like the JDL, the Puerto Rican FALN, or the KKK. They are dangerous groups, and sometimes it helps to let them know that they are being investigated for clearly criminal activity. Deterrent interviewing may indeed be less harmful to their legitimate activities than warnings by public announcement.

Having said that, I may sound as if I am an advocate of preventive action. I am not. My purpose in defining preventive action and in trying to specify legitimate forms of preventive action is to give the word some meaning. Then prohibitions mean something. I am afraid that if we try to ban COINTELPRO and preventive action and don't define those terms, we will merely permit the FBI to substitute some other euphemism in its place and go on doing substantially what it did before.

So, in my section on preventive action, I list a number of prohibitions which ought to be adopted to forbid the gross abuses that we have all come to associate with COINTELPRO. I would turn this list into a regulation issued by the Justice Department, something which the Attorney General did not do in the FBI guidelines.

Now, I know the Justice Department is likely to say we can't define all of this, so let's not define any of it. But it seems to me that regulations can be written hypothetically. They can be written by example;

they don't have to cover everything. We could ban the substance of COINTELPRO where we have a rich factual record of abuses, and by banning past abuses we would make a start toward defining those values we wish to protect against investigative agencies.

I won't take the time now to review the kinds of COINTELPRO activities I would ban, but I think the list in my statement covers the worst of COINTELPRO. Not that I think that regulations are the ultimate answer, but I think they would provide the proper foundation for corrective legislation. In my section of criminal penalties, I would propose two amendments to the criminal code to back up a preventive action regulation. The first would make it a crime to interfere with first amendment rights, because that is what I think COINTELPRO was. I am not in favor of a general statute forbidding all interference with all constitutional rights. When you enact a statute like that you get into the same problem we have had with sections 241 and 242 of title 18, the old Reconstruction Civil Rights Act. Prosecutors say we can't enforce them. My research uncovers no case in which a Federal investigative or intelligence agent has ever been prosecuted under those statutes, although the language is broad enough to permit it. The only Federal officials who have been prosecuted under one of those is John Ehrlichman. And that took a special prosecutor and extensive publicity.

So I recommend passage of a specific statute forbidding deliberate interference with first amendment rights. The abuses would be defined in terms of torts law in order to make the kinds of infringements banned relatively clear. The list of six could be expanded, but I think they would cover the essential harms that were characteristic of COINTELPRO. The crimes I propose would be specific intent crimes designed only to punish deliberate, calculated conspiracies or actions, like COINTELPRO to deprive people of first amendment rights. I am not proposing to make all torts by Federal agents Federal crimes.

I like the idea of specific statutes to commemorate COINTELPRO, because I think that the gloss of history is very important to the future interpretations of the law. If 20 years from now similar abuses occur, somebody might say, that is like COINTELPRO. We banned that 20 years ago. That law must now be enforced. And so I think there will be more pressure to prosecute than if prosecutors can say that activity might be banned by section 241 or 242 of the criminal code but those sections are pretty vague and designed for other purposes so, on balance, they should not be invoked.

My other criminal statute would punish fraudulent interferences with first amendment rights, because many COINTEL actions were tricks to deceive people into violating the constitutional rights of others, or to cause them to refrain from exercising their own rights. Federal jurisdiction would arise when the fraudulent act affected the use of the mail in interstate communications or interstate travel, or the use of interstate or foreign commercial facilities.

Then, to take care of burglaries, break-ins, criminal trespasses, and theft which were not necessarily part of the COINTEL programs, I would amend those provisions of the Federal code that deal with such crimes to authorize prosecution when the burglar happens to be an employee of the Federal intelligence or investigative agency. And in

that way I think we would authorize punishment for virtually all of the serious abuses that have recently come to light.

Now, I don't believe for a minute that by writing a criminal statute you stop anything. The history of sections 241 and 242 offers one good example; the history of the Posse Comitatus Act provides another. The major problem, if any criminal prosecutions are to occur, is to break down the institutional conflict of interest that exists within the Department of Justice. No Attorney General wants to prosecute a subordinate, because if he does others will not serve him well and he will lose his capacity for leadership. I think that is true of the Directors of the CIA and of military intelligence. If you are not loyal to your subordinates your subordinates won't be loyal to you. And so quiet, subtle signals go out from the men on top: We don't want to hear about wrongdoing down at the bottom of the bureaucracy. Subordinates quickly get the message and don't report wrongdoing to their superiors. There is a quiet assumption that wrongdoing will be covered up. If the coverup fails, some people may be forced to retire earlier, but that will be the end of it.

If there are to be any prosecutions that institutional conflict of interest has to be overcome. There are two ways to do that. One is to put the Justice Department lawyers in a position where they are responsible for, or at least can't ignore, FBI abuses. There are at least three ways in which that can be done. First, if there is an investigation of an organization exercising first amendment rights, because that organization also is suspected of criminal activity to achieve its ends, assign an assistant U.S. attorney to serve as advising law officer to that investigation. He should be required to see to it that the investigating agents live within their jurisdiction and their authority, and do not trample upon first amendment rights, or fourth amendment rights, or any other rights.

Second, there are a few areas where the Justice Department will be involved in what might be called intelligence activity. That will occur where there are terrorist groups active in society, and where there are disruptive demonstrations like May Day 1971. In those situations Justice Department officials will need a certain amount of information to guide them in their decisionmaking to enable them to respond to public demands for action. Some of this information may be drawn from criminal investigations in the field, but some of it will, of necessity, have to come from general intelligence-type inquiries, just to give public officials an awareness of the nature of the group and its objectives. Of course there again we get to the brink of Jeb Magruder's slippery slope. I have not tried to define what the limits of appropriate investigations in those areas are, but for a start I would say for a start that the Attorney General's guidelines on civil disturbances are very good.

What I would suggest is that the Justice Department ought to get involved in what intelligence people call the "scoping" of investigations of terrorist groups like the Ku Klux Klan, the organizers of May Day-type demonstrations. Justice Department attorneys should be involved in outlining the nature and scope of such investigations because that is where the greatest abuses of first amendment rights and other rights occur. In the past, the FBI, military, and police

agents who scoped most "internal security" investigations were insensitive to the nature of the organizations they were dealing with. They did not understand the rhetoric or discount rhetoric in the light of capabilities. And they got carried away preparing for the worst possible situation. If there were Justice Department officials involved in that scoping, then under most administrations those investigations would be a lot narrower than they were when they were in the exclusive domain of the FBI. It would also implicate the Justice Department officials in those investigations, so that if afterward it was discovered those investigations violated first amendment rights, those officials could be held accountable.

The third administrative suggestion I would make is to create a reviewing agency to go over the records of investigations where politically motivated groups are concerned, so succeeding administrations can police what their predecessors did to investigate groups like the May Day organizers, the Ku Klux Klan, the Weathermen, or the FALN.

Of course, there is also a possibility that a scoping unit or a reviewing unit could be dominated by people like those who run the Internal Security Division in the Justice Department. But I would submit that even if they had been in charge of the FBI's domestic intelligence investigations, the number of abuses would have been less. The mere shifting of the decisionmaking authority to a higher level would have reduced the volume and perhaps the venality of those abuses.

The Justice Department has responded to recent criticism by creating a review unit called the Office of Professional Responsibility. Its primary function is to investigate allegations of abuses, and in so doing it has had to review the FBI's nonpolitical investigations of political groups.

I like the idea of having that unit there, and I have a great respect for the men who staff it. But, frankly, I have little hope that it will be a lasting institution that we can rely on. Its power and influence will depend upon the support it gets from the Attorney General, and its capacity to outlast those who would delay and confound its investigations. When American politics returns to normal, when Presidents again appoint the kinds of Attorney General that we have had in this century, that office will wane, if not disappear. So it seems to me that we have to go beyond that, and also try to create prosecutors who will prosecute.

To me, the stated argument in discussing various proposals for criminal prosecution. My conclusion is that I don't believe that a special prosecutor is the way to handle abuses by the intelligence agencies, particularly the routine, low level abuses. Most of the special prosecutor proposals I have seen look upward from the Criminal Division at the White House and a politicized Attorney General, and carry about restrictions on the scope of investigation by those officials.

A better way to create prosecutors who have a vested interest in prosecuting the intelligence agencies' investigators is to create a Division of Government Crimes within the Justice Department as the Senate Committee on Government Operations has recently proposed. I don't think that is a complete answer. I don't think they can prosecute them all, but I think if you create such a group in the Justice

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Department you would have some people whose careers depended on bringing at least a few prosecutions. And so there would be some causes on the books showing that FBI agents and intelligence agents could be prosecuted for their wrongs.

Having said all that, I am not really hopeful that we will have many criminal prosecutions. So the remainder of my statement focuses on civil remedies that might be prescribed, and on measures to expand the capacity of private citizens to enforce the standards outlined in my criminal statutes through civil litigation. And I also discussed in my statement the notification of COINTELPRO victims, and various ways in which that might be enhanced. I am critical of the criteria for notification which the Justice Department has adopted and would be surprised if more than two dozen victims were ever notified.

I think I have spoken long enough about the various kinds of proposals I have made in my statement.

Rather than say any more about the alternatives for reform, I welcome your questions on what I have said so far.

{ Professor Pyle's prepared statement follows: }

STATEMENT OF CHRISTOPHER H. PYLE, ASSISTANT PROFESSOR, JOHN JAY COLLEGE OF CRIMINAL JUSTICE, CITY UNIVERSITY OF NEW YORK

Recent histories have portrayed the U.S. Department of Justice as a cautious ally of the civil rights movement and the Federal Bureau of Investigation as a passive bystander, reluctant to protect movement organizers for fear of alienating cooperative Southern sheriffs.

Now these histories must be rewritten. Documents from the Bureau's own files now establish beyond doubt that the FBI deliberately sought to sabotage the public protest wing of the civil rights movement. It did so not only by calculated inaction in the presence of violence, but by the clandestine use of disruptive tactics entirely at variance with the proper role of law enforcement in a free society.

Perhaps the most venal of these efforts was the Bureau's vendetta against the Rev. Martin Luther King, the nation's most respected black leader. Bureau records now confirm that extensive wiretaps and bugs were used, not to protect King against false charges as Attorney General Kennedy apparently had hoped, but to defame his reputation, deny him honors, and destroy his political effectiveness. High officials of the FBI even went so far as to send King and his wife a package of what it viewed as highly embarrassing materials obtained through its illegal surveillance of him in hotels and motels across the country. Accompanying the package, mailed shortly before King was to receive the Nobel Peace Prize, was an anonymous note. It read: "King, there is only one thing left for you to do. You know what it is. You have just 34 days in which to do it. (The exact number has been selected for a specific reason.) It has definite practical significance. You are done. There is but one way out for you."

In 1967, the vendetta against King was expanded into a systematic campaign to disrupt and destroy what J. Edgar Hoover considered to be "black hate groups" King's Southern Christian Leadership Conference, an integrated association of black Southern ministers and white Northern liberals dedicated to achieving racial integration, was placed high on the hate group list. One purpose of the campaign, euphemistically called a "counterintelligence program" despite the absence of any foreign involvement, was "to prevent the rise of a black messiah who could unite and electrify" black Americans. "Martin Luther King," the authorizing memorandum continued, "might aspire to that position . . . if he abandoned his supposed obedience to white liberal doctrines." Bureau officials even selected a person "to assume the role of leadership of the Negro people when King has been completely discredited."

Civil rights and black power groups were not the only targets for attack. Secret programs of harassment also were mounted against the Communist Party, the Socialist Workers Party, Ku Klux Klans, the anti-war movement, and several nationality groups. Poison-pen letters, like the blackmail threat and suicide suggestion to Dr. King, were common, but agents provocateurs, burglaries, and

Bureau-inspired police raids were used as well. Some unfortunate souls were "snitch-jacketed"—falsely made to appear to be "snitches" or informants—and were thus caused to be driven from their organizations and ostracized by their friends. Rival groups were provoked to shoot at each other and an American Nazi driven to suicide by an anonymous FBI threat to expose his Jewish ancestry.

For more than thirty years the FBI systematically violated criminal laws, civil laws, constitutional guarantees, and jurisdictional limitations in its efforts to spy on and harass domestic political activists. In addition to the "counter-intelligence programs" (called "Cointelpros" for short), there were hundreds of surreptitious entries into the premises of political groups to photograph records and steal information. During the mid-1960s, FBI burglaries at the offices of the Socialist Workers Party in New York averaged more than one a month, even though the Party was unsuspected of criminal activity. Agents came to refer to these clandestine missions as "black bag jobs," and looked forward to commendations and bonuses for burglaries well done.

Laws protecting the sanctity of first-class mail also were breached. From 1940 to 1966, the FBI opened and photographed some 130,000 letters. (The CIA independently rifled nearly 250,000 letters between 1953 and 1973 in violation of the same criminal and civil laws.)

Other crimes which FBI agents may have committed in the name of "internal security" are mail and wire fraud, forgery, sending obscene material through the mails, reckless endangerment of human life, incitement to violence, and obstruction of justice. Civil wrongs covertly inflicted on private persons include libel, slander, false light invasion of privacy, trespass, and interference with contractual relations.

The first, and most obvious lesson to be drawn from this appalling record is the utter contempt it reflects for the rule of law. As a ranking FBI official admitted to the Senate Select Committee on Intelligence Activity when asked whether the constitutionality or legality of Cointelpro was ever considered: "No, we never gave it a thought." The Cointelpro documents reveal an agency motivated less by a desire to avert crime than by a racist resentment of assertive black leaders, a right-wing hostility towards all things communistic and communal, and a Victorian disgust at (and fascination with) changing sexual mores. Through its programs of harassment, the FBI brought the Cold War home. William C. Sullivan, one of the Cointelpro architects, expressed the Bureau's attitude best in a deposition to the Senate Committee:

This is a rough, tough, dirty business, and dangerous. . . . No holds were barred. We have used [these tactics] against Soviet agents. . . . [The same tactics] were brought home against any organization against which we were targeted. We did not differentiate. This is a rough, tough business.

The second, obvious lesson to be drawn from this record of lawlessness is the failure of successive administrations and Congress to keep the secret bureaucracies of government in check. President Franklin D. Roosevelt, with his customary disregard for constitutional proprieties, unleashed the FBI with a series of secret directives and without imposing any of the restrictions which the scandals of the post-World War I era should have suggested. Members of powerful Congressional Committees, like Martin Dies, Joseph McCarthy, Richard Nixon, John Rooney, Richard Ichord, John McClellan, and James Eastland, saw to it that Hoover received most of the money and support he requested. Aware of Hoover's support in Congress and respectful of the ruthlessness with which he used his secret files on prominent persons, no attorney general from Murphy to Mitchell attempted to reestablish Justice Department supervision and control.

The third important lesson to be learned from this record is that the Bureau was not just a lawless agency out of democratic control: it was a lawless agency engaged in a calculated assault on political freedom. Through its programs of surveillance and harassment, the FBI sought to influence which views and which spokesmen would be heard in the political marketplaces of America. What the Supreme Court had forbidden the Bureau to do directly and openly through prosecutions to suppress lawful advocacy of political ideas, it sought to achieve covertly and by criminal means.

The political intent of the Cointel programs must be clearly understood if effective remedies are ever to be designed. Their impact on the political process was not incidental, or minor, as the Justice Department would have us believe, but central and substantial. The objective, in the words of J. Edgar Hoover, was "to expose, disrupt, and . . . neutralize" various political groups. To achieve this

objective, the Bureau sought to get professors fired from their jobs, created phony political organizations (called "notionals"), published bogus college newspapers, and cancelled the motel reservations of convention-bound activists. Magazine reprints by the thousands were anonymously mailed to college administrators, politicians, and newspaper editors to inspire them to turn against anti-war and student protesters. Still other campaigns of "disinformation" and deception were undertaken to split radical groups off from potential sources of membership, money, and support. Viewed together, as they should be, the counterintelligence programs against domestic political groups constitute still another federal crime—conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. . . ."

"If there is any fixed star in our constitutional constellation," Justice Jackson once wrote, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." Yet this is precisely what J. Edgar Hoover and his associates tried to do. Behind the wall of secrecy which they erected with the acquiescence of successive presidents, attorneys general, and Congresses, Bureau executives conspired not only to define the limits of political deviance, but to enforce those limits by clandestine, illegal means.

"PREVENTIVE ACTION"

Caught between the Bureau's defenders and critics, and painfully aware that their capacity to lead the FBI out of the shame of Cointelpro will be limited if they do not at least appear to defend it, Justice Department officials have been slow to acknowledge the significance of the recent disclosures.

When NBC-TV reporter Carl Stern pried the first Cointelpro documents out of the Justice Department with a Freedom of Information Act lawsuit, Attorney General William B. Saxbe ordered the Bureau to investigate itself and appointed a joint FBI-Justice Department committee to review its findings. The committee, headed by Assistant Attorney General Henry Petersen (the Watergate investigator who saw nothing wrong in leaking grand jury secrets to Richard Nixon), concluded that the "overwhelming bulk" of Cointelpro actions "were clearly legitimate and proper undertakings," and announced that it could find no grounds to prosecute anyone. Asked later why no administrative sanctions were imposed either, Deputy Attorney General Lawrence Silberman blamed it all on Hoover: "If discipline were to be meted out, it would have to be meted out to one who is no longer alive."

Saxbe agreed, although he agreed with the committee that a few of the harassment operations "can only be considered abhorrent in a free society." After more Cointelpro's against Puerto Rican, Cuban, and Communist groups were discovered, Attorney General Edward H. Levi called the Bureau's actions "outrageous and . . . and foolish." However, what outraged the former law professor was not the Bureau's systematic violations of law, but the "dishonesty and incivility" of those actions. "Foolish" was the word Levi chose to characterize "Operation Hoodwink," the FBI's campaign to trick the Mafia into attacking American Communists. "I think the sending of anonymous letters, false letters, trying to get organized crime people angry at the Communists doesn't work very well," he said, "and therefore it's foolish."

Instead of ridding the government of its dangerously foolish agents, the Attorney General has assigned Justice Department lawyers to defend all but two of them against lawsuits by their victims. He has announced a program to notify Cointelpro victims of the Bureau's responsibility for their misfortunes, but has drawn the criteria for notice so narrowly that few notices are likely to be sent out.

While the Attorney General has sought to protect FBI agents from civil suits, Director Kelley has spoken out vigorously in their defense. "For the FBI to have done less under the circumstances," he told newsmen, "would have been an abdication of its responsibilities to the American people." Testifying before this subcommittee, Kelley promised that he would not "abridge rights" of any citizen without first obtaining the approval of the Attorney General or the President "unless in balance there would be a feeling on my part that it would perhaps be a good idea."

The Director has backed away from this impolitic position, and has even tried to put some distance between himself and Hoover's FBI by publicly apologizing for some Cointelpro abuses. But he has not given up his belief that the Bureau

must be able to supplement its traditional investigative and arrest powers with some sort of covert action.

Attorney General Levi seems to agree, at least in principle. Testifying before the Senate Select Committee in December 1975, Levi argued that the Bureau should have the power, subject to the attorney general's approval, to take "preventive action" against persons and groups where necessary to prevent the commission of federal crimes that pose imminent danger of violence to life or property.

The Attorney General offered no definition of "preventive action," other than to say that it should be non-violent, like the switching of street signs to prevent hostile mobs from clashing. Why the FBI should be involved in preventing mobs from clashing, Levi did not say. Tentative guidelines prepared by a Justice Department-FBI committee later added the requirement that the violence also threaten substantially to impair the essential functioning of government. This raised the possibility that FBI agents or informants would not be able to take "preventive action" just to protect lives or property—a curious inversion of values. It was obvious that the Department had not thought the problem through and when the Attorney General released his FBI guidelines in March he announced that he had "temporarily" abandoned efforts to provide express authority for preventive action. Technically, if not politically, the FBI now is back where it was when Cointelpro began.

It is fair to assume that neither Levi nor Kelley wishes to revive the more venal tactics of the Hoover regime. Rather, what both appear to want is some kind of power to break up terrorist combinations like the Ku Klux Klans, the Weatherman underground, and the Puerto Rican FALN before their campaigns of bombing and shooting get off the ground. Neither official is likely to trumpet that desire, because the clandestine disruption of even violent political groups raises grave constitutional questions. It can also expose FBI agents to private lawsuits and presidential administrations to charges of political repression. On the other hand, both men know that it is they who will catch hell politically if the Bureau fails to prevent a terrorist action from occurring.

Therein lies a dilemma. How can the government deal effectively with politically-motivated, violence prone groups without also violating civil and constitutional rights? So far, we as a nation have dodged one horn of this dilemma by refusing to specify fully what liberties and procedures are due to suspected criminals prior to arrest. The Supreme Court has gradually narrowed the range of "speech crimes" that can be prosecuted in court, but it has prescribed virtually no limits on informants and has had nothing to say about most forms of harassment characteristic of Cointelpro. Congress has offered no guidelines either.

We have evaded the second horn of the dilemma by allowing law enforcement and intelligence agencies to improvise their own solutions behind an iron wall of secrecy. At times, the inaction by Congress, the president, and the attorney general has been so conscious as to seem to say to the Bureau: Go ahead do something, do anything, and if you stretch the law a bit, we won't ask any questions. It has been a government by euphemisms consciously employed by all concerned to avoid responsibility for questionable actions almost certain to follow.

Indeed, "preventive action" appears to be a new euphemism for Cointelpro, or at least the non-violent side of those programs. Civil libertarians would ban it altogether, but banning the term without defining its meaning would be futile. Another euphemism would only spring up in its place. The better approach would be to authorize those few preventive actions which might properly be taken in certain, well-defined circumstances, forbid all others, and impose effective criminal, civil, and administrative sanctions to punish and deter future abuses.

UP FROM EUPHEMISMS

The time has come to decide what may and may not be done in the name of "preventive action." Two principles should guide the enterprise. First, the government has the right and duty to prevent injury to lives and property and, in some instances, should be allowed to do so covertly once the conspirators have ceased abstract discussions and begun to procure weapons or explosives and lay concrete plans to commit crimes of violence. Second, the government has no business manipulating the internal affairs or external political effectiveness of any politically-motivated group, however violent it may be, by clandestine, non-prosecutorial means.

For example, nothing should prevent the FBI from taking steps to warn or protect the chosen victims of planned violence or to guard property marked for destruction. Bureau informants should be free, on their own initiative, to stuff sawdust into dynamite sticks, defuse bombs, disarm weapons, deactivate ammunition or otherwise deprive the conspirators of the physical capability to commit an imminent attack on life or property. Where a terrorist group is intimidating a community, the FBI should be free (with specific authority from the Attorney General and under close Justice Department scrutiny) to conduct deterrent interviewing designed to let suspected terrorists know that they are not anonymous. However, if such interviewing is to be allowed, it must be carried out discretely, so that employers will not be caused to fire, or neighbors to shun, the suspects.

Infiltration of (or the recruitment of informants from within) politically-motivated groups should be allowed, but only when they have indicated, by credible statements and actions, that they are preparing to commit or are developing the capability to commit bombings, shootings, kidnappings, skyjackings, hijackings, robberies, or similar crimes, or are actively soliciting and inciting others to do so. To provide grounds for an infiltration, a statement would have to go beyond abstract expressions regarding the duty, desirability, or inevitability of vaguely defined revolutionary action and actually evidence a current intent to engage in, facilitate, or promote criminal actions to achieve political ends in the relatively near future. Actions which might justify infiltration would include the acquisition of weapons or explosives, the conduct of para-military training, or the rehearsal of planned crimes. Authorization for the infiltration should come from outside the Bureau, possibly from an assistant U.S. attorney in the first instance or a judge through the issuance of a warrant. Regardless of who grants the authority, all officials involved should be required to take all reasonable measures to minimize the extent and duration of the intrusion and see to it that use of the technique does not lead to disruption or harassment.

A clear distinction should be drawn between terrorists who shoot, beat, kidnap, and bomb, and political protesters who violate crowd control regulations to conduct disruptive demonstrations. The nature of their lawbreaking and its consequences to the community are quite different, and warrant different kinds of treatment. Preventive action should be taken to thwart demonstrating groups bent on disrupting a city or closing down government buildings, but the action should take the form of negotiating parade permits, insisting on the use of demonstration marshals, erecting barricades, positioning blocking forces, and otherwise following conventional, non-covert, crowd control techniques. Since the FBI is a national investigative agency with no crowd control responsibilities, it should not be involved in this kind of preventive action in any way, except perhaps as the source of properly obtained intelligence on the specific purposes and capabilities of the demonstrators. Infiltrating the organizing staff of a demonstration should be forbidden unless authorized by a judicial warrant which establishes that reasonable grounds exist to believe that the organizers intend to promote violence by their followers or otherwise violate the terms of their demonstration permit.

In no case should the FBI or any other agency of government be allowed to sabotage the demonstration by stealing files, forging communications, sending false extortion notes from one group to another, or spreading false rumors—all tactics used by the FBI against the anti-war protests of the 1960s. The government should be permitted to monitor the demonstrators' walkie talkies if a judge finds that there is reason to believe that the radios may be used to promote violence or other substantial violations of the demonstration permit. However, the government should not be allowed to disrupt those communications (as it often did in the 1960s) unless necessary to prevent imminent violence. Any such decision, of course, should be made by Justice Department or mayoral staff members and should be subjected to subsequent scrutiny in court.

Dragnet arrests like those used in Washington, D.C. in 1971 to crush the May Day protests should also be forbidden. Where National Guard or Army troops are called out to suppress a full-scale riot, the primary form of preventive action should be the imposition of a curfew and the guarding of persons and property. Because there is no credible evidence that any of the ghetto riots of this century were the product of covert organization, no covert riot control techniques such as round-up lists, general search warrants, or networks of "ghetto informants" should be developed. Similarly, the FBI should be forbidden to maintain lists of allegedly potential "subversives" for round-up purposes in case of some equally undefined "internal security crisis."

Both Levi and Kelley appear to believe that it is not the duty of the FBI or any other governmental agency to manipulate the internal affairs of external relations of politically-motivated groups for the purpose of undercutting their political effectiveness. However, neither appears willing to admit that that is precisely what the FBI and many police "red squads" have been doing for years. Instead of ducking the issue of preventive action, the Attorney General should issue detailed regulations keyed to past abuses. No regulation can possibly anticipate all of the manipulations a politically-inspired agency can dream up, but one which simply forbids known abuses would be substantial. As Kenneth Culp Davis points out in his seminal book *Discretionary Justice*, there is nothing to prevent administrators from instructing by illustration when they cannot specify everything by commands.

To curb the government's perennial impulse to suppress its critics, the following kinds of preventive action, drawn from the public record of Cointelpro abuses, should be outlawed:

1. Sending anonymous or fictitious communications to members of political groups designed to create internal dissension, cause the group to expel members, or promote misunderstandings or disputes with other groups.

2. Notifying employers, prospective employers, creditors, credit bureaus, relatives, or neighbors of the allegedly illegal, immoral, or controversial activities of an individual for the purpose of limiting the individual's capacity to exercise constitutionally protected rights.

3. Leaking information from investigative or intelligence files to the news media, public officials, or private citizens for the purpose of reducing a person's reputation, casting him in a false light, or otherwise undermining his political influence.

4. Asking foundations, administrators, and civic leaders to deny recognition, money, or other support to a particular individual or group.

5. Interviewing individuals at their places of employment or recreation, or questioning others about them, in ways calculated or unnecessarily likely to increase the possibility that they will be fired, transferred, or ostracized.

6. Directing informants to spread rumors or to commit actions designed to promote fear or distrust within a political group.

7. Systematically investigating members of a political group for non-federal crimes and then persuading local or state authorities to arrest, raid, or prosecute those members or others on the basis of that information.

8. Informing the news media or opposition candidates that a particular candidate for public office will be attending, or has attended, a meeting of a particular political group, or is receiving financial or other support from a particular group or individual.

9. Creating bogus political organizations (called "notionals") or encouraging informants to assume policymaking positions in political groups.

10. Forging signatures, signature stamps, letterhead, membership or business cards, press credentials, or other items of identification for the purpose of disrupting a political group.

11. Using the mails or any other form of communications to transmit false, misleading, threatening, blackmailing, defamatory, or otherwise harassing messages to political groups or individuals.

12. Interfering with the contractual relationships, credit ratings, or legal status of individuals for the purpose of limiting their political participation or the participation of others close to them.

13. Publishing bogus newspapers, handbills, or similar publications.

14. Sending bogus letters to elected officials purporting to come from constituents urging them to take positions for or against particular political groups, individuals, or policies.

15. Encouraging building, fire, health, or safety inspectors to harass political groups or individuals.

16. Sending anonymous letters to, or otherwise approaching, the operators of hotels, motels, or meeting places to persuade them to deny space or services to political groups or individuals.

17. Impersonating individuals or group leaders for the purpose of cancelling reservations or offering non-existent accommodations for visiting demonstrators.

18. Sending anonymous communications to the relatives of politically active individuals objecting to the activists' behavior, or to parents alleging that their children have been engaging in sexual activity with, or are otherwise associating with, political activists.

19. Jamming or otherwise interfering with the radio communications of parade marshals trying to control peaceful demonstrations.

20. Infiltrating, wiretapping, or bugging the legal defense camp of political activists charged with criminal activity without a warrant establishing probable cause to believe that a felony is being, or is about to be committed, and assuring that the fruits of the surveillance will not be made available to government lawyers or investigators working on the case.

21. Obstructing, delaying, or otherwise interfering with the mail, telephone messages, or other communications of political groups or individuals, unless necessary to prevent immediate harm to lives or property and subject to subsequent notice to the affected parties.

22. Encouraging tax authorities to audit the returns of politically active individuals or groups absent probable cause to believe that they have engaged in tax fraud.

23. Conducting anonymous mailings of literature to editors, publishers, administrators, college trustees, and others, in an effort to influence their attitudes towards, or treatment of, politically active individuals or groups.

Needless-to-say, this list could be extended and refined. What is important, however, is for the Attorney General to acknowledge the political intent of the abuses that have occurred and expressly forbid their recurrence. That step alone would go far towards imposing limits on the misuse of FBI authority.

In addition, the Justice Department should insist that specific permission be obtained by the Bureau in order to employ any potentially disruptive or harassing technique not directly associated with the detection and prosecution of a specific crime. Failure to obtain such permission should be grounds for a variety of administrative penalties, from loss of pay and promotional opportunities to dismissal from government employment.

CRIMINAL PENALTIES

It would be naive to suppose that specific regulations defining what may and may not be done in the name of "preventive action" would end all abuses. Hoover and his agents knew that they were violating constitutionally protected rights. Cointelpro occurred because FBI executives were confident that their agents would never be caught, or, if caught, punished.

There were many reasons for this confidence, not the least of which were the Bureau's near monopoly on investigative resources, its autonomy from the Department of Justice, and the disciplined secrecy enforced by an autocratic director. An important contributing factor, however, was the absence of any federal criminal laws specifically protecting the constitutional and civil rights of individuals and organizations from encroachment by federal agents.

The only civil rights provisions in the federal criminal code were enacted to protect the 13th, 14th, and 15th Amendment rights of black Americans against state and private action. Section 241 was enacted to punish private conspiracies like the Ku Klux Klans; section 242 was meant to punish state officials acting under color of state law. Section 245 was added in 1968 to protect civil rights workers. Nothing in the express language of these statutes prevents their application to federal officials, but it took a special prosecutor and a White House-directed burglary to bring about that extension. *United States v. Ehrlichman*, 379 F. Supp. 291 (1974), aff'd 44 L.W. (1976).

The ambiguous and restrictive nature of the case law interpreting the Reconstruction era statutes also tends to inhibit their application. Both have survived constitutional challenges on void for vagueness grounds, but only because the Supreme Court was willing to read into them the requirement of a specific intent to violate a federally protected right. *Screws v. United States*, 321 U.S. 91 (1951) and *United States v. Williams*, 341 U.S. 70 (1951). The requirement of a specific intent, however, does not foreclose debate over whether a federally-protected right was violated in any given instance by action taken under color of federal law. Given the unwillingness of the Petersen Committee to recognize that the Cointel programs were themselves conspiracies to violate First Amendment rights, it is reasonable to expect that government will continue to hide behind the laws' ambiguities.

Narrow judicial interpretations of the privileges and immunities protected by the acts, coupled with language restricting their application to cases in which the rights of "citizens" are violated, also limits their application in Cointelpro situations.

These deficiencies in the existing law suggest that adequate legislation cannot be achieved by adoption of a broadly worded "abuse of process" statute, or by a law expressly extending sections 241 and 242 (or something like them) to violations under color of federal law. The better approach would be to tailor remedial legislation to the kinds of abuses characteristic of the *Cointel* programs—conspiracies, attempts, and actions specifically intended to deprive individuals, organizations, and groups of rights guaranteed by the First Amendment. With history as their gloss, and the force of analogy to give them meaning, such laws would stand a much better chance of equitable enforcement.

My own preference is for one set of laws to punish *Cointel*-type actions and another to cover improper mail openings, burglaries, break-ins, thefts, and electronic surveillance. The following amendments, keyed to S. 1 (94th Cong., 1st Sess., Jan. 15, 1975), are suggested.

§ 1506. Interference with First Amendment Rights

"(a) OFFENSE.—A person is guilty of an offense if he injures, interferes with, or adversely affects the

- "(1) reputation;
- "(2) contractual relations;
- "(3) employment relations;
- "(4) financial credit;
- "(5) legal status;
- "(6) freedom to travel in, or use a facility in interstate or foreign

commerce;
of any individual, group, or organization with intent to injure, interfere with, or adversely affect the ability of that individual, group, or organization to achieve lawful ends through the exercise of rights guaranteed by the First Amendment to the federal Constitution.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction in this section if the actor is an officer, employee, agent, or paid informant of a federal or state investigative, law enforcement, or intelligence agency or unit."

§ 1507. Fraudulent Interference with First Amendment Rights

"(a) OFFENSE.—A person is guilty of an offense if, acting under color of law, he

"(1) undertakes a scheme or artifice designed to defraud or deceive another with the intent to impose a burden upon, or otherwise interfere with any individual, group, or organization, because that individual, group, or organization has, is, or may engage in expressions or activities protected by the First Amendment to the federal Constitution, and

"(2) pursuant to that scheme or artifice communicates or causes to be communicated false or misleading information.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if

"(1) the actor is an officer, employee, agent, or paid informant of a federal or state investigatory, law enforcement, or intelligence agency or unit; or

"(2) the actor, in committing the offense,

"(A) uses or causes the use of the United States mail;

"(B) uses or causes the use of any interstate or foreign communication facility, including a facility of wire, radio, or television communications subject to federal regulation; or

"(C) causes, induces, or impedes

"(1) travel by any other person in interstate or foreign commerce; or

"(2) use by any other person of any facility in interstate or foreign commerce."

In addition, Congress should make it a federal crime for an employee of any federal or state investigative, law enforcement, or intelligence agency or unit to conduct burglaries, criminal entries, criminal trespasses, or thefts for the purpose of gathering information on the lawful exercise of rights guaranteed by the First Amendment of the federal Constitution, or for the purpose of interfering with expressions or activities protected by that Amendment.

This objective could be accomplished by amending the jurisdictional provisions of the following sections of S. 1: § 1711 (Burglary), § 1712 (Criminal Entry), § 1713 (Criminal Trespass), and § 1731 (Theft) to provide:

"—There is federal jurisdiction over an offense described in this section if

"(1) the actor is an officer, employee, agent, or paid informant of a federal or state investigative, law enforcement, or intelligence agency or unit, and

"(2) he commits the offense with the intent to collect information on the beliefs, associations, or activities of any individual, group, or organization, or to interfere with the internal affairs or external influence of that individual, group, or organization, because that individual, group, or organization has, is, or may engage in the exercise of rights secured by the First Amendment to the federal Constitution."

ENHANCING THE PROSPECTS OF PROSECUTION

Enactment of specific criminal laws will not, of itself, assure that government officials are punished for their crimes. Ways have to be found to overcome the inherent reluctance of the Justice Department to prosecute executive branch employees.

Nothing makes government lawyers howl louder than to suggest that they have not been even-handed in the enforcement of the law. But the record is clear. Since 1924, when J. Edgar Hoover assumed his directorship, not one FBI agent has been prosecuted for a crime arising out of his employment. Annotations of the federal criminal code reveal no instances in which agents of any federal investigative, law enforcement, or intelligence agency have been prosecuted for civil rights violations, mail fraud, burglary, or illegal electronic surveillance, despite extensive evidence that such crimes have been committed.

Reasons for this inaction are not hard to find. Hoover's policy of internal punishment and quiet dismissal is well known; so too is the twenty-year agreement between the Justice Department and the CIA not to prosecute any of the Agency's operatives without the Agency's consent. The political influence and administrative autonomy of these agencies, coupled with their internal discipline and secrecy, also limited the possibility of scandals and disclosures that might lead to prosecution.

However, none of these reasons fully accounts for the Justice Department's unwillingness to act even when abuses were well known. The truth is that no department or agency head anywhere in the federal government wants to punish his subordinates. To lead their agencies, government executives must first defend them. If they do not protect their employees from embarrassment, their employees will not protect them.

To avoid this danger, the men at the top let it be known, in a variety of subtle ways, that they do not want to know about wrongdoing at the bottom. Alert subordinates pick up these signals easily; they know that a political executive who punishes his agency's wrongdoers without pressure from the outside soon loses his capacity to lead. On the other hand, subordinates also know that the political executive who learns about agency wrongdoing and does nothing risks serious embarrassment should the wrongdoing later become public. So they do not tell him and he does not ask. Instead, the matter is quietly covered up. All concerned find it easier to "see no evil, hear no evil, and speak no evil," even if they occasionally end up looking like monkeys.

Anyone who would enhance government accountability must first solve this problem. Two remedies are necessary. The first is to break down the conspiracy of silence, and the second is to provide for independent investigators and prosecutors.

More Justice Department supervision and control

To suggest ways in which government secrecy in general might safely be reduced is beyond the scope of this testimony. What can be done, however, is to explore ways in which the Justice Department can be made more knowledgeable of FBI investigations of politically-motivated individuals and groups in those few instances where such investigations are appropriate.

There are at least four ways in which Justice Department involvement can be increased—by the case, by the program, by complaints, and by inspection. If each of these approaches were to be built into the investigative and review process, it would be difficult for future Departmental executives to say they didn't know.

Law Officers.—Insofar as the FBI must investigate any politically-active individuals and organizations because they are suspected of trying to achieve their political ends by illegal means, an assistant U.S. attorney should be assigned to the case. His function should be to serve as an advising law officer—to follow the course of the inquiry without assuming control and to advise the investigating agents of the limits of their authority and the propriety (as well as legal-

ity) of their techniques. Where difficult legal or moral issues are involved, he should be free to obtain advice from his superiors, and should encourage the agents to do the same within the FBI. And he should know that if the investigators violate civil and constitutional rights, responsibility will rest with him too.

Scoping Units.—Most of the FBI's violations of political rights have occurred in the context of formal programs—programs kept secret from Congress, the public, the president, and the attorney general. To prevent such programmatic abuses from recurring, efforts to define the FBI's investigative and intelligence functions should be supplemented by the requirement that the Justice Department play an active part in "scoping" (defining the nature and scope of) those few programs that may properly be authorized. For example, were the Ku Klux Klans to ride again, high level Justice Department officials should be in charge of, or at least intimately involved in, planning the FBI's response.

It may be argued, of course, that to vest such a power in men like Robert Mardian or the staff of the old Internal Security Division would not safeguard individual liberties. But involving Justice Department officials at that level could reduce the number of abuses, enhance the possibility of "whistleblowing," and give successive administrations the opportunity and duty to curb and expose the wrongful political biases, if any, in investigations conducted under the supervision of their predecessors.

Of course, the scoping function need not be vested in an internal security division or section. A better place for it would be in the Office of the Deputy Attorney General. He is the official most likely to be handling internal security crises on a day-to-day basis, and therefore most in the need for usable information on the intentions, capabilities, and probable courses of action of terrorist organizations and the organizers of potentially violent mass demonstrations.

The scoping unit, if one were to be created, ought to be conceived of as a professional office of analysts—persons with substantial credentials in the politics of mass protest, terrorism, and civil disturbances. It should not be a retirement home for ex-investigators or a patronage position for lawyers without special expertise in civil rights and liberties. With the right staff, such a unit would help presidents and attorneys general deal much more intelligently with hysterical demands that the government "do something—anything" each time there is a bombing, a riot, or a whiff of rebellion. It would also protect them from the dangers of overreaction that can arise from reading too many dramatic, but unsubstantiated informant reports.

Reviewing Unit.—Whether or not the Justice Department takes an active part in supervising the collection of information that will affect its responses to riots, acts of terrorism, and mass demonstrations, it should have the ability to investigate complaints of FBI wrongdoing, and to inspect the records of investigations which may infringe on First Amendment rights.

Such a unit already exists in the Office of Professional Responsibility. Its function, according to the press release issued at the time of its creation, is to "receive and review information or allegations concerning conduct by a Justice Department employee that may violate the law, Departmental orders or regulations, or applicable standards of conduct." The primary reason for creating the Office at this time may be inferred from the fact that the first Counsel on Professional Responsibility is Michael E. Shaheen, Jr., the Department's liaison officer with Congressional committees investigating intelligence abuses.

In the five months that the office has been in operation, it has concentrated on such highly controversial matters as the murder of Dr. King, the financial relations between top FBI officials and the U.S. Recording Co., the Bureau's chief supplier of electronic surveillance equipment, and allegations that FBI agents gave an author highly classified documents pertaining to the safety of nuclear reactors. The Office is also home for the panel of lawyers charged with notifying victims of Cointelpro abuses.

While major investigations are conducted by special task forces, routine matters are referred elsewhere. Allegations of criminal activity go to the appropriate division; charges of non-criminal misconduct are referred to the head of the Justice Department agency to which the employee is assigned or to its internal inspectorate. If these investigations do not prove satisfactory, the Counsel can undertake his own inquiry using investigators and attorneys borrowed from uninvolved agencies and divisions from within the Department.

At this time, every investigation undertaken by the Office remains under active study. No FBI agents or other Departmental employees have been charged with any crimes as a result of its work. However, two Customs agents have been charged with illegal wiretapping, and the Department has refused counsel to two FBI agents being sued for burglarizing the New York offices of the Socialist Workers Party on the ground that the agents may be prosecuted.

The need for a review unit like the Office of Professional Responsibility cannot be denied, but its limitations must be acknowledged. Its mandate is limited to investigating Department of Justice employees; CIA and military agents are beyond its reach. How well it does with Departmental investigations will depend both on the support it receives from the attorney general and on its ability to outlast those who would resist its inquiries. There can be no doubt that the current Attorney General has given the office full support, and, to give it staying power, has directed that the Counsel's position be made a permanent part of the Department, rather than a temporary element of his personal staff. However, institutionalism does not guarantee influence. It would not be at all surprising to see the Office wane in a few years, when presidents return to appointing more traditional attorneys general and the nation returns to normalcy.

Creating prosecutors who will prosecute

Enhancing knowledge of FBI activities within the Justice Department should increase control and decrease the number and seriousness of improper investigations and harassments. Detailed regulations stating what cannot be done in the name of "preventive action" backed by new civil rights laws specifying which constitutional encroachments can be punished should eliminate many excuses for not prosecuting. But neither approach will assure that government criminals are brought to justice unless the institutional reluctance to punish is overcome.

There are two ways it can be done. One is to remove the prosecution of government employees out of the Justice Department and vest it in some sort of politically independent special prosecutor. The other is to lodge within the Justice Department a special staff of prosecutors who have as their chief duty and ambition the prosecution of governmental crime. Of course, the two approaches are not mutually exclusive.

Special prosecutors.—There have been many proposals for removing the prosecution of government officials from the Justice Department since the days of Richard Nixon, John Mitchell, and the pliant Mr. Petersen. One would create a permanent office of special prosecutor or "public attorney;" another would vest the function in an independent prosecutorial commission. (Senator Ervin advocated removing the entire Justice Department from politics, although how that would enhance the prosecution of its agents still remains unclear). Members of the Watergate special prosecutor's office have opposed making their unit permanent, on the grounds that it would then cease to be special and might attract men of lesser integrity for whom the prosecutorial power is a weapon to advance their political fortunes. Permanent or temporary, the proposals call for making the prosecutors independent by vesting the power to appoint them in sitting courts, retired federal judges, or the president, but with the advice and consent of the Senate and for a fixed term longer than that of the president. Removal, too, would be made difficult in memory of the "Saturday Night Massacre." See generally: Watergate Reorganization and Reform Act of 1975, Hearings Before the Committee on Government Operations, U.S. Senate, 94th Cong., 1st Sess., Parts 1 and 2 (1975, 1976); American Bar Association, Preventing Improper Influence on Federal Law Enforcement Agencies, rev. ed. (1976); Removing Politics from the Administration of Justice, Hearings Before the Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, 93rd Cong., 2d Sess., (1974).

The one element that all special prosecutor proposals have in common is that they were prepared with Watergate in mind. They look upwards from the Criminal Division of the Justice Department in anticipation of partisan pressures from a politicized attorney general or a presidential staff bent on killing an investigation and covering up evidence of misconduct. The wrongs they would address are conflicts of interest, implications of partiality, alleged misconduct, professional impropriety on the part of lawyers (or the appearance thereof), improper influence, or obstruction of justice. None looks downwards at routine abuses of the investigative, law enforcement, or intelligence functions, or seeks to remedy the institutional conflict of interest of administrators reluctant to embarrass their

agency. Each proposes a rare and unusual procedure to cope with politically-charged allegations against high government officials. None is designed to attack the abuses characteristic of *Cointelpro*.

A Division of Government Crimes.—To cope with these limitations, the Senate Committee on Government Operations has proposed a new Division of Government Crimes for the Justice Department. (S. 495, 94th Cong., 1st Sess., 1975, as amended in Committee Print and retitled "Watergate Reorganization Reform Act of 1976," and announced by press release dated April 9, 1976.) In addition to enforcing the election laws and prosecuting all criminal cases against high-level presidential appointees not referred to a temporary special prosecutor, this new division would prosecute all federal officials and employees charged with committing crimes in the course of their employment. An Assistant Attorney General, nominated by the president and confirmed by the Senate for a four-year term, would head the division. The president could remove his nominee from office, but he would have to explain why to Congress.

The Senate bill would, in effect, elevate the newly created Public Integrity Section of the Criminal Division into a full-fledged division. However, whereas the existing section is limited to prosecuting government, union, and corporate officials for interstate bribery, extortion, racketeering, and mail fraud, and political candidates and their staffs for election law violations, the proposed division would have much broader duties, including the prosecution of FBI, CIA, and military personnel for violations of civil and constitutional rights. Responsibility for such cases, which now lies inactive in the criminal and civil rights divisions, would go to a new staff of prosecutors with an institutional and career stake in bringing at least some prosecutions to court.

In my opinion, S. 495, as revised, offers the soundest approach to enhancing the prospects for prosecution of low-level investigative, law enforcement, and intelligence abuses before they reach the scale of the *Cointelpros*.

CIVIL REMEDIES

When all is said and done, however, I am doubtful that many government agents will be prosecuted for their crimes. The cumulative effect of the many obstacles to successful investigation and prosecution is simply too great often to be overcome. This does not mean that efforts at revising the criminal law and prosecutorial mechanisms should not be pursued; only that reformers should view them as valuable mainly for their symbolic effect and as standards to be enforced through civil litigation and the political process.

To enhance the capacity of the courts to check *Cointelpro* abuses, there should be a new chapter 172 of Title 28, United States Code, entitled "Illegal Investigative Activity." In it Congress should place an arsenal of new civil weapons against wrongful investigative, law enforcement, and intelligence activities.

The first three sections of this chapter might well consist of the civil remedies set forth in Representative Kastenmeier's "Freedom from Military Surveillance Act of 1975" (H.R. 142, 94th Cong., 1st Sess., Jan. 14, 1975). To this could be added a new section 2894 to permit civil recovery for the *Cointelpro*-type offenses that would be outlawed by the proposed amendment to S. 1. The new section might read:

§ 2894. *Civil action; Interference with First Amendment Rights*

"(a) Whenever any officer, employee, agent, or paid informant of any investigative, law enforcement, or intelligence agency or unit of the United States, acting under color of law, injures, interferes with, or adversely affects the exercise of First Amendment rights as secured by Sections 1503 and 1507, title 18, United States Code, that officer, employee, agent, or paid informant and the United States shall be jointly and severally liable to any person injured, interfered with, or adversely affected thereby in an action at law or equity, or other proper proceeding for redress.

"(b) In an action at law brought pursuant to this section, the court may grant

"(1) any actual damages suffered by the plaintiff, but not less than liquidated damages of \$1,500 for each discrete injury, interference, or adverse effect caused thereby;

"(2) such punitive damages as the court may allow, but not in excess of \$5,000.

"(c) In a suit for equitable relief brought pursuant to this section, the court may grant such temporary or permanent equitable relief as it may deem appropriate, including, but not limited to

"(1) mandatory and prohibitory injunctions;

"(2) destruction, expungement, correction, annotation, amendment, or recall of records;

"(3) issuance, by the United States, of public statements of correction, retraction, or apology.

"(4) the severance, from employment by any investigative, law enforcement, or intelligence agency of the United States of any officer, employee, agent, or paid informant thereof found liable under this section or guilty under sections 1503 and 1507, title 18, United States Code.

"(d) In an action brought pursuant to this section, the court also may grant or order, as it may deem appropriate, the following relief

"(1) declaratory judgments;

"(2) costs of any successful action, including reasonable attorneys fees;

"(3) indemnification, by the United States to any officer, employee, agent, or paid informant of any investigative, law enforcement, or intelligence agency or unit for costs of any successful legal defense, including reasonable attorneys fees;

"(4) indemnification, by the United States to any officer, employee, agent, or paid informant of any investigative, law enforcement, or intelligence agency or unit found liable in an action brought pursuant to this section in proportion to the degree of its responsibility for the wrongful acts, provided that the indemnification shall not exceed nine-tenths of the gross income of the officer, employee, agent, or paid informant in any calendar year until the judgment is paid."

NOTIFICATION OF COINTELPRO ABUSES

Of course, civil remedies against government misconduct are not any good if the victim does not know of the government's responsibility for his injury. In the case of *Cointelpro*, that knowledge may soon exist, because, on April 1, Attorney General Levi appointed a panel of lawyers to notify the programs' victims. The decision undoubtedly was a difficult one for him to make as an administrator, but it was morally correct, and, if properly administered, could do much to restore public confidence in the Department.

Unfortunately, the procedures for notification are far from adequate. Under the Attorney General's directive, notice will be given only when "(1) the specific *Cointelpro* activity was improper, (2) actual harm may have occurred, and (3) the subjects are not already aware that they were the targets of *Cointelpro* activities."

The first criterion fails to specify any types of *Cointelpro* activity that the Department now considers to be "improper." Thus, the panel has been given complete and essentially unreviewable power to decide which targets of government harassment will be permitted to sue the government for redress of legal wrongs.

Already there is reason to believe that the Department will take a restrictive view of what is "improper" *Cointelpro* activity. For example, Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, has testified that the Bureau's practice of "advising local, state and federal authorities of civil and criminal violations by group members" was "clearly proper." [Testimony before the Subcommittee on Government Information and Individual Rights, U.S. House of Representatives, April 28, 1976, p. 8 (prepared statement)]. Many Americans would disagree.

The first criterion also would exempt the Justice Department from having to give notice where the harassment was not conducted as part of a formal *Cointelpro* program. Thus, new facts about the FBI's attack on the Rev. Martin Luther King would not have to be disclosed. Nor would notices have to go out to the victims of FBI burglaries, mail openings, illegal wiretaps and bugs, and agents provocateurs.

The second criterion restricts notice to those situations in which "actual harm may have occurred." Evidence of possible harm must appear in the FBI's own records; otherwise no notice will be given. Since most *Cointelpro* records do not record what happened as a result of the harassment efforts, this criterion virtually guarantees that few FBI agents will be held accountable for their wrongs.

The third criterion would exempt the Department from having to notify subjects who are "already aware that they were targets of *Cointelpro* activities." Once general knowledge may be presumed, notice of newly discovered, previously

undisclosed abuses would not have to be given. Since most organizations targeted under the Cointel programs have now been identified publicly, few, if any, new notices would have to be issued. Those individuals and groups who now possess some knowledge of how they were victimized would be left to their remedies under the Freedom of Information Act and the pre-trial discovery rules—a process much like the game of “Twenty Questions.” The Attorney General has thus provided that his lawyers and agents will not have to volunteer any new information in the Cointelpro litigation now under way.

The Abzug bill

To remedy defects such as these, Congresswoman Abzug has proposed legislation to compel the Justice Department to “inform each person who was . . . the subject of a file or named in an index created, maintained, or disseminated . . . in connection with an operation or program known as “Counter-Intelligence program” or “Cointelpro”, . . . that he, she, or it was such a person, provide each such person with a clear and concise statement of such person's rights under this section [allowing expungement] and section 552 of this title [the Privacy Act], and provide each such person with the option of requiring that agency to destroy each copy of such file or index in its possession.” H.R. 12039, and H.R. 13193, 94th Cong., 2d Sess., (1976).

The administrative impracticalities and privacy invasion that would be involved in locating and notifying the thousands of persons named in the Cointelpro files and in answering their inquiries and requests has been adequately summarized in testimony before the Subcommittee on Government Information and Individual Liberties on April 28. I would only add, as one who has read thousands of pages of domestic intelligence reports compiled by the FBI, the military, and the police, that notification of everyone mentioned in those files would be a waste of time and money rivalling only the compilation of the files in the first place.

A Claims Commission

A better approach would be to set up a neutral claims commission of distinguished citizens with a staff to notify all targets of potentially harmful surveillance or harassment, and a separate panel to adjudicate claims for damages arising out of the notifications.

Criteria for deciding who should be notified should be specified by the instrument creating the commission. They should be written by generalizing on past abuses, much as I have done to suggest “preventive actions” that should not be permitted. Of course, nothing should foreclose the commission's staff from giving additional notice where unanticipated abuses are uncovered.

The staff also should be instructed to resolve all doubts about possible injury in favor of notification. The additional letter of notice may be general, so as not to unduly shock the recipient or invade his right not to know, but letters should go to each individual, group, or organization which was the target of a specific harassment attempt, regardless of whether they may be aware of the attempt or not. Then, in response to their request for further information, the Department should provide them with unexpurgated copies of all records of those attempts. Departmental resources also should be made available to counsel for any victims seeking to locate potential defendants in civil suits arising out of the notifications. Priority should be given to giving detailed notice to targets of Cointelpro and similar actions who have already filed suit so that they will not be delayed further by the dilatory tactics of government lawyers and evasive defendants. After the notices have been given, the staff should summarize its findings by drafting a regulation to prohibit similar actions in the future.

The panel to adjudicate claims should function like a workman's compensation board with informal procedures, a definite bias towards resolving doubts in favor of the claimants, and in conducting its business in the interests of the claimants and not their attorneys. The awards, for the most part, need not be large. The symbolism of the panel's findings will, in most instances, be reward enough.

The Justice Department may be moving in this direction. In a letter to Senator Percy made public on April 12, the Attorney General announced a new policy of compensating the victims of “wrong house” raids. Extension of that policy to the victims of Cointelpro would, in the end, save much time, money, and inconvenience for all concerned. Victims who receive prompt, informative, and courteous apologies from their government are less likely to press unreasonable claims for damages, while the adoption of expeditious claims procedures would save the government, as well as the claimants, the costs of protracted litigation.

EASING THE BURDEN OF CIVIL LITIGATION

Creating a notification and claims commission would go far towards redressing past abuses, but it would not punish similar wrongdoing in the future. To assure effective policing of federal law enforcement, investigative, and intelligence agencies, an effort must be made to ease the burden of civil litigation.

Standing to challenge improper surveillance

Since political surveillance is the breeding ground of political harassment, Congress should make certain that the surveillance can be challenged in court before the harassment begins. The chief obstacle to be overcome is *Laird v. Tatum*, 408 U.S. 1 (1972), in which a sharply divided Supreme Court ruled that the targets of Army surveillance within the United States could not challenge that monitoring in court because they could not prove they had suffered sufficiently at the Army's hands to qualify as effective litigants. Their allegation that the surveillance, which was unauthorized by law and served no legitimate military need, exerted a present chilling effect upon their willingness to freely exercise their First Amendment rights was rejected as too intangible a claim. As a result, the only surveillance cases that can be brought today are those where the plaintiffs have evidence of direct, concrete injury, such as the loss of a job or proof of defamation.

If the "presumption for freedom" associated with First Amendment litigation is to be vindicated fully, *Laird v. Tatum* must be legislatively overturned. This could be done by a relatively simple amendment to title 28 granting standing to the subjects of unconstitutional or illegal governmental surveillance. The term subjects should be used in place of "persons aggrieved" or "persons injured" to emphasize that Congress rejects the *Tatum* decision, or, more precisely, has made a legislative finding that injury must be presumed once the plaintiff has shown that he was the subject or target of illegal monitoring. Any such provision, of course, would have to be written to effectuate new statutes defining the legal limits of government surveillance affecting values and interests protected by the Bill of Rights.

Jurisdictional amount

Another obstacle to redressing CoIntelpro abuses is the requirement that the plaintiff, in order to invoke the jurisdiction of a federal court, must allege that the "matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs." 28 U.S.C. Sec. 1331 (a).

Although the courts have been willing to accept the most strained valuations of the amount in controversy when constitutional rights are at stake, the Justice Department continues to invoke the requirement. Occasionally, the Department wins and the plaintiff is told he must provide further evidence of the money value of his hurt. Cf. *Oesterreich v. Selective Service*, 303 U.S. 233, 230 (1968). Thus, the primary function of the requirement is to allow the government to harass inexperienced attorneys, confuse judges, and run up the costs of litigation.

Distinguished commentators have noted that the requirement, intended to reduce the volume of diversity litigation in federal courts, has no legitimate function in cases involving federal questions. Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 *Law & Contemp. Prob.* 216, 225 (1948); Friedenthal, "New Limitations on Federal Jurisdiction," 11 *Stan. L. Rev.* 213, 216-218 (1959). It is completely unjustified when applied to cases involving the freedoms of speech and assembly—rights "not capable of money evaluation." *Hague v. C.I.O.*, 307 U.S. 406, 529 (1939) (Stone, J.).

Congress, itself, has recognized this point by suspending the jurisdictional amount requirement in several statutes involving civil rights and liberties. Federal courts have been granted jurisdiction, without regard to the amount in controversy, over action to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the federal Constitution, or by any federal civil rights statute, 28 U.S.C. Sec. 1343(3). Congress also has suspended the requirement for victims of illegal wiretapping (18 U.S.C. Sec. 2520) and for persons denied the right to correct federal records pertaining to them (5 U.S.C. Sec. 552a (g) (1)).

In 1969 the American Law Institute recommended elimination of the amount in controversy requirement in all "cases in which the plaintiff claims violation of his constitutional rights by a federal official. . . ." Study of the Division of Jurisdiction Between State and Federal Courts (1969), p. 172. The time has come for Congress to take that recommendation.

Discovery

The most serious impediments to successful civil suits against improper surveillance and harassment have arisen in the area of pretrial discovery. In most civil suits, defendants are obliged to come forward on demand with evidence in their possession relevant to the case. Where suits have been brought against government officials for wrongful electronic surveillance, however, Justice Department attorneys have claimed that the wiretap logs are "privileged" against disclosure because they relate—or so it is alleged—to "national security."

Executive privilege is too complex a subject to be discussed in the context of this testimony, but a few observations may be in order. First, the term itself is much too broad and ought to be broken down—and preferably in legislation—into manageable concepts like an "advice privilege" for confidential, non-criminal advice among policy-makers and their staffs, a "sources and methods" privilege for certain sensitive techniques of investigation or intelligence-gathering, and a military and diplomatic secrets privilege for matters like battle plans, armaments, or negotiating positions. None of these privileges should be absolute, each should have a time limit on its invocation, and each should be defined in terms of the competing social interests the judge should weigh.

Second, formal procedures should be prescribed to govern the assertion of legitimate privileges. In most instances, assertion should be a formal act of the agency involved, approved by its chief executive. The assertion should be more than a mere claim; it should take the form of an in camera submission of evidence and arguments to the court. In some instances, the hearing should be open to plaintiff's counsel so that the inferences and claims drawn by the government can be challenged. To facilitate appeals and assure careful decision-making, judges should be required to write opinions justifying their denials of discovery. Interlocutory appeals ought to be permitted under expeditious procedures.

Third, successful invocation of an "executive privilege" ought not to result in dismissal of the suit, but should—at least at the judge's discretion—result in a default judgment against the government.

Fourth, since class actions are the only economical way to effectively challenge broad programs of surveillance and harassment, the government should be required to disclose—at least to the court—who the members of the affected class are.

These suggestions by no means exhaust the possibilities for reform. Before offering any more, however, I would welcome the committee's response.

Mr. EDWARDS. I wonder if we could have the next witness make her statement on the same subject and then have the questions?

Mr. DRINAN. It is up to you. It would be agreeable.

Mr. EDWARDS. Would it be agreeable if we did that and then had questions as a panel?

Mr. PYLE. Yes.

Mr. DRINAN. While Hope Eastman is coming forward, I just would like to ask this witness, Mr. Pyle, something about the paid informants that you have all through your proposed statute. And you can respond to this later if you would. I have some difficulty in incorporating that type of character into the proposed Federal statute. I don't know who these paid informants are. As you know, they did 85 percent of all the work in the COINTELPRO program according to the GAO study. But we can discuss that later.

Let me say also for the record, Mr. Chairman, and also Mr. Pyle, that in today's record I have inserted your fine article in the Nation magazine. It is page E2847. I will give you a copy later.

I yield back to the Chairman.

Mr. EDWARDS. Our next witness represents the American Civil Liberties Union.

The formal presentation will be made by Ms. Hope Eastman, associate director of the ACLU here in Washington since 1969.

Ms. Eastman received her law degree from Harvard in 1967 and was with the Office of the Legal Advisor with the Department of State. She is currently vice chairperson of the American Bar Association Commission on Rights for Women.

Ms. Eastman is accompanied by Mr. Mark Gitenstein, who is temporarily working for the ACLU foundation, involved in research on a variety of subjects.

Mr. Gitenstein is an attorney who is well versed in the issues before us. Mr. Gitenstein worked for Senator Ervin's Subcommittee on Constitutional Rights and played an important role in the drafting of the Ervin bill on criminal justice information. Mr. Gitenstein was also a member of the staff of the Senate Select Committee To Study Governmental Operations With Respect to Intelligence Activities, and in that capacity was a principal author of the "Report on Intelligence Activities and the Rights of Americans."

Ms. Eastman, I understand that you will give an opening statement on behalf of the ACLU and then we will proceed with the panel. We are glad to have you here.

Ms. Eastman has been a friend of the chairman and the members of the subcommittee and the committee for a number of years.

TESTIMONY OF HOPE EASTMAN, ASSOCIATE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION, ACCOMPANIED BY MARK GITENSTEIN

Ms. EASTMAN. Thank you for your kind words, and for the opportunity to appear here this morning.

I have a prepared statement which I do not wish to read, but would like inserted for the record. I would like to summarize it. Also, I am counting on my colleague, Mark Gitenstein, to poke me in the elbow when he thinks I have left something out. So if you see him do it he will have something to add.

I would like to start this morning by raising several points which appear in my prepared statement and some which flow from listening to Professor Pyle. The Justice Department has issued these regulations on domestic intelligence activities. It has not yet released, although it indicates that it is intending to at some time in the future, guidelines on regular, ordinary criminal investigations. It is essential in attempting to evaluate whether there is a need for domestic intelligence—and as you can tell from my statement we do not believe there is either the need for or constitutional room for domestic intelligence investigations—to look at the criminal guidelines first before evaluating the claims made by the Justice Department with respect to domestic intelligence.

Actually Mark has just handed me something which I have not noticed before, and I might just begin by reading it to you. It is a request from the Internal Security Division in March 1969 advising the FBI that the Justice Department was considering a grand jury investigation of some serious future campus disorders with a view toward prosecuting under the Anti-Riot Act, the Smith Act, the Vorhees Act, and statutes on sedition, conspiracy, and insurrection. It appears at page 508 of book 3 of the Church committee report, the supplementary detailed staff report. I would like you to listen to what the

Justice Department conceives that under this ordinary criminal investigation it can ask the FBI to do. The Internal Security Division asked the FBI:

To secure in advance the names of any persons planning activities which might fall within the prescription of any of the foregoing statutes. It would also be important for us to know the identities of the officials of any participating organizations who have custody or control of records concerning the activities of such organizations which we would seek to obtain by means of subpoenas duces tecum—

And I might add parenthetically or by other means:

It would also be most helpful if you were able to furnish us with the names of any individuals who appeared at more than one campus either before, during, or after any activity of disorder or riot, and the identities of those persons from outside the campus who might be instigators of those incidents.

The FBI was asked to use not only its existing sources but also any other source you may be able to develop.

Now, this looks an awful lot like the domestic intelligence authority that the FBI and the Justice Department is now seeking. All I want to do with this at this point is to urge you to ask them: Just what can you do in the context of a traditional criminal investigation? I know in preparing for this testimony I found an article on the front page of the New York Times about two postal aides being held by Federal officials in an \$800,000 theft at Kennedy International Airport. It details how they had been tipped off that the crime was going to continue. They had kept them under surveillance for several weeks and did quite a number of other things. Again, this is all in the context of a traditional criminal investigation. So when you go beyond this you really have to ask yourself the question which I address a little later in my testimony. I think it is what Chris raised with his example about the Ku Klux Klan. What they are really asking you, when you set all the language and detailed provisions altogether in one package, is for authority to keep track of the political views and the political activities of people, some of which, of course, involve potential violence—I am not denying that—but to keep track of those activities of youths, people, personalities, and organizations so that someday they can predict the violence and presumably stop it.

I think that that is just an unacceptable degree of authority in a democracy, especially in a democracy that is governed by the first amendment. While no one wants to say, of course, that we have to let the bombing occur, living under the Constitution is not always easy. As someone else I know is credited with saying, "the Constitution is not made for sunny days." You must make hard choices. This may be one of those hard choices. Although some information may be potentially useful—and we will come back to that a little later in the testimony—it is just too dangerous to let the Government collect it.

Chris referred this morning to the slippery slope. I have referred to that in my testimony today. What began in 1936 as a limited program to keep track of Communist and Fascist subversives, led us to the program against Dr. Martin Luther King. While the Attorney General may well be making good faith efforts to put a stop to these activities, he is only one person, and he is not going to have that job forever. Even if I agreed with him that he was doing a good job—which I don't, because I don't agree with the guidelines—you can't

write laws just for well-meaning people. You have to write laws for the Richard Nixons of the world. That is what we are coming here to ask the Congress to do.

The second thing which you must address--and I think it was highlighted by Congressman Drinan already this morning--is the role of informants. That is the one part of this whole puzzle that nobody inside the Government seems willing to talk about. If I understand it correctly, the Church committee didn't get the information it wanted on the use of informants, the GAO did not get the information it wanted on the use of informants, and you haven't gotten the information you want on the use of informants. And yet about 80 percent of the domestic intelligence investigations use informants.

I noted something very interesting in reading the guidelines again last night, and that is that even during the preliminary investigation, checking with existing sources and existing informants is permitted. This puts a premium on earlier Government efforts to insert informants as widely as possible, so that when the next investigation comes, those are established informants. Nowhere in these guidelines does anybody tell you anything about how they make the judgment to insert the informer in the first instance. Once the informer is there, all bets are off, and they can go to those informants during the preliminary investigation.

I think I would not want to delay the corrective legislation I will propose while you get all the answers on informants. But before authorizing their use, you should insist on answers to these and related questions. I would not accept the Attorney General's protestations that warrants are a bad idea for informers. I am not sure that that is the right or only solution but certainly some solution which smokes this information out of the Justice Department is an essential element of any program.

Now, in my prepared testimony we make two basic points about the domestic intelligence program. One is that it inevitably violates the Constitution. To illustrate, I would like to read you one thing which I found in your hearings. The Attorney General in his testimony before the subcommittee on February 11 started out by saying:

The proposed domestic security guidelines proceed from the assumption that Government monitoring of individuals or groups because they hold unpopular or controversial views is intolerable in our society.

On that same day, however, FBI Director Kelley observed,

I feel I would be remiss in my duties if I were to ignore any group that advocates violence to accomplish its objectives.

Director Kelley's statement is not consistent with the *Bradenburg* case in which the Supreme Court said until you come a lot closer to violence, until the violence is imminent, such advocacy is protected speech no less than any other protected speech.

Now, the Attorney General also, it seems to me, made a significant concession on that day, saying that under the guidelines the preliminary investigation would be opened simply as a reaction to the Weather Underground Newsletter which says: "The rulers have set the time for the party; let us bring the fireworks." This is protected first amendment speech. At some point later it crosses over the boundary. But up until the point in time that it does cross that boundary, it is first amend-

ment protected speech, and should be none of the Government's business.

It should be noted that the guidelines and the Church committee recommendations leave open room for investigation of lawful activity because of alleged inadequacies in the criminal law. As we have said to them we say to you, it is relevant in another context, too, the wiretapping context where they argue that the reason they have to authorize new kinds of wiretapping is that the existing espionage laws are inadequate. The answer is, as the Church committee said, to change the laws now, make it clear in the criminal law what is prohibited by law, and then investigate only that.

I would like to refer you to my testimony on page 8, because I think that it is an important point that the Church committee made and it appears at the bottom of my testimony:

One of the advantages of confining the FBI and the Justice Department to criminal investigations is that there are traditional external restraints inherent in the criminal process which disappear in the domestic intelligence context.

I think that fact has been overlooked. There are diverse U.S. attorneys, grand juries, defense counsels, discovery, the trial judge, the jury and the appellate process. But none of these restraints exist in the domestic intelligence area.

Now, the next point that we make is really not my essential point. My essential point is that the first amendment prohibits domestic intelligence. But the fact is that according to the investigations so far undertaken, domestic intelligence has not worked. And I am not going to repeat for you the statistics that came out of your GAO report. But in 17 cases, a total of 2 percent, where they gained advance knowledge of possible violence, it turns out in many instances to be minor demonstrations. That is all they can come up with. It seems to me they have not made their case. Certainly when you are involved in infringing first amendment rights by definition in domestic intelligence, then they should not be allowed to get away with it.

Having said all this, what do we propose as a solution? I would not like to see the Congress involved in simply rewriting the Attorney General's domestic guidelines. I think what you need to do is a set of fairly simple things: Prohibit domestic intelligence; prohibit counter-intelligence programs; repeal the speech crimes sections of title 18 which serve as the basis for the domestic intelligence jurisdiction. I should add parenthetically two things about that. There is a limitation, imposed by Supreme Court decisions on those statutes which apparently has never reached the FBI; it still interprets the statutes as written on the books. Despite the fact that 15 years ago the Supreme Court construed them more narrowly, they are still being interpreted as if they were valid on their face.

There was no dissenting vote in the Church committee for repeal or modification of these statutes. It is not at this point in our history a really controversial act.

Mr. EDWARDS. Shouldn't those statutes be eliminated in the revision of the Federal Code because of the court decisions?

Ms. EASTMAN. That is my next point that I am going to come to. In the negotiations over the revision of the Federal Criminal Code, Senators McClellan and Hruska have agreed to drop those sections.

Now, I would not urge you to wait for S. 1 to become law to make these changes. As you know, we continue to oppose enactment of S. 1 even the negotiated changes. I am hopeful the Congress won't enact S. 1 in its present form. Don't wait for them. Go forward as part of the package on the FBI and repeal those "speech" crimes.

The third thing I would like to discuss is where I actually intended to begin my testimony—that is, with a look at a set of proposed intelligence reform proposals which have been adopted by the ACLU. They aren't limited to the FBI; they cover the CIA and all the other intelligence agencies of the Government. They proceed from several basic assumptions. With respect to the FBI, that assumption is, as I have outlined this morning, that there should be no domestic intelligence, that the FBI should be limited to the investigation of crimes. Similarly, with respect to the CIA and the other intelligence agencies, we recommend a prohibition on peacetime espionage and on peacetime covert activities. The reason is similar to our FBI position: The existence of these activities—whether espionage or domestic intelligence—inevitably lead to violations of our liberties which cannot be prevented by less drastic remedies. To support these restrictions, particularly with reference to the FBI, the ACLU has come up with a series of proposals which are attached to my testimony, the highlights of which are on page 2. I would like to just urge some of them on you at this point, as what I would see as perhaps title III or IV of the bill on domestic intelligence. Title I, ban domestic intelligence. Title II, repeal the speech crimes, and title III, set up some remedies and sanctions. First and foremost among them is a civil remedy statute. And a civil remedy statute which leaves no room, I might add—without getting off into a whole other discussion—for the Supreme Court to say, oh, no, that is not a constitutional right, or that is not a first amendment right. I think Chris is right, you can't write a statute that makes infringement of first amendment rights the trigger for the civil remedies. The Burger Supreme Court has consistently, when confronted with a new view of what might be covered by the first amendment, said, no, the first amendment doesn't cover that, or no, the right of privacy doesn't exist there. They have been very inhospitable to citizen suits attempting to redress constitutional and civil rights violations, as you are undoubtedly well aware.

Perhaps this is the right place to insert for the record some testimony which the ACLU gave to the Senate last week before Senator Tunney's Subcommittee on Constitutional Rights with respect to the Burger Court's hostility to citizen suits. I must say that although I am reasonably familiar with the cases, when I sat down and read the testimony in which they were all discussed together, I was appalled. The degree to which the Burger Court has said, "Don't bug us with this stuff," is just frightful.

Mr. EDWARDS. Without objection the material will be made a part of the record.

Ms. EASTMAN. Thank you. To me it very strongly buttresses the case for strong statutory civil remedies to enforce whatever limits you create. It is a comment that relates not only to the FBI, but to other substantive rights that you might create. I know you are also considering legislation on arrest records and other criminal justice records.

Carefully drafted civil remedies that repair all of these court-conceived loopholes are essential. We would be delighted to help draft such statutes. And I have at my side perhaps one of the greatest living experts on civil remedy statutes whose help I am sure I can volunteer as well.

Mr. EDWARDS. It is difficult in the area you describe to create a criminal remedy for a local policeman who by mistake or otherwise releases an arrest record which is public information anyway, but which just happens to be prohibited because of the filing system. It is very difficult to formulate such legislation.

Ms. EASTMAN. I would like to comment a little bit on the criminal remedy, too. I know Chris talked about this. Maybe it is because of spending too much time in Washington, or having been here through the last 7 or 8 years, but I don't have any faith in criminal remedies when the conduct you are trying to prohibit is in the Government's interest as it perceives it. The Government controls the prosecution of offenses its official commit. For that reason I sharply disagree, and the ACLU sharply disagrees, with Chris' negative reaction toward a special prosecutor. We support 100 percent Mr. Drinan's bill to create a special prosecutor for the intelligence agencies. I urge that concept on you as a part of this package, and whatever other packages the Judiciary Committee comes up with on intelligence reform.

I would like to add a couple of other things which come out of the package of reforms. These appear on page 2 of my testimony. One issue which I think the Judiciary Committee has not paid adequate attention to is the fate of the whistleblowers, the Ernest Fitzgeralds of the world. At the present time they take unbelievable risks, as I am sure I do not have to tell you, by revealing Government misconduct. I think the Congress needs to step in and say, "no, no, these are heroes, not villains." This is one of the main sources for the Congress and the people to get their information. We must protect these people by making it impossible for the Federal Government to retaliate. Whether you make retaliation against a whistleblower a civil or criminal offense I am not sure. If you had a special prosecutor I would have more faith in making it a criminal offense to retaliate. But in any event, the retaliation ought to be prohibited against whistleblowers.

Next, we propose—and I guess this may not be within your jurisdiction, but I am not sure—drastic limits on the Government's ability to classify and keep secrets. I guess that is really a Government Operations Committee issue. But to the extent that you have the powers of persuasion there, I would urge that this committee recommend as part of its report on the FBI, if nothing else, that that committee act on this problem.

The ACLU is also proposing that it be made a Federal offense to lie to Congress, and to the public, with certain carefully drafted limitations. I recognize that this is a controversial proposal. The reaction to it from some people is fear that it would be used against the Daniel Ellsbergs and the other dissenters in Government. My answer to that is, the Government does not need that. They have plenty of other tools. Daniel Ellsberg might have gone to jail for 110 years under existing law. If you had a special prosecutor, and if Government senior officials, other than elected officials who are not subject to recall at the polls,

could be penalized for lying on vital public issues, that would be very important.

In sum, we are urging on you some simple reforms. It is not a complicated task for this subcommittee and for the Judiciary Committee to write a bill which will put the FBI out of the domestic intelligence business, which will create remedies and sanctions, create a special prosecutor, repeal the Smith Act—those are all fairly clearcut things to do. The hard job is to resist the Government charge that you are tying their hands so that they cannot prevent violence or overthrow of the Government. To that charge, I urge you to reply. As I said before, the Constitution is not made for sunny days; there are hard choices to be made. To quote what is at the end of my written statement, a favorite phrase of Senator Ervin's and an appropriate response in this area: "Necessity is the plea of tyrants and the creed of slaves."

Mr. EDWARDS. Thank you very much.

Mr. Gitenstein.

Mr. GITENSTEIN. I just wanted to underline two points that Hope has made. And that is that, beginning in January of this year, when I was working with Senator Mondale on the Domestic Subcommittee of the Church committee, we knew that the toughest issue we would face in drafting our recommendations was not whether or not the FBI should be authorized to investigate King, or the Women's Liberation Movement, or the NAACP, or the Southern Christian Leadership Conference. Those were obviously inappropriate investigations, and I assume that most of the members of your committee would agree. The tough issue is the prevention of violence and, of course, espionage. So we asked the Bureau to come forward with their strongest cases. "Show us how you can justify continued domestic intelligence in this area." We went through as many cases as we could get our hands on. We encouraged the staff and members of the committee to do the same thing. I am sure you can get access to the same documents we did. And they provided us with some 20 or 30 cases—and I was appalled. I agree that I was skeptical when I started. But the cases are not strong. There is not a record for going beyond criminal investigation. And I think it is incumbent on any committee that attempts to deal with this issue to search your minds and hearts and look at the record, and the statistics. The GAO report was suggesting that they didn't get to see the real cases, though. And I think, as Members of Congress, you ought to be able to see the real files. We saw them, and they're not compelling cases.

So, picking up on Hope's last point, that necessity is not an inappropriate reason for violation of civil liberties—domestic intelligence, it is not even necessity. You can't prove that it is necessary or that it is effective. Sure, there were cases of real violence that they might have prevented, or possibly some cases that they did prevent. But they are few and far between.

And the other point is, certainly after these guidelines you are not going to prevent much violence. The guidelines tend to permit surveillance of people who don't engage in violence. They still allow you to throw the net fairly broadly, but they are not going to prevent much violence, because the key to preventing violence, going back to Congressman Drinan's point, is informant penetration. And they place some limitation on informants. I think when you analyze the cases

in the light of the guidelines, you will find that you don't prevent much violence but just permit continuing surveillance.

And the other point about preventing violence is that it inevitably will permit the surveillance of lawful activities in violation of the *Brandenburg* case. The *Brandenburg* case, as I read it, says that you can't proscribe advocacy of even violence, unless it is incitement to riot or imminent violence. I am reminded of a beautiful example of where the Bureau takes the direction by the Department to investigate the advocacy of violence, whether Klan violence or whatever, and runs with it—an example of the failure of communication between the prosecutor and the investigator. Hope points out the same problem in juxtaposing the Kelley quote and the Levi quote as it occurred in your hearings. The example I have in mind appears on pages 512 and 513 of books III of the Church Committee report, where you find a Bureau memorandum about how to choose people to place on the security index. And they are talking about the New Left.

Mr. DRINAN. What page is that on?

Mr. GITENSTEIN. Pages 512 and 513.

Ms. EASTMAN. Could we submit those pages for the record? Would that be helpful?

Mr. EDWARDS. Yes; they will be accepted for the file. We will make the decision as to whether they will be part of the record.

Mr. GITENSTEIN. And here you have Washington headquarters sending out a directive to the field as to who is to go in the security index. Of course, the security index was essentially those people who are to be continually investigated by the Bureau. And they begin by saying, people in the New Left are inevitably involved in violence. And here again this is the kind of investigation you might be permitting under the Levi guidelines.

Ms. EASTMAN. Not "might," Mark I think you "will" be permitting that under the Levi guidelines.

Mr. GITENSTEIN. And here again you have the investigators, that is, the FBI, trying to define how are you going to select out who in the New Left is an appropriate target and who isn't. And I am quoting from the document:

The emergency of the New Left as a subversive force dedicated to the complete destruction of the traditional values of our democratic society presents the Bureau with an unprecedented challenge. Although the New Left has no definable ideology of its own, it does have strong Marxist existentialist, nihilist, and anarchist overtones.

This is a thing you find about the documents—they can't define it, just like you can't define the kind of people who are violence prone.

I am reading from page 512 now, a Bureau document.

Mr. EDWARDS. What date?

Mr. GITENSTEIN. That would be April 2, 1968. This is an old document, but it does illustrate the problem. And it is trying to direct the people in the field as to how you are going to select the violence-prone members of the New Left.

And it should be borne in mind that even if the subject's membership in a subversive organization cannot be proven, his inclusion on the security index may often be justified because of the activities which establishes anarchist tendencies.

In this regard you should constantly bear in mind the public statements, the writings and the leadership activities of security investigations which establish them as anarchist—

That is a proper area of inquiry.

Mr. EDWARDS. I think you have to give the guidelines credit for they would nullify that 1968 statement. The guidelines do say, "which involve or which will involve the violation of Federal law." I think if you ask the FBI today, they would tell you that they are no longer in that area. According to them—and we haven't as yet checked it out—they have reduced their domestic intelligence cases under the guidelines, and as a result of the guidance and assistance of the various select committees and other committees they have reduced their domestic intelligence cases from well over 100,000 to an existing 5,000.

Mr. GITENSTEIN. I think that is fair. The problem is that this issue has not been resolved in this sense. Those guidelines permit the predication of investigation upon a "specific allegation or information." The Church committee uses similar language. The point is, what is that allegation or information? What are you investigating? What triggers it? And the point is, I was never able to pin a Bureau witness down on the record that speech, association, public statements, writings, leadership—and later on in the same document it says, the rejection of law and order, the advocacy of violence as an abstract concept does that trigger an investigation? They won't say no. The point of the matter is that they can't say no. If they are going to prevent violence it is impossible not to trigger your investigations on these kinds of facts. And in all the cases where they actually try to prevent violence they did trigger investigations on such advocacy or association.

Ms. EASTMAN. Indeed the quote that I gave you from FBI Director Kelley says just that, that he would be remiss in his duties if he did not pay attention to advocacy of violence.

Mr. EDWARDS. I understand the statements of Director Kelley. He has made a number of speeches, portions of which are distressing. But I still think you get back to the basis of investigation based on the language in the guidelines—I am not saying that I approve of them. However, I don't think it is quite fair to go back to the 1968 statements either—"which involve or will involve the use of force and violence and which involve or will involve the violation of Federal law."

Ms. EASTMAN. When?

Mr. EDWARDS. That is paragraph 1 of the guidelines. You are almost at probable cause for commission of a crime.

Ms. EASTMAN. Will violate Federal law and the banning of violence when?

Mr. EDWARDS. I know that they are not specific.

Ms. EASTMAN. But that seems to me, unless I am missing something, to be a very important loophole, that someone bent on investigating a group that advocates violence and may or may not be doing more. A good lawyer looks at that guideline and says, that doesn't tell me when the violence has to occur. Later on there is discussion about the imminence of the violence, but it is not really a limitation on initiating the investigation. If you are just talking about preliminary investigations, there is no requirement that the violence is imminent.

Mr. GITENSTEIN. And there is no limitation on what kind of facts—in other words, if it is association or speech, whether that can trigger or not trigger an investigation.

Let me conclude with just a summary of the kinds of examples they gave us, which I think are the ones that you will have to grapple with, too. Perhaps they have already presented them to you.

The 20 cases included a lot of really serious violence by Panthers, for example, or Klansmen. The troublesome things about all those investigations that I looked at—and it illustrates this same point—is, first, most of those investigations will be prohibited under the guidelines.

Ms. EASTMAN. Even their guidelines.

Mr. GITENSTEIN. Even their guidelines. They were not prohibited under their old manual sections. They would be prohibited under the Church committee report. So therefore if you are doing this to prevent violence if you want to adopt any restrictions which come close to *Brandenburg*, you are going to cut out prevention of violence. Because in every one of those cases what they had to do in order to prevent the violence was to penetrate a group, target informants, predicate investigations not on specific acts of violence, but on the fact that a Panther chapter in one city was a Panther chapter, not on a specific allegation of specific criminal action or even of any advocacy of violence. In other words the investigation was predicated on constitutionally protected association and nothing more. And what always makes me suspicious of these guidelines, and troubled me by the failure of the Department to pin down this imminence thing, is that the Bureau, if it is really trying to prevent violence, wants to be able to target people based on what they say and do in terms of their association rather than their conduct. It is the only way you can really prevent violence through intelligence investigations. So the words are very important, each one of the words are. And that is what troubles me about this imminence thing. If they are interpreted loosely, the guidelines will permit unconstitutional investigation of speech and association and may prevent some violence. If they are interpreted restrictively I am not satisfied that you are going to be preventing any violence with these guidelines, all you are going to be doing is permitting continued surveillance that is going to serve no purpose.

Ms. EASTMAN. I have nothing further to add except to say that I have a couple of other things I would like to submit for the record.

Mr. EDWARDS. Yes, they will be received without objection.

[The prepared statement of Ms. Eastman follows:]

STATEMENT OF HOPE EASTMAN, ASSOCIATE DIRECTOR, WASHINGTON NATIONAL OFFICE, AMERICAN CIVIL LIBERTIES UNION

My name is Hope Eastman, I am a lawyer and the Associate Director of the Washington Office of the American Civil Liberties Union. We appreciate this opportunity to appear before your Subcommittee to share with you our recommendations for Congressional control of the FBI. As you are well aware, the main goal of the ACLU is to insure that the Bill of Rights is an effective bulwark against governmental erosion of individual rights and liberties.

Congressional investigations of the past few years—the Watergate Committee, the Church Committee, and, of course, the impeachment inquiry by the House Judiciary Committee—have produced a staggering record of governmental disregard for the Bill of Rights. The excesses of the Nixon Administration were no aberration. In the words of the *New York Times*, “the drift into dangerous abuses has been long, steady, and bipartisan in nature.” *New York Times*, Sunday, May 23, 1976, 16.

ACLU PROGRAM: CONTROL OF INTELLIGENCE AGENCIES

The FBI's domestic intelligence role, the major focus of these hearings, is one part of a much larger issue. For this reason, the Board of Directors of the American Civil Liberties Union has adopted a comprehensive set of recommendations

to control the nation's intelligence agencies. A copy of the entire program is attached to our statement.

Although some of these recommendations fall outside the jurisdiction of the Subcommittee, I would like to describe the highlights briefly. At the heart of the recommendations is a prohibition on peacetime covert intelligence gathering and operation by both the foreign and domestic agencies of the government, including the CIA and FBI.

To support these prohibitions and to make them effective, we would propose a wide range of sanctions and safeguards:

First, there needs to be a drastic curtailment of the government's power to classify information and thereby to cover up the kinds of abuses which all of these investigations have revealed.

Second, we would reverse the traditional situation by legislating a prohibition on retaliating against the "whistle-blower" who reveals governmental misdeeds.

Third, we would make it an offense for intelligence agency officials and senior non-elected policy makers to lie to Congress and the public about activities which Congress prohibits.

Fourth, recognizing that despite the wide-ranging illegal activities which have been revealed prosecutions have been few and far between, and recalling the Justice Department's twenty-year agreement with the CIA to let the CIA make the decisions about prosecution of CIA officials, we would create a Special Prosecutor whose mandate was limited to investigation and enforcement of the statutes which control the intelligence community. Federal officials whose duties were other than ministerial would be required by the criminal law to report violations of the Congressional statutes to the Special Prosecutor.

Fifth, we would couple this with a comprehensive civil remedies statute to enable those whose rights were violated by the intelligence agencies to sue and recover damages.

The remainder of the recommendations involve further proposals to reduce secrecy, to create publicly-determined charters for the intelligence agencies which limit the scope of their authority and their power to exchange information, to restrict investigative techniques, and to provide for effective Congressional oversight.

ACLU PROPOSAL: NO FBI DOMESTIC INTELLIGENCE ROLE

In the area of FBI domestic intelligence, our recommendation is a simple one. The FBI should have no such role. It should be instead limited to investigating crimes which have been, are being, or are about to be committed. The investigation by the FBI of people who are not engaged in criminal conduct is fundamentally inconsistent with the tenets of our democracy and will inevitably involve inquiry into First Amendment-protected activity. Moreover, even when unencumbered by the variety of restrictions proposed by the Attorney General or the Church Committee, it has not worked.

Before discussing those points with you, I would like to raise three questions on which I think we all need more information:

What will the Justice Department's promised criminal investigation guidelines contain? Obviously the FBI, when alerted to a threatened crime, has adequate ways to step in without waiting for the crime to be committed. Neither the FBI nor the Justice Department has ever been very specific about what they feel they cannot do within that framework. Yet they seek this broader authority which inevitably will focus on speech as one of the main indicators of future possible violence.

What really is the role of government informants in existing domestic intelligence investigations? The Church Committee, the GAO, and members of this Subcommittee have expressed grave concern about their activities. Few facts are really known. Yet the Attorney General argues that the matter be left in his control.

What is the relationship between the role played by these informants and the Department's assertion that they cannot always use the traditional means of preventing a crime, i.e. arrest, prosecution, and conviction? Are they really telling us that they are closing their eyes to crime in order to preserve ongoing surveillance?

DOMESTIC INTELLIGENCE THREAT TO FIRST AMENDMENT INEVITABLE

Returning to the discussion of our proposal that Congress prohibit all domestic intelligence, we begin, as others have done, with the oft-cited words of Attorney General Harlan Fiske Stone:

... the Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct, and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish.—New York Times, May 13, 1924.

Three days after making that statement in 1924, Attorney General Stone issued orders to his new Director of the FBI, J. Edgar Hoover, providing that "the activities of the Bureau are to be limited to investigations of violations of law." "Intelligence Activities and the Rights of Americans," Book II of the "Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities," U.S. Senate, 94th Congress, 2nd Session, Report 94-755 (April 26, 1976), 23-24, hereinafter cited as Senate Report, Book II.

Hoover himself once observed: "Our agents cannot be used as instruments for social reform. They are law-enforcement agents. Their job is to gather facts when there is an indication that a federal law has been violated."—Pat Watters, Stephen Gillers, "Investigating the FBI," 420 (Doubleday 1973).

However, he did not live by that view or indeed by the Stone directive. Once the FBI began, at President Roosevelt's request in 1936, to go beyond investigating crimes, it started down the "slippery slope" which led to Cointelpro, the wiretapping and attempted blackmail of Dr. Martin Luther King, and the Huston plan. Those engaged in domestic security were guided not by law, ethics or morality, but by pragmatism. As one agent told the Senate Committee, the Constitution and law were "not given a thought." Senate Report, Book II, 14.

The Attorney General's March 10, 1976 guidelines on domestic security investigations are offered to cure these abuses. FBI Director Kelley, in a widely covered dramatic statement, has apologized for the past practices of the FBI. Yet the Attorney General's guidelines will not stop the abuses. As the General Accounting Office has found, "the language in the draft guidelines would not cause any substantial change in the number and type of domestic investigations initiated." Comptroller General of the United States, "Report to the House Committee on the Judiciary: FBI Domestic Intelligence Operations—Their Purpose and Scope: Issues That need to Be Resolved (General Accounting Office: February 24, 1976), 150, hereinafter cited as GAO Report.

The recommendations of the Church Committee which would confine domestic intelligence investigations to two areas—hostile foreign intelligence and terrorism—similarly will not end the abuses. The Church Report itself concludes:—

We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses characterized as "vacuum cleaners," sweeping in information about lawful activities of American citizens.—Senate Report, Book II, 3-4.

Indeed, as Senator Philip Hart pointed out in his separate views:

The task of finding out whether a dissident is contemplating violence or is only involved in vigorous protest inevitably requires investigation of his protest activities.—Senate Report, Book II, 361.

The Attorney General, in his testimony before this Subcommittee on February 11, 1976, stated that:

The proposed domestic security guidelines proceed from the assumption that Government monitoring of individuals or groups because they hold unpopular or controversial views is intolerable in our society.—Tr. 656.

Yet on that same day, FBI Director Kelley observed:

I feel I would be remiss in my duties if I were to ignore any group that advocates violence to accomplish its objectives.—Tr. 673.

The Attorney General too conceded that under their guidelines, a preliminary investigation would be opened as a reaction to a Weather Underground newsletter about the Bicentennial which said: "The rulers have set the time for the party; let us bring the fireworks." This is protected First Amendment speech. See *Brandenburg v. Ohio*, 395 U.S. 434 (1969). Yet, according to the Attorney General, it could trigger at least preliminary FBI surveillance.

It should be noted that the guidelines and the Church Committee recommendations leave the door open for investigation of activities which are in themselves not criminal. In authorizing an investigation of the terrorist who advocates the overthrow of our government, the Committee and the Attorney General also authorize the investigation of a prominent political leader, like Dr. King, upon an unsupported allegation that he might become violent in the future.

Senator Philip Hart pointed out, in his separate views on the Church report, that it is appealing to say the FBI should be permitted to "do everything possible" to frustrate the terrorist in the example I have described. Unfortunately it is impossible to authorize the first investigation without also authorizing the second. Senator Hart went on to say:

. . . In America we must refuse to let the Government "do everything possible." For that would entail spying on every militant opponent of official policy, just in case some of them may resort to violence. We would become a police state. The question, then, is whether a limited form of preventive intelligence, consistent with preserving our civil liberties, can be justified by the expected benefits and can also be kept under effective control.—Senate Report, Book II, 359.

Thus we return to our proposal: that the FBI be limited to the investigation of committed or imminent crimes. Although there is no guarantee that even this limitation will suffice, certainly anything which goes beyond this limitation has been demonstrably unsuccessful in preventing the FBI from spilling over into the investigation of lawful assembly and political expression and the invasion of individual privacy.

Limiting the FBI to traditional criminal investigations brings their activities within traditional confines. As the Senate Committee stated it:

. . . In criminal prosecutions, the courts have struck a balance between protecting the rights of the accused citizen and protecting the society which suffers the consequences of crime. Essential to the balancing process are the rules of criminal law which circumscribe the techniques for gathering evidence, the kinds of evidence that may be collected, and the uses to which that evidence may be put. In addition, the criminal defendant is given an opportunity to discover and then challenge the legality of how the Government collected information about him and the use which the Government intends to make of that information.

This Committee has examined a realm of governmental information collection which has not been governed by restraints comparable to those in criminal proceedings. We have examined the collection of intelligence about the political advocacy and actions and the private lives of American citizens. That information has been used covertly to discredit the ideas advocated and to "neutralize" the actions of their proponents.—Senate Report, Book II, 3.

If Congress were to authorize the FBI to engage in domestic intelligence, which is aimed at predicting crime and gathering intelligence, not prosecution, the traditional external restraints inherent in the criminal process disappear: investigations managed by diverse U.S. Attorneys, grand juries, the role of the defense attorney in discovery, the trial judge, the jury and the appellate process. Congress would in effect be substituting some kind of COINTELPRO-authority (even if the known abuses were prohibited) for the traditional form of deterrence we have found satisfactory for all other criminal activity: swift arrest, prosecution, and conviction. Neither Justice Department control nor the best Congressional oversight is an adequate substitute.

DOMESTIC INTELLIGENCE HAS NOT WORKED

Supporters of an FBI domestic intelligence program argue that some threats are so severe that government cannot wait until they are imminent, but must begin sooner. The primary argument is that only domestic intelligence investigations can frustrate violent crimes. As other witnesses before this Subcommittee have outlined convincingly, that argument is not supported by the record. See, e.g., testimony of Jerry J. Berman, Center for National Security Studies, May 13, 1976.

The Church Committee carefully analyzed this argument. According to the Report, the Committee had unprecedented access to actual Bureau case files where violence was theoretically prevented by intelligence investigations. Yet Senator Hart, who had access to those files, comes to the following startling conclusion:

The FBI only provided the Committee with a handful of substantiated cases—out of the thousands of Americans investigated—in which preventive intelligence produced warning of terrorist activity. Further, most of those few investigations which did detect terrorism could not have been opened under the Committee's proposed restrictions. In short, there is no substantial record before the Committee that preventive intelligence, under the restrictions we propose, would enable the Government to thwart terrorism.—Senate Report, Book II, 359-60.

The General Accounting Office, which reviewed an even greater cross section of cases, also came up with little if any evidence that the Bureau was able to frustrate significant violent activity through intelligence investigations when it was subject to no meaningful restrictions. After reviewing almost 800 actual Bureau intelligence cases, the GAO came up with a paltry 17 cases (about 2% of the total cases) where the FBI gained advance knowledge of possible violence. The actual list of 17 cases is included in the GAO report. The results are absurd. They include such "threats" as "Plans by a subversive group to hold a demonstration at the United Nations to coincide with the visit of President Nixon"; "Planned busing demonstration"; "Plans to embarrass a foreign ambassador by asking questions during the ambassador's visit to a college campus." GAO Report, 141. Of course, there were also serious violent threats, such as possible police ambushes, but the GAO could not determine from the FBI files whether the information on such threats was even accurate or whether the FBI played any role in frustrating the threat.

SIMPLE LEGISLATIVE PROHIBITIONS NEEDED

As we said at the outset, we believe that Congress need only enact a relatively simple statute, one that restates the FBI's jurisdiction in terms of criminal investigations, prohibiting all domestic intelligence activity and banning the collection of information on First Amendment-protected activities.*

We do not believe that it is adequate for Congress merely to pass judgment on the Attorney General's proposed guidelines. There is no statutory authority for the guidelines at the present. Nor has there ever been.

I am sure by now that you are familiar with the history of secret unwritten executive orders upon which the FBI's huge domestic intelligence program is based. For a detailed description, see Senate Report, Book II, 21-137. A consensus has emerged in the Senate Committee, the General Accounting Office, and a special Committee of the American Bar Association that there is no federal statutory basis for FBI intelligence programs. Even former chairman of the House Internal Security Committee, Congressman Richard Ichord, has concluded that "Congress has not directly imposed upon the FBI clearly defined duties in the acquisition, use or dissemination of domestic or internal security intelligence." Senate Report, Book II, 136. FBI Director Kelley too seeks a Congressional statute. In his testimony before the Church Committee he stated:

The FBI urgently needs a clear and workable determination of our jurisdiction in the intelligence field, a jurisdictional statement that the Congress finds to be responsive to both the will and needs of the American people. . . .

The fact that the Department of Justice has commenced the formulation of operational guidelines governing our intelligence activities does not in any manner diminish the need for legislation. The responsibility for conferring jurisdiction resides with the Congress.—"Hearings before the Select Committee to Study Governmental Operations with Respect to Intelligence Activities," U.S. Senate, 94th Congress, 1st Session, Vol. 6, 286.

The ACLU, believing that FBI domestic intelligence operations are without legal foundation, has taken this issue to the courts. The ACLU now has at least two dozen major cases pending in the federal courts which involve federal government surveillance of Americans. The question of the FBI's underlying legal authority to conduct intelligence operations is a potential issue in at least half of these cases. Chief among them are *Jabara v. Kelley*, C.A. No. 39065 (E.D. Mich.) and *Kenyatta v. Kelley*, C.A. No. 71-2505 (E.D. Pa.). While we expect to prevail in these cases, they may not provide a total answer. Even if relief is granted in some or all of the cases, there could be room for the FBI to assert domestic in-

*The statute would also have to repeal 18 U.S.C. 2385-2386, as recommended by the Church Committee. Senate Report, Book II, 339. These "speech" crimes have not been the subject of a prosecution in two decades. The Supreme Court has limited their reach to imminent lawless action involving violence. Yet the FBI interprets them as written and they serve as the basis for widespread investigation of protected speech and association.

telligence jurisdiction over a slightly different factual situation. We need the Congress to act, not to authorize as FBI Director Kelley seeks, but to prohibit.

There is an additional reason why the Congress must articulate the limits of FBI authority by statute. The Department of Justice asserts that one basis for FBI domestic intelligence programs is inherent executive power. This assertion is a clear challenge to this Subcommittee and to the rest of Congress. As the Senate Select Committee pointed out in its report, Congress should "make it clear to the Executive Branch that it will not condone, and does not accept, any theory of inherent or implied authority to violate the Constitution . . . or any statutes." Senate Report, Book II, 297. This is not an academic exercise. Just last week, the Court of Appeals for the District of Columbia reversed the convictions of Bernard Barker and Eugenio Martinez for their participation in the break-in into the office of Daniel Ellsberg's psychiatrist, Lewis J. Fielding. Two of the judges who accepted their plea of good-faith belief that they were engaged in a governmentally authorized operation did so because of the long-standing Department of Justice view—which continues to this day—that the President has an inherent power to order such warrantless searches for foreign intelligence reasons. Had Congress stepped in to reject an assertion of inherent power, that defense would have been unavailable. That kind of Congressional action is no less needed here.

CONCLUSION

The ACLU believes that the FBI must be restricted to enforcement of the criminal law without resort to a domestic intelligence program. We believe that this prohibition must be coupled, as we outlined at the outset, with a series of sanctions and safeguards to insure against Executive Branch misuse of whatever powers the FBI is given and of whatever limits the Congress places on it.

Ours is the simplest approach. It is the only one which will protect our liberties. Advocates of a domestic intelligence role for the FBI will say threats of violence make it necessary. Challenge their contentions. The threats to the domestic tranquillity or the national security they recite are frequently hypothetical and the capability of the Bureau to counter the threats is not supported by the record. It is wise to remember the famous warning that the English statesman William Pitt made to Parliament as it considered repressive proposals of the Crown, and of which Senator Ervin was fond of reminding Congress in the course of his many civil liberties crusades: "Necessity is the plea of Tyrants and the creed of slaves."

AMERICAN CIVIL LIBERTIES UNION,
Washington, D.C.

CONTROLLING THE INTELLIGENCE AGENCIES

Control of our government's intelligence agencies demands an end to tolerance of "national security" as grounds for the slightest departure from the constitutional restraints which limit government conduct in other areas. Preservation of the Bill of Rights as a meaningful limitation on government power demands no less. Government secrecy must be drastically curtailed while restoring citizens' freedom from governmental scrutiny of and interference in their lives. To end that secrecy, limit government surveillance, and create effective enforcement mechanisms the following measures should be adopted:

A. END CLANDESTINE GOVERNMENT COVER-STORIES AND COVER-UPS

1. Prohibit the peacetime use of spies in the collection of foreign intelligence. Abolish clandestine organizations¹ for intelligence collection. Enact precisely drawn criminal sanctions against clandestine governmental relationships with citizens² and against the payments of public or private funds and other things of value, directly or indirectly, to citizens of our own and foreign nations for peacetime spying and espionage.

2. Make it a crime for intelligence agency officials or senior non-elected policy makers willfully to deceive Congress or the public regarding activities which violate the criminal law or limits to be imposed on intelligence agencies.

¹ A "clandestine organization" is one whose agents, officers, members, stockholders, or employees, or its activities, characteristics, functions, name, nature, or salaries are secret.

² "Citizen" includes individuals and associations, corporations, firms, partnerships, and other organizations.

3. Make it a criminal offense for a federal official whose duties are other than ministerial willfully to fail to report evidence of criminal conduct or conduct in violation of these limits to the Special Prosecutor (see (d)).

4. Protect "whistle blowers" in order to encourage revelation of activities which violate the criminal law or these limitations to Congress and to the public.

5. Create a permanent and independent Office of Special Prosecutor to police the intelligence community. The mandate should be limited to the investigation and prosecution of crimes committed by officials involved in this area. There should be time limits on the length of time the Special Prosecutor and his or her staff may serve. The Office should have a mandate to initiate probes of other government agencies to find violations, as well as to prosecute those alleged violators brought to its attention. It should have access to all intelligence community files, and be empowered to use any information necessary for successful prosecution of criminal offenses. If the information is used, it must be given to the defendant.

B. DRASTIC REDUCTION OF SECRECY

1. Limit the authority of the Executive Branch to classify to three categories of information: technical details of weaponry, knowledge of which would be of benefit to another nation; technical details of tactical military operations in time of declared war; and defensive military contingency plans in response to attacks by foreign powers, but not including plans of surveillance in respect of domestic activity.

2. Create a mandatory exemption from classification of any information relating to U.S. activities in violation of U.S. laws.

3. Limit executive privilege to the "advice" privilege, guaranteeing Congressional access to all other information no matter what its classification. Congress would also have access to "advice" when it has probable cause to believe it contains evidence of criminal wrongdoing or violation of the limits Congress imposed by statute or resolution on intelligence activities.

4. Make absolute the right of Congress to release unilaterally information classified by the Executive Branch. Individual members of Congress cannot be restrained by classification procedures from releasing information which contains evidence of criminal wrongdoing or violations of the statutory limits to be imposed on intelligence activities.

5. Define proper roles for intelligence agencies (see (c)) in public debate. Make the budgets for the various intelligence agencies public.

C. PUBLIC DETERMINATION OF AGENCY'S ACTIVITIES

1. Create legislative charters for each major agency, all provisions of which are to be publicly known. These would provide that all activities not specifically authorized therein be prohibited. The details would be required to be spelled out in agency regulations which are subject to public comment and Congressional control.

2. Limit the terms of agency heads. Also increase the independence of general counsels and require their written opinion on the legality of any questions nearing the limits we establish.

3. Limit the CIA, under the new name of the Foreign Intelligence Agency, to collecting and evaluating foreign intelligence information. Abolish all covert and clandestine activities.

4. Restrict the FBI to criminal investigations by eliminating all COINTELPRO-type activity and all foreign and domestic intelligence investigations of groups or individuals unrelated to a specific criminal offense.

5. Limit the IRS to investigations of tax liability and tax crimes. IRS access to, or collection of, information on taxpayers' political views and activities should be barred.

6. Prohibit the National Security Agency from intercepting and recording international communications of Americans, whether via telecommunication, computer lines, or other means.

7. Prohibit the military from playing any role in civilian surveillance. No information on civilians and military personnel exercising constitutional rights should be collected.

8. Establish a separate agency to conduct security clearance investigations for federal employees, judgeships, and presidential appointees. Investigations should not take place without the applicant's authorization. Files should be kept sepa-

rate and limited to the purpose of the security investigation. Exceptions in the 1974 Privacy Act which deny people access to their files should be repealed.

9. Flatly prohibit exchange of information between agencies, except for evidence of espionage and other crimes which may be sent to the agency responsible for investigating or prosecuting them. Existing government files on First Amendment political activities should be destroyed.

D. LIMIT INVESTIGATION TECHNIQUES

1. Prohibit entirely wiretaps, tapping of telecommunications, and burglaries.

2. Restrict mail openings, mail covers, inspection of bank records, and inspection of telephone records by requiring a warrant issued on probable cause to believe a crime has been committed.

3. Prohibit all domestic intelligence and political information-gathering. Only investigations of crimes which have been, are being, or are about to be committed may be conducted.

4. Prohibit the recording of and keeping of files on those attending political meetings or engaging in other peaceful political activities.

5. Make limitations public in regulations subject to public comment and Congressional control.

E. ENFORCEMENT

1. Make it a criminal offense for an official knowingly to order the violation of the above restrictions on both the scope of the agency's activities and its techniques.

2. It should also be a separate criminal offense to fail to report violation of the restrictions described in A, B, C, and D to the Special Prosecutor or to deceive Congress and the public about the same.

3. Establish a wide range of civil remedies for those whose rights have been violated by intelligence officials or organizations, patterned after those now available for victims of unauthorized wiretaps and violations of the Privacy Act. Such a statute should eliminate the present jurisdictional amount requirement; eliminate any need to prove actual damage or injury; declare certain practices to be injurious and provide liquidated damages for those aggrieved; provide for recovery of attorneys' fees and costs; and disallow a "good faith" defense.

F. CONGRESSIONAL OVERSIGHT

Create *separate* committees in each House with: jurisdiction over authorization of funds for CIA, NSA, and FBI; legislative authority on entire range of intelligence activities; oversight of all agencies engaging in intelligence activities; a special mandate to oversee and legislate with respect to: (a) compliance with sharply curtailed classification system, (b) new surveillance technology, and (c) all intelligence activities which might endanger individual rights; rotating membership for Committee members; and limits on the length of time any staff member may work for the Committee.

Adopted by ACLU National Board of Directors, December 6-7, 1975, and February 11-15, 1976.

Mr. EDWARDS. The gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman. And I thank all three of you for your very fine testimony.

Going back to Mr. Pyle first, on page 14 I wonder how you come onto the Secret Service on that. You say: "Similarly the FBI should be forbidden to maintain lists of allegedly potential subversives for roundup purposes." And I would like to call Ms. Eastman's attention, too, to the fact that the ACLU does not mention the Secret Service.

Let's take the ordinary hypothetical that the Secret Service has 11 letters from people in Detroit that they expect to assassinate the President. When the President goes into Detroit what can the Secret Service do?

Mr. Pyle, you say the FBI should not maintain lists. Would you extend that to these people?

Mr. PYLE. I think that to understand what the term "preventive action" means you have to study what the Secret Service does to protect the President. It does work from lists. Several days before the President arrives in town the Secret Service will go into that town and will try to locate those persons who have allegedly threatened the life of the President. If these persons are mentally unstable, the preventive action often will take the form of asking a member of the family to keep the person occupied while the President is in town. Occasionally, I believe, Secret Service agents have even taken such people out to lunch to occupy them while the President was there. Those seem to me rather benign forms of preventive action, and a sensible accommodation. On the other hand, I believe the Secret Service acted improperly in Oklahoma, when it prevented a member of the State legislature from sitting in his own seat in the legislative chamber to listen to a Presidential speech. Experiences such as these suggest the need for drawing lines. If government is to learn from its mistakes—and successes—it must do so by drafting regulations which build on past experiences. The Secret Service has to have lists in order to do its job, but regulations must specify what it can and cannot do to people on those lists. I might add that my greatest concern is not with the mere keeping of lists but the growth of those lists to the point where they become useless as well as potentially dangerous.

Mr. DRINAN. That is another question.

Ms. Eastman, I wonder if it is by design that the ACLU in their guidelines on page 3 mentioned the CIA, the FBI, the IRS, the NSA, and the military, but did not mention the Secret Service?

Ms. EASTMAN. As the drafter of that document I am embarrassed to assure you that it was an oversight on my part.

Mr. DRINAN. Would the same rules apply?

Ms. EASTMAN. The ACLU board of directors did not really address the question of the Secret Service. I can't tell you what the ACLU would say, or whether they would say something different. I think you can draw some suggestions as to what the position might be from the other kinds of things that are prohibited. If the list is limited to people who make concrete direct threats to the President, as was in your example, that is quite different from a list made up of somewhat less concrete factors. Now, when you reach the question of whether the Secret Service can take preventive action other than arrest against those people, I would like to reserve judgment.

Mr. DRINAN. Thank you. My paranoid mind suggests that if we ever did get guidelines for all these other agencies and omitted the Secret Service, that the people in the executive branch would greatly expand the Secret Service.

Ms. EASTMAN. I share that view.

Mr. DRINAN. Mr. Pyle, on page 15 of your prepared statement you waffled on the question of informants. You say that they can be used. You want to institutionalize them. Yet you also say that the FBI should not encourage informants to assume policymaking positions in political groups. If you are going to use informants, why don't you use them all the way? And why do you permit informants to assume non-policymaking positions in political groups but forbid them from going further?

Mr. PYLE. First, I would say that informants are an ancient American institution. They are part of the structure of our Government. So my purpose is not to institutionalize them. My purpose here is to recognize the existence of an institution, and then try to deal with that reality.

Mr. DRINAN. Legalizing the institution.

Mr. PYLE. If I were to write a set of regulations dealing with informants, I would restrict the institution sharply. At the same time, I am not ready to abolish it entirely, particularly in the area of straight, nonpolitical criminal investigations. Also, I have a problem with the definition of what an informant is. There has been much discussion with abolishing informants without stating just what we would be abolishing. It seems to me that if there is a member of an organization who wishes to provide information to a law enforcement agency about criminal activity in his organization, he should be permitted to do so.

Mr. DRINAN. That is not in issue. That is not a paid informant, that is a volunteer.

Mr. PYLE. So our problem is one of definition, of writing regulations dealing with informants, and of deciding where to begin to draw the lines between casual, walk-in sources, voluntary informants within organizations, and then voluntary informants who gradually become paid informants on the FBI payroll.

Mr. DRINAN. You don't gradually become. It is like being pregnant, you are paid or you are not paid. We know nothing of how they become informants, but all of a sudden these characters are being paid out of a secret slush fund about which no one knows anything. The informants have no civil service status. No anything. And there are thousands of them.

Mr. PYLE. When I say gradually becoming informants I was thinking of the usual recruitment procedure which I learned in the military as an intelligence officer, where you begin by providing the person with a little expense money, then get their signature on a receipt, and gradually put them into a dependent status. That is what I meant by the word "gradual."

Mr. DRINAN. The FBI didn't even hire the informants, because according to the GAO study they didn't turn up anything useful.

I wonder in the four suits the ACLU is bringing, Ms. Eastman, whether the status of the informant might emerge there. When they assume policymaking positions in political groups this is especially important. And I wonder if in those 20 suits the issue will emerge of their whole status?

Ms. EASTMAN. I can't say with certainty. Certainly many of those cases involve the role of informers and informants. To a degree, the discovery procedures in these cases will smoke that role out. If my suspicion is correct about the lengths to which the Government will go to protect information about the use of informants, then we may not learn as much as we hope to learn through the discovery process. I think that is one of the reasons why—although I didn't write my testimony that way—the more work I did in preparing to come here this morning, the more I came to the conclusion that informants may be a part of the problem for you to address. Even if we learn enough in the process of discovery, I in no way look to the courts to place any limita-

tion on the use of informants in the first amendment area. I think that if anyone does that, the burden is on you and no one else. If you won't do it no one will help us with it.

Mr. PYLE. Congressman, may I amplify my remarks in answer to your question on my point on page 15 of my prepared statement regarding preventive action?

Mr. DRINAN. Yes.

Mr. PYLE. It seems to me that it would be unconstitutional for Congress to pass a law forbidding persons who gradually move from membership to informant status not to assume positions of leadership within their organizations.

Mr. DRINAN. No; that is not right. We could say that no funds in this appropriation for the FBI shall be used to pay informants.

Mr. PYLE. Yes; that you could do.

Mr. DRINAN. And I hope that, at least, we will do.

Mr. PYLE. That would not, however, stop the flow of information out of that organization. It would stop the payment for it and slow the flood, perhaps.

Mr. DRINAN. It is still a crime, I understand, of nondisclosure, whatever you call it—misprision. Mr. Pyle, do you have any thoughts on whether the FBI should be permitted, with or without a warrant, to commit trespasses solely for the purpose of installing electronic listening devices?

Mr. PYLE. My general reaction of course is no.

Mr. DRINAN. What is your specific reaction?

Don't waffle, now.

Mr. PYLE. I am going to waffle.

Mr. DRINAN. Ms. Eastman, you won't waffle.

Ms. EASTMAN. We are opposed to all wiretapping, and therefore we are opposed to trespassing.

Mr. DRINAN. That is an easy way out. Suppose they go wiretapping with warrants. Would you say that under some circumstances, since they have, let us assume, the right to place the device, would you assume that in some circumstances they would also have the correlative right of entering by trespass or by deceit in order to install the electronic devices?

Ms. EASTMAN. The question goes the other way, because I think, having authorized them to install the wiretap, you have in effect authorized them to trespass. So it is not, having tolerated wiretap, would I tolerate trespass, it is are you willing to authorize trespass to authorize wiretapping?

Your question reminds me of something I really would like to comment on if I might. I would like to make one more insertion for the record: The decision of the Court of Appeals last week overturning the conviction of Martinez and Barker for the break-in in Daniel Ellsberg's psychiatrist's office. Its significance is really most directly related to the warrant in this wiretapping issue, but it is related to this trespass issue, too. The reason the conviction was overturned was because the court found that those two gentlemen, in their relationship with Howard Hunt, had a reasonable belief that they were involved in a Government operation, and given the 20-year history of warrantless surveillance under executive branch control, there was a plausible legal

theory under which Hunt could have authorized them to engage in this break-in. Now, that taught me something that I had not been aware of. When you are discussing leaving room for inherent power of the President to wiretap, you are also leaving room for them to trespass and burglarize, not simply to install the wiretap, but for all other purposes. The Justice Department in those cases presently asserts the right to commit the black bag job under an inherent power to violate the fourth amendment in the name of national security. I can't urge that issue on you enough in dealing with some of these other problems.

Mr. DRINAN. My time has probably expired.

Mr. EDWARDS. But not as to domestic intelligence?

Ms. EASTMAN. Perhaps even there. If domestic intelligence has absolutely no relation to foreign intelligence, then they would not be able to make that argument. But foreign intelligence surveillance affects Americans—what was the argument in terms of Daniel Ellsberg? In the Daniel Ellsberg case, they had one never-verified, never even identified, allegation that he was in touch with the Soviets.

Mr. GITENSTEIN. I might point out how the Church committee dealt with this point. It is sort of complicated. It is covered in recommendations 52 and then 54. On surreptitious entry unrelated to electronic surveillance warrants, general search and seizure law should apply. There should be no surreptitious entries against Americans. Now, against foreigners they would be a bit more flexible. In essence, they authorize "black bag jobs" against foreigners, foreigners being defined as nonresidential aliens who are agents of a foreign power, KGB agents. Now, on the surreptitious entry related to electronic surveillance, the key language is part of that recommendation, which says that the disclosure requirements of the electronic surveillance statute should not apply to an American involved in hostile foreign intelligence activities or espionage. So they are a good bit tighter than current policy. But there is still some flexibility in there.

Mr. DRINAN. Thank you.

Mr. Pyle, do you want to justify burglary, too?

Mr. PYLE. You rephrased your question. And added to a great deal of precision, and added to it a public policy decision, that some kinds of bugging—

Mr. DRINAN. You are not backing away?

Mr. PYLE. No; I am trying to answer. If Congress allows electronic bugging, it seems to me that authority to conduct surreptitious entries to install those devices must be implied. But then you might want to limit the occasions and the places in line with fourth amendment reasonableness requirements.

Mr. DRINAN. Would you agree with the recommendations of the Church committee just cited?

Mr. PYLE. No; because as you know from reading my article in the Nation, I am opposed to drawing distinctions between constitutional rights of visiting foreigners and those of resident aliens and American citizens. The Church committee, in my judgment, would sell out the constitutional rights of visiting foreigners far too casually. The Constitution doesn't speak of different classes of people and persons under the fourth or fifth amendment; it says people and persons. If you want to amend the Constitution, that is one thing. But short of

amending the Constitution you can't read nonresident aliens out of the fourth amendment's protection.

Mr. DRINAN. How sharply do you differ from the position enunciated by Hope Eastman? Or do you?

Mr. PYLE. I am not certain which position you are referring to.

Mr. DRINAN. I think that my time has expired. I yield back to the chairman.

Mr. EDWARDS. Thank you.

We had our own domestic intelligence program here in the House for a long time, you know, and we stopped it.

Ms. EASTMAN. Thanks to you in large measure.

Mr. EDWARDS. Thank you. Father Drinan and the others worked long on it. And the world has not come to an end since the files have been shifted over and locked up in the Archives. When we talk to the Department of Justice and the FBI about the domestic intelligence program and the alleged FBI jurisdictions, they always get back to terrorism, which is a crime. When you ask about the Communist Party they say, we are assessing that. Those political parties with alleged connections to a foreign government are not going to be a part of the domestic intelligence program. I don't think that under these guidelines they can, even though the FBI might want to continue jurisdiction—because it is rather pleasant to have a large jurisdiction—they don't fall within the guidelines. The basis for investigation in the guidelines do not vary too much from yours, except that they will involve the violation of Federal law. As you say, Hope, the guidelines don't say "immediate." What you say is that it must be imminent—the criminal activity is about to take place. That is really the chief difference.

Ms. EASTMAN. But that is an important difference.

Mr. EDWARDS. Of course, it is an important difference.

Ms. EASTMAN. If you don't have that very clear limitation, you have moved back the investigation so far that Mark has to be right, the only thing they really needed this special authority for is to investigate speech very early on, to take speech as some indication of later conduct, and move from there. That is precisely what we say they can't do.

And also—how can I say this nicely? I think maybe you are too trusting of them. You read the guidelines in a restrictive way. But count them to read the guidelines in as unrestrictive a way possible. Of course, the guidelines, as Mr. Pyle pointed out before, have no force of law. They are not even regulations. The next Attorney General is free to disregard them.

Mr. EDWARDS. With your rights in law you can get into difficulty, because before you know it you are licensing things that you have left out of the law.

I might say that that is one of the problems, Mr. Pyle, with your listing of COINTELPRO-type activities that should not be undertaken, is because the law doesn't say that it can't be done, therefore we can do it.

Mr. PYLE. Excuse me. My list would take the form of a regulation and I would not make that a closed-end regulation. The regulation could end with a provision that no activities similar to the above shall

be undertaken, and we might add, without the permission of the Attorney General and notice to the appropriate committee of Congress. I agree with you that legislation cannot begin to specify all of these matters. That is why I have drafted legislation which would turn certain torts into crimes when done by Federal agents with the intent to violate first amendment rights. And I back those criminal statutes up with civil penalties, so that there could be enforcement through private litigation if the reluctance of prosecutors persists.

Mr. EDWARDS. With regard to informants, Ms. Eastman, do you object to the use of informants in criminal investigations by the local people?

Ms. EASTMAN. I think my comments are restricted to areas where the first amendment is more directly involved. I am not prepared to say that they don't need some reexamination, regulation, and control. But at the same time I am not at this point prepared to say that they should be banned.

Mr. EDWARDS. What about the use of informants by the FBI in espionage cases with regard to Russians?

Ms. EASTMAN. Again, I think we are all too ignorant to make those judgments. We don't know how they decide to use them, who the targets are, where they go. It is easy to say, espionage is so serious, it is different, it is not the first amendment. But you don't know what they use them for. I would not be prepared to say they are OK.

Mr. EDWARDS. You have no real problems where the protections of the criminal justice system are present. The big objection to domestic intelligence programs is that these traditional protections aren't there?

Ms. EASTMAN. Right.

Mr. EDWARDS. So in the case of an informant where there is an espionage case involving a foreign agent, there would be some criminal justice protection built into it?

Ms. EASTMAN. Maybe. If you assume that an espionage investigation leads to a prosecution, yes, I think that may well be true. There are controls there that are not present in the domestic intelligence area. I am not prepared to believe that that is the goal of most espionage investigations, however, especially against foreigners. How many prosecutions have there been in the history of the espionage laws of the United States?

Mr. GITENSTEIN. My experience in talking to people at the Bureau is that they don't want to prosecute espionage cases, they want to use persona non grata and other techniques, and in some cases COIN TELPRO.

Mr. EDWARDS. They have by law, they can't lock up Russians.

Mr. GITENSTEIN. Even against Americans they would prefer to continue, for example, electronic surveillance without resorting to criminal prosecution, just to keep tabs on what is going on.

Ms. EASTMAN. There is a question I raised in my testimony. They worry about informants, and they talk about preventive action, whether it is in the guidelines or not. Are they saying they want to let the crime continue so that they can keep watching these people for other more important reasons? That makes me very uncomfortable.

Mr. DRINAN. Ms. Eastman, the regular law of criminal procedure suggests that a law enforcement official, when he is not in uniform,

may induce a person to commit a crime, but he may not entrap that person. It is a relatively sophisticated area of the law. But I wonder how this comes out in connection with what the ACLU recommends on A-2 in its guidelines. Would this be a violation of your proposed guidelines when a person, actually an FBI agent without a uniform, without identifying himself, actually deceives a group of individuals? Should this be a crime under your guidelines, make it a crime for intelligence agency officials willfully to deceive Congress or the public? This individual is not deceiving Congress, but he is deceiving a section of the public. He is a double agent. Would you say that any double agent of that kind, an informant, if you will, or an FBI agent who is an underground agent, would violate that guideline?

Ms. EASTMAN. I don't think that guideline is intended to reach that kind of a situation. It is aimed at senior policymaking officials.

Mr. DRINAN. Should you have another guideline?

Ms. EASTMAN. Yes; I think perhaps we should have another guideline.

Mr. DRINAN. Therefore, would you say that any double agent, any underground person, any person whose very existence depends upon his deception of a group of persons, whether they are citizens or not, that that in and of itself should be permitted?

Ms. EASTMAN. I am not sure, because I haven't thought about what other kinds of situations which do not pose first amendment problems might involve. The law of entrapment is wholly inadequate. Much more needs to be prohibited, not authorized.

Mr. DRINAN. But I think in the area of criminal investigation, narcotics, real espionage, and so on, that we do have a body of law that governs that area. But when it comes to the question of intelligence-seeking, we don't have any law. And I think it is a very difficult question whether an FBI agent can go underground, deceive those around him, denying identity as a law enforcement official and, by that means, obtain intelligence.

Mr. Pyle?

Mr. PYLE. I think we have a problem here. This morning, most of the discussion has moved from intelligence on the one hand to criminal investigations on the other, as if somehow they belong in separate compartments. In the 1940's, 1950's, and 1960's, intelligence and criminal investigations were separated within the FBI. In the military and elsewhere, they were structurally separate, too. But there is no reason they have to be separated. The practice of the FBI since about 1973 had been to justify all of what was formerly domestic intelligence work as the leading edge of vaguely defined criminal investigations, and that is likely to be its practice in the future. The abuses of political rights in the future are likely to take place in what are, at least arguably, criminal investigations. Thus, simply to ban or regulate the use of informants for intelligence purposes won't accomplish much. I would not go so far as to write a law saying that deception by undercover agents or paid informants is to be forbidden. However, I would like to see some regulations, and perhaps legislation, forbidding the facilitation of crime by agents or informers. The *New York Panther* case, the *Hardy* case in Camden, and other instances in which political groups have been charged with criminal activity, involved criminal

activity could not have occurred if FBI informants had not provided the means. And so I would change the rules of governing informants to forbid the Government to provide the dynamite, money, or other means to facilitate the commission of politically motivated crimes.

Mr. DRINAN. That is entrapment. There is a law against entrapment.

Mr. PYLE. No; the current laws of entrapment, as I understand it, do not go that far. As long as the court can find that there was some intent to do some bombing in the minds of the defendants, the Government's role in providing the bombs will not be seen as entrapment. I disagree. In my opinion, intent is not static. It goes up, it goes down, it comes and it goes. When the FBI or police come along and provide people with the capability to do things, this affects their intent, and can become a form of entrapment. I would rewrite the law of entrapment to forbid such practices.

Mr. DRINAN. What about the other side of the coin, where the FBI alleges that they put informants or double agents into organizations, and they get into a policymaking position and they deter the group from violence?

Mr. PYLE. I would forbid that also. It is not the function of Government to engage in the covert manipulation of people.

Mr. DRINAN. Thank you. I yield back to the chairman.

Mr. EDWARDS. Mr. Parker.

Mr. PARKER. Ms. Eastman, the ACLU position, as you have articulated it here this morning, is that there should be no domestic intelligence role for the FBI; is that correct?

Ms. EASTMAN. That is correct.

Mr. PARKER. That they should be limited to investigation of crimes. The language which you used in your statement on page 3 is that the FBI should be limited to investigating crimes which have been, are being, or are about to be committed. Could you define for me crimes which are about to be committed, or what that means to the ACLU?

Ms. EASTMAN. I will give you an example of the one I began with earlier this morning. It appears on page—I think it was the front page of the May 25 New York Times—two postal aides held on \$800,000 theft. Acting on a tip, the FBI kept under surveillance for 2 weeks postal officials who were about to steal the money and spend it. When they had adequate information about what they had done and let them do some of the spending, they arrested them. Now, I am answering a general question by giving an example.

Mr. PARKER. In other words, it would require somehow, the gathering of some information that there was going to be criminal activity?

Ms. EASTMAN. Yes, it is the standard, I think, reasonable suspicion.

Mr. PARKER. Articulate facts?

Ms. EASTMAN. Articulate facts.

Mr. PARKER. But we are talking about what facts under that standard would trigger an investigation?

Ms. EASTMAN. Correct.

Mr. PARKER. Let me impose, then, a little further with some hypotheticals for you. You use as an example on page 7 of your statement the Underground Newsletter. Let's assume that you are the special agent in charge of the Washington FBI office and you receive a note from the head of the American Legion which says, "The rulers have

set the time for the party, and let us bring the fireworks." I assume that would evoke no reaction from you at all?

Ms. EASTMAN. No.

Mr. PARKER. Let us say that the letter came from the chairman of the American Legion, and it says, "The rulers have set the time for the party, let us bring the explosives." Would that change your view at all?

Ms. EASTMAN. No.

Mr. PARKER. Let us say that the letter came to you from the Weather Underground—"The rulers have set the time for the party, and let us bring the fireworks."

Ms. EASTMAN. No.

Mr. PARKER. Let's say a letter came to you from the Weather Underground and it says, "The rulers have set the time for the party, let us bring the explosives."

Ms. EASTMAN. No; I don't think it would change it.

Mr. PARKER. You don't think that the information or the track record of either individual or group which is making those statements is something which might lead you to investigate or trigger an investigation of any kind?

Let me change the facts—

Ms. EASTMAN. Let me answer as to these facts before you change them.

You are offering me one fact and telling me to give you a yes or no.

Mr. PARKER. I will give you more facts.

Ms. EASTMAN. No. What you are really saying is, you have no facts—you have information on the reliability of the source, and perhaps you have information on other violent actions which have taken place. What other information do you have?

Mr. PARKER. I don't have any other source. Let us say it is the Weather Underground newsletter, which has claimed in the past 6 months three different bombings in three different cities?

Ms. EASTMAN. And what has the FBI done in response to those crimes—what have they learned in response to these claims?

Mr. PARKER. At this point, let us say they have learned nothing.

Mr. GITENSTEIN. Are they investigating the group as perpetrators of those acts?

Mr. PARKER. For the purposes of starting this investigation, let us say they are not at that point. Would you start an investigation, is the nature of my question.

Ms. EASTMAN. I would start a congressional investigation as to why they hadn't started an investigation on the other three bombings. You are separating them in a way in which I think it is somewhat unreasonable to assume that they would be separated. You are not making a judgment, then, on the basis of the piece of paper. That is what I am trying to avoid, making that the trigger for the FBI's interest. You have an ongoing investigation, and you are not going to have that sort of a situation when you are limited—

Mr. PARKER. Let me get back to the piece of paper that is the trigger. Let's start with fresh facts. Let's say this is the first we have heard of this, and you are the special agent in charge. The message is, "The rulers have set the time for the party, we are responsible for a bombing

which took place at the New York La Guardia Airport, and we are going to bring the explosives."

Ms. EASTMAN. I think that you have added a vital tenet. I think that the right answer is to investigate the bombing at La Guardia Airport and see where that leads you.

Mr. EDWARDS. Isn't there a possibility of a conspiracy for a new bombing?

Mr. GITENSTEIN. There might even be a straight criminal conspiracy possibility there. But the piece of paper standing on its own, without any evidence that they were engaged in past criminal activity—

Mr. PARKER. So the simple statement, let us bring the explosives, would bring no response from you at all?

Ms. EASTMAN. Let me add my further reaction to the thing you are proposing. It seems to me to highlight the need to know what the criminal guidelines say.

Mr. PARKER. I think it could be stated that most criminal guidelines are going to give the FBI some authority to involve themselves in some type of investigation that they believe is going to be a violation of Federal law, or an allegation of a violation.

Ms. EASTMAN. Of course. But what else?

Mr. PARKER. My question to you is, How does the language in the domestic security guidelines which premises any investigation at the beginning, or the starting of any investigation by the FBI presently, on activity which involved or will involve the use of force or violence, and—not or, but and—which involved or will involve a violation of the Federal law. How does that differ from the language which says, they ought to be able to investigate crimes which have been and are about to be committed? It is a matter of semantics.

Mr. GITENSTEIN. The tough issue for me, Mr. Parker, is trying to distinguish between authorizing an investigation of the Socialist Workers Party, for example, which might fall into those guidelines where violence is not imminent and cases where violence is imminent. In other words, somewhere in the future they say they are going to overthrow the Government and engage in all of those acts, but they haven't decided when that would be. In that case, I would have serious doubts about authorizing an investigation under these guidelines on the one hand, and on the other, authorizing the investigation you are talking about, where you have a piece of paper, a credible allegation, and the suggestion the group engaged in a committed act before, which to me is straight criminal investigation. I would authorize the latter but not the former. The problem with the guidelines is that they appear to authorize both.

Mr. PARKER. I think the question you raise is actually under consideration right now by the Attorney General, and we will find out what the answer is for the Socialist Party.

Mr. EDWARDS. If there is any decision made that the present guidelines would authorize the investigation of the Socialist Workers Party and continuing surveillance of them, then they had better throw them out the window.

Mr. GITENSTEIN. Let me pose one other hypothetical that is going to be tough to deal with, too, and which you should keep your eye on. That is the case of a new group where you have no indication of the credibility of the allegation—changing Mr. Parker's hypothetical a

little bit—where they are not saying that they ever engaged in any criminal act before, they are just making that allegation and the Bureau gets the information, now, what should you do in that situation? My personal view is, you don't do anything unless you have got a credible allegation, the informant is reliable, and you are talking about a specific act. If they say, we are going to blow up the Washington Monument on such and such a date, then you have got reasonable suspicion that they are going to engage in a crime.

Mr. PARKER. You have just included a number of judgment factors in your answer to that. I think what we are searching for is how you put those judgment factors down in black and white on a piece of paper.

Mr. GITENSTEIN. I think recommendations 42 and 43 of the Church committee do it. I have my doubts about 44. I don't know why we had to go that extra step.

Ms. EASTMAN. Also I think one of the problems with the hypothetical which you use and which Mark picked up on is that you can read that, as I did when I selected it as my example, as a fairly nonspecific kind of a threat. Now, if you interpret it as a specific threat relating to possible criminal activity at the Washington Monument on the Fourth of July, you might come up with a wholly different reaction to it. That may be the difficulty in that example. But the example itself is not as clear as I intended it to be as an example.

Could I ask a question of you. Both of you seem to put heavy emphasis on the language of the first section of the guidelines which links violent activity and violent action which is a violation of criminal law as being some extra special safeguard that wouldn't be there if the second clause were not there. I don't understand what the significance of that is. Violent activity—I can't think of any violent activity that would be within the jurisdiction of the FBI in the first instance that is not a violation of Federal law. So I don't know that that adds very much. Maybe I am just misunderstanding your reaction.

Mr. EDWARDS. I think there is a big split in the Department of Justice and the FBI about what it means. I don't think anyone knows exactly what it means. But I do know that in the stresses and strains that are going on over there with regard to the interpretation of that paragraph 1, that all of these organizations of people that have been under investigation for years are being looked at again. It seems to me that the only possible interpretation of that paragraph 1 would have to be that the investigations, the opening of the investigations, the preliminary investigations would eventually—and it will probably take awhile—have to be confined to the violations of Federal law.

Ms. EASTMAN. I don't understand. Maybe this is really my question—do you interpret that second clause as being pointed at the ultimate conduct that they use as the basis for justifying the investigation, or that the facts that come to their attention which would trigger the investigation are themselves violations of the law? Now, if it is the latter, I understand why you think it is a real limitation. If they can only investigate current activities that are a violation of law on the likelihood that some day they will lead to violent activities, that would be a real limitation. But I never read that that way.

Mr. EDWARDS. My interpretation is very strict.

Mr. Parker.

Mr. PARKER. The emphasis I placed on it was to try to find the semantic difference in the language you used, crimes about to be committed, the same language that is in the guidelines.

Professor Pyle, do you have the same view as the ACLU with respect to the facts and circumstances which would initiate investigations using the hypotheticals that we were using earlier?

Mr. PYLE. When I first heard your hypothetical I immediately inferred the Weather Underground's history, including the fact that they made bombs in a townhouse in New York and that they claimed credit for a number of bombings of corporate headquarters. The Weather Underground has such a track record for bombing that if they were to use the word "fireworks," I would know what it meant. I would want the Government to know where that "party" was going to take place, and I would want its people there to investigate, to guard, and to watch. And I would also want the government to examine its records of past criminal investigations of the underground for leads. I don't have any trouble at all with that hypothetical.

There is another hypothetical which intrigues me, because it opens a very fruitful line of inquiry.

Remember the racial turmoil in Birmingham and the bombing of a church Sunday school one Sunday morning in the spring of 1963? All the FBI knew for a fact was that the bombing had occurred. In light of recent events it was reasonable to assume that the bombing was racially motivated. The Bureau also was aware that there was in that city an organization with a track record of night-riding and violent, antiblack rhetoric. But it had no facts linking the organization to the bombing. However, it knew of no other organization in the neighborhood with a similar record of racist criminality. Under those circumstances, was it unreasonable for the FBI to investigate the local Ku Klux Klan as a possible suspect in that bombing? My answer clearly is yes. Of course, I would have to justify that answer on the basis of noncriminal information, including rumor, because there might not be any criminal convictions. This information might also include a great deal of rhetoric protected by the first amendment from punishment, although not investigation--rhetoric full of allusions to the racist violence of the 1870's, 1880's, and 1900's.

Ms. EASTMAN. Your example changes the situation totally. You are talking about, how do you find out from past conduct about a new bombing which is in fact taking place. That is the example that you gave. What we are talking about here, which changes for me the picture entirely, is it is political rhetoric which is vague and talks about some activity some day in the future. That is nonspecific.

Mr. PYLE. In the original hypothesis, the Government had set the date for the "party." So we have a date certain, in the relatively near future. The message talks about "fireworks," and because of the groups' record we knew that fireworks for them can be a euphemism for the explosive. Under those circumstances an investigation--even one using penetration agents--would be warranted.

Ms. EASTMAN. That may go back to the difficulties with the facts that that example contains, as I said before. But it doesn't change the difference between the one you just outlined and that one, which is that the crime had already taken place. Now, to the extent that you have facts that go beyond that simple statement that put the investiga-

tion in the context of an imminent crime, I don't have any trouble with it either. But when it is short of that, and it is just a statement, even just a statement by the Weather Underground, I have trouble.

Mr. PARKER. You want to categorize information gathering, or intelligence information?

Ms. EASTMAN. I want to limit intelligence information to very imminent crimes where the criminal justice system begins to have an interest in it. As I said at the outset of my testimony—what was Senator Hart's phrase? Do everything possible. But we can't do everything possible. And I think that is where you draw the line.

Mr. PARKER. Just one other question of the ACLU. Under the reduction of secrecy section of your statement which you attached to your prepared statement, you talk about making absolute the right of Congress. You suggest that all Members of Congress would be individually and unilaterally free to release any information which contains evidence of criminal wrongdoing. I would like to understand that a little more before I file a formal protest with the ACLU. Isn't there really a danger that by granting to each Member of Congress that power unilaterally to disclose something that has been classified you could be damaging someone's career or reputation, and the information could turn out to be untrue? I am very concerned about an ACLU position which would advocate that.

Ms. EASTMAN. Well, it is certainly by no means an easy issue to develop policy on. And I think that to the best of my ability to convey to you the thinking of the board of directors which adopted this policy after some debate, it is that—again. I am struggling because I don't want to put words in their mouths that are not there—but as I understand it, I think that the judgment is that when you are dealing with an area of massive Government misconduct, a proven track record of massive Government misconduct, and massive coverup by the executive branch of its own activities, and where the Congress had done a creditable job of ferreting out some of that misconduct, with the help of the press, that that right on the part of the Congress is necessary, and that perhaps it reflects—and again I can't speak for the board of directors, because I don't know what is in all their 80-some minds—but I think it reflects a judgment that the rights of Government officials may be different from the rights of ordinary citizens.

Mr. PARKER. I think we argued during the impeachment hearings that the President was not above the law. I don't know that I understand how a Member of Congress is above the law.

Ms. EASTMAN. I am saying it the other way around, that the right of the executive branch official to be free from the impact of disclosures may be less by virtue of the Government official's position and the Government official's activities. I don't have any trouble with the privacy questions that were part of your example, because I don't really read that policy to extend to things that are unrelated to his conduct as a Government official. I do see that there is some difficulty with the kind of adverse publicity affecting criminal trial possibilities. That is the only other issue that I see. And I think that also was pretty much settled during the Watergate era where people were able to get a fair trial. And as the ACLU argued in the Watergate era, when you are dealing with official crime, even if you have to forego a criminal trial because of adverse publicity, the remedy is to forego that trial,

and not stop the disclosure. I hope that is kind of giving you an idea of what they have in mind.

Mr. PARKER. Not at all. I still don't understand how you can open it up to a grab bag of individual citizens who are going to perhaps allege problems that don't exist. The one important thing that a Government official has very often is his reputation and his job. You would allow one Member of Congress to decide that a Government official is doing his job improperly, and then be free to unilaterally reveal information that will damage that person's career.

Mr. GITENSTEIN. But all the documents that I saw that were classified in the Congress were not classified because they might jeopardize someone's privacy, but for other reasons. So a Congressman who gets a Government document is not going to be helped by the classification. It is a problem he faces all the way around.

Mr. PARKER. I realize the classification problem, and Congress should address itself to that problem. But it seems to me that you are creating an entire set of other problems.

Ms. EASTMAN. That is what I was trying to suggest at the outset. I think the ACLU understood what some of these problems were, and made a judgment that the problems were necessary in the interest of the basic objective that they had in mind, which was controlling intelligence agencies. And again I think—we are not talking about a general policy that applies to the Agricultural Bureau, and its overall operations, or indeed probably 90 percent of the agencies of the Government. This is a specific, limited policy which is designed to be a response to an overwhelming record of abuse in the area of intelligence operations which affects the constitutional rights of American citizens. Now, whether that kind of provision would be justified elsewhere at this time I have no idea. But I believe the ACLU is right in saying that it is justified here.

Mr. EDWARDS. Mr. Starek.

Mr. STAREK. Thank you, Mr. Chairman.

Professor Pyle, I greatly appreciate the listing of preventive action based on specific acts or specific, for lack of a better word, examples. I wonder if you can address for us the ACLU's recommendation that the FBI have absolutely no domestic intelligence functions?

Mr. PYLE. Generally I agree with the ACLU. The Domestic Intelligence Branch within the FBI should be abolished. I also believe that virtually all FBI investigations should be criminal investigations. However, that does not begin to solve the problem. With a little ingenuity, particularly with the many speech crimes that remain in title 18, the FBI can continue to do virtually everything it did in the 1940's, 1950's and 1960's without a separate domestic intelligence or internal security staff. So you have got to go further, accept the rest of the ACLU package, and get rid of the speech crimes. Having done that, there are still going to be areas in which there would be investigations into political beliefs and actions. For example, suppose we have another war and people start burning their draft cards. That is a crime. The law has been upheld by the Supreme Court. The FBI has to investigate the crime, and to investigate the crime it will have to look into people's beliefs. Again we are back to Jeb Magruder's slippery slope.

Suppose as a result of that war we have more mass demonstrations in Washington. The Justice Department needs a certain amount of intelligence in order to anticipate the size of crowds. But there will be a great deal of pressure on the Justice Department, some of it coming from a very alarmed White House, to go further and infiltrate the organizers of that demonstration to find out who is "behind" them. These demands will come because Government officials will suspect that the protest organizers intend to aid and abet the enemy in time of war. It is at that juncture that we will need carefully drawn lines, both in regulations and legislation, to prevent that kind of intelligence-gathering. And I think the Attorney General has made a good start on that with his guidelines on civil disturbances.

The most difficult problem I see is in the area of terrorist investigations. I don't know what this word "terrorism" means. I have been trying to define it. I can come up with laymen's definitions, and I can consult all sorts of dictionaries. But I would not want to see that word used to designate a category of investigations in the FBI's manual. To me the word "terrorism" is very much like the word "subversive." It is a rubbery word that you can wrap around almost anything. It seems to imply a criminal conspiracy, but it does not necessarily denote any overt criminal actions. There are a lot of terrorist activities or terrorist statements that can create fear and foreboding in a community without constituting a crime. And, like it or not people have the right to scare the bejesus out of American citizens with violent-sounding rhetoric, so long as that rhetoric is not accompanied by conspiracy or attempts to commit or incite traditional crimes.

Mr. STAREK. But in your answer to the questions posed by Mr. Parker, I received the impression that you thought it would be perfectly all right for the Bureau to begin an investigation of a particular group based on the past history of that group.

Mr. PYLE. Yes. But the past history we are referring to was the history of a criminal organization. The Weather Underground that bombed.

Let's take a case like *Watts v. United States*. A fellow at the Washington Monument stands up and says, if I ever get L. B. J. in my gun-sights I will shoot him dead. Now, does that mean that you can investigate that man and all of his political associates because of that statement made at a rally? I don't think so, because I don't attach a great deal of credibility to a statement like that. However, there do come circumstances where an organization, because of its capabilities, because of the context in which it makes its statements, might very well be investigated even though its members have committed no crimes. Investigation would be appropriate where people who have joined the organization know how to make bombs and seem to have been recruited by the organization because they have that capability. My problem is, I am not sure I know how to draft a regulation that would permit that kind of investigation and yet foreclose the kinds of abuses we have had. So, I fall back upon my proposal for having an assistant U.S. attorney involved in the investigation early on and a scoping unit involved so that you don't have an investigation of one Klan in Birmingham automatically trigger investigations of other Klans throughout the land. I think at some point you have got to build in discretion to the system.

Mr. EDWARDS. Then you differ strongly with the ACLU position?

Mr. PYLE. I expect I do, yes, although I have hopes that they will come around to my position.

Mr. EDWARDS. You could have a continuous investigation going on for 5 years under your definition.

Ms. EASTMAN. Under Chris' formulation, no matter what kind of internal control mechanisms you create, exactly what has gone on in the past would be permissible.

Mr. PYLE. May I respond to that?

Ms. EASTMAN. Mark is adding, especially if Robert Mardian would be Attorney General. You cannot write these things for well-meaning people.

Mr. EDWARDS. I will add, if Mr. Starek will permit, and then yield to Mr. Pyle, and that is exactly the expanded authority that the FBI has had indefinitely over decades. And yet I think we are hard put to find one or two cases of bombing of the terrorism type that they have been able to stop in advance under the conspiracy statutes, and so forth. Did you think of any?

Mr. PYLE. I agree with that. From my limited research in the foreign intelligence area I think that is true also. Most of the successful espionage investigations by the FBI came because there was a walk-in informant who said, this crazy guy from the Soviet Embassy has just asked me to give him some documents.

The fact that the vast majority of domestic and foreign intelligence investigations by the FBI have failed does not surprise me. One reason for these failures is that the Bureau has been run by right-wing ideologies rather than dispassionate, fact-oriented investigators. But even if they have failed in all their investigations, which I don't believe, I would still have to say that they should be permitted to investigate a group with a track record like the Ku Klux Klan, when you have a racial bombing in the community, or when you have a situation like the one in Mr. Parker's hypothetical. I say this even though I fully expect that the bureau may never catch the bombers.

But to return to an earlier point, you seem to think that because I would grant the authority to initiate an investigation, based upon credible rhetoric, that I would permit that investigation to go on indefinitely. I would not. I just find it impossible to specify when threats and rhetoric become credible in the light of a group's history and therefore warrant the opening of an investigation. The judgments are too subtle to be cast into regulations or laws. The greater gain for civil liberties, it seems to me, will come if we concentrate on finding ways to shut down investigations of politically motivated groups when allegations against them prove baseless. That is a problem we have not been able to solve in our Government: how do you shut something down once it gets started? I think that the creation of a scoping unit, the use of assistant U.S. attorneys, the use of review units, of strengthened congressional oversight, will help in that regard considerably. You will inhibit the conduct of improper investigations. You will put people into the administrative process who can shut it down. The Attorney General's guidelines, I believe, make an effort in this direction by putting time limits on certain kinds of investigations. However, that safeguard is not going to be very helpful, if the FBI can

stop an investigation on the 90th day and resume it on the 92d day simply by calling it a new investigation. So my inclination is to put people into the process who will have a different outlook from the Bureau which lacks the capacity to tell a revolutionary from a criminal sounding group from one that actually engages in crime to achieve political ends.

Mr. EDWARDS. Mr. Starek.

Mr. STAREK. Thank you, Mr. Chairman.

Mr. Pyle, I am somewhat concerned about your recommendation to include an assistant U.S. attorney early on in a FBI investigation. Congress has seen the miserable failure in that regard with respect to the Office of Drug Abuse law enforcement program. And I am not so sure that the record of the assistant U.S. attorneys involved in investigations early on with respect to domestic intelligence would be any better than the way it was with Federal, State, and local law enforcement officials charged with criminal drug enforcement.

Mr. PYLE. There is some historical support for your position. During World War I many of the abuses in domestic intelligence occurred because politically appointed U.S. attorneys and their assistants wanted to persecute German-Americans. These lawyers, rather than curbing the Bureau, became advocates of abusive investigations. On the other hand, the education of young lawyers has changed in recent years. They are more likely than FBI agents to understand the requirements of the first amendment and to be tolerant of political diversity. So on balance, I believe that the more Justice Department lawyers you have in the investigative process the more law-abiding that process will become, and the fewer incursions there will be into purely speech areas. By adding young attorneys I think you will add people who will say, wait a minute, this is nonsense, this is silly, this is a waste of time. This proposal is not meant to be a cure-all. What I have proposed are successive ways to reduce the volume of improper investigations. So at one point I would use the assistant U.S. attorneys, even though some of them might become advocates of excessive action. At another stage I would insert a scoping unit, so that when these investigations become programmatic there will be somebody to squelch the nonsense. And then I would add a reviewing unit so that the succeeding administration can expose wrongs committed under previous administrations. Even under those restrictions abuses are going to occur. But there should be fewer abuses than before.

Mr. STAREK. Ms. Eastman, did I understand you correctly to include in your recommendations from the ACLU a prohibition against FBI's counterintelligence function in addition to domestic intelligence functions?

Ms. EASTMAN. Counterintelligence?

Mr. STAREK. Yes.

Ms. EASTMAN. No.

Mr. STAREK. I thought I heard you say that, and I wanted to clarify it.

Ms. EASTMAN. No. What I said was that there should be no peacetime espionage capacity in the United States. Counterintelligence is obviously something different, no more or less controversial, but different.

Mr. STAREK. Who would you recommend take over the peacetime espionage investigations? Or do you think there should be none?

Ms. EASTMAN. Investigations of espionage against the United States, or the United States involving itself in peacetime espionage?

Mr. STAREK. The first.

Ms. EASTMAN. No; what I am saying is that counterintelligence or counterespionage investigations to determine who is involved and what they are doing to stop it it seems to me is a straight criminal investigation matter. It may have different techniques that need to be looked at, but it is a criminal matter. Those proposals are addressed to the United States itself engaging in peacetime espionage.

Mr. STAREK. Thank you very much.

Mr. EDWARDS. Mr. Parker, any further questions?

Mr. PARKER. No thank you, Mr. Chairman.

Mr. EDWARDS. I think that Mr. Gitenstein suggests that we examine case by case the open files in domestic intelligence which is something the Select Committee did, and which we were only able to do through the GAO under certain unfavorable restrictions, would be more valuable to our work on this committee as the FBI examines themselves. And then as the Department of Justice examines them thereafter, or concurrently the futility really of some of the investigation will come to the top, and they will start to close them out obviously. And the GAO report indicated that in 10 field offices there were 19,600 open cases. And now they claim that in the entire United States there are only 5,000. So there must have been an awful lot of paper saved in the last few months. And I think 5,000 is probably way too many.

Mr. GITENSTEIN. Of course, you have got to be careful about how they define a case. The Communist Party of the United States is one case. And the King case is one case. I have seen the roomful of files on the King case. It would fill up that whole desk.

Ms. EASTMAN. Again, out of ignorance, you might also have to watch what they now label as a criminal investigation and not a domestic intelligence investigation.

Mr. EDWARDS. And also your suggestion with regard to the guidelines for criminal investigations will be examined with some care.

Well, we thank the three witnesses. Their contribution has been considerable. And we really appreciate your coming. Thank you.

[Whereupon, at 12:45 a.m., the subcommittee was adjourned, subject to the call of the Chair.]



ADDITIONAL MATERIAL

Material Submitted for the Record by ACLU

[From the *Privacy Report*, November 1975]

POLITICAL SURVEILLANCE: CASES FROM THE ACLU'S DOCKET

The dictionary definition of surveillance is "a watch kept over a person, especially one under suspicion." Political surveillance is a watch kept over a person whose political beliefs are "under suspicion"—a search for the ideological enemies of the government.

Anyone who reads the papers knows that the United States government has been conducting just such a search for many years, and that we, its citizens, are the persons "under suspicion." The government's surveillance apparatus encompasses all the favorite devices of bad fiction—wiretaps, hidden tape recorders, planted informers and agents provocateurs, fake identification papers, forged letters, opened mail, the circulation of false rumors, and hundreds of thousands of cross-indexed intelligence dossiers. It would be ludicrous if it were not real.

House and Senate investigating committees, presidential commissions, and enterprising investigative reporters have all brought to light important knowledge about the government's search for its enemies. There is now another, increasingly significant source of information about surveillance—the courts. Through litigation, brought by or on behalf of "persons under suspicion" who are victims of political surveillance, a great deal is being learned about the surveillance apparatus: its techniques, its purported justifications, and its excesses. In much of this litigation the ACLU Foundation is playing a central role.

The issue of surveillance does not stand alone. It is rooted in the larger problem of government secrecy (usually cloaked in a rationale of "national security"), which permits an indulgence in unconstitutional practices that could not withstand the test of public scrutiny. And, of course, surveillance is not a single act; it is a pattern of assaults on privacy, some, such as wiretaps and searches of bank records, a part of the surveillance itself, others, such as the discrediting of political activists and the discouragement of political dissent, an outgrowth of surveillance.

The surveillance cases described in this *Privacy Report* all illustrate the close relationship between governmental secrecy and the individual's right to privacy. Herein lies one very important accomplishment of surveillance litigation: that it brings to public view many unconstitutional governmental programs that have flourished only because they are invisible.

WIRETAPS

Of all the devices in the surveillance arsenal, the wiretap is the most insidious. A wiretap is quite simply a dragnet, entrapping all speech by all parties to every conversation on a tapped phone. The ACLU has long argued that no wiretap can ever satisfy Fourth Amendment standards of search and seizure; it is by definition a constitutionally forbidden general search.

The courts and the statutes require prior judicial authority for the use of wiretaps in criminal investigations. (How easily that requirement is circumvented and how frequently it is ignored is another story.) In "national security" investigations, however, the executive branch has long claimed the right to wiretap without judicial approval. Since 1972 the courts have whittled away at that claim: the Supreme Court in *U.S. v. U.S. District Court*, 407 U.S. 297 (1972), declaring that the government may not use warrantless taps in domestic national security investigations; the Court of Appeals for the District of the Columbia Circuit, in *Zucchion v. Mitchell*, 516 F.2d 594 (D.C. Cir., 1975), ruling that even in national security investigations related to foreign affairs, warrant-

less taps may not be used against a domestic organization which is "neither the agent of nor acting in collaboration with a foreign power." Despite such decisions, however, the government continues to lay claim to very broad "national security" powers in defending warrantless taps, as illustrated in two current ACLU cases.

Morton Halperin was employed as a senior staff member of the National Security Council. In May 1969 the FBI placed a tap on Halperin's home phone; the tap remained until February 1971. It was one of the 17 taps in a program initiated by President Nixon, Attorney General Mitchell, Henry Kissinger, and FBI Director Hoover called for the purpose of discovering who was leaking "inside" information, especially concerning the bombing of Cambodia, to the press. The tap was placed without a warrant, and remained on the Halperin phone many months after Halperin had left his government job—in fact, while he was acting as a consultant to the Muskie presidential campaign. Throughout the entire period the FBI sent reports of intercepted conversations to Henry Kissinger and the White House.

Abdeen Jabara is an American-born lawyer, practicing in Michigan, who has been prominently active in Arab-American political organizations. From at least October 1972, and very possibly before, Jabara's phone conversations were intercepted¹ by the FBI. In this case the interceptions were only one aspect of a comprehensive surveillance of Jabara's activities, which included the monitoring and reporting of all his public speeches, infiltration by FBI agents and informers into organizations of which he was a member, inspection of his bank records, the compilation of extensive files describing his professional and political activities, and the dissemination of derogatory information about him to other government agencies (and even agencies of other governments, such as Israeli intelligence) and opposing political organizations.

Both men are suing for relief that includes money damages. *Halperin v. Kissinger*, Civ. 1187-73, D.D.C.; *Jabara v. Kelley*, Civ. 30065, E.D.Mich.

The wholesale intrusion into what the courts have called "the reasonable expectation of privacy" is particularly striking in these cases. The Halperin tap picked up 21 months of conversations involving not only Halperin himself but also his wife, three children, relatives, friends, associates, and visitors to the Halperin home, and including many legally privileged husband-wife communications. The Jabara interceptions, among all their other intrusions, violated the legally protected confidentiality of attorney-client communications.

The tap itself, as a mechanical device, is unselective; it is up to the agent listening in, the "monitor," to decide what conversations are worth hearing, logging, and reporting. The vagueness—indeed, the total lack—of standards for making these selections is revealed in the deposition in the Halperin case of an FBI agent in charge of all "national security" wiretaps in the Washington, D.C., area. He stated that FBI monitors are expected to rely on their "experience," "intelligence," and their "own evaluation" in deciding what calls are "pertinent." Pertinent to what? This is not necessarily specified in the agent's instructions, although he may be given a list of contacts to keep a particular watch for. The monitors do not shy from recording conversations involving a spouse or children. In fact, in the early stages of a surveillance, they will be especially attentive to such conversations as a means of compiling "sort of a book" on the subject. Sometimes, monitors will make notes on three or four "no value" calls rather than have a blank page in the log—just to show they are on the job! Monitors are expected to aid in physical surveillance of the subject, noting the times, places and contacts of his business and social engagements as well as periods when he is at home.

It is extremely difficult, even in litigation, to force the government to admit to wire-tapping. In *Jabara*, after prolonged wrangling in the courts, the government finally revealed that three attorneys general had authorized 13 separate warrantless taps on which Jabara's conversations had been overheard, but refused to say why, claiming "executive privilege." The claim asserted only that the surveillance was "deemed necessary," based on "Secret" and "Top Secret" intelligence available to the President, "to protect the Nation against actual or potential attack . . . or to obtain foreign intelligence." However, there has never been any allegation that Jabara was acting for or with a foreign power or that he was suspected of any illegal activity. In *Halperin*, former President Nixon tried to

¹ Overheard through taps placed on the phones of the other parties to Jabara's conversations.

assert a claim of "presidential privilege" to avoid testifying on his part in the wiretap surveillance program, in particular, on his reasons for believing the surveillance to be justified. The court rejected that claim, and Nixon's testimony can now be obtained.

The frustration of these and similar wiretap suits is the difficulty of bringing the cases to trial because of the enormous obstacles in obtaining disclosure of the government's actions and justifications in any matter deemed (by the government) to relate to "national security." One compensation of the long-drawn-out discovery proceedings, however, is the opportunity to expose the government's repeated disregard for the law and the Constitution, a result of the exercise of unrestrained discretion under the banner of this same magic phrase, "national security."

UNDERCOVER AGENTS AND INFORMERS

Next to the wiretap, the most intrusive technique of surveillance is the undercover agent. By infiltrating a "suspect" organization in the guise of a fellow worker for the cause, by winning the trust of its members and taking an active part in the furtherance of its activities, perhaps even a role of leadership, the undercover agent does not merely collect information but also affects, and sometimes perverts, the nature of the organization itself. The most common results of the infiltration of a political organization, beyond the fat dossiers collected on its members, are the disruption of the group and the discrediting of its cause.

Again, two cases from the ACLU docket can be used in illustration.

Beginning in May 1970, campus security police at Kent State University in Ohio employed 15 undercover agents to infiltrate student organizations. One of these agents, posing as a student, joined the campus chapter of Vietnam Veterans Against the War, participated in its meetings, and was invited into its members' homes. For more than three months he filed written reports on its members' political and personal activities and secretly copied their private papers. Then, brandishing a Chinese-made machine gun and a Vietnamese rocket-propelled grenade launcher supplied by his superiors, he tried to induce the group to kill "the pigs" and blow up campus buildings with explosives he offered to supply. The group rejected these schemes, but were so shaken by his persistence that they reported him to the local police. After his arrest for possession of illegal firearms, his undercover status was revealed. *Kent State U.V.A.W. v. Pyke*, C72-1271, N.D. Ohio.

More bizarre is the tale of the Berlin Democratic Club and the Lawyers Military Defense Committee in West Germany. The first of these, a group of American civilians residing in Berlin, worked for the McGovern candidacy in 1972 and became formally affiliated with the Democratic Party in 1973; it was also active in promoting voter registration, G.I. rights, and impeachment. The second is an association of American attorneys providing civilian counsel to U.S. servicemen stationed abroad. In 1974 members of both groups and a number of U.S. citizens resident abroad brought suit against the Army, which, in a vaguely defined search for sources of "dissidence" and "disaffection," was conducting massive surveillance of their lawful political and professional activities--including wiretaps, infiltration and disruption by undercover agents, the use of informers, clandestine photography, the collection of extensive dossiers, the circulation of allegations and rumors detrimental to their professional careers, and the interception of their mail. A year later, it was learned that the Army had maintained a paid informer inside LMDC for a considerable time after the suit was filed, and that the agent had been in a position to report back to the Army on attorney-client conversations in which strategy for the suit was discussed. (The surveillance suit is not the only case affected by this breach of the legally privileged lawyer-client communication; the conviction in one court-martial defended by LMDC has already been reversed because of the informer's presence and the use of wiretaps, and others may be reopened.) Reports written by top-level intelligence officers show that they knew the use of the agent to be of dubious legality, fraught with "flap potential," in their words, though they also considered his presence an asset which could be "of extreme value in planning counteractions." *Berlin Democratic Club et al v. Schlesinger*, Civ. No. 310-74, D.D.C.

But the undercover agent does not simply supply names, dates, and events for government dossiers. He is also a participant in the events on which he is spying, and can very easily be used as an agent provocateur to discredit and eventually

destroy the organization by seducing its members beyond legal dissent into violent, criminal acts. Because the agent is in a position to manipulate as well as observe, his presence may be a mechanism of entrapment. The Kent State case is based in part on the argument that the plaintiffs' First Amendment rights were violated by an attempt to entrap them which, had it succeeded, would have thoroughly discredited their political activities.

COUNTERINTELLIGENCE

Kent State is an example of a government effort to disrupt dissent through entrapment. The Army tried to undermine LMDC² by spreading rumors that its lawyers were "Marxist-Leninists," a characterization sure to prejudice them in the eyes of the officers sitting on courts-martial, and that they only took cases with headline value and then dropped them when the publicity died out, an allegation designed to scare away potential clients.

But the government's efforts to disrupt dissent have gone far beyond this scattershot approach. We now know of the existence of a more formal and formidable program intended to break the back of domestic dissent, in particular, the political left, the antiwar movement, and black activism. The FBI's COINTELPRO (Counterintelligence Program) apparently began in 1956 and, says the Bureau, was discontinued in 1971. It consisted of seven programs, five of them for the surveillance of certain kinds of domestic organizations and for the disruption, exposure, and neutralization of these groups and their individual members. All seven were authorized at different times by J. Edgar Hoover, and none were revealed to any attorney general, although several attorneys general were aware of FBI efforts to penetrate two targets, the Communist Party and several white "hate groups." The House Appropriations Subcommittee, according to the FBI, knew about the program. Among the undertakings: sending anonymous or forged letters to organizations and their members, leaking detrimental investigative material to "friendly" media, using informants to disrupt a group, informing employers and credit bureaus of members' activities (sexual as well as political), undermining the political candidacies of targeted individuals or taking covert action to prejudice judicial proceedings in which they were involved, and informing families (usually by anonymous communications) of their "radical or immoral" activity. With respect to the five domestic programs, the FBI reports implementation of 2370 "proposals," in 527 of which "known results were obtained."

Muhammad Kenyatta is an example of one "known result" of the COINTELPRO effort. Kenyatta was a leader in the black civil rights movement in Mississippi in the late '60s, when the FBI listed him on its "Agitator Index" and placed him under intense surveillance. Eventually, by circulating false rumors about Kenyatta to his associates in the movement and sending him forged threatening letters purporting to come from them, the Bureau succeeded in driving Kenyatta and his family out of the State (to Pennsylvania, where he was again placed under surveillance) and in discrediting the organization he had headed to the point where its funds were discontinued and its activities drastically curtailed. *Kenyatta v. Kelley*, 71 Civ. 2595, E.D. Pa.

The most significant revelations of COINTELPRO documents have come as the result of litigation by another of its targets, the Socialist Workers Party. It was this suit which shook loose official acknowledgement and a description of COINTELPRO by the FBI, and again just recently brought to light additional evidence that at least one of the same techniques continues to be used despite the supposed termination of COINTELPRO in 1971: FBI agents are still visiting and interviewing SWP members for no other reason than their political affiliation, and, of course, reporting the conversations in FBI files. *Socialist Workers Party v. Attorney General*, 73 Civ. 3160, S.D.N.Y.²

With apologies for some "isolated instances" of practices "abhorrent in a free society," the FBI has explained that COINTELPRO has undertaken to counteract "threats to domestic order." With respect to the particular program called COINTELPRO-New Left, Director Clarence Kelley cited not only the FBI responsibility to investigate allegations of criminal acts, but also the Bureau's decision—apparently on its own authority—"that some additional effort must be made to neutralize and disrupt this revolutionary movement."

²This suit is sponsored by the Political Rights Defense Fund, and the lawyers representing the plaintiffs are not affiliated with the ACLU.

POLICE SURVEILLANCE

Relatively few people, out of the total population, have been subjected to surveillance by wiretaps. But enormous numbers of people have been subjected to routine police surveillance because of their political activities. The ACLU docket includes class actions against the police departments of such major cities as Los Angeles, Philadelphia, New York, Kansas City, St. Louis, Chicago, and Houston, as well as some smaller cities and several state agencies, for activities ranging from photographic surveillance of public demonstrations, infiltration of political organizations, and harassment of demonstrators to the compilation of "intelligence" or "non-criminal" dossiers on politically active citizens, running into the hundreds of thousands in some of the larger jurisdictions.

A major obstacle in all these cases has been the Supreme Court's 5-4 decision in *Laird v. Tatum*, 408 U.S. 1 (1972), a class action for injunction of the Army's surveillance of civilians. The majority ruled that the plaintiffs could not point to any actual injury to themselves or to any governmental act directly against them specifically, but were attacking the "mere existence" of the intelligence operation. Furthermore, according to the majority, the plaintiffs' contention that the gathering, storing, and dissemination of political information had a chilling effect upon their exercise of First Amendment rights was "disproved" by the fact that they had exposed themselves publicly in bringing a lawsuit! Yet it is precisely this contention which lies at the heart of the civil liberties argument and which, ultimately, must prevail. The First Amendment embraces a clear right of associational privacy which is violated by any "official" notice of a person's lawful political activities, even if there is no concrete harm such as exposure to retaliation or the loss of a job.

Nonetheless, most surveillance suits involve some evidence of injury, as, for example, the disruption of professional services provided by the attorney-plaintiffs in *Berlin Democratic Club* through wiretap interception of privileged lawyer-client communications, or, in that same case, the deportation of an American civilian activist by West German authorities at the behest of U.S. Army Intelligence. An important early victory was won in *Handschu v. Murphy*, 349 F. Supp. 766 (S.D. N.Y., 1972), a challenge to the political surveillance operations of the New York City Police Department's Special Services Division, in which the court denied the defendants' motion to dismiss in part because it could be shown that the revelation of an antiwar organization "member" as a Special Services agent had resulted in the destruction of the group. A court of appeals reversed a lower court's denial of a class action against police photographic surveillance in Fall River, Massachusetts, in part because of a leak to the press of a police photo showing a congressional candidate's wife leading an antiwar demonstration. *Yaffe v. Powers*, 454 F. 2d 1362 (1st Cir., 1972).

A measure of the distance traveled by the courts since 1972 in their sensitivity to the First Amendment claims of all the victims of surveillance, not merely those who can demonstrate concrete injury, is the swift action early this year by a district court in Texas in dealing with Houston police dossiers on over a thousand politically active local citizens covering a period of more than ten years. The court denied the defendants' motion to dismiss, granted a preliminary injunction, and appointed three masters of the court to obtain custody of the files, guard against their destruction or dissemination, and design procedures for notifying everyone mentioned in the files so that they may consider whether to join the class action. *Greater Houston ACLU v. Welch*, 74-H-59, S.D. Tex.

For the most part, a rationale for the conduct of wide-ranging political surveillance by police agencies has been limited to general statements about the need for intelligence in relation to possible civil disturbances. There is no explanation of why it is thought necessary or legally proper to wiretap and infiltrate political organizations not connected with any criminal investigation, or to photograph participants in lawful demonstrations, or to compile "non-criminal" dossiers on thousands of citizens who publicly support almost any political cause, including tidbits on their personal lives as well as their political views. "Excesses" tend to be described, as in a police affidavit in *Handschu*, as "aberrations in violation of departmental policy." That not merely the "excesses" but the routine practices as well are being questioned may be indicated in recent moves by some police agencies to redesign and publicly explain their "political intelligence guidelines." They do not appear ready to question, however, the validity of their authority to conduct any political intelligence operations at all.

PERVERSION OF LAW ENFORCEMENT

Any political surveillance conducted by any law enforcement agency, whether a local police department or the FBI, represents a perversion of the agency's law enforcement mission. Some particularly striking situations illustrate that perversion in its most extreme form, when agencies are deliberately used to "get" the government's political enemies.

Allard Lowenstein, a member of Congress from New York from 1968 to 1970, was defeated for re-election in 1970 and was a candidate for the congressional nomination in 1972. He brought suit against his opponent in that race, John Rooney, officials of the FBI and IRS, and a number of White House aides to former President Nixon for conducting special investigations into his personal life and political activities and turning that information over to his campaign opponent, and for placing his name on the White House "enemies list," which may have led to an IRS audit of his tax returns at the behest of Nixon's aides. Lowenstein contends that the misuse of governmental agency powers in these politically motivated investigations constituted a conspiracy in violation of his First, Fourth, Fifth, and Ninth Amendment rights of privacy, and in violation of the rights of the voters to exercise their electoral powers free of deceptive practices. *Lowenstein v. Rooney*, 74C593, E.D. N.Y.

Teague v. Alexander, Civ. No. 75-0416, D.D.C., is a class action on behalf of persons who were subjected to special IRS audits and investigations solely because of their political associations and opinions. It focuses on the activities of an IRS department called the Special Services Staff, organized in response to White House pressures to "do something" about certain groups or individuals whom the Administration deemed "extremist" or "dissident." The purpose was not to collect revenue, but to investigate and harass. During its four-year life, SSS collected files on 8,000 individuals and 3,000 organizations. When the operation was closed, the files were incorporated into the regular IRS records. And there they remain.

The suit seeks money damages, a permanent injunction against IRS political surveillance, and the destruction of all IRS records having to do with taxpayers' political beliefs and associations.

DISCRETION AND JUDICIAL REVIEW

If there is one encompassing theme in this depressing recitation of the government's assaults against its citizens in the name of "national security," it is the unbridled discretion which the government enjoys in its choice of goals and methods. The determination of what constitutes "national security" and of the means to be used to protect it are the exclusive province of the executive and are insulated from the influence of Congress, the courts, and the people. The White House, the FBI, the CIA, the IRS, the Army, and local and state police agencies all seem unable—and are certainly unwilling—to explain by what standards they define and conduct their mysterious missions, and it is becoming clear that in fact there are no standards. Even those few decisions of the courts which have ventured to place positive restrictions on the permissible scope and methods of surveillance have in practice failed to curb this exercise of unbridled discretion. And that is largely because the surveillance apparatus itself has remain hidden from view. This, one hopes, can be rectified, and this is one reason why surveillance litigation must be vigorously pursued.

As new assaults and new victims are revealed, new lawsuits are being added to the surveillance docket. In July, ACLU filed a class action against the CIA, the FBI, and the Post Office for opening, reading, and photographing—without warrants—first-class mail addressed to or sent by U.S. citizens corresponding with citizens of the Soviet Union. The mail surveillance program, initiated in 1953 (and supposedly terminated in 1975, although ACLU alleges that it continues today), is characterized in the suit as "an extended conspiracy" against tens of thousands of U.S. citizens. *Driver v. Helms*, Civ. No. 75-0224, D.R.I. Late in October, another ACLU class action was brought against the National Security Agency, the CIA, and Western Union International, RCA Global Communications, and ITT World Communications, among others, for intercepting private overseas cable communications—again, without warrants—compiling a "watchlist" of American dissenters having "foreign contacts," opening their foreign mail, and infiltrating their organizations with undercover agents. *Chandler v. Helms*, Civ. No. 75-1773, D.D.C.

WHAT ARE ACLU'S SURVEILLANCE SUITS MEANT TO ACCOMPLISH?

First, discovery: a full revelation, under court order, of the methods the government has used in each of its surveillance operations and, just as important, a full explanation of the government's purported justifications. Most of the cases on ACLU's surveillance docket are in this intricate, sometimes tedious pre-trial stage, for government agencies do not willingly yield what they see as "their" secrets. The first aim is thus to pierce the wall of secrecy and to bring home to the American public the dangers of secret government.

Second, a judicial declaration that each of the surveillance practices at issue is a violation of the Constitution, and a permanent injunction against their further use.

Third, money compensation to the victims of surveillance. The combination of declaratory and injunctive relief and the award of monetary damages is intended to forestall the resumption of "business as usual."

Fourth, the orderly and complete destruction of all surveillance files. This promises to be a monumental task, for surveillance information compiled by one agency is almost invariably shared with others, often even disseminated outside the government.

What is ultimately sought, then, goes beyond the redress of past wrongs. It is subjection of the entire political surveillance apparatus to continuing judicial review, so that not just specific surveillance operations, but also the scope of the government's authority to conduct political surveillance, can be tested by the standards of the Constitution.¹

In the States

CALIFORNIA PRIVACY BILL

Governor Edmund Brown, Jr., vetoed what would have been the California Information Practices Act of 1975, a privacy law modeled after the federal Privacy Act of 1974, but providing more limited exemptions for law enforcement investigative records and establishing a state commission to oversee implementation of the law and investigate violations.

As adopted by an overwhelming majority of both houses of the state legislature, the law would have:

- (1) prohibited maintenance of any records describing how individuals exercise their First Amendment rights;
- (2) permitted state agencies to collect only relevant, timely, and accurate information;
- (3) permitted individuals to see, copy, and amend their records;
- (4) prohibited disclosure of personal information maintained by an agency except for the agency's "routine uses" as established by law, or pursuant to the individual's consent;
- (5) provided civil and criminal penalties for violation;
- (6) prohibited denial of a state benefit to an individual who refuses to disclose his or her Social Security number, unless disclosure is required by statute.

The ACLU affiliates in California helped to draft the law and lobbied vigorously for its adoption. Initial objections by law enforcement agencies had resulted in some early compromises, to the apparent satisfaction of all. Concerns about the costs of implementation were met by dropping a provision that would have required agencies to notify every person on whom they maintained records.

Two weeks before the veto deadline, the bill's principal Senate sponsor invited the Governor's questions, particularly questions about costs. There was no response until, just one day before the deadline, the various state agency heads, who had been silent during the five-month legislative hearing process, first voiced their objections to the projected costs, which they estimated at an extraordinarily high figure. The Governor did not even consider the measure until the very evening of the veto deadline, and then only in consultation with his cabinet, all of whom were opposed. No supporter of the bill was invited to contribute to the discussion.

¹ For further information: Readers may obtain the 27-page ACLU privacy, secrecy, and surveillance docket for 50¢ by writing to the Privacy Project, ACLU Foundation, 22 East 40th Street, New York, New York 10016. A more detailed analysis of particular surveillance, *The Abuses of the Intelligence Agencies*, by Jerry J. Berman and Morton H. Halperin (1975, 185 pages), may be ordered from the Center for National Security Studies at 122 Maryland Avenue, N.E., Washington, D.C. 20002. The cost is \$2.75.

In the end, just minutes before midnight, the Governor vetoed, saying the bill contained provisions "which are entirely too complex," and that the proposed commission would "add another unneeded bureaucracy to our government." But, in the estimation of Benjamin Bycel, legislative director of the ACLU of Southern California, "What the governor was really saying was that an intricate and important piece of legislation was too difficult for him to grasp in a few short hours late at night. Brown's rejection of the privacy legislation was made necessary not by its complexity, but by his own refusal to take a hand in its formulation—even though he had been asked to do so."

In the Courts

ARREST RECORDS

A decision by the Court of Appeals for the District of Columbia has articulated the constitutional issues, and in particular the right to privacy, in the transmission of arrest records from a local police department to the FBI. *Utz v. Cullhane*, No. 72-1116 (D.C. Cir., Oct. 3, 1975).

The plaintiffs in *Utz* were not seeking expungement of their records, or challenging the validity of their arrests, the constitutional property of sending particular arrest records to the FBI for specific law enforcement purposes, or the routine dissemination of fingerprints to the FBI. Rather, they were contending that the routine dissemination of arrest records, either before a conviction or after exoneration, by the Washington, D.C., Metropolitan Police Department to the FBI is a violation of their constitutional rights of due process, privacy, and the presumption of innocence, at least so long as the FBI continues to re-disseminate such records for other than law enforcement purposes.

The Court took note in particular of three points. First, that the records at issue were those of people who had been arrested but had not yet faced trial, or had been acquitted, or whose cases had not been prosecuted. Second, that the mere fact of an arrest is, in our society, often viewed as an indication of guilt or wrongdoing, and nowhere more so than in the employment market. Third, that the records are sent by police to the FBI in full knowledge that the FBI makes them widely available for employment and licensing purposes.

The Court expressed "severe doubts" about the constitutionality of the police department's practice, although basing its decision in this case on a District of Columbia statute. "We agree that there is a substantial bundle of constitutional rights which may be unnecessarily infringed when such [pre-conviction or post-exoneration] arrest records are transmitted to the FBI with the knowledge that they will be retransmitted to a multitude of organizations for a multitude of purposes, all of which are susceptible of abuse."

CONVICTION RECORDS

The Court of Appeals for the Eighth Circuit has held that a company policy of refusing to hire any person having a conviction record for any crime more serious than a traffic offense violates Title VII of the 1964 Civil Rights Act. This is because such a policy, in its effect, discriminates against blacks by disqualifying them at more than twice the rate whites are disqualified, together with the fact that the company, Missouri Pacific Railroad, could offer no "overriding business justification" for its policy. The plaintiff in this case was a black man who had served 21 months on a conviction for refusing military induction. The Court held that the district court should enjoin Missouri Pacific's practice and determine whether the plaintiff should be awarded back pay. *Green v. Missouri Pacific Railroad*, 17 CrL 2378 (8th Cir., July 23, 1975).

TESTIMONY OF ARYEH NEIER AND BURT NEUBORNE, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION, BEFORE THE U.S. SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, MAY 19, 1976

(Aryeh Neier is Executive Director of the American Civil Liberties Union. Burt Neuborne is Professor of Law at New York University and former Assistant Legal Director of the American Civil Liberties Union.)

We appear here today on behalf of the American Civil Liberties Union, a nation-wide non-partisan organization of 275,000 members dedicated to the advancement of the principles of the Bill of Rights.

In your letter of invitation, Mr. Chairman, you noted that this is the 70th anniversary of Roscoe Pound's address to the American Bar Association on the causes of popular dissatisfaction with the administration of justice. When Roscoe Pound embarked upon his critical re-examination of the role of law in American life, he unleashed a current of legal idealism which has sought to transform American law from a device for the maintenance of the status quo into a device for the just resolution of disputes. We have come a long way from Pound's beginning. When Pound wrote, in 1906, only the rich and the powerful could view American law with satisfaction. Powerless segments of American society correctly perceived law as a hostile force. The primary role of law was the protection of privilege. It is a tribute to how far we have advanced in the last 70 years that the weak and the powerless have come to regard American law, not necessarily as an implacable enemy, but as a potential ally which provides them with hope for justice.

Mr. Chairman, we are grateful, on behalf of the American Civil Liberties Union, for the opportunity to discuss with you a disquieting phenomenon which threatens much of the progress we have made toward realizing Roscoe Pound's dream of equal justice through law. During the last several decades, two extraordinary occurrences have made possible our progress toward Pound's dream—the emergence of the Federal judiciary as an easily accessible and sympathetic forum for the protection of the rights of the politically powerless and the growth of a segment of the American Bar dedicated, not to servicing the rich and powerful, but to vindicating the rights of those who traditionally have lacked access to the courts. The combination of a receptive Federal judiciary and an idealistic civil rights-civil liberties bar culminated in the transformation of law from the preserve of the privileged to an engine of social reform. In the last few years, however, the ability of the Federal judiciary to perform its historic and primary function as guardian of the United States Constitution has been seriously undermined by a series of restrictive decisions of the current Supreme Court. Moreover, at the same time that the current Court has sought to restrict access to the Federal courts, it has delivered a series of severe blows to the newly emergent public bar. Mr. Chairman, if the current majority of the Supreme Court is permitted—by shutting down access to the federal courts and by crippling the public bar—to dismantle the apparatus which was responsible for the transformation of the role of law in our society, the progress of the last seventy years will evaporate. To much of America, law will, once again, become the enemy to be feared and evaded, rather than an ally to be respected and revered.

The current Court's assault on the role of the Federal judiciary and the public bar has occurred in four areas. First, the Court has severely restricted access to the Federal courts by aggrieved individuals; second, the Court has placed significant, and perhaps, insuperable obstacles in the way of persons seeking to band together to seek class action relief from the Federal courts; third, the Court has struck a blow at the continued existence of an independent public bar by denying Federal courts the power to award attorneys fees in many cases; and, finally, the Court has drastically restricted the ability of a Federal court to grant meaningful remedies—even to successful plaintiffs.

I. THE RESTRICTION OF ACCESS TO THE FEDERAL COURTS

Since the Civil War, the Federal trial courts have served as the primary enforcement arm of the Bill of Rights and 13th, 14th and 15th Amendments. While state courts retain a concurrent obligation to enforce the Federal Constitution, it has been the lesson of our history—and it remains the fixed belief of virtually every experienced civil rights lawyer in America—that Federal courts provide the most effective forum within which to enforce the Constitution of the United States.

Congress has codified this judgment in the Civil Rights Act of 1871, (42 USC § 1983) which guarantees a Federal judicial forum whenever state or local officials interfere with Federal constitutional or statutory rights. Unfortunately, the command of Congress has been severely weakened by the current Court.

First, in cases like *Warth v. Seldin*, 95 S. Ct. 2197 (1975) and *Rizzo v. Goode*, U.S. (1976), a majority of the current Court has restricted the class of persons who may complain to the Federal courts about violations of their Federal constitutional rights. In *Warth*, the Court ruled that minority residents of the Roch-

ester area could not challenge suburban exclusionary zoning practices which condemned them to a ghetto existence because they were unable to point to a specific housing project which they would have resided in, but for the exclusionary zoning. Of course, the very existence of exclusionary zoning prevented the planning or construction of such projects—reducing the decision to a crude exercise in Catch-22. In *Rizzo*, the Court ruled that Black citizens of Philadelphia, who had been the target of proven police abuse, could not seek an order directing the Mayor to establish a police complaint procedure, since they were not currently suffering any abuse at *his* hands. The extremely crabbed view of the standing doctrine enunciated in cases like *Warth* and *Rizzo*¹ as a “prudential” matter by a majority of the Court, leave thousands of Americans with festering constitutional grievances, but without a Federal court within which to resolve them in an orderly manner.

Second, in cases like *Paul v. Davis*, U.S. (1976), the current Court has read the Civil Rights Act of 1871 in a grudging manner to refuse access to the Federal courts to persons who have been seriously injured by lawless government action. In *Paul*, a police flier had erroneously stigmatized the plaintiff as a “known” and “active shoplifter.” When the erroneously stigmatized plaintiff sought Federal judicial relief, the Supreme Court ruled that police injury to reputation—even if knowingly and maliciously caused—was not a deprivation of constitutional rights and, thus, could not be redressed in Federal court. Thus, persons whose lives have been seriously affected by lawless governmental action are denied access to a Federal forum, unless they can shoehorn their injury into the narrow constitutional categories enunciated by a majority of the current Supreme Court.

Third, the current Court has dramatically expanded the doctrines of abstention and comity to force case after case out of Federal court. Despite the ruling of *Monroe v. Pape*, 385 U.S. 167 (1961) that civil rights plaintiffs are not obliged to exhaust state judicial remedies prior to seeking relief in Federal court, the current Supreme Court has clamped a *de facto* state judicial exhaustion requirement on civil rights plaintiffs—imposing a delay of from 1–2 years before many civil rights plaintiffs may gain access to a Federal forum.

The availability of expeditious Federal relief from constitutional violations has been a critical factor in transforming abstract constitutional doctrine into practical reality. Accordingly, the draftsmen of the Civil Rights Act of 1871 and eight members of the Supreme Court in *Monroe v. Pape* recognized the delay which would be caused by requiring resort to state court as a pre-condition to Federal judicial review would destroy 42 U.S.C. § 1983 as an effective device for the protection of Federal constitutional rights. Accordingly, it is now well settled that a civil rights plaintiff need not exhaust state judicial remedies before seeking Federal judicial review under the Civil Rights Act of 1871. Unfortunately, however, the current Court has made a mockery of the notion of direct and uncomplicated access to Federal courts by imposing at least three forms of state exhaustion on prospective civil rights plaintiffs.

First, in *Pretzer v. Rodriguez*, 411 U.S. 475 (1973), the current Court invented a species of cases falling within the term “core habeas corpus” in connection with which it imposed a requirement of exhaustion of state judicial remedies.

Second, in a series of cases exemplified by *Bochning v. Indiana State Employees Association*—U.S.—(1976), the current Court has dramatically broadened the concept of abstention into a virtual *de facto* exhaustion requirement. In the view of Chief Justice Burger, and perhaps a majority of the current Court, whenever the challenged action of a state official might violate state constitutional or statutory law, a civil rights plaintiff must seek relief in state court on state law grounds, prior to seeking relief in Federal court. If such a view of abstention/exhaustion prevails—and there are disturbing signs that it may—speedy access to Federal court will become a thing of the past. Such a view would disturb settled notions of Federal jurisdiction dating back to *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913).

Finally, in the wake of *Younger v. Harris* 401 U.S. 37 (1971), which forbade Federal judicial interference with pending state criminal proceedings, the current Court has ousted the Federal courts from wide areas of constitutional adjudication in the guise of comity. In *Huffman v. Pursue, Ltd.* 420 U.S. 592

¹ Other recent cases similarly restricting standing are: *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Laird v. Tatum*, 408 U.S. (1972).

(1971), the Court declined to permit a Federal court to enjoin an unconstitutional state civil court injunction. Thus, by the simple expedient of commencing a state *civil* proceeding against a potential Federal civil rights plaintiff, state officials can now deprive that plaintiff of access to a Federal court. Moreover, in *Hicks v. Miranda*, 422 U.S. 332 (1975), the current Court ruled that even if a Federal plaintiff wins the race to the courthouse and seeks Federal judicial review prior to the initiation of state judicial proceedings against him, the state may nevertheless oust the Federal courts by filing a proceeding even after the Federal action is filed. Such a reverse removal power renders it an act of some courage to seek relief in Federal court, since a predictable response under *Hicks* to a § 1983 complaint will be the commencement of state criminal proceedings against the Federal plaintiff.

The net result of expanding the law of standing; narrowing the cause of action granted by the Civil Rights Act of 1871; and pyramiding abstention and comity into a disguised exhaustion requirement, has been the creation of a jurisdictional maze which must be run in order to gain Federal review of Federal constitutional questions—a far cry from the simple, direct and effective remedy intended by Congress in 1871. Unless Congress re-asserts its will, the current Court bids fair to repeal 42 USC § 1983 by judicial fiat.

II. RESTRICTIONS ON ACCESS TO CLASS ACTIONS

In 1966, the Federal Rules of Civil Procedure were amended to authorize individual litigants, whose separate claims might not be sufficient to justify the expense and uncertainty of judicial review, to aggregate their claims into a class action and, by combining into a class, to match the legal resources available to corporations or the government. The class action promised the ability to provide legal redress to thousands of Americans who might otherwise lack the resources or the capacity to protect their rights individually. It also promised the emerging public bar the opportunity to provide legal services to far more persons than had been thought possible in a conventional procedural posture. From the beginning, however, the Supreme Court has narrowly restricted the use of class actions and the current Court has cast serious doubt on class actions as a remedial device. The Supreme Court's attack on class actions began in *Snyder v. Harris*, 394 U.S. 332 (1969), when the Court ruled that members of a class could not aggregate their individual damages to satisfy the jurisdictional amount requirements of 28 U.S.C. §§ 1332 and 1331. Since one of the primary purposes of class actions was to permit powerless individuals to aggregate into a powerful, *ad hoc* entity for the purposes of litigating a specific claim, *Snyder* was a serious blow. After *Snyder*, poor persons, whose claims rarely, if ever, exceeded \$10,000 individually, were forbidden to aggregate and were, thus, often excluded from Federal court. As bad as *Snyder* was, however, *Zahn v. International Paper Company*, 414 U.S. 291 (1973) was even worse. In *Zahn*, the Court ruled that even if the named plaintiff individually satisfied the \$10,000 jurisdictional amount, no class action would be permissible unless the members of class each satisfied the \$10,000 jurisdictional amount. Thus, class actions have now been transformed, through the magic of a hostile Supreme Court, into a device for the protection of persons whose claims must each be large enough not to require class actions in the first place. Of course, where a jurisdictional basis other than diversity or Federal question exists, aggregation is unnecessary, since jurisdictional amount is not an issue. Even in such situations, however, the current Court has evinced strong hostility to class actions. In *Eisen v. Jacqueline & Carlisle Co.*, — U.S. — (1975), the current Court required persons wishing to bring a class action for damages to notify each member of the class at his own cost. If, as seems likely, the same rules are applied to injunctive or declaratory class actions, only the rich will be able to afford a class action, despite the fact that its purpose was the equalization of litigation resources between rich and poor.

III. RESTRICTIONS ON ATTORNEYS' FEES IN CONSTITUTIONAL CASES

Throughout most of our history, the availability of counsel in constitutional cases has been accidental. The lack of an economic base forced persons seeking to vindicate constitutional rights to rely on volunteer counsel provided by sympathetic attorneys who donated their services to a case. Much is owed to volunteers such as Clarence Darrow, Osmond Fraenkel, Charles Houston, William

Hastie and Arthur Garfield Hays, whose talent unlocked constitutional rights for thousands of impoverished persons. However, reliance on volunteer counsel had its obvious limitations. Availability was sporadic and never came close to meeting the demand for legal services. Accordingly, as the public's perception of the role of law grew closer to Pound's ideal, pressures for a full-time, professionalized public interest bar grew apace. Hundreds of able lawyers, eschewing traditional practice with its monetary rewards, hoped to embark on a career as representatives of the politically powerless. In part, the public bar was subsidized by foundations; in part by cause organizations such as the ACLU and the NAACP. The creation of the OEO Legal Services Corporation was an important step toward institutionalizing the public bar. The most promising source of support for an independent public bar lay, however, not with the foundations; not with cause organizations dependent on voluntary contributions; and not with the government. Rather it lay with the traditional power of a court of equity to award counsel fees to a deserving attorney in a case which benefitted society. Viewing the public bar as private attorneys general, the lower Federal judiciary systematically awarded counsel fees in appropriate cases to lawyers whose efforts had vindicated the rights of the public. While rich awards were by no means automatic and by no stretch of the imagination even close to what could be earned in the private sector, court awarded fees did constitute an important source of financial support for the public bar. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S.Ct. 1612 (1975), the current Supreme Court ended the practice of awarding attorneys' fees in constitutional cases. In an ironic abuse of statutory construction, the Court reasoned that since Congress had repeatedly expressly approved the awarding of attorneys' fees in specific contexts, courts lacked the power to award such fees in the absence of express Congressional approval. Following such reasoning to its logical conclusion, when Congress wishes to approve a practice, it should not expressly authorize it, for fear that the Supreme Court will forbid it in all other situations. Whatever the merits of *Alyeska Pipeline*, it struck a sharp blow at the public bar by cutting off its most promising economic base. Given the depths of idealism that motivate the public bar and its proven resiliency, it will doubtless survive—but in a weakened condition.

Coupled with the current Court's assault on the role of the lower Federal judiciary and its unremitting hostility to class actions, its action in *Alyeska* further threatens the ability to enforce the constitutional rights we have won over the past 70 years.

IV. RESTRICTIONS ON REMEDIES

The fourth, and perhaps most disturbing, assault on the lower Federal courts as an effective forum for the protection of constitutional rights involves a series of Supreme Court decisions disabling the Federal courts from providing effective relief—even in those cases where a Federal judge has found that a violation of constitutional law has taken place. Thus, in *Imbler v. Pachtman*, 424 U.S. 409 (1976), the current Court ruled that a Federal court lacks power to grant compensatory damages to a person who has been the target of malicious and unconstitutional action by a state prosecutor. See also, *Picerson v. Ray*, 386 U.S. 547 (1967) (absolute immunity for judges) and *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators immune). Similarly, in *Edelman v. Jordan*, 415 U.S. 651 (1974), the current Court deprived the lower Federal courts of the power to award damages against a state agency which had unlawfully injured a Federal plaintiff. Earlier decisions had already deprived lower Federal courts of ability to grant damages against municipalities, *Monroe v. Pape*, 365 U.S. 167 (1961); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

Thus, when a civil rights plaintiff seeks compensatory damages in a Federal court he is likely to lose—even if he wins on the merits. If the defendant is a judge, a state legislator, a prosecutor, or a local or state governmental agency, current judge-made law deprives a Federal judge of the power to award damages. Moreover, even when such an absolute prohibition on damages is absent, the courts have fashioned a good faith defense which, more often than not, will preclude a damage award. E.g. *Picerson v. Ray*, 386 U.S. 547 (1967). It is no exaggeration to characterize the current law of constitutional compensation in the Federal courts as a trap for the unwary.

The current Court has linked its prohibition on damages with an equally drastic assault on the power to grant effective injunctive relief in constitutional cases.

In *Rizzo v. Goode*, — U.S. — (1970), the current Court stripped the lower Federal courts of the power to fashion flexible equitable decrees to deal with police abuse. In *Rizzo*, a Federal judge, after a scrupulous and painstaking trial which documented twenty instances of unredressed police abuse, ordered responsible city officials to institute a program for the resolution of civilian complaints against the police. The Supreme Court reversed—after chastising the trial judge for exceeding his appropriate role. *Rizzo* merely continued a trend exemplified by *O'Shea v. Littleton*, 414 U.S. 488 (1974), in which the current Court reversed a similar imaginative decree aimed at controlling rampant racial discrimination in the administration of justice in Cairo, Illinois. If the current trend continues, Federal judges will soon be stripped of the capacity to fashion meaningful relief to prevent future violations of law. Indeed, it is merely a continuation of this trend which has led the Solicitor General to urge that Federal judges be stripped by the Court of the power to order effective desegregation decrees involving the transportation of pupils.

CONCLUSION

It is, of course, a truism to note that the value of a constitutional right is no greater than the procedures which exist to vindicate it. A constitutional right without a forum to enforce it is meaningless; a constitutional right without a lawyer to enforce it is illusory; and a constitutional right for which no remedy exists is downright dishonest. Yet, the sum and substance of the decisions of the current Supreme Court lead inexorably and dishearteningly to precisely such a dilemma. Indeed, much of the procedural retrenching of the current Court appears to be a kind of guerrilla warfare aimed at many of the more controversial substantive decisions of the Warren era. Rather than forthrightly confronting these decisions and seeking to reverse them openly, some members of the current Court appear to have chosen to reverse them covertly by dismantling the apparatus needed for their enforcement. Reasonable persons may agree or disagree with many of the substantive decisions of the Warren Court. If they are to be reversed, however, it should be an open process after full argument; rather than by the cynical and covert emasculation of the Federal courts which has been the disturbing pattern of the current Court. If, as Mr. Justice Frankfurter observed, the history of liberty is inextricably bound up with procedure, the current Supreme Court has seriously endangered our liberties by playing fast and loose with the procedures we have painstakingly erected to protect them. It is time Congress put a stop to such unprincipled and high handed behavior.

We call on this Subcommittee to begin the process of examining specific legislative remedies to deal with the obstacles the current Supreme Court has placed in the way of judicial protection of constitutional rights. The American Civil Liberties Union would welcome the opportunity to assist in this process.

Thank you.

- SENATE

[94th Cong., 2d sess., Report No. 04-755]

INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS—BOOK II

Final report of the select committee to study governmental operations with respect to intelligence activities, United States Senate together with additional supplemental, and separate views.

I. INTRODUCTION AND SUMMARY

The resolution creating this Committee placed greatest emphasis on whether intelligence activities threaten the "rights of American citizens."¹

The critical question before the Committee was to determine how the fundamental liberties of the people can be maintained in the course of the Govern-

¹ S. Res. 21, sec. 2(12). The Senate specifically charged this committee with investigating "the conduct of domestic intelligence or counterintelligence operations against United States citizens." (Sec. 2(2)) The resolution added several examples of specific charges of possible "illegal, improper or unethical" governmental intelligence activities as matters to be fully investigated (Sec. (2)(1)—CIA domestic activities; Sec. (2)(3)—Houston Plan; Sec. (2)(10)—surreptitious entries, electronic surveillance, mail opening.)

ment's effort to protect their security. The delicate balance between these basic goals of our system of government is often difficult to strike, but it can, and must be achieved. We reject the view that the traditional American principles of justice and fair play have no place in our struggle against the enemies of freedom. Moreover, our investigation has established that the targets of intelligence activity have ranged far beyond persons who could properly be characterized as enemies of freedom and have extended to a wide array of citizens engaging in lawful activity.

Americans have rightfully been concerned since before World War II about the dangers of hostile foreign agents likely to commit acts of espionage. Similarly, the violent acts of political terrorists can seriously endanger the rights of Americans. Carefully focused intelligence investigations can help prevent such acts.

But too often intelligence has lost this focus and domestic intelligence activities have invaded individual privacy and violated the rights of lawful assembly and political expression. Unless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature.

We have examined three types of "intelligence" activities affecting the rights of American citizens. The first is intelligence collection—such as infiltrating groups with informants, wiretapping, or opening letters. The second is dissemination of material which has been collected. The third is covert action designed to disrupt and discredit the activities of groups and individuals deemed a threat to the social order. These three types of "intelligence" activity are closely related in the practical world. Information which is disseminated by the intelligence community² or used in disruptive programs has usually been obtained through surveillance. Nevertheless, a division between collection, dissemination and covert action is analytically useful both in understanding why excesses have occurred in the past and in devising remedies to prevent those excesses from recurring.

A. Intelligence Activity: A New Form of Governmental Power to Impair Citizens' Rights

A tension between order and liberty is inevitable in any society. A Government must protect its citizens from those bent on engaging in violence and criminal behavior, or in espionage and other hostile foreign intelligence activity. Many of the intelligence programs reviewed in this report were established for those purposes. Intelligence work has, at times, successfully prevented dangerous and abhorrent acts, such as bombings and foreign spying, and aided in the prosecution of those responsible for such acts.

But, intelligence activity in the past decades has, all too often, exceeded the restraints on the exercise of governmental power which are imposed by our country's Constitution, laws, and traditions.

Excesses in the name of protecting security are not a recent development in our nation's history. In 1798, for example, shortly after the Bill of Rights was added to the Constitution, the Alien and Sedition Acts were passed. These Acts, passed in response to fear of pro-French "subversion", made it a crime to criticize the Government.³ During the Civil War, President Abraham Lincoln suspended the writ of habeas corpus. Hundreds of American citizens were prosecuted for anti-war statements during World War I, and thousands of "radical" aliens were seized for deportation during the 1920 Palmer Raids. During the Second World War, over the opposition of J. Edgar Hoover and military intelligence,⁴ 120,000 Japanese-Americans were apprehended and incarcerated in detention camps.

Those actions, however, were fundamentally different from the intelligence activities examined by this Committee. They were generally executed overtly

² Just as the term "intelligence activity" encompasses activities that go far beyond the collection and analysis of information, the term "intelligence community" includes persons ranging from the President to the lowest field operatives of the intelligence agencies.

³ The Alien Act provided for the deportation of all aliens judged "dangerous to the peace and safety" of the nation. 1 Stat. 570, June 25, 1798. The Sedition Act made it a federal crime to publish "false, scandalous and malicious writing" against the United States government, the Congress, or the President with the intent to "excite against them" the "hatred of the good people of the United States" or to "encourage or abet any hostile designs of any foreign nation against the United States." (1 Stat. 596, July 14, 1798.) There were at least 25 arrests, 16 indictments, and 10 convictions under the Sedition Act. (See James M. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell U. Press, 1956).)

⁴ Francis Biddle, *In Brief Authority* (Garden City: Doubleday, 1962), p. 224; Roger Daniels, *Concentration Camps USA: Japanese Americans and World War II* (New York: Holt, Rinehart, and Winston, 1971), p. 66.

under the authority of a statute or a public executive order. The victims knew what was being done to them and could challenge the Government in the courts and other forums. Intelligence activity, on the other hand, is generally covert. It is concealed from its victims⁶ and is seldom described in statutes or explicit executive orders. The victim may never suspect that his misfortunes are the intended result of activities undertaken by his government, and accordingly may have no opportunity to challenge the actions taken against him.

It is, of course, proper in many circumstances—such as developing a criminal prosecution—for the Government to gather information about a citizen and use it to achieve legitimate ends, some of which might be detrimental to the citizen. But in criminal prosecutions, the courts have struck a balance between protecting the rights of the accused citizen and protecting the society which suffers the consequences of crime. Essential to the balancing process are the rules of criminal law which circumscribe the techniques for gathering evidence,⁷ the kinds of evidence that may be collected, and the uses to which that evidence may be put. In addition, the criminal defendant is given an opportunity to discover and then challenge the legality of how the Government collected information about him and the use which the Government intends to make of that information.

This Committee has examined a realm of governmental information collection which has not been governed by restraints comparable to those in criminal proceedings. We have examined the collection of intelligence about the political advocacy and actions and the private lives of American citizens. That information has been used covertly to discredit the ideas advocated and to "neutralize" the actions of their proponents. As Attorney General Harlan Fiske Stone warned in 1924, when he sought to keep federal agencies from investigating "political or other opinions" as opposed to "conduct . . . forbidden by the laws":

"When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish.

". . . There is always a possibility that a secret police may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood."

Our investigation has confirmed that warning. We have seen segments of our Government, in their attitudes and action, adopt tactics unworthy of a democracy, and occasionally reminiscent of the tactics of totalitarian regimes. We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses characterized as "vacuum cleaners,"⁸ sweeping in information about lawful activities of American citizens.

The tendency of intelligence activities to expand beyond their initial scope is a theme which runs through every aspect of our investigative findings. Intelligence collection programs naturally generate ever-increasing demands for new data. And once intelligence has been collected, there are strong pressures to use it against the target.

⁶ Many victims of intelligence activities have claimed in the past that they were being subjected to hostile action by their government. Prior to this investigation, most Americans would have dismissed these allegations. Senator Philip Hart aptly described this phenomenon in the course of the Committee's public hearings on domestic intelligence activities:

"As I am sure others have, I have been told for years by, among others, some of my own family, that this is exactly what the Bureau was doing all of the time, and in my great wisdom and high office, I assured them that they were [wrong]—it just wasn't true, it couldn't happen. They wouldn't do it. What you have described is a series of illegal actions intended squarely to deny First Amendment rights to some Americans. That is what my children told me was going on. Now I did not believe it.

"The trick now, as I see it, Mr. Chairman, is for this committee to be able to figure out how to persuade the people of this country that indeed it did go on. And how shall we insure that it will never happen again? But it will happen repeatedly unless we can bring ourselves to understand and accept that it did go on." Senator Philip Hart, 11/18/75, Hearings, Vol. 6, p. 41.

⁷ As the Supreme Court noted in *Miranda v. Arizona*, 384 U.S. 436, 483, 486 (1966) even before the Court required law officers to advise criminal suspects of their constitutional rights before custodial interrogation, the FBI had "an exemplary record" in this area—a practice which the Court said should be "emulated by state and local law enforcement agencies." This commendable FBI tradition in the general field of law enforcement presents a sharp contrast to the widespread disregard of individual rights in FBI domestic intelligence operations examined in the balance of this Report.

⁸ *New York Times*, 5/13/24.

⁹ Mary Jo Cook testimony, 12/2/75, Hearings, Vol. 6, p. 111; James B. Adams testimony, 12/2/75, Hearings, Vol. 6, p. 186.

The pattern of intelligence agencies expanding the scope of their activities was well described by one witness, who in 1970 had coordinated an effort by most of the intelligence community to obtain authority to undertake more illegal domestic activity:

"The risk was that you would get people who would be susceptible to political considerations as opposed to national security considerations, or would construe political considerations to be national security considerations, to move from the kid with a bomb to the kid with a picket sign, and from the kid with the picket sign to the kid with the bumper sticker of the opposing candidate. And you just keep going down the line."⁹

In 1940, Attorney General Robert Jackson saw the same risk. He recognized that using broad labels like "national security" or "subversion" to invoke the vast power of the government is dangerous because there are "no definite standards to determine what constitutes a 'subversive activity', such as we have for murder or larceny." Jackson added:

"Activities which seem benevolent or helpful to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as 'subversive' by those whose property interests might be burdened thereby. Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as subversive. We must not forget that it was no so long ago that both the term 'Republican' and the term 'Democrat' were epithets with sinister meaning to denote persons of radical tendencies that were 'subversive' of the order of things then dominant."¹⁰

This wise warning was not heeded in the conduct of intelligence activity, where the "eternal vigilance" which is the "price of liberty" has been forgotten.

B. The Questions

We have directed our investigation toward answering the following questions:

Which governmental agencies have engaged in domestic spying?

How many citizens have been targets of Governmental intelligence activity?

What standards have governed the opening of intelligence investigations and when have intelligence investigations been terminated?

Where have the targets fit on the spectrum between those who commit violent criminal acts and those who seek only to dissent peacefully from Government policy?

To what extent has the information collected included intimate details of the targets' personal lives or their political views, and has such information been disseminated and used to injure individuals?

What actions beyond surveillance have intelligence agencies taken, such as attempting to disrupt, discredit, or destroy persons or groups who have been the targets of surveillance?

Have intelligence agencies been used to serve the political aims of Presidents, other high officials, or the agencies themselves?

How have the agencies responded either to proper orders or to excessive pressures from their superiors? To what extent have intelligence agencies disclosed, or concealed them from, outside bodies charged with overseeing them?

Have intelligence agencies acted outside the law? What has been the attitude of the intelligence community toward the rule of law?

To what extent has the Executive branch and the Congress controlled intelligence agencies and held them accountable?

Generally, how well has the Federal system of checks and balances between the branches worked to control intelligence activity?

C. Summary of the Main Problems

The answer to each of these questions is disturbing. Too many people have been spied upon by too many Government agencies and too much information has been collected. The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power. The Government, operating primarily through secret informants, but also using other intrusive techniques such as wiretaps, microphone "bugs", surreptitious mail opening, and break-ins, has swept in vast amounts of information about the personal

⁹ Tom Charles Huston testimony, 9/28/75, Hearings, Vol. 2, p. 45.

¹⁰ "The Federal Prosecutor", *Journal of the American Judicature Society* (June, 1940), p.18.

lives, views, and associations of American citizens. Investigations of groups deemed potentially dangerous—and even of groups suspected of associating with potentially dangerous organizations—have continued for decades, despite the fact that those groups did not engage in unlawful activity. Groups and individuals have been harassed and disrupted because of their political views and their lifestyles. Investigations have been based upon vague standards whose breadth made excessive collection inevitable. Unsavory and vicious tactics have been employed—including anonymous attempts to break up marriages, disrupt meetings, ostracize persons from their professions, and provoke target groups into rivalries that might result in deaths. Intelligence agencies have served the political and personal objectives of presidents and other high officials. While the agencies often committed excesses in response to pressure from high officials in the Executive branch and Congress, they also occasionally initiated improper activities and then concealed them from officials whom they had a duty to inform.

Governmental officials—including those whose principal duty is to enforce the law—have violated or ignored the law over long periods of time and have advocated and defended their right to break the law.

The Constitutional system of checks and balances has not adequately controlled intelligence activities. Until recently the Executive branch has neither delineated the scope of permissible activities nor established procedures for supervising intelligence agencies. Congress has failed to exercise sufficient oversight, seldom questioning the use to which its appropriations were being put. Most domestic intelligence issues have not reached the courts, and in those cases when they have reached the courts, the judiciary has been reluctant to grapple with them.

Each of these points is briefly illustrated below, and covered in substantially greater detail in the following sections of the report.

1. The Number of People Affected by Domestic Intelligence Activity

United States intelligence agencies have investigated a vast number of American citizens and domestic organizations. FBI headquarters alone has developed over 500,000 domestic intelligence files,¹¹ and these have been augmented by additional files at FBI Field Offices. The FBI opened 65,000 of these domestic intelligence files in 1972 alone.¹² In fact, substantially more individuals and groups are subject to intelligence scrutiny than the number of files would appear to indicate, since typically, each domestic intelligence file contains information in more than one individual or group, and this information is readily retrievable through the FBI General Name Index.

The number of Americans and domestic groups caught in the domestic intelligence net is further illustrated by the following statistics:

Nearly a quarter of a million first class letters were opened and photographed in the United States by the CIA between 1953–1973, producing a CIA computerized index of nearly one and one-half million names.¹³

At least 130,000 first class letters were opened and photographed by the FBI—between 1940–1966 in eight U.S. cities.¹⁴

Some 300,000 individuals were indexed in a CIA computer system and separate files were created on approximately 7,200 Americans and over 100 domestic groups during the course of CIA's Operation CHAOS (1967–1973).¹⁵

Millions of private telegrams sent from, to, or through the United States were obtained by the National Security Agency from 1947 to 1975 under a secret arrangement with three United States telegraph companies.¹⁶

An estimated 100,000 Americans were the subjects of United States Army intelligence files created between the mid-1960's and 1971.¹⁷

Intelligence files on more than 11,000 individuals and groups were created by the Internal Revenue Service between 1969 and 1973 and tax investigations were started on the basis of political rather than tax criteria.¹⁸

¹¹ Memorandum from the FBI to the Senate Select Committee, 10/6/75.

¹² Memorandum from the FBI to the Senate Select Committee, 10/6/75.

¹³ James Angleton testimony, 9/17/75, p. 28.

¹⁴ See Mail Opening Report: Section IV, "FBI Mail Openings."

¹⁵ Chief, International Terrorist Group testimony, Commission on CIA Activities Within the United States, 8/10/75, pp. 1485–1489.

¹⁶ Statement by the Chairman, 11/6/75; re: SHAMROCK, Hearings, Vol. 5, pp. 57–60.

¹⁷ See Military Surveillance Report: Section II, "The Collection of Information about the Political Activities of Private Citizens and Private Organizations."

¹⁸ See IRS Report: Section II, "Selective Enforcement for Nontax Purposes."

At least 26,000 individuals were at one point catalogued on an FBI list of persons to be rounded up in the event of a "national emergency".¹⁹

2. Too Much Information Is Collected For Too Long

Intelligence agencies have collected vast amounts of information about the intimate details of citizens' lives and about their participation in legal and peaceful political activities. The targets of intelligence activity have included political adherents of the right and the left, ranging from activist to casual supporters. Investigations have been directed against proponents of racial causes and women's rights, outspoken apostles of nonviolence and racial harmony; establishment politicians; religious groups; and advocates of new life styles. The widespread targeting of citizens and domestic groups, and the excessive scope of the collection of information, is illustrated by the following examples:

(a) The "Women's Liberation Movement" was infiltrated by informants who collected material about the movement's policies, leaders, and individual members. One report included the name of every woman who attended meetings,²⁰ and another stated that each woman at a meeting had described "how she felt oppressed, sexually or otherwise".²¹ Another report concluded that the movement's purpose was to "free women from the humdrum existence of being only a wife and mother", but still recommended that the intelligence investigation should be continued.²²

(b) A prominent civil rights leader and advisor to Dr. Martin Luther King, Jr., was investigated on the suspicion that he might be a Communist "sympathizer". The FBI field office concluded he was not.²³ Bureau headquarters directed that the investigation continue—using a theory of "guilty until proven innocent":

"The Bureau does not agree with the expressed belief of the field office that -----²⁴ is not sympathetic to the Party Cause. While there may not be any evidence that ----- is a Communist neither is there any substantial evidence that he is anti-Communist."²⁵

(c) FBI sources reported on the formation of the Conservative American Christian Action Council in 1971.²⁶ In the 1950's, the Bureau collected information about the John Birch Society and passed it to the White House because of the Society's "scurrilous attack" on President Eisenhower and other high Government officials.²⁷

(d) Some investigations of the lawful activities of peaceful groups have continued for decades. For example, the NAACP was investigated to determine whether it "had connections with" the Communist Party. The investigation lasted for over twenty-five years, although nothing was found to rebut a report during the first year of the investigation that the NAACP had a "strong tendency" to "steer clear of Communist activities."²⁸ Similarly, the FBI has admitted that the Socialist Workers Party has committed no criminal acts. Yet the Bureau has investigated the Socialist Workers Party for more than three decades on the basis of its revolutionary rhetoric—which the FBI concedes falls short of incitement to violence—and its claimed international links. The Bureau is currently using its informants to collect information about SWP members' political views, including those on "U.S. involvement in Angola," "food prices," "racial matters," the "Vietnam War," and about any of their efforts to support non-SWP candidates for political office.²⁹

¹⁹ Memorandum from A. H. Belmont to L. V. Boardman, 12/8/54. Many of the memoranda cited in this report were actually written by FBI personnel other than those whose names were indicated at the foot of the document as the author. Citation in this report of specific memoranda by using the names of FBI personnel which so appear is for documentation purposes only and is not intended to presume authorship or even knowledge in all cases.

²⁰ Memorandum from Kansas City Field Office to FBI Headquarters, 10/20/70. (Hearings, Vol. 6, Exhibit 54-8).

²¹ Memorandum from New York Field Office to FBI Headquarters, 5/28/69, p. 2. (Hearings, Vol. 6, Exhibit 54-1).

²² Memorandum from Baltimore Field Office to FBI Headquarters, 5/11/70, p. 2.

²³ Memorandum from New York Field Office to FBI Headquarters, 4/14/64.

²⁴ Name deleted by Committee to protect privacy.

²⁵ Memorandum from FBI Headquarters to New York Field Office 4/24/64, re CPUSA, Negro question.

²⁶ James Adams testimony, 12/2/75, Hearings, Vol. 6, p. 137.

²⁷ Memorandum from F. J. Baumgardner to William C. Sullivan, 5/29/63.

²⁸ Memorandum from Oklahoma City Field Office to FBI Headquarters, 9/19/41. See Development of FBI Domestic Intelligence Investigations: Section IV, "FBI Target Lists."

²⁹ Chief Robert Shackelford testimony, 2/6/76, p. 91.

(e) National political leaders fell within the broad reach of intelligence investigations. For example, Army Intelligence maintained files on Senator Adlai Stevenson and Congressman Abner Mikva because of their participation in peaceful political meetings under surveillance by Army agents.³⁰ A letter to Richard Nixon, while he was a candidate for President in 1968, was intercepted under CIA's mail opening program.³¹ In the 1960's President Johnson asked the FBI to compare various Senators' statements on Vietnam with the Communist Party line³² and to conduct name checks on leading antiwar Senators.³³

(f) As part of their effort to collect information which "related even remotely" to people or groups "active" in communities which had "the potential" for civil disorder, Army intelligence agencies took such steps as: sending agents to a Halloween party for elementary school children in Washington, D.C., because they suspected a local "dissident" might be present; monitoring protests of welfare mothers' organizations in Milwaukee; infiltrating a coalition of church youth groups in Colorado; and sending agents to a priests' conference in Washington, D.C., held to discuss birth control measures.³⁴

(g) In the late 1960's and early 1970's, student groups were subjected to intense scrutiny. In 1970 the FBI ordered investigations of every member of the Students for a Democratic Society and of "every Black Student Union and similar group regardless of their past or present involvement in disorders."³⁵ Files were opened on thousands of young men and women so that, as the former head of FBI intelligence explained, the information could be used if they ever applied for a government job.³⁶

In the 1960's Bureau agents were instructed to increase their efforts to discredit "New Left" student demonstrators by tactics including publishing photographs ("naturally the most obnoxious picture should be used"),³⁷ using "misinformation" to falsely notify members events had been cancelled,³⁸ and writing "tell-tale" letters to students' parents.³⁹

(h) The FBI Intelligence Division commonly investigated any indication that "subversive" groups already under investigation were seeking to influence or control other groups.⁴⁰ One example of the extreme breadth of this "infiltration" theory was an FBI instruction in the mid-1960's to all Field Offices to investigate every "free university" because some of them had come under "subversive influence."⁴¹

(i) Each administration from Franklin D. Roosevelt's to Richard Nixon's permitted, and sometimes encouraged, government agencies to handle essentially political intelligence. For example:

—President Roosevelt asked the FBI to put in its files the names of citizens sending telegrams to the White House opposing his "national defense" policy and supporting Col. Charles Lindbergh.⁴²

—President Truman received inside information on a former Roosevelt aide's efforts to influence his appointments,⁴³ labor union negotiating plans,⁴⁴ and the publishing plans of journalists.⁴⁵

—President Eisenhower received reports on purely political and social contacts with foreign officials by Bernard Baruch,⁴⁶ Mrs. Eleanor Roosevelt,⁴⁷ and Supreme Court Justice William O. Douglas.⁴⁸

³⁰ Senate Judiciary Subcommittee on Constitutional Rights, Report, 1973, p. 57.

³¹ Senate Select Committee Staff summary of HTLINGUAL File Review, 9/5/75.

³² FBI Summary Memorandum, 1/31/75, re: Coverage of T.V. Presentation.

³³ Letter from J. Edgar Hoover to Marvin Watson, 7/15/66.

³⁴ See Military Report: Sec. II, "The Collection of Information About the Political Activities of Private Citizens and Private Organizations."

³⁵ Memorandum from FBI Headquarters to all SAC's, 11/4/70.

³⁶ Charles Brennan testimony, 9/25/75, Hearings, vol. 2, p. 117.

³⁷ Memorandum from FBI Headquarters to all SAC's, 7/5/68.

³⁸ Abstracts of New Left Documents #161, 115, 48. Memorandum from Washington Field Office to FBI Headquarters, 1/21/69.

³⁹ Memorandum from FBI Headquarters to Cleveland Field Office, 11/29/68.

⁴⁰ FBI Manual of Instructions, Sec. 87, B(2-f).

⁴¹ Memorandum from FBI Headquarters to San Antonio Field Office, 7/23/69.

⁴² Memorandum from Stephen Early to J. Edgar Hoover, 5/21/40; 6/17/40.

⁴³ Letter from J. Edgar Hoover to George Allen, 12/3/46.

⁴⁴ Letter from J. Edgar Hoover to Maj. Gen. Harry Vaughn, 2/15/47.

⁴⁵ Letter from J. Edgar Hoover to M. J. Connolly, 1/27/50.

⁴⁶ Letter from J. Edgar Hoover to Dillon Anderson, 11/7/55.

⁴⁷ Letters from J. Edgar Hoover to Robert Cutler, 2/18/58.

⁴⁸ Letters from J. Edgar Hoover to Robert Cutler, 4/21/58-4/27/53.

—The Kennedy Administration had the FBI wiretap a Congressional staff member,⁴⁸ three executive officials,⁴⁹ a lobbyist,⁵⁰ and a Washington law firm.⁵¹ Attorney General Robert F. Kennedy received the fruits of a FBI “tap” on Martin Luther King, Jr.,⁵² and a “bug” on a Congressman both of which yielded information of a political nature.⁵³

—President Johnson asked the FBI to conduct “name checks” of his critics and of members of the staff of his 1964 opponent, Senator Barry Goldwater.⁵⁴ He also requested purely political intelligence on his critics in the Senate and received extensive intelligence reports on political activity at the 1964 Democratic Convention from FBI electronic surveillance.⁵⁵

—President Nixon authorized a program of wiretaps which produced for the White House purely political or personal information unrelated to national security, including information about a Supreme Court justice.⁵⁶

3. Covert Action and the Use of Illegal or Improper Means

(a) *Covert Action.*—Apart from uncovering excesses in the collection of intelligence, our investigation has disclosed covert actions directed against Americans, and the use of illegal and improper surveillance techniques to gather information. For example:

(1) The FBI's COINTELPRO—counterintelligence program—was designed to “disrupt” groups and “neutralize” individuals deemed to be threats to domestic security. The FBI resorted to counterintelligence tactics in part because its chief officials believed that the existing law could not control the activities of certain dissident groups, and that court decisions had tied the hands of the intelligence community. Whatever opinion one holds about the policies of the targeted groups, many of the tactics employed by the FBI were indisputably degrading to a free society. COINTELPRO tactics included:

—Anonymously attacking the political beliefs of targets in order to induce their employers to fire them;

—Anonymously mailing letters to the spouses of intelligence targets for the purpose of destroying their marriages;⁵⁷

—Obtaining from IRS the tax returns of a target and then attempting to provoke an IRS investigation for the express purpose of deterring a protest leader from attending the Democratic National Convention;⁵⁸

—Falsely and anonymously labeling as Government informants members of groups known to be violent, thereby exposing the falsely labeled member to expulsion or physical attack;⁵⁹

—Pursuant to instructions to use “misinformation” to disrupt demonstrations, employing such means as broadcasting fake orders on the same citizens band radio frequency used by demonstration marshalls to attempt to control demonstrations,⁶⁰ and duplicating and falsely filling out forms soliciting housing for persons coming to a demonstration, thereby causing “long and useless journeys to locate these addresses”;⁶¹

Sending an anonymous letter to the leader of a Chicago street gang (described as “violence-prone”) stating that the Black Panthers were supposed to have “a hit out for you.” The letter was suggested because it “may intensify . . . animosity” and cause the street gang leader to “take retaliatory action”.⁶²

(II) From “late 1963” until his death in 1968, Martin Luther King, Jr., was the target of an intensive campaign by the Federal Bureau of Investigation to “neutralize” him as an effective civil rights leader. In the words of the man in charge of the FBI's “war” against Dr. King, “No holds were barred.”⁶³

⁴⁸ Memorandum from J. Edgar Hoover to the Attorney General, 2/16/61.

⁴⁹ Memorandum from J. Edgar Hoover to the Attorney General, 2/14/61.

⁵⁰ Memorandum from J. Edgar Hoover to the Attorney General, 2/16/61.

⁵¹ Memorandum from J. Edgar Hoover to the Attorney General, 6/26/62.

⁵² Memorandum from Charles Brennan to William Sullivan, 12/19/66.

⁵³ Memorandum from J. Edgar Hoover to the Attorney General, 2/18/61.

⁵⁴ Memorandum from J. Edgar Hoover to Bill Moyers, 10/27/64.

⁵⁵ Memorandum from C. D. DeLoach to John Mohr, 8/29/64.

⁵⁶ Letter from J. Edgar Hoover to H. R. Haldeman, 6/25/70.

⁵⁷ Memorandum from FBI Headquarters, to San Francisco Field Office, 11/26/68.

⁵⁸ Memorandum from [Midwest City] Field Office to FBI Headquarters, 8/1/68; memorandum from FBI Headquarters to [Midwest City] Field Office, 8/6/68.

⁵⁹ Memorandum from Columbia Field Office to FBI Headquarters, 11/4/70, re: COINTELPRO-New Left.

⁶⁰ Memorandum from Charles Brennan to William Sullivan, 8/15/68.

⁶¹ Memorandum from Chicago Field Office to FBI Headquarters, 9/9/68.

⁶² Memorandum from FBI Headquarters to Chicago Field Office, 1/30/69 re: COINTELPRO, Black Nationalist-Hate Groups.

⁶³ William C. Sullivan testimony, 11/1/75, p. 49.

The FBI gathered information about Dr. King's plans and activities through an extensive surveillance program, employing nearly every intelligence-gathering technique at the Bureau's disposal in order to obtain information about the "private activities of Dr. King and his advisors" to use to "completely discredit" them.⁶⁴

The program to destroy Dr. King as the leader of the civil rights movement included efforts to discredit him with Executive branch officials, Congressional leaders, foreign heads of state, American ambassadors, churches, universities, and the press.⁶⁵

The FBI mailed Dr. King a tape recording made from microphones hidden in his hotel rooms which one agent testified was an attempt to destroy Dr. King's marriage.⁶⁶ The tape recording was accompanied by a note which Dr. King and his advisors interpreted as threatening to release the tape recording unless Dr. King committed suicide.⁶⁷

The extraordinary nature of the campaign to discredit Dr. King is evident from two documents:

At the August 1963 March on Washington, Dr. King told the country of his "dream" that:

"all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual, 'Free at last, free at last, thank God Almighty, I'm free at last.'"

The Bureau's Domestic Intelligence Division concluded that this "demagogic speech" established Dr. King as the "most dangerous and effective Negro leader in the country."⁶⁸ Shortly afterwards, and within days after Dr. King was named "Man of the Year" by *Time* magazine, the FBI decided to "take him off his pedestal," "reduce him completely in influence," and select and promote its own candidate to "assume the role of the leadership of the Negro people."⁶⁹

In early 1968, Bureau headquarters explained to the field that Dr. King must be destroyed because he was seen as a potential "messiah" who could "unify and electrify" the "black nationalist movement". Indeed, to the FBI he was a potential threat because he might "abandon his supposed 'obedience' to white liberal doctrines (non-violence)."⁷⁰ In short, a non-violent man was to be secretly attacked and destroyed as insurance against his abandoning non-violence.

(b) *Illegal or Improper Means*.—The surveillance which we investigated was not only vastly excessive in breadth and a basis for degrading counterintelligence actions, but was also often conducted by illegal or improper means. For example:

(1) For approximately 20 years the CIA carried out a program of indiscriminately opening citizens' first class mail. The Bureau also had a mail opening program, but cancelled it in 1966. The Bureau continued, however, to receive the illegal fruits of CIA's program. In 1970, the heads of both agencies signed a document for President Nixon, which correctly stated that mail opening was illegal, falsely stated that it had been discontinued, and proposed that the illegal opening of mail should be resumed because it would provide useful results. The President approved the program, but withdrew his approval five days later. The illegal opening continued nonetheless. Throughout this period CIA officials knew that mail opening was illegal, but expressed concern about the "flap potential" of exposure, not about the illegality of their activity.⁷¹

(2) From 1947 until May 1975, NSA received from international cable companies millions of cables which had been sent by American citizens in the reasonable expectation that they would be kept private.⁷²

(3) Since the early 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant. Recent court decisions have curtailed the use of these techniques against domestic targets. But past subjects of these surveillances have included a United States

⁶⁴ Memorandum from Baumgardner to Sullivan, 2/4/64.

⁶⁵ Memorandum from Chicago Field Office to FBI Headquarters, 12/16/68; memorandum from FBI Headquarters to Chicago Field Office, 1/30/69, re: COINTELPRO, Black Nationalist-Hate Groups.

⁶⁶ William C. Sullivan, 11/1/75, pp. 104-105.

⁶⁷ Andrew Young testimony, 2/19/76, p. 8.

⁶⁸ Memorandum from Sullivan to Belmont, 8/30/68.

⁶⁹ Memorandum from Sullivan to Belmont, 1/8/64.

⁷⁰ Memorandum from FBI Headquarters to all SACs, 3/4/68.

⁷¹ See Mail Opening Report: Section II, "Legal Considerations and the 'Flap' Potential."

⁷² See NSA Report: Section I, "Introduction and Summary."

Congressman, a Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group. While the prior written approval of the Attorney General has been required for all warrantless wiretaps since 1940, the record is replete with instances where this requirement was ignored and the Attorney General gave only after-the-fact authorization.

Until 1965, microphone surveillance by intelligence agencies was wholly unregulated in certain classes of cases. Within weeks after a 1954 Supreme Court decision denouncing the FBI's installation of a microphone in a defendant's bedroom, the Attorney General informed the Bureau that he did not believe the decision applied to national security cases and permitted the FBI to continue to install microphones subject only to its own "intelligent restraint".⁷²

(4) In several cases, purely political information (such as the reaction of Congress to an Administration's legislative proposal) and purely personal information (such as coverage of the extra-marital social activities of a high-level Executive official under surveillance) was obtained from electronic surveillance and disseminated to the highest levels of the federal government.⁷⁴

(5) Warrantless break-ins have been conducted by intelligence agencies since World War II. During the 1960's alone, the FBI and CIA conducted hundreds of break-ins, many against American citizens and domestic organizations. In some cases, these break-ins were to install microphones; in other cases, they were to steal such items as membership lists from organizations considered "subversive" by the Bureau.⁷⁵

(6) The most pervasive surveillance technique has been the informant. In a random sample of domestic intelligence cases, 83% involved informants and 5% involved electronic surveillance.⁷⁶ Informants have been used against peaceful, law-abiding groups; they have collected information about personal and political views and activities.⁷⁷ To maintain their credentials in violence-prone groups, informants have involved themselves in violent activity. This phenomenon is well illustrated by an informant in the Klan. He was present at the murder of a civil rights worker in Mississippi and subsequently helped to solve the crime and convict the perpetrators. Earlier, however, while performing duties paid for by the Government, he had previously "beaten people severely, had boarded buses and kicked people, had [gone] into restaurants and beaten them [blacks] with blackjacks, chains, pistols."⁷⁸ Although the FBI requires agents to instruct informants that they cannot be involved in violence, it was understood that in the Klan, "he couldn't be an angel and be a good informant."⁷⁹

4. Ignoring the Law

Officials of the intelligence agencies occasionally recognized that certain activities were illegal, but expressed concern only for "flap potential." Even more disturbing was the frequent testimony that the law, and the Constitution were simply ignored. For example, the author of the so-called Huston plan testified:

Question. Was there any person who stated that the activity recommended, which you have previously identified as being illegal opening of the mail and breaking and entry or burglary—was there any single person who stated that such activity should not be done because it was unconstitutional?

Answer. No.

Question. Was there any single person who said such activity should not be done because it was illegal?

Answer. No.⁸⁰

Similarly, the man who for ten years headed FBI's Intelligence Division testified that:

"... never once did I hear anybody, including myself, raise the question: 'Is this course of action which we have agreed upon lawful, is it legal, is it ethical or

⁷² Memorandum from Attorney General Brownell to J. Edgar Hoover, 5/20/54.

⁷³ See finding on Political Abuse. To protect the privacy of the targeted individual, the Committee has omitted the citation to the memorandum concerning the example of purely personal information.

⁷⁴ Memorandum from W. C. Sullivan to C. D. DeLoach, 7/19/66, p. 2.

⁷⁵ General Accounting Office Report on Domestic Intelligence Operations of the FBI, 9/75.

⁷⁶ Mary Jo Cook testimony, 12/2/75, Hearings, Vol. 6, p. 111.

⁷⁷ Gary Rowe deposition, 10/17/75, p. 9.

⁷⁸ Special Agent No. 8 deposition, 11/21/75, p. 12.

⁷⁹ Huston testimony, 9/23/75, Hearings, Vol. 2, p. 41.

moral.' We never gave any thought to this line of reasoning, because we were just naturally pragmatic."⁴¹

Although the statutory law and the Constitution were often not "[given] a thought",⁴² there was a general attitude that intelligence needs were responsive to a higher law. Thus, as one witness testified in justifying the FBI's mail opening program:

"It was my assumption that what we were doing was justified by what we had to do . . . the greater good, the national security."⁴³

5. Deficiencies in Accountability and Control

The overwhelming number of excesses continuing over a prolonged period of time were due in large measure to the fact that the system of checks and balances—created in our Constitution to limit abuse of Governmental power—was seldom applied to the intelligence community. Guidance and regulations from outside the intelligence agencies—where it has been imposed at all—has been vague. Presidents and other senior Executive officials, particularly the Attorneys General, have virtually abdicated their Constitutional responsibility to oversee and set standards for intelligence activity. Senior government officials generally gave the agencies broad, general mandates or pressed for immediate results on pressing problems. In neither case did they provide guidance to prevent excesses and their broad mandates and pressures themselves often resulted in excessive or improper intelligence activity.

Congress has often declined to exercise meaningful oversight, and on occasion has passed laws or made statements which were taken by intelligence agencies as supporting overly-broad investigations.

On the other hand, the record reveals instances when intelligence agencies have concealed improper activities from their superiors in the Executive branch and from the Congress, or have elected to disclose only the less questionable aspects of their activities.

There has been, in short, a clear and sustained failure by those responsible to control the intelligence community and to ensure its accountability. There has been an equally clear and sustained failure by intelligence agencies to fully inform the proper authorities of their activities and to comply with directives from those authorities.

6. The Adverse Impact of Improper Intelligence Activity

Many of the illegal or improper disruptive efforts directed against American citizens and domestic organizations succeeded in injuring their targets. Although it is sometimes difficult to prove that a target's misfortunes were caused by a counter-intelligence program directed against him, the possibility that an arm of the United States Government intended to cause the harm and might have been responsible is itself abhorrent.

The Committee has observed numerous examples of the impact of intelligence operations. Sometimes the harm was readily apparent—destruction of marriages, loss of friends or jobs. Sometimes the attitudes of the public and of Government officials responsible for formulating policy and resolving vital issues were influenced by distorted intelligence. But the most basic harm was to the values of privacy and freedom which our Constitution seeks to protect and which intelligence activity infringed on a broad scale.

(a) *General Efforts to Discredit.*—Several efforts against individuals and groups appear to have achieved their stated aims. For example:

A Bureau Field Office reported that the anonymous letter it had sent to an activist's husband accusing his wife of infidelity "contributed very strongly" to the subsequent breakup of the marriage.⁴⁴

Another Field Office reported that a draft counsellor deliberately, and falsely, accused of being an FBI informant was "ostracized" by his friends and associates.⁴⁵

⁴¹ William Sullivan testimony, 11/1/75, pp. 92-93.

⁴² The quote is from a Bureau official who had supervised for the "Black Nationalist Hate Group" COINTELPRO.

⁴³ Question. Did anybody at any time that you remember during the course of the programs discuss the Constitutionality or the legal authority, or anything else like that?

⁴⁴ Answer. No, we never gave it a thought. As far as I know, nobody engaged or ever had any idea that they were doing anything other than what was the policy of the Bureau which had been policy for a long time." (George Moore deposition, 11/3/75, p. 88.)

⁴⁵ Branigan, 10/9/75, p. 41.

⁴⁶ Memorandum from St. Louis Field Office to FBI Headquarters, 6/19/70.

⁴⁷ Memorandum from San Diego Field Office to FBI Headquarters, 4/30/69.

Two instructors were reportedly put on probation after the Bureau sent an anonymous letter to a university administrator about their funding of an anti-administration student newspaper.⁶⁶

The Bureau evaluated its attempts to "put a stop" to a contribution to the Southern Christian Leadership Conference as "quite successful."⁶⁷

An FBI document boasted that a "pretext" phone call to Stokely Carmichael's mother telling her that members of the Black Panther Party intended to kill her son left her "shocked". The memorandum intimated that the Bureau believed it had been responsible for Carmichael's flight to Africa the following day.⁶⁸

(b) *Media Manipulation.*—The FBI has attempted covertly to influence the public's perception of persons and organizations by disseminating derogatory information to the press, either anonymously or through "friendly" news contacts. The impact of those articles is generally difficult to measure, although in some cases there are fairly direct connections to injury to the target. The Bureau also attempted to influence media reporting which would have any impact on the public image of the FBI. Examples include:

Planting a series of derogatory articles about Martin Luther King, Jr., and the Poor People's Campaign.⁶⁹

For example, in anticipation of the 1968 'poor people's march on Washington, D.C.' Bureau Headquarters granted authority to furnish "cooperative news media sources" an article "designed to curtail success of Martin Luther King's fund raising."⁷⁰ Another memorandum illustrated how "photographs of demonstrators" could be used in discrediting the civil rights movement. Six photographs of participants in the poor people's campaign in Cleveland accompanied the memorandum with the following note attached: "These [photographs] show the militant aggressive appearance of the participants and might be of interest to a cooperative news source."⁷¹ Information on the Poor People's Campaign was provided by the FBI to friendly reporters on the condition that "the Bureau must not be revealed as the source."⁷²

Soliciting information from Field Offices "on a continuing basis" for "prompt . . . dissemination to the news media . . . to discredit the New Left movement and its adherents." The Headquarters directive requested, among other things, that:

"specific data should be furnished depicting the scurrilous and depraved nature of many of the characters, activities, habits and living conditions representative of New Left adherents."

Field Offices were to be exhorted that: "Every avenue of possible embarrassment must be vigorously and enthusiastically explored."⁷³

Ordering Field Offices to gather information which would disprove allegations by the "liberal press, the bleeding hearts, and the forces on the left" that the Chicago police used undue force in dealing with demonstrators at the 1968 Democratic Convention.⁷⁴

Taking advantage of a close relationship with the Chairman of the Board—described in an FBI memorandum as "our good friend"—of a magazine with national circulation to influence articles which related to the FBI. For example, through this relationship the Bureau: "squashed" an "unfavorable article against the Bureau" written by a free-lance writer about an FBI investigation; "postponed publication" of an article on another FBI case; "forestalled publication" of an article by Dr. Martin Luther King, Jr.; and received information about proposed editing of Kings' articles.⁷⁵

(c) *Distorting Data to Influence Government Policy and Public Perceptions.*—Accurate intelligence is a prerequisite to sound government policy. However, as the past head of the FBI's Domestic Intelligence Division reminded the Committee:

The facts by themselves are not too meaningful. They are something like stones cast into a heap.⁷⁷

⁶⁶ Memorandum from Mobile Field Office to FBI Headquarters, 12/9/70.

⁶⁷ Memorandum from Wick to DeLoach, 11/9/66.

⁶⁸ Memorandum from New York Field Office to FBI Headquarters, 9/9, 68.

⁶⁹ See King Report: Sections V and VII.

⁷⁰ Memorandum from G. C. Moore to W. C. Sullivan, 10/26/68.

⁷¹ Memorandum from G. C. Moore to W. C. Sullivan, 5/17/68.

⁷² Memorandum from FBI Headquarters to Miami Field Office, 7/9/68.

⁷³ Memorandum from C. D. Brennan to W. C. Sullivan, 5/22/68.

⁷⁴ Memorandum from FBI Headquarters to Chicago Field Office, 8/28/68.

⁷⁵ Memorandum from W. H. Stepleton to DeLoach, 11/3/64.

⁷⁷ Sullivan, 11/1/75, p. 48.

On certain crucial subjects the domestic intelligence agencies reported the "facts" in ways that gave rise to misleading impressions.

For example, the FBI's Domestic Intelligence Division initially discounted as an "obvious failure" the alleged attempts of Communists to influence the civil rights movement.⁹⁴ Without any significant change in the factual situation, the Bureau moved from the Division's conclusion to Director Hoover's public congressional testimony characterizing Communist influence on the civil rights movement as "vitaly important."⁹⁵

FBI reporting on protests against the Vietnam War provides another example of the manner in which the information provided to decision-makers can be skewed. In acquiescence with a judgment already expressed by President Johnson, the Bureau's reports on demonstrations against the War in Vietnam emphasized Communist efforts to influence the anti-war movement and underplayed the fact that the vast majority of demonstrators were not Communist controlled.⁹⁶

(d) *"Chilling" First Amendment Rights.*—The First Amendment protects the Rights of American citizens to engage in free and open discussions, and to associate with persons of their choosing. Intelligence agencies have, on occasion, expressly attempted to interfere with those rights. For example, one internal FBI memorandum called for "more interviews" with New Left subjects "to enhance the paranoia endemic in these circles" and "get the point across there is an FBI agent behind every mailbox."¹⁰⁰

More importantly, the government's surveillance activities in the aggregate—whether or not expressly intended to do so—tends, as the Committee concludes at p. 290 to deter the exercise of First Amendment rights by American citizens who become aware of the government's domestic intelligence program.

(c) *Preventing the Free Exchange of Ideas.* Speakers, teachers, writers, and publications themselves were targets of the FBI's counterintelligence program. The FBI's efforts to interfere with the free exchange of ideas included:

Anonymously attempting to prevent an alleged "Communist-front" group from holding a forum on a midwest campus, and then investigating the judge who ordered that the meeting be allowed to proceed.¹⁰¹

Using another "confidential source" in a foundation which contributed to a local college to apply pressure on the school to fire an activist professor.

Anonymously contacting a university official to urge him to "persuade" two professors to stop funding a student newspaper, in order to "eliminate what voice the New Left has" in the area.

Targeting the New Mexico Free University for teaching "confrontation politics" and "draft counseling training."¹⁰²

7. Cost and Value

Domestic intelligence is expensive. We have already indicated the cost of illegal and improper intelligence activities in terms of the harm to victims, the injury to constitutional values, and the damage to the democratic process itself. The cost in dollars is also significant. For example, the FBI has budgeted for fiscal year 1976 over \$7 million for its domestic security informant program, more than twice the amount it spends on informants against organized crime.¹⁰³ The aggregate budget for FBI domestic security intelligence and foreign counterintelligence is at least \$80 million.¹⁰⁴ In the late 1960s and early 1970s, when

⁹⁴ Memorandum from Baumgardner to Sullivan, 8/26/63, p. 1. Hoover himself construed the initial Division estimate to mean that Communist influence was "infinitesimal."

⁹⁵ See Finding on Political Abuse, p. 225.

⁹⁶ See Finding on Political Abuse, p. 225.

¹⁰⁰ "New Left Notes—Philadelphia," 9/16/70, Edition #1.

¹⁰¹ Memorandum from Detroit Field Office to FBI Headquarters, 10/26/60; Memorandum from FBI Headquarters to Detroit Field Office 10/27, 28, 31/60; Memorandum from Baumgardner to Belmont, 10/26/60.

¹⁰² See COINTELPRO Report: Section III. "The Goals of COINTELPRO: Preventing or disrupting the exercise of First Amendment Rights."

¹⁰³ The budget for FBI informant programs includes not only the payments to informants for their services and expenses, but also the expenses of FBI personnel who supervise informants, their support costs, and administrative overhead. (Justice Department letter to Senate Select Committee, 3/2/76).

¹⁰⁴ The Committee is withholding the portion of this figure spent on domestic security intelligence (informants and other investigations combined) to prevent hostile foreign intelligence services from deducing the amount spent on counterespionage. The \$80 million figure does not include all costs of separate FBI activities which may be drawn upon for domestic security intelligence purposes. Among these are the Identification Division (maintaining fingerprint records), the Files and Communications Division (managing the storage and retrieval of investigative and intelligence files), and the FBI Laboratory.

the Bureau was joined by the CIA, the military, and NSA in collecting information about the anti-war movement and black activists, the cost was substantially greater.

Apart from the excesses described above, the usefulness of many domestic intelligence activities in serving the legitimate goal of protecting society has been questionable. Properly directed intelligence investigations concentrating upon hostile foreign agents and violent terrorists can produce valuable results. The Committee has examined cases where the FBI uncovered "illegal" agents of a foreign power engaged in clandestine intelligence activities in violation of federal law. Information leading to the prevention of serious violence has been acquired by the FBI through its informant penetration of terrorist groups and through the inclusion in Bureau files of the names of persons actively involved with such groups.¹⁰⁸ Nevertheless, the most sweeping domestic intelligence surveillance programs have produced surprisingly few useful returns in view of their extent. For example:

Between 1960 and 1974, the FBI conducted over 500,000 separate investigations of persons and groups under the "subversive" category, predicated on the possibility that they might be likely to overthrow the government of the United States.¹⁰⁹ Yet not a single individual or group has been prosecuted since 1957 under the laws which prohibit planning or advocating action to overthrow the government and which are the main alleged statutory basis for such FBI investigations.¹⁰¹

A recent study by the General Accounting Office has estimated that of some 17,528 FBI domestic intelligence investigations of individuals in 1974, only 1.8 percent resulted in prosecution and conviction, and in only "about 2 percent" of the cases was advance knowledge of any activity—legal or illegal—obtained.¹⁰²

One of the main reasons advanced for expanded collection of intelligence about urban unrest and anti-war protest was to help responsible officials cope with possible violence. However, a former White House official with major duties in this area under the Johnson administration has concluded, in retrospect, that "in none of these situations . . . would advance intelligence about dissident groups [have] been of much help," that what was needed was "physical intelligence" about the geography of major cities, and that the attempt to "predict violence" was not a "successful undertaking."¹⁰³

Domestic intelligence reports have sometimes even been counter-productive. A local police chief, for example, described FBI reports which led to the positioning of federal troops near his city as:

"... almost completely composed of unsorted and unevaluated stories, threats, and rumors that had crossed my desk in New Haven. Many of these had long before been discounted by our Intelligence Division. But they had made their way from New Haven to Washington, had gained completely unwarranted credibility, and had been submitted by the Director of the FBI to the President of the United States. They seemed to present a convincing picture of impending holocaust."¹¹⁰

¹⁰⁸ Examples of valuable informant reports include the following: one informant reported a plan to ambush police officers and the location of a cache of weapons and dynamite; another informant reported plans to transport illegally obtained weapons to Washington, D.C.; two informants at one meeting discovered plans to dynamite two city blocks. All of these plans were frustrated by further investigation and protective measures or arrest. (FBI memorandum to Select Committee, 12/10/75; Senate Select Committee Staff memorandum: Intelligence Cases in Which the FBI Prevented Violence, undated.)

One example of the use of information in Bureau files involved a "name check" at Secret Service request on certain persons applying for press credentials to cover the visit of a foreign head of state. The discovery of data in FBI files indicating that one such person had been actively involved with violent groups led to further investigation and ultimately the issuance of a search warrant. The search produced evidence, including weapons, of a plot to assassinate the foreign head of state. (FBI memorandum to Senate Select Committee, 2/23/76)

¹⁰⁹ This is the number of "investigative matters" handled by the FBI in this area, including as separate items the investigative leads in particular cases which are followed up by various field offices. (FBI memorandum to Select Committee, 10/6/75.)

¹⁰⁷ Shackelford 2/13/76, p. 32. This official does not recall any targets of "subversive" investigations having been referred to a Grand Jury under these statutes since the 1950s.

¹⁰⁶ "FBI Domestic Intelligence Operations—Their Purpose and Scope: Issues That Need To Be Resolved," Report by the Comptroller General to the House Judiciary Committee, 2/24/76, pp. 138-147. The FBI contends that these statistics may be unfair in that they concentrate on investigations of individuals rather than groups. (Ibid., Appendix V) In response, GAO states that its "sample of organization and control files was sufficient to determine that generally the FBI did not report advance knowledge of planned violence." In most of the fourteen instances where such advance knowledge was obtained, it related to "such activities as speeches, demonstrations or meetings—all essentially nonviolent." (Ibid., p. 144.)

¹⁰⁸ Joseph Callfano testimony, 1/27/76, pp. 7-8.

¹¹⁰ James Ahern testimony, 1/20/76, pp. 16, 17.

In considering its recommendations, the Committee undertook an evaluation of the FBI's claims that domestic intelligence was necessary to combat terrorism, civil disorders, "subversion," and hostile foreign intelligence activity. The Committee reviewed voluminous materials bearing on this issue and questioned Bureau officials, local police officials, and present and former federal executive officials.

We have found that we are in fundamental agreement with the wisdom of Attorney General Stone's initial warning that intelligence agencies must not be "concerned with political or other opinions of individuals" and must be limited to investigating essentially only "such conduct as is forbidden by the laws of the United States." The Committee's record demonstrates that domestic intelligence which departs from this standard raises grave risks of undermining the democratic process and harming the interests of individual citizens. This danger weighs heavily against the speculative or negligible benefits of the ill-defined and overbroad investigations authorized in the past. Thus, the basic purpose of the recommendations contained in Part IV of this report is to limit the FBI to investigating conduct rather than ideas or associations.

The excesses of the past do not, however, justify depriving the United States of a clearly defined and effectively controlled domestic intelligence capability. The intelligence services of this nation's international adversaries continue to attempt to conduct clandestine espionage operations within the United States.¹¹¹ Our recommendations provide for intelligence investigations of hostile foreign intelligence activity.

Moreover, terrorists have engaged in serious acts of violence which have brought death and injury to Americans and threaten further such acts. These acts, not the politics or beliefs of those who would commit them, are the proper focus for investigations to anticipate terrorist violence. Accordingly, the Committee would permit properly controlled intelligence investigations in those narrow circumstances.¹¹²

Concentration on imminent violence can avoid the wasteful dispersion of resources which has characterized the sweeping (and fruitless) domestic intelligence investigations of the past. But the most important reason for the fundamental change in the domestic intelligence operations which our Recommendations propose is the need to protect the constitutional rights of Americans.

In light of the record of abuse revealed by our inquiry, the Committee is not satisfied with the position that mere exposure of what has occurred in the past will prevent its recurrence. Clear legal standards and effective oversight and controls are necessary to ensure that domestic intelligence activity does not itself undermine the democratic system it is intended to protect.

[From the New York Times, May 25, 1976]

TWO POSTAL AIDES HELD IN \$800,000 THEFT

(By Max H. Selgel)

Two Postal Service employees at Kennedy International Airport were accused yesterday of stealing \$800,000 and then going on a spending spree totaling nearly \$150,000. The rest of the money still is missing. The theft was considered to be the largest embezzlement of currency in the history of the post office.

Both the theft and the spending were said to have occurred while Federal officials were keeping one of the two suspects under surveillance. The officials

¹¹¹ An indication of the scope of the problem is the increasing number of official representatives of communist governments in the United States. For example, the number of Soviet officials in this country has increased from 383 in 1961 to 1,079 by early 1975. There were 2,688 East-West exchange visitors and 1,500 commercial visitors in 1974. (FBI Memorandum, "Intelligence Activities Within the United States by Foreign Governments," 3/20/75.)

¹¹² According to the FBI, there were 89 bombings attributable to terrorist activity in 1975, as compared with 45 in 1974 and 24 in 1973. Six persons died in terrorist claimed bombings and 76 persons were injured in 1975. Five other deaths were reported in other types of terrorist incidents. Monetary damage reported in terrorist bombings exceeded 2.7 million dollars. It should be noted, however, that terrorist bombings are only a fraction of the total number of bombings in this country. Thus, the 89 terrorist bombings in 1975 were among a total of over 1,900 bombings, most of which were not, according to the FBI, attributable clearly to terrorist activity. (FBI memorandum to Senate Select Committee, 2/23/76.)

reported that they had been tipped off to watch David Walker, 48 years old, a foreman of mails, two weeks before the theft occurred, last September 22.

An unidentified person had reported to the postal inspectors that he had been approached by Mr. Walker and had been offered \$100,000 to transport a mail pouch from the Postal Service facility at Kennedy Airport to a pre-arranged point outside.

At the time, the informant said, Mr. Walker had told him he had another person working with him inside the airport mail facility. The informant then discussed these matters with Mr. Walker in a telephone conversation, which he taped and subsequently turned over to postal inspectors.

The officials reported that their investigation then disclosed that the theft had occurred in the registry section of the airport mail facility. A Postal Service registry bill, bearing the signature of Helen A. Helton, showed that she had been the last-known person to be in possession of the 12 parcels of mail that were stolen.

Mrs. Helton, 47, of 38-26 Corporal Stone Street, Bayside, Queens, a \$250-a-week clerk, was arrested with Mr. Walker yesterday in connection with the theft.

According to Gavin Scotti, an assistant United States Attorney, most of the money that was taken had been shipped in 10 parcels from the Banco Nazionale in Milan, Italy, to the Irving Trust Company, here. The other two parcels had been shipped from the Royal Bank of Canada, on the island of Granada in the British West Indies, to the Chase Manhattan Bank. A spokesman for Chase Manhattan said that this shipment had involved only \$2,000.

A spokesman at the Irving Trust Company said that the bank was not responsible for the money, since it had not received it. He added that it could be assumed that the shipper had insured the parcels.

EXPENDITURES LISTED

Edmond H. Mullins, a postal inspector who signed the complaint against the two suspects, listed some of their expenditures.

He said that three weeks after the theft, on Oct. 14, Mr. Walker had paid in cash about \$1,500 that he owed his Bank AmeriCard account; on Oct. 28, he bought a tract for \$2,250; on Dec. 30, he purchased a Ford Elite for his wife for \$4,198; on Jan. 6 of this year, he bought three parcels of property in Jamaica, Queens, for \$500,000, paying \$100,000 in cash; on Feb. 5, he bought a \$15,500 Jaguar car for himself; and on Feb. 19, he paid \$5,000 in cash for a Ford Thunderbird, which Mrs. Helton bought.

Inspector Mullins noted that Mr. Walker, who lives at 188-25 121st Avenue, St. Albans, Queens, earned only \$17,000.

Neither the postal inspectors nor other officials were able to say yesterday how the two suspects could have removed the packages of currency from the airport mail facility.

Both Mr. Walker and Mrs. Helton were arraigned in Federal Court in Brooklyn before Magistrate Vincent A. Catoggio. He ordered each held in \$50,000 bail pending a hearing June 3.

[94th Cong., 2d sess., Report No. 94-755]

SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS—BOOK III

Final report of the select committee to study governmental operations with respect to intelligence activities United States Senate.

[EXCERPT]

Black Panther Party
 Communist
 Congress of Racial Equality
 Ku Klux Klan
 Latin American
 Minuteman
 Nation of Islam
 National States Rights Party
 Progressive Labor Party

Nationalist groups advocating Independence for Puerto Rico
 Revolutionary Action Movement
 Southern Christian Leadership Conference
 Students for a Democratic Society
 Student Nonviolent Coordinating Committee
 Socialist Workers Party
 Workers World Party
 Miscellaneous⁵¹⁹

The overlap with the Security Index is indicated by the inclusion in 1968 of Students for a Democratic Society and the Student Nonviolent Coordinating Committee in a list of organizational affiliations for the Security Index. By 1968 the Security Index also contained persons without organizational affiliation designated "Anarchist" and "Black Nationalist."⁵²⁰

The Rabble Rouser Index was renamed the Agitator Index in March 1968, and field offices were directed to obtain a photograph of each person on the Index.⁵²¹

The Domestic Intelligence Division also stressed the dangerousness of the "New Left" movement and the need to include its "leading activists" on the Security Index.

"The emergence of the new left movement as a subversive force dedicated to the complete destruction of the traditional values of our democratic society presents the Bureau with an unprecedented challenge in the security field. Although the new left has no definable ideology of its own, it does have strong Marxist, existentialist, nihilist and anarchist overtones. While mere membership in a new left group is not sufficient to establish that an individual is a potential threat to the internal security of the United States, it must be recognized that many individuals affiliated with the new left movement do, in fact, engage in violence or unlawful activities, and their potential dangerousness is clearly demonstrated by their statements, conduct and actions.

"The Bureau has recently noted that in many instances security investigations of these individuals are not being initiated. In some cases, subjects are not being recommended for inclusion on the Security Index merely because no membership in a basic revolutionary organization could be established. Since the new left is basically anarchist, many of the leading activists in it are not members of any basic revolutionary group. It should be borne in mind that even if a subject's membership in a subversive organization cannot be proven, his inclusion on the Security Index may often be justified because of activities which establish his anarchistic tendencies. In this regard, you should constantly bear in mind *the public statements, the writings and the leadership activities* of subjects of security investigations which establish them as anarchists *are proper areas of inquiry*. Such activity should be actively pursued through investigation with the ultimate view of including them on the Security Index. It is entirely possible, therefore, that a subject without any organizational affiliation can qualify for the Security Index by virtue of his public pronouncements and activities which establish *his rejection of law and order* and reveal him to be a *potential threat* to the security of the United States." [Emphasis added.]

Field offices were cautioned, however, "that more dissent and opposition to the Governmental policies pursued in a legal constitutional manner are not sufficient to warrant inclusion in the Security Index." Agents were to report information "to show the potential threat and not merely show anti-Vietnam or peace group sentiments without also revealing advocacy of violence or unlawful action which would justify an investigation."⁵²²

At the same time that these instructions were issued, the FBI instituted a COINTELPRO program against the "New Left." The Agitator Index and the Security Index served as indicators of the prime subjects for efforts under COINTELPRO to disrupt groups and discredit individuals in the "New Left."⁵²³

The FBI did not develop its new Security Index policies alone. As the Commission on Civil Disorders had encouraged the FBI to identify "rabble rousers," so President Johnson ordered a comprehensive review of the Government's emergency plans after the October 1967 March on the Pentagon against the Vietnam war.

⁵¹⁹ SAC Letter No. 68-5, 1/16/68.

⁵²⁰ SAC Letter No. 68-14, 2/20/68.

⁵²¹ Memorandum from FBI Headquarters to all SAC's, 3/21/68.

⁵²² SAC Letter No. 68-21, 4/2/68.

⁵²³ See Report on COINTELPRO.

Attorney General Ramsey Clark was appointed chairman of a committee to review the Presidential Emergency Action Documents (PEODs) prepared under the Emergency Detention Program. Subsequent decisions were summarized in an FBI memorandum:

- "After extensive review, in which the FBI participated, a proposal was submitted to the President that certain documents be revised. It was proposed that the Emergency Detention Program be revised to agree with the provisions of the Emergency Detention Act [of 1950].

"The Internal Security Division (ISD) of the Department has raised questions as to the ability to discharge the responsibilities of the Attorney General under the Emergency Detention Act of 1950. By letter dated 2/26/68 the Department requested a conference with the FBI for the purpose of reviewing the implementation of the Emergency Detention Program . . ."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1883

UNITED STATES OF AMERICA

v.

BERNARD L. BARKER, APPELLANT

No. 74-1884

UNITED STATES OF AMERICA

v.

EUGENIO R. MARTINEZ, APPELLANT

Appeals from the United States District Court for the District of Columbia

(D.C. Criminal 74-116)

Argued 18 June 1975

Decided 17 May 1976

Daniel B. Shultz (appointed by this Court), for appellants in Nos. 74-1883 and 74-1884.

Phillip B. Heyman, Special Assistant to the Special Prosecutor, with whom *Henry S. Ruth, Jr.*, Special Prosecutor, *Peter M. Kreindler*, Counsel to the Special Prosecutor, *Maureen E. Gerlin* and *Richard D. Weinberg*, Assistant Special Prosecutors, were on the brief for appellee. *Leon Jancorski*, Special Prosecutor at the time the record was filed, entered an appearance as Special Prosecutor.

Ivan Michael Schaeffer, Attorney, Department of Justice, filed a memorandum on behalf of the United States of America as *amicus curiae*.

Before: LEVENTHAL and WILKEY, Circuit Judges and MERRIGUE,* *United States District Judge* for the Eastern District of Virginia.

Opinion *Per Curiam*.

Circuit Judge WILKEY and District Judge MERRIGUE filed opinions reversing the judgment of the District Court.

Dissenting Opinion filed by Circuit Judge LEVENTHAL.

PER CURIAM: The mandate of the court is that the judgment of the District Court is reversed and the case is remanded for a new trial. Judges Wilkey and Merrigue have filed separate opinions. Judge Leventhal dissents.

*Sitting by designation pursuant to 28 U.S.C. § 292(d).

WILKEY, Circuit Judge: Two of the "footsoldiers" of the Watergate affair, Bernard Barker and Eugenio Martinez, are with us again. They haven't been promoted, they are still footsoldiers. They come before us this time to challenge their convictions under 18 U.S.C. § 241, for their parts in the 1971 burglary of the office of Dr. Louis J. Fielding.

I. FACTS

During the summer of 1971, following the publication of the now famous "Pentagon Papers," a decision was made to establish a unit within the White House to investigate leaks of classified information. This "Room 16" unit, composed of Egil Krogh, David Young, G. Gordon Liddy, and E. Howard Hunt—and under the general supervision of John Ehrlichman—determined, or was instructed, to obtain all possible information on Daniel Ellsberg, the source of the Pentagon Papers leak.¹ After Ellsberg's psychiatrist, Dr. Fielding, refused to be interviewed by FBI agents, the unit decided to obtain copies of Ellsberg's medical records through a covert operation.

Hunt had been a career agent in the CIA before his employment by the White House. One of his assignments was as a supervising agent for the CIA in connection with the Bay of Pigs Invasion, and, as "Eduardo," he was well known and respected in Miami's Cuban-American community. A fact destined to be of considerable importance later, he had been Bernard Barker's immediate supervisor in that operation. When the "Room 16" unit determined that it would be best if the actual entry into Dr. Fielding's office were made by individuals not in the employ of the White House, Hunt recommended enlisting the assistance of some of his former associates in Miami.

Hunt had previously reestablished contact with Barker in Miami in late April 1971, and he met Martinez at the same time. He gave Barker an unlisted White House number where he could be reached by phone and wrote to Barker on White House stationery. On one occasion Barker met with Hunt in the Executive Office Building. By August 1971 Hunt returned to Miami and informed Barker that he was working for an organization at the White House level with greater jurisdiction than the FBI and the CIA. He asked Barker if he would become "operational" again and help conduct a surreptitious entry to obtain national security information on "a traitor to this country who was passing . . . classified information to the Soviet Embassy." He stated further that "the man in question . . . was being considered as a possible Soviet agent himself."

Barker agreed to take part in the operation and to recruit two additional people. He contacted Martinez and Felipe deDiego. Barker conveyed to Martinez the same information Hunt had given him, and Martinez agreed to participate. Like Barker, Martinez had begun working as a covert agent for the CIA after Castro came to power in Cuba. Although Barker's formal relationship with the CIA had ended in 1966, Martinez was still on CIA retainer when he was contacted.

Both testified at trial that they had no reason to question Hunt's credentials. He clearly worked for the White House and had a well known background with the CIA. During the entire time they worked for the CIA, neither Barker nor Martinez was ever shown any credentials by their superiors. Not once did they receive written instructions to engage in the operations they were ordered to perform. Nevertheless, they testified, their understanding was always that those operations had been authorized by the Government of the United States. That they did not receive more detail on the purpose of the Fielding operation or its target was not surprising to them; Hunt's instructions and actions were in complete accord with what their previous experience had taught them to expect. They were trained agents, accustomed to rely on the discretion of their superiors and to operate entirely on a "need-to-know" basis.

On 2 September 1971 Hunt and Liddy met Barker, Martinez, and deDiego at a hotel in Beverly Hills, California. Hunt informed the defendants that they were to enter an office, search for a particular file, photograph it, and replace it. The following day the group met again. Hunt showed Barker and Martinez identification papers and disguises he had obtained from the CIA. That evening the defendants entered Dr. Fielding's office. Contrary to plan, it was necessary for them to use force to effect the break-in. As instructed in this event, the defendants spilled pills on the floor to make it appear the break-in had been a search for drugs. No file with the name Ellsberg was found.

¹ A more detailed discussion of the organization and purpose of the "Room 16" unit is in our opinion in *United States v. Ehrlichman*, No. 74-1882, at pp. 3-4.

The next day Barker and Martinez returned to Miami. The only funds they received from Hunt in connection with the entry of Dr. Fielding's office were reimbursement for their living expenses, the cost of travel, and \$100.00 for lost income.

On 7 March 1974 the defendants were indicted under 18 U.S.C. § 241, along with Ehrlichman, Liddy, and deDiego for conspiring to violate the Fourth Amendment rights of Dr. Fielding by unlawfully entering and searching his office. On 7 May 1974 the defendants filed a Motion for Discovery and Inspection with an accompanying memorandum outlining, *inter alia*, their proposed defense of absence of *mens rea* due to a mistake of fact mixed with law attributable to their reasonable reliance on apparent authority.² On 24 May 1974, in a memorandum order, the District Court rejected the defendants' position, on the ground that "a mistake of law is no defense."³

On 12 July 1974 the jury returned verdicts of guilty against both Barker and Martinez.

II. LEGAL ISSUES

The court's determination at the outset that a mistake of law could not excuse defendants' conduct led to two important legal errors which require reversal of the Barker and Martinez convictions.

First, the defendants were prevented during the trial from offering complete evidence as to the reasonableness of their belief in Hunt's authority to engage them in the Fielding operation.⁴

Second, at the end of the trial, the District Court rejected the defendants' proposed instructions setting forth their theory of the case.⁵ The jury was advised that to convict they need find only that the purpose of the break-in was to enter and search Dr. Fielding's office without a warrant or his permission, and for a governmental rather than purely private purposes; a mistake as to the legality of such an operation was no defense.⁶

Barker and Martinez raise two arguments to sustain their position that they lacked the *mens rea* required for a conviction under section 241. The first is that their reasonable reliance on Hunt's authority—their "mistake of fact mixed with law"—negated the element of intent which is common to most serious criminal offenses, including conspiracy. It is this claim which requires reversal. Had the law as it stood in 1971 been correctly appraised by the trial judge, a more ample scope of proof and different jury instructions would have been granted appellants, all as discussed in Part IV, *infra*. The second argument is based upon the particular element of "specific intent" contained in section 241. While the court's opinion in *Ehrlichman* analyzes this second argument in detail,⁷ a summary here may be helpful to distinguish the two arguments.

III. THE "SPECIFIC INTENT" REQUIREMENT OF 18 U.S.C. § 241

It is settled law that a conviction under this section requires proof that the offender acted with a "specific intent" to interfere with the federal rights in question.⁸ This does not mean that he must have acted with the subjective

² Barker Appendix at 55.

³ *United States v. Ehrlichman*, 376 F. Supp. 29, 35 (D.D.C. 1974).

⁴ See generally Offer of Proof, Barker Appendix at 86.

⁵ Barker Appendix at 104-05.

⁶ Tr. 2525-26.

⁷ "In order to establish the requisite intent the Prosecutor must show that the object of the conspiracy and the purpose of each defendant was to carry out a warrantless entry into and search of Dr. Fielding's office without permission.

"In determining whether or not each defendant had the requisite intent, you should keep in mind that a mistake of fact may constitute a defense to the conspiracy charge but a mistake of law is not a defense.

"Thus, if one of the defendants honestly believed that a valid warrant had been obtained, such a mistake of fact would render him innocent of the alleged conspiracy because it cannot be said that he intended to conduct a warrantless search.

"On the other hand, if the defendant was fully aware of the relevant facts—that the search lacked both warrant and Dr. Fielding's permission, but erroneously believed that the search was still legal, that would constitute a mistake of law and a mistake of law is no excuse.

"In other words, an individual cannot escape the criminal law simply because he sincerely but incorrectly believes that his acts are justified in the name of patriotism, or national security, or a need to create an unfavorable press image, or that his superiors had the authority without a warrant to suspend the Constitutional protections of the Fourth Amendment."

⁸ *United States v. Ehrlichman*, No. 74-1822, at pp. 9-22.

⁹ See, e.g., *United States v. Guest*, 393 U.S. 745, 753-54 (1960).

awareness that his action was unlawful. It is enough that he intentionally performed acts which, under the circumstances of the case, would have been clearly in violation of federal law, absent any other defense.

In the instant case, the District Court instructed the jury that a conviction was appropriate under section 241 if they found that the defendants conspired to enter and search Dr. Fielding's office, for governmental rather than personal reasons, without a warrant and without Dr. Fielding's permission. Barker and Martinez argue, however, citing *United States v. Guest*,⁹ that the court erred in failing to advise the jury that a conviction was only possible if they further found that an unauthorized search of Dr. Fielding's office was the *predominant*, as opposed to incidental, purpose of the conspiracy. They conclude that such a test could not be met here, since their primary objective was the inspection of Ellsberg's records, not the burglary of Dr. Fielding's office.

Admittedly, the Supreme Court's brief discussion in *Guest* of the "specific intent" requirement is susceptible of the interpretation the defendants would place upon it. The Court did use the words "predominant purpose" to characterize the kind of intent to interfere with the right of interstate travel which could trigger the application of section 241.¹⁰ That such an interpretation of the "specific intent" requirement is incorrect, however, was made quite clear by the Supreme Court in its most recent major decision on the requirements of section 241, *Anderson v. United States*.¹¹ In that case, the primary objective of the conspiracy was to influence a local election by casting false votes. As an incidental matter, false votes were cast for candidates for federal office as well. The Court concluded that "specific intent" had been adequately proven:

A single conspiracy may have several purposes but if one of them—whether primary or secondary—be the violation of federal law, the conspiracy is unlawful under federal law.¹²

Moreover, the Court emphasized, there was no requirement under section 241 that the defendants have entertained the purpose of changing the outcome of the federal election. It was enough that they intended to cast false votes for candidates for federal office and thereby dilute the voting power of their fellow citizens.¹³

Thus, under *Anderson*, even if the defendants had as their primary objective the photographing of Daniel Ellsberg's medical file, so long as one of the purposes of the entry was to search Dr. Fielding's office without a warrant or his consent, the "specific intent" requirements of section 241 were met. Like that of Ehrlichman, the appeal of Barker and Martinez on this ground alone would falter.

IV. THE DEFENSE OF GOOD FAITH, REASONABLE RELIANCE ON APPARENT AUTHORITY

A.

The primary ground upon which defendants Barker and Martinez rest their appeal is the refusal of the District Court to allow them a defense based upon their good faith, reasonable reliance on Hunt's apparent authority. They characterize this defense as a mistake of fact "coupled with" a mistake of law which negated the *mens rea* required for a violation of section 241. "The mistake of fact was the belief that Hunt was a duly authorized government agent; the mistake of law was that Hunt possessed the legal prerequisites to conduct a search—either probable cause or a warrant."¹⁴

It is a fundamental tenet of criminal law that an honest mistake of fact negatives criminal intent, when a defendant's acts would be lawful if the facts were as he supposed them to be.¹⁵ A mistake of law, on the other hand, generally

⁹ 383 U.S. 845 (1966).

¹⁰ A specific intent to interfere with a federal right must be proved, and at trial the defendants are entitled to a jury instruction phrased in those terms. Thus for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel or to oppress a person because of his exercise of that right, then, . . . the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought. *Id.* at 760.

¹¹ 417 U.S. 211 (1974).

¹² *Id.* at 226.

¹³ *Id.*

¹⁴ Barker Br. at 31-32.

¹⁵ 1 Wharton's Criminal Law and Procedure § 157 (Cum. Supp. 1974); Williams, Criminal Law: The General Part § 52-74 (2nd ed. 1961); Model Penal Code § 2.04(1) (P.O.D. 1962). It is important to distinguish simple ignorance of fact from mistake of fact. Simple ignorance is generally *not* an excuse, because in such a situation the defendant cannot claim his action was lawful under the facts as he affirmatively believed them to be. See *United States v. Barker*, — U.S. App. D.C. —, —, 514 F. 2d 208, 267 and n. 78 (1975) (Wilkey J., dissenting); Williams, *supra*, at 151-56.

will not excuse the commission of an offense.¹⁶ A defendant's error as to his *authority* to engage in particular activity, if based upon a mistaken view of legal requirements (or ignorance thereof), is a mistake of *law*. Typically, the fact that he relied upon the erroneous advice of another is not an exculpatory circumstance. He is still deemed to have acted with a culpable state of mind.¹⁷

Thus at first blush the trial judge's rejection of the defense proffered by the defendants—both in his pre-trial order and in his instruction to the jury—seems legally sound. He advised the jury that if the defendants honestly believed a *valid warrant* had been obtained, this would constitute a mistake of *fact* which would render them innocent of a conspiracy to conduct a search in violation of the Fourth Amendment. If, in contrast, they simply believed, despite the absence of a warrant, that for reasons of national security or superior authority the break-in was legal, such a mistake of *law* would not excuse their acts.¹⁸

B.

With all due deference to the trial judge, I must conclude that both charges were in fact incorrect, and that this error must be faced by the court on this appeal. The technical difficulty with the first instruction points up the deeper problem with the second.

A governmental search and seizure is not rendered lawful under the Fourth Amendment by the simple fact that a warrant has been obtained. The search is constitutionally proper only if the accompanying warrant is based upon legally sufficient probable cause. A factual mistake as to whether a warrant has been obtained, therefore, would not necessarily excuse an unlawful search—because that search would not necessarily have been legal under the facts as the defendant believed them to be. As the District Court instructed the jury, only a mistake as to whether a *valid* warrant has been obtained would excuse the defendant's action, and that is a mistake of *law*. That the recipient of the warrant may have relied upon the opinion of a judge in determining that he had legally adequate probable cause to make a search does not, under traditional analysis, alter the situation. His mistake remains one of *law*, and, under a strict construction of the rule, will not excuse his unlawful act.

It is readily apparent that few courts would countenance an instruction to a jury—even assuming a criminal prosecution were brought against government agents in such a situation¹⁹—which advised that since the mistake in acting on an invalid warrant was one of *law*, it would not excuse the agent's unlawful search. It is neither fair nor practical to hold such officials to a standard of care exceeding that exercised by a judge. Moreover, although the basic policy behind the mistake of law doctrine is that, at their peril, all men should know and obey the law,²⁰ in certain situations there is an overriding societal interest in having individuals rely on the authoritative pronouncements of officials whose decisions we wish to see respected.²¹

For this reason, a number of exceptions to the mistake of law doctrine have developed where its application would be peculiarly unjust or counterproductive.²² Their recognition in a particular case should give the defendant a defense similar to one based upon mistake of fact. I submit, with one important difference. His mistake should avail him only if it is *objectively reasonable* under the circumstances.²³ The mistake of a government agent in relying on a magis-

¹⁶ Wharton's, *supra* note 15, at § 162; Williams, *supra* note 16, at c. 8; Hall & Sellman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 642 (1941).

¹⁷ See Perkins on Criminal Law 926-27 (2nd ed. 1969).

¹⁸ Tr. at 2525-26, note 6, *supra*.

¹⁹ Police officers, receiving and acting on such defective warrants, are rarely prosecuted. See Model Penal Code § 2.04 (P.O.D. 1962).

²⁰ For a full discussion of the various rationales which have been forwarded to support the mistake of law doctrine, see *United States v. Barker*, — U.S. App. D.C. —, —, 514 F. 2d 208, 227-37 (1975) (Bazelon, J., concurring).

²¹ See Hall & Sellman, *supra* note 16, at 675-88. In support of the general proposition that in compelling circumstances the law will not deny a defense to individuals who have mistakenly relied on the authority of a public official, see *Oox v. Louisiana*, 379 U.S. 559 (1965), *Raley v. Ohio*, 360 U.S. 423 (1959), and *United States v. Mancuso*, 130 F. 2d 90 (3rd Cir. 1943). See also Perkins, *supra* note 17, at 926-27.

²² See generally Williams, *supra* note 15, at 293-345.

²³ In view of the strong public policy backing the mistake of law doctrine and the necessity for compelling justification to overcome it, it would appear rarely tenable to allow a defense based upon an irrational reliance on the authority of a public official. See Hall & Sellman, *supra* note 16, at 647. In contrast, although there is some authority to the effect that a mistake of *fact* must be reasonable to negate intent (Wharton's, *supra* note 15, at 382 n. 19), the better, and more widely held view is that even an unreasonable mistake of fact, if honest, constitutes a valid defense. Williams, *supra* note 15, at 201; Model Penal Code, Tentative Draft No. 4, at p. 186 (Commentary on § 2.04(1) (1953)).

trate's approval of a search can be considered virtually *per se* reasonable. (The first instruction of the District Court, therefore, was incorrect only in characterizing a defense based upon the belief that a valid warrant had been obtained as one of fact, rather than as an exception to the mistake of law doctrine.²⁴ Similarly, if a private person is summoned by a police officer to assist in effecting an unlawful arrest, his reliance on the officer's authority to make the arrest may be considered reasonable as a matter of law. The citizen is under a legal obligation to respond to a proper summons and is in no position to second-guess the officer's determination that an arrest is proper. Indeed, it is society's hope in recognizing the reasonableness of a citizen's mistake in this situation to encourage unhesitating compliance with a police officer's call.²⁵

Other situations in which a government official enlists the aid of a private citizen to help him perform a governmental task are not so obviously reasonable on their face.²⁶ If the official does not *order* the citizen to assist him, but simply asks for such assistance, the citizen is not under a legal compulsion to comply.²⁷ Also, if the circumstances do not require immediate action, the citizen may have time to question the lawfulness of the planned endeavor. Nevertheless, the public policy of encouraging citizens to respond ungrudgingly to the request of officials for help in the performance of their duties remains quite strong. Moreover, the gap (both real and perceived) between a private citizen and a government official with regard to their ability and authority to judge the lawfulness of a particular governmental activity is great. It would appear to serve both justice and public policy in a situation where an individual acted at the behest of a government official to allow the individual a defense based upon his reliance on the official's authority—if he can show that his reliance was *objectively reasonable* under the particular circumstances of his case.

C.

This brings us to the District Court's second instruction to the jury. Although the defendants characterized their mistake as to Hunt's authority as one of fact, rather than law,²⁸ they requested an instruction which substantially coincides with my view of the proper test:

[I]f you find that a defendant believed he was acting out of a good faith reliance upon the apparent authority of another to authorize his actions, that is a defense to the charge in Count 1, provided you find that such a mistake by a defendant was made honestly, sincerely, innocently and was a reasonable mistake to make based upon the facts as that defendant perceived them.²⁹

²⁴ The trial judge's error in this regard was certainly understandable. When the issue is one of reliance on authority, the distinction between law and fact becomes extremely difficult to discern. See *United States v. Barker*, — U.S. App. D.C. —, —, 514 F. 2d 208, 227-70 (opinions of Bazelon, C.J., concurring, MacKinnon, dissenting, and Wilkey, dissenting). Indeed, that difficulty underscores the correctness of my position in this case that in situations where a citizen is innocently drawn into illegal action at the behest, and on the authority of a government official, he should be allowed a defense of mistake of law based upon his reasonable reliance. If his mistake were labelled one of fact, it would provide a complete defense no matter how unreasonable the reliance. See note 23 *supra*.

²⁵ This common law exception to the mistake of law doctrine is codified in section 3.07 (4) (a) of the Model Penal Code, which states:

"(a) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided he does not believe the arrest is unlawful."

²⁶ See the discussion of *People v. Weiss*, 276 N.Y. 384, 12 N.E. 2d 514 (1938), in the opinions of Chief Judge Bazelon, concurring, and Judges MacKinnon and Wilkey, dissenting, in *United States v. Barker*, — U.S. App. D.C. —, —, 514 F. 2d 208, 234-36, 242-43, 265-70.

²⁷ The Special Prosecutor argues in the instant case that since the defendants were not ordered to aid in the fielding break-in, they can draw no support from the common law "call to aid" rule. He cites section 3.07 (4) (b) of the Model Penal Code for the position that when one is "not summoned" but nevertheless aids a police officer in making an unlawful arrest, only a mistake of fact is a valid defense. It would appear, however, that a citizen who is "asked" or "entreated" to assist a police officer bears a heavy civic responsibility to comply. He is effectively, if not technically, "summoned." In such a situation, although we might hesitate to presume the reasonableness of his action as a matter of law, if the citizen can show that his mistake as to the officer's lawful authority was in fact reasonable under the circumstances, I submit he makes out a valid defense.

²⁸ See note 24 *supra*.

²⁹ *Barker Appendix at 104-05.*

The District Court refused this instruction, regardless whether denominated a mistake of fact or an exception to the doctrine of mistake of law, and advised the jury simply that a mistake as to the legality of an unlawful search was no excuse.³⁰

It is clear from the above discussion of the search innocently conducted under an invalid warrant that the court's instruction did not state the law, and that a mistake as to the legality of an unlawful search may sometimes be an excuse. The trial judge can justify such an instruction in this context only if there is no legal possibility of equating the reliance of Barker and Martinez on Hunt's apparent authority with the reliance of a police officer on a judicial warrant subsequently held invalid. And this will be true *if and only if* Barker and Martinez could not show *both* (1) *facts* justifying their reasonable reliance on Hunt's apparent authority and (2) *a legal theory* on which to base a reasonable belief that Hunt possessed such authority.

Barker and Martinez meet the test as to *facts*. There was abundant evidence in the case from which the jury could have found that the defendants honestly and reasonably believed they were engaged in a top-secret national security operation lawfully authorized by a government intelligence agency. They were enlisted for the break-in by a White House official, E. Howard Hunt, whom they knew as a long-time government agent with the CIA. They were told that the operation concerned national security involving "a traitor to this country who was passing . . . classified information to the Soviet Embassy." Further, their long experience with the CIA had taught the defendants the importance of complete reliance on, and obedience to, their supervisor. That they should be expected to operate on a "need-to-know" basis was neither unusual nor cause for inquiry.

Barker and Martinez likewise meet the test as to the *legal theory* on which Hunt could have possessed such authority. That the President had the authority to confer upon a group of aides in the White House "more authority than the FBI or CIA," was in 1971 and is now by no means inconceivable as a matter of law. I certainly do not assert that the President here actually did so act (see the court's opinion in *Ehrlichman*), nor do we in this case need to decide the question of Executive authority to conduct warrantless searches pertaining to foreign agents, which issue was left open by the Supreme Court in *United States v. United States District Court (Keith)*.³¹

What is so evident from the trial court's instructions and his previous legal memorandum, and likewise in the concurring statement of my colleague Judge Leventhal in *Ehrlichman*, is that neither the trial judge nor Judge Leventhal agree with the theory that the Chief Executive acting personally has a constitutionally conferred power, where the objects of investigation are agents or collaborators with a foreign nation, to authorize a visual or auditory search and seizure of materials bearing on the suspected betrayal of defense secrets, without securing a judicial warrant—in short, that in this very carefully defined area,³² there does exist a constitutional Chief Executive warrant. They may be right. *But that is not the issue here for Barker and Martinez.* The issue is whether, given undisputed facts as known and represented to them, it was reasonable in 1971 for Barker and Martinez to act on the assumption that authority had been validly conferred on their immediate superior. The trial judge and my colleague have been unable to restrain themselves from inferentially deciding the issue deliberately left open by the Supreme Court in *Keith* in 1972, and having done so then proceed to tax Barker and Martinez with a failure to have acted on *their* unestablished rationale in 1971.

That the President would have such power under the Constitution is and has always been the clear position of the Executive Branch. Significantly, the present Attorney General only recently commented on *Keith* to this effect: "*In United States v. United States District Court*, while holding that the warrant requirement of the Fourth Amendment applied in the domestic security field, the Court expressly stated that 'the instant case requires no judgment with respect to the activities of foreign powers, *within or without this country.*' (Emphasis the

³⁰ Tr. 2525. See note 6 *supra*.

³¹ 407 U.S. 297, 321-22 (1972). Barker and Martinez do not allege that they thought the President personally had authorized the operation, nor does the issue arise here as it does in *Ehrlichman*. Laymen Barker and Martinez would not be expected to have cognizance of the forty years' practice whereby foreign affairs surveillances were authorized without a warrant either by the Attorney General or President. Their justification is a reasonable mistake of law, and in their position and known facts a reasonable mistake of law involves a mistake as to Hunt's authority, not that of the Attorney General or President.

³² See *Zuceibon v. Mitchell*, — U.S. App. D.C. —, — 516 F. 2d 594, 689 (1975) (en banc) (Wilkey, J. dissenting), *cert. denied*, 44 U.S.L.W. 3587 (19 April 1976).

Attorney General's.) It is not without significance that the words of the Court focus on the subject matter of the surveillance, rather than on the physical location where it is conducted."²³ No court has yet ruled that the President lacks this prerogative in a case involving wiretapping of foreign agents or collaborators with a foreign power.²⁴

In the instant case, the Department of Justice, while supporting the Special Prosecutor on other issues, within the limits of a 300-word Memorandum, took the pains to state:

"In regard to warrantless searches related to foreign espionage or intelligence, the Department does not believe there is a constitutional difference between searches conducted by wiretapping and those involving physical entries into private premises. One form of search is no less serious than another. It is and has long been the Department's view that warrantless searches involving physical entries into private premises are justified under the proper circumstances when related to foreign espionage or intelligence." (See U.S. Brief p. 45, n. 39).²⁵

Finally, on 19 February 1976, the Attorney General announced his decision, on the recommendation of the Deputy Attorney General and the head of the Civil Rights Division, not to prosecute former CIA Director Richard Helms for his personally authorizing a 1971 break-in at a photographic studio as part of a national security violation investigation.²⁶ Helms, like the present defendants, was involved in a 1971 break-in to conduct a visual search for evidence of national security violations. The positions of both Helms and the present appellants rest upon good faith belief that their warrantless physical intrusions were legally authorized. Helms' belief, which led the Justice Department to decline prosecution, was that a statute authorized him to ignore the commandments of the Fourth Amendment. Barker's and Martinez's belief was that there was authorization within the White House for this intrusion relating to national security—a legal theory which, if valid, would be of constitutional rather than merely statutory dimensions. Though both were mistakes of law, appellants' view thus appears to be supported by sounder legal theory than that of Helms, who seems to assert that a statute can excuse constitutional compliance. Yet even in the case of Helms, the Attorney General concluded that any prosecution for the physical search would be inappropriate.

²³ The Record of the Association of the Bar of the City of New York, Vol. 30, p. 331 (May-June 1975).

²⁴ *United States v. Butenko*, 494 F. 2d 593 (3rd Cir. 1974), cert. denied, *Ivanov v. United States*, 419 U.S. 881 (1974); *United States v. Brown*, 484 F. 2d 418 (5th Cir. 1973). Cf. *Zweibon v. Mitchell*, ___ U.S. App. D.C. ___, 516 F. 2d 594 (1975), cert. denied, 44 U.S.L.W. 3587 (19 April 1976), (distinctly non-collaborators with the Soviet Union were the objects of electronic surveillance).

²⁵ Memorandum for the United States as Amicus Curiae, p. 2.

²⁶ The Department of Justice announcement said:

"The Department of Justice will not prosecute former CIA Director Richard Helms and others for their role in a 1971 break-in at a photographic studio in Fairfax City, Virginia, Attorney General Edward H. Levi announced today.

"The Department's investigation involved the surreptitious entry by CIA agents and Fairfax City police into a photographic studio on February 19, 1971.

"The Federal statute under which prosecution was considered is Section 242 of Title 18, United States Code.

"The leading case interpreting that statute, *Screws v. United States*, 325 U.S. 91, 104 (1945), requires proof that the accused willfully deprived an individual of a specific and well-defined constitutional right.

"After studying the facts carefully and interrogating the witnesses at length, the Department concluded that the evidence did not meet the standard set by the *Screws* case to establish a criminal violation of the statute."

The written announcement was amplified, according to *The Washington Post* of 20 February 1976, pp. A1 and A6, as follows:

"Justice Department sources said that Helms clearly thought he had the authority to approve a break-in and did so to complete a security investigation. . . .

"It was impossible to prove he (Helms) had intent to violate anyone's civil rights," one Justice Department source said. . . .

"The 1947 law setting up the CIA says, 'The Director of central intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.'

"Under this law Justice Department attorneys said they felt Helms could reasonably argue the protection required extraordinary means."

Mr. Helms' counsel is reported as commenting, "If the government has a right to conduct electronic surveillance, then it has a right to make surreptitious entry." *The Washington Post*, 20 February 1976, at A1.

Naturally I share my colleague's distaste for the necessity to rely upon an Executive Department's press release or a newspaper article related thereto. Where prosecution is declined, however, by definition no paper is ever filed in a court. An official written announcement of the Department of Justice, giving a terse summary of the legal rationale supporting the decision, is more than is usually available and all that can ever be expected.

The trial court rejected the pleas of appellants Barker and Martinez that they should have been allowed a defense on proof of reasonable, though mistaken, belief that their actions were duly authorized by an organization "at the White House level . . . above the FBI and the CIA." Either the Attorney General was wrong on 19 February 1976 when he declined prosecution of Director Helms, or the trial judge here was wrong when he barred the evidence and jury instruction which might have acquitted Barker and Martinez. I believe, as set forth in the previous nineteen pages, that the trial judge was wrong and the Attorney General right. But even if I am in error on this, of one thing I am certain: In 1971 there was not in the United States of America one Fourth Amendment for Richard Helms and another for Bernard Barker and Eugenio Martinez.

As to the *reasonableness* of the legal theory on which Barker's and Martinez's actions rest, they thus have at least the position of the Attorney General behind them. This is not to hold here that the position is correct, but surely two laymen cannot be faulted for acting on a known and represented fact situation and in accordance with a legal theory espoused by this and all past Attorneys General for forty years. It is in implicit recognition of this that Judge Leventhal feels obliged to attempt to undermine the theory on the merits³⁷ by trying to distinguish between wiretapping and physical entry; according to Judge Leventhal, the first *perhaps* constitutionally granted to the President, the second never.³⁸

Since the issue here is not the correctness of the legal theory, but the reasonableness in 1971 of acting consonant with it, and since the Department of Justice addressed the issue to this court in only one paragraph, a brief reply to Judge Leventhal may suffice: (1) a physical trespass is usually necessary to install a wiretap, whether the tap is authorized by the Judiciary or the Executive; (2) such physical trespasses have repeatedly been authorized by Judges, Presidents, and Attorneys General; (3) they will continue to be so authorized until the Supreme Court rules otherwise; (4) *what is the constitutional difference* between a physical entry (Presidentially authorized) for the purpose of an *auditory search* (wiretap) and a physical entry (Presidentially authorized) for the purpose of a *visual search* (photographing documents)? What is the constitutionally relevant distinction between surreptitiously listening to (or recording) a citizen's spoken words and looking at (or photographing) his written words? (5) If there is no difference, then when the Supreme Court reserved the question of wiretapping (auditory searches) in *Keith*, did it not also logically and necessarily reserve the same issue in regard to visual searches?

We all know that *physical entry* for the purpose of *auditory search* has been authorized by President and Attorney General for forty years in national security related cases. It is the constitutional validity of this which the Supreme Court

³⁷ Albert Judge Leventhal makes his statement in *Ehrlichman*, where the issue of apparent approval by a higher authority does not arise. No one represented to Ehrlichman that he was acting on higher authority for Ehrlichman *was* higher authority in that case. See court's opinion in *Ehrlichman*, No. 74-1882, at 21.

With regard to the comparative positions of the offices of the Attorney General and the Special Prosecutor, and with all due respect to the public service this special task force has rendered in a time of crisis, it is a special task force created in 1973 which will shortly disband and close its files. The Attorney General has been with us since President Washington's first cabinet meeting in 1789, and is not about to go out of business. The Attorney General, then, represents a long perspective of what our legal problems in this most delicate area of national security and constitutional principles have been for 200 years and are likely to be in the future. That perspective of the Attorney General is deepened by the vast accumulated experience reposing in the personnel and files of the Department of Justice, heightened by the close personal relationship between President and Attorney General at some periods of our history, and sharpened by the current awareness of the present Attorney General as to what great problems in this area loom in the immediate future. In evaluating the conflicting views of the two offices, these factors surely must be placed in the balance by any court ultimately applying constitutional principles to national security problems.

³⁸ Judge Leventhal asserts (p. 10) "[t]here may well be a critical difference between electronic surveillance and physical entries for the purpose of search and seizure . . ." and approves the Special Prosecutor's stress on certain language in *Keith*. The partially quoted thought from the Supreme Court complete is "Though physical entry of the home is the chief evil against which the *wording* of the Fourth Amendment is directed, its *broad spirit* now shields private speech from unreasonable surveillance. (Citing *Katz*, *Berger*, and *Silverman*) Our decision in *Katz* refused to lock the Fourth Amendment into instances of actual physical trespass." 407 U.S. at 313 (emphasis supplied).

I cannot agree that Justice Powell's language, specifically cited by Judge Leventhal and the Special Prosecutor to prove a constitutional difference "between electronic surveillance and physical entries," supports the difference at all. I respectfully suggest the opposite meaning is conveyed, i.e., physical and electronic entry stand on the same footing, good or bad. And that is all that it is necessary to understand to validate Barker's and Martinez's argument that they lacked the requisite criminal intent in 1971, given the state of Fourth Amendment law then and now.

has never voided but specifically reserved in *Kelth*. We all know (or suspect) that *physical entry* for the purpose of *visual search* has been authorized by President and Attorney General for many years in national security related cases. It is the constitutional validity of this which the Attorney General reserved in one paragraph of his two-page memorandum in this case, but which has never reached the Supreme Court. Unpermitted physical entry into a citizen's dwelling is no doubt the core of the Fourth Amendment prohibition against unreasonable searches and seizures,³⁰ but physical entry for an auditory or visual search may stand on the same footing, whether constitutionally firm or infirm.³¹

That auditory and visual searches and physical entry to effect them stand on the same footing, is what the Department of Justice memorandum maintained. It also stated that both are valid in the strictly limited espionage and intelligence area. After *Katz*³² in 1967 ruled out completely the patently untenable distinction between trespassory and non-trespassory wiretaps and held that the application of the Fourth Amendment could not turn on the presence or absence of a physical intrusion, it would appear *arguable* that physical entry for either an auditory or visual search for material related to an agent or collaborator with a foreign nation, if authorized by the President or Attorney General, would be valid under the Executive's constitutional foreign affairs powers.

This court need not pass and does not pass on the correctness of the Attorney General's position. I do think the defendants Barker and Martinez were entitled to act in objective good faith on the facts known to them in regard to Hunt's position and implicitly on the validity of a legal theory, still to be disproved, which has been vigorously espoused by President and Attorney General for the last forty years. I think it plain that a citizen should have a legal defense to a criminal charge arising out of an unlawful arrest or search which he has aided in the reasonable belief that the individual who solicited his assistance was a duly authorized officer of the law. It was error for the trial court to bar this defense in the admission of evidence and instructions to the jury, and the convictions must accordingly be *reversed*.

³⁰ It can be readily agreed that the framers of the Fourth Amendment were primarily concerned with physical intrusions by governmental officials into the sanctity of the home. It is extremely doubtful, however, that this tells us anything about how they would have regarded electronic intrusions. Not being blessed with the telephone, they never considered the problem of wiretaps. A good argument can be made that electronic, "non-trespassory" searches are more intrusive than their "trespassory" counterparts. *United States v. Smith*, 321 F. Supp. 424 (D.D.C. Cal. 1971), reasoned:

"[E]lectronic surveillance is perhaps the most objectionable of all types of searches in light of the intention of the Fourth Amendment. It is carried out against an unsuspecting individual in a dragnet fashion, taking in all of his conversations whether or not they are relevant to the purposes of the investigation and continuing over a considerable length of time. If the government's "reasonableness" rationale is accepted in this case, then it would apply a *fortiori* to other types of searches. Since they are more limited in time, place and manner, they would be even more reasonable." *Id.* at 429.

³¹ The only possible rationale for distinguishing electronic information gathering from physical searches is that, in the District Court's words, the former is "less intrusive" than the latter. Exactly why this might be so is not explained in Judge Leventhal's opinion. See note 38 *supra*. The Special Prosecutor, however, defends the distinction by repeatedly emphasizing in his brief that a wiretap is *non-trespassory*. He suggests that if the Government must effect a trespass in order to place wiretapping or bugging equipment—and certainly if a trespass is made in order to photograph documents—then immunity from the warrant requirement in cases related to foreign affairs is lost.

The Special Prosecutor cites no authority in direct support of this proposition. He relies essentially on an absence of discussion of the question to create a heretofore unsuggested distinction. Neither logic, history, nor case law, however, provides an adequate basis for this artificial differentiation.

From a logical standpoint, if a President has the authority pursuant to his foreign affairs power to approve surveillance activities, it would appear that his prerogative is no different from that of a court reviewing a warrant request in a more mundane criminal setting. If there is a "national security" exemption (which neither the Supreme Court in *Kelth* nor this court in *Zacchian* ruled out), the task of determining whether such a search is justified falls to the Executive, rather than to the courts. All the elements of speed, secrecy, and Executive expertise which support vesting this power in the President where wiretapping (whether "trespassory" or "non-trespassory") is involved also apply where a photographic search is in question. Court-ordered surveillances are sometimes trespassory, sometimes not, depending on the requirements of the situation, and so are Executive surveillances in the foreign affairs field.

The record in a recent case in this court provides documentation of judicial authorization for government agents to "Intercept wire communications [etc. and to] install and maintain an electronic eavesdropping device within the [room of a building at a specific address] to intercept [certain specified] oral communications . . . concerning [certain] described offenses. Installation of the above described eavesdropping device may be accomplished by any reasonable means, including surreptitious entry or entry by ruse." *United States v. Barker*, — U.S. App. D.C. —, —, 514 F. 2d 208, 241-42 (1974) (MacKinnon, J. dissenting). Of course, if a trespass is not necessary in a particular case to effect an eavesdrop, the court need not gratuitously authorize a surreptitious entry; but few would question a court's power to do so in cases in which it is required.

³² *United States v. Katz* 389 U.S. 347 (1967).

MERHIGE, *District Judge*: While I generally concur with the positions taken by my Brothers with respect to the "specific intent" requirement of 18 U.S.C. § 241, I am not, despite my concurrence with the results reached by Judge Wilkey willing to fully subscribe to the views expressed by him in his analysis of the mistake of law issue. Our differences arise from my inability to acquiesce in the broad framework inherent in his analysis. My views in this regard follow:

Defendants Barker and Martinez rest their appeal on the district court's refusal to instruct the jury that a "good faith reliance upon the apparent authority of another to authorize [their] actions" is a defense to the charge of conspiracy under Title 18 U.S.C. § 241. The district judge advised the jury that a mistake of law is no excuse, and, therefore, that a mistake as to the legality of the search in issue was not a defense to the charges contained in the indictment. In that regard, the district judge was applying the general rule on mistake of law that has long been an integral part of our system of jurisprudence. See, e.g., *Lambert v. California*, 355 U.S. 225, 228 (1957) quoting *Shelvin-Carpenter Company v. Minnesota*, 218 U.S. 57, 68 (1910). See generally Hall & Seligman, *Mistake of Law and Mens Rea*, 8 *University of Chicago Law Review* 641 (1941); Keedy, *Ignorance and Mistake in the Criminal Law*, 22 *Harv. L. Rev.* 75 (1908); Perkins, *Ignorance and Mistake in Criminal Law*, 88 *Univ. of Pa. L. Rev.* 85 (1939). The most commonly asserted rationale for the continuing vitality of the rule is that its absence would encourage and reward public ignorance of the law to the detriment of our organized legal system, and would encourage universal pleas of ignorance of the law that would constantly pose confusing and, to a great extent, insolvable issues of fact to juries and judges, and bog down our adjudicative system. See *United States v. Barker*, 514 F. 2d 208, 230-32 (D.C. Cir. 1975, Bazelon, Chief Judge concurring), Hall & Seligman, *supra* at 646-51. The harshness of the rule on the individual case is responded to by either or both of two thesis: individual justice and equity is outweighed by the larger social interest of maintaining a public knowledge about the law so as to discourage and deter "illegal" acts; and, as discussed by Judge Leventhal in his view of this case, the rule is subject to mitigation by virtue of prosecutorial discretion, judicial sentencing, executive clemency, and/or jury nullification.¹ E.g., Perkins, *supra* at 41.

Exceptions to the rule, however, have developed in situations where its policy foundations have failed to apply with strength, and alternative policy consideration strongly favor a different result. The exceptions have been both statutory, e.g., Act of August 22, 1940, § 49, 15 U.S.C. § 80a-48; Public Utility Holding Company Act of 1935, § 29, 15 U.S.C. § 79z-3, and judicial. E.g., *United States v. Mancuso*, 139 F. 2d 90 (3d Cir. 1943); *Moyer v. Meter*, 206 Okla. 405, 288 P. 2d 338 (1951); Anno., 29 A.L.R. 2d 825 (1953). See also Model Penal Code §§ 2.05(3), 3.07(4)(a). The instant case fits the pattern of a set of circumstances that has been recognized by some, and that in my view should be endorsed by this Court as an exception to the general rule. Defendants Barker and Martinez contend that they were affirmatively misled by an official interpretation of the relevant law, and are entitled to an instruction to that effect, permitting the jury to assess the reasonableness and sincerity of their alleged reliance.

The Model Penal Code states the defense as follows:

A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when: . . . (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense. § 2.04(3)(b).

See also Proposed New Federal Criminal Code, Final Report of a National Commission on Reform of Federal Criminal Laws § 610 (1971). The rationale of the section is well illustrated by the case of *United States v. Mancuso*, 139 F. 2d 90 (3d Cir. 1943). The legal issue therein was whether a defendant could be punished for failure to obey an order made by a local draft board when its issuing

¹ This Circuit has held that jury instructions on nullification are improper. *United States v. Dougherty*, 475 F. 2d 1118 (D.C. Cir. 1972). The Court acknowledges, however, that a jury still may acquit in disregard of the instructions on the law given by the trial judge. *Id.* at 1132.

of such an order to the defendant was interdicted by a judicial decree which was itself, erroneous and subject to reversal. The court in that case stated:

We think the defendant cannot be convicted for failing to obey an order, issuance of which is forbidden by the court's injunction. While it is true that men are, in general, held responsible for violations of the law, whether they know it or not, we do not think the layman participating in a lawsuit is required to know more than the judge. 139 F. 2d at 92. (Footnote omitted)

The introduction of an "official" source for an individual's reliance on a mistaken concept of the law in acting "illegally" significantly diminishes the strength of the policy foundations supporting the general rule on mistake of law, and adds policy considerations of grave import that would favor an apposite result. In my view, the defense is available if, and only if, an individual (1) reasonably, on the basis of an objective standard, (2) relies on a (3) conclusion or statement of law (4) issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field. The first three issues are of course of a factual nature that may be submitted to a jury; the fourth is a question of law as it deals with interpretations of the parameters of legal authority.

Exoneration of an individual reasonably relying on an official's statement of the law would not serve to encourage public ignorance of law, for the defense requires that the individual either seek out or be cognizant of the official statement upon which he or she relies. Some knowledge of the law, verified by an independent and typically competent source, is required. Furthermore, pleas of ignorance of the law will neither be so universal nor so abnormally confusing to the fact-finder as to discompose the judicial process. The defense is precisely limited to be consistent with its policies, and it involves issues no more complex than those decided on a routine basis in other matters.

Furthermore the defense advances the policy of fostering obedience to the decisions of certain individuals and groups of individuals that society has put in positions of prominence in the governing structure—i.e., courts, executive officials and legislative bodies. While the policy is unquestionably strongest when applied to those bodies that apply or make law with the most apparent finality, i.e., legislatures and the courts, it has application as well to those in official positions that "interpret" the law in a largely advisory capacity, i.e., opinions of the United States Attorney General. The reasonableness of the reliance may dissipate if one depends on nonenforceable advisory opinions of minor officials however. The policy is limited by the actual existence of an appropriate "official(s)" and does not support an abrogation of the policies behind the general mistake of law rule if an individual places his or her reliance, though reasonable, in a stranger to public office erroneously believing him to be an official.³ Similarly, the defense does not extend to reliance on individuals, who although employed in a public capacity, have no interpretative or administrative responsibilities in the area associated with the legal concepts involved in the mistaken opinion or decision.

The defense has been most commonly accepted when an individual acts in reliance on a statute later held to be unconstitutional,⁴ or on an express decision of unconstitutionality of a statute by a competent court of general jurisdiction that is subsequently overruled.⁵ Most jurisdictions will not permit a defense based on reliance upon the advice of counsel.⁶ The defense, however, is not limited to those which have been most commonly accepted as I have heretofore made reference. In *State v. Davis*, 216 N.W.2d 31 (Wisc. 1974), the defendant was exonerated on the basis of a reliance on erroneous advice of a county corporation counsel and assistant district attorney. In *People v. Ferguson*, 24 P.2d 965

³ Similarly, the defense of mistake of law historically given a private person when he responds to a request by a police officer to aid in making an arrest and the arrest proves ultimately to have been unlawful, is limited by the requirement that the party aided has the authority to make the arrest. *E.g.*, *Dietrichs v. Schaw*, 48 Ind. 175 (1878); *Moyer v. Meler*, 205 Okla. 408, 288 P. 2d 828, 840 (1951).

⁴ *E.g.*, *Claybrook v. State*, 164 Tenn. 440, 51 S.W. 2d 499 (1932); *State v. Godwin*, 128 N.C. 897, 31 S.E. 221 (1898). *But see Dupree v. State*, 184 Ark. 1120, 44 S.W. 2d 1097 (1932).

⁵ *E.g.*, *United States v. Mancuso*, 139 F. 2d 90 (8d Cir. 1948); *State v. O'Neil*, 147 Iowa 513, 128 N.W. 484 (1910); *State v. Chicago, M. & St. P. Ry. Co.*, 130 Minn. 144, 153 N.W. 320 (1915); *State v. Longino*, 109 Miss. 125, 67 So. 902 (1915); *State v. Jones*, 44 N.W. 623, 107 P. 2d 324 (1940). *But see Hoover v. State*, 59 Ala. 57 (1877).

⁶ *E.g.*, *Staley v. State*, 89 Neb. 701, 131 N.W. 1028 (1911); *State v. Whitaker*, 118 Ore. 656, 247 P. 1077 (1926).

(Call. 1933), reliance on the advice of the state corporation commissioner and deputy commissioners was held to excuse a violation of the state's blue sky laws. See also *Texas Co. v. State*, 254 P. 1060 (Ariz. 1927); *State v. White*, 140 S.W. 806 (Mo. 1911); *State v. Person*, 1 S.E. 914 (N.C. 1887). But see *U.S. v. Mansavage*, 178 F.2d 812 (7th Cir. 1949); *Hopkins v. State*, 69 A.2d 456 (Md. 1949); *Staley v. State*, 131 N.W. 1028 (Neb. 1911); *State v. Foster*, 46 A. 833 (R.I. 1900).

Arguments against extending the defense to reliance on the advice of government officials take a form of the following proposition: Minor government officials will have the ability to effectively "immunize" individuals from prosecution. In response, it must be noted that with respect to a particular statement, a government official is himself culpable if he knowingly mistakes the law. Hence he may proffer mistaken advice without retribution only until he discovers its invalidity. To argue further, that incompetent or dishonest minor officials may exist in numbers serious enough to question reliance on their decisions or interpretations, inherently characterizes those public servants upon whom we must depend for the ultimate success of the operation of our government, as suspect. I for one, am not willing to assume that the incidence of incompetent, insensitive or dishonest public officials is significant enough to dispute the premise that in general, public officials merit the respect of the public. Furthermore, our citizenry are not so naive as not to recognize that all of our institutions, are susceptible of being made up of both savory and unsavory individuals.

Still some will have cause to be concerned about the extent of the exception to the general rule. Judge Leventhal notes that "[t]he potentially broad range of illegal activities that a government official might request a private citizen to do, would make it impossible to rely on the educational value that normally inheres when a mistake of law is recognized as an excuse in one case that serves to defuse them all for similarly circumstanced defenders in the future." The argument is one of great appeal. Nevertheless, it smacks of a distrust of public officials, yet to so categorize it may be unfair. In essence, it asserts that since there exists a large number of public officials who may well be asked to advise or decide on a myriad of legal problems, that many mistaken judgments may be advanced and members of the public should be required before acting in accordance therewith to examine those interpretations at their peril. The argument, assuming as I do that it is not directed at corrupt officials, requires the individual citizen to be more cognizant of and have a better understanding of the law than a public official who is responsible for and specifically employed to make interpretations of the law in the relevant legal field. Such a burden is, in my view, unreasonable. Finally, it should be noted that the strength of the arguments premised upon the potential extent of the defense is mitigated by the requirement of objective reasonableness. If a public officials' opinion of the law is fairly outrageous, the jury may conclude that a reasonable man would take appropriate steps to verify it prior to reliance thereon.

Applying the defense to the facts of this case, the record discloses sufficient evidence of reliance on an official interpretation of the law for the matter to have been submitted to the jury. Barker and Martinez assert that they relied on Hunt's authority as delegated from an intelligence superstructure controlled by the White House, and firmly believed that they were acting in a legal capacity. The Executive Branch of the United States Government is vested with substantive responsibilities in the field of national security, and decisions of its officials on the extent of their legal authority deserve some deference from the public.⁶ A jury may well find that John Ehrlichman, then Assistant to the President for Domestic Affairs, expressed or implied that the break-in of Dr. Field's office was legal under a national security rationale, and that Hunt, as an executive official in a go-between capacity, passed the position on to the defendants, which they, acting as reasonable men, relied upon in performing the break-in.⁷

Accordingly, while I concur with Judge Wilkey that the jury should have been instructed on a limited mistake of law defense, I believe any such instruction should, in the event of a retrial be couched consistent with the views herein expressed.

LEVENTHAL, Circuit Judge dissenting: This opinion considers the appeals of Bernard L. Barker and Eugenio R. Martinez, who were convicted of conspiracy

⁶ This is not to say that I concur in the view of the Attorney General that there is a "national security" exception permitting physical intrusion in a citizen's home or office on specific approval of the President or Attorney General, even in the absence of a valid warrant. That issue is not before us.

⁷ See Footnotes 4 and 5 in Judge Leventhal's opinion.

in violation of 18 U.S.C. § 241, and sentenced to three years probation. They were charged, along with co-defendants John D. Ehrlichman and G. Gordon Liddy, with conspiracy to enter without lawful authority the offices of Dr. Lewis J. Fielding on September 3, 1971, in order to search for confidential information concerning his patient, Daniel Ellsberg, thereby injuring Dr. Fielding in his Fourth Amendment right to be secure against unreasonable searches and seizures.

Barker and Martinez present considerations and issues that differ in some respects from those discussed in the opinions issued today in the cases of Ehrlichman and Liddy. I would reach the same result, of affirmance. Whatever equities may pertain to the case of these defendants of Cuban origin, who claim that their actions reflect their patriotism, were taken into account when the trial judge limited their sentence to a modest probation. Their quest for complete exculpation does not entitle them, in my view, to a ruling that the trial judge was mistaken as to the pertinent principles of law.¹

My opinion explaining why I dissent from the reversals contemplated by Judges Wilkey and Merhige, is cast in the conventional form of opinions that present first a statement of facts, then an orderly discussion of the legal principles more or less seriatim. This case also calls, I think, for an opening exclamation of puzzlement and wonder. Is this judicial novelty, a bold injection of mistake of law as a valid defense to criminal liability, really being wrought in a case where defendants are charged with combining to violate civil and constitutional rights? Can this extension be justified where there was a deliberate forcible entry, indeed a burglary, into the office of a doctor who was in no way suspected of any illegality or even impropriety, with the force compounded by subterfuge, dark of night, and the derring do of "salting" the office with nuggets to create suspicion that the deed was done by addicts looking for narcotics?

Judge Wilkey begins to cast his spell by describing Barker and Martinez as "footsoldiers" here in court again. Of course, they are here this time for an offense that took place the year before the notorious 1972 Watergate entry that led them to enter pleas of guilty to burglary. Every violation of civil rights depends not only on those who initiate, often unhappily with an official orientation of sorts, but also on those whose active effort is necessary to bring the project to fruition. To the extent appellants are deemed worthy of sympathy, that has been provided by the probation. To give them not only sympathy but exoneration, and absolution, is to stand the law upside down, in my view, and to sack legal principle instead of relying on the elements of humane administration that are available to buffer any grinding edge of law. That this tolerance of unlawful official action is a defense available for selective undermining of civil rights laws leads me to shake my head both in wonder and despair.

I. FACTUAL BACKGROUND

Barker and Martinez are both American citizens.² They fled Cuba for Miami, Florida, after Fidel Castro came to power. Both Barker and Martinez have been covert agents for the Central Intelligence Agency. Martinez worked for the CIA from 1959 until 1972, and was involved in infiltrating Cuba and supplying arms and ammunition to Cuba from a United States base. Barker worked undercover in Cuba before his arrival in Miami in 1960. He was terminated in 1966. During their CIA employment both Barker and Martinez were involved with the Bay of Pigs operation, and Barker's immediate superior for that venture was E. Howard Hunt, known as "Eduardo" in Miami's Cuban-American community.

Hunt, along with Egil Krogh, David Young and G. Gordon Liddy, composed the White House "Room 16" Unit. The unit was established under the supervision of John Ehrlichman, then Assistant to the President for Domestic Affairs,

¹ Defendants also contend that the district court erred in failing to dismiss the indictment for grand jury improprieties; in failing to correct for prejudicial publicity; and in failing to give a jury nullification charge. The grand jury point is dealt with in note 58, *infra*. Their claims of error in refusing to dismiss the indictment or order a continuance or change of venue on prejudicial pretrial publicity grounds should be rejected for the reasons set forth in *United States v. Ehrlichman*, decided this day, at note 8. A right to a jury nullification charge was rejected by this court in *United States v. Dougherty*, 164 U.S. App. D.C. 76, 93-100, 478 F. 2d 1113, 1130-1137 (1972), and that decision controls defendants' claim as well.

² Barker was an American citizen by birth, lost his citizenship while living in Cuba, but reacquired it. (Tr. 2187). Martinez became a naturalized citizen in July 1970 (Tr. 2149).

to investigate and stop leaks of classified information. Publication of the "Pentagon Papers" was the catalyst for the Room 16 unit's formation, and obtaining information on the source of that famous leak—Daniel Ellsberg—became the unit's primary concern. After Ellsberg's psychiatrist, Dr. Fielding, refused to be interviewed by FBI agents, the unit decided to obtain copies of Ellsberg's medical records by a surreptitious entry of Dr. Fielding's office.

To avoid White House employee involvement in the actual search, Hunt recruited Barker, and through Barker, Martinez and Felipe De Diego.⁵ Barker testified (Tr. 2197ff) that Hunt said he was in an "organization that had been created in the White House level—this organization he described as a sort of superstructure that was above the FBI and the CIA" and "had been formed because the FBI was tied by Supreme Court decisions . . . and the Central Intelligence Agency didn't have jurisdiction in certain matters." He spoke of "some kind of upheaval in the intelligence community in Washington" and asked if Barker would like to become operational again, which Barker termed a "very happy thing to us."

While conducting these negotiations, Hunt represented himself accurately as working in the White House.⁶ We may assume for present purposes that a jury might reasonably find that Barker and Martinez did, as they later put it, believe or assume that Hunt was a "CIA man" in the White House, notwithstanding contrary indications.⁷ Martinez was aware that his participation in the plan might have been illegal for a "normal citizen." (Tr. 2170).

On September 2, 1971, Hunt and Liddy met Barker, Martinez and De Diego at a hotel in Beverly Hills, California. Hunt informed the defendants that they were to enter Dr. Fielding's office and photograph the files of one of his patients. They were told that Dr. Fielding was not himself the subject of investigation. There was no discussion of authorization for the entry and search. The group met the following day, and Hunt showed Barker and Martinez identification papers and disguises obtained from the CIA.

On the evening of September 3, Barker and De Diego, dressed as delivery men, delivered a valise containing photographic equipment to Dr. Fielding's office. Later that evening they and Martinez, having been told that the "Ellsberg" file was the one they were to search for and photograph, entered Dr. Fielding's office and rifled the files. They entered by force, breaking the lock on the office door, and also used force, a crowbar, to open Dr. Fielding's file cabinets. Although the plan was to accomplish entry without force, it also included the alternative that in the event force had to be used, Barker and his colleagues were to make the entry look as if it had been by an addict seeking drugs, and accordingly, before leaving, they scattered pills about the office. The next day Barker and Martinez returned to Miami, having failed to locate the Ellsberg records.

As a defense to the March 7, 1974, indictment for conspiring to violate Dr. Fielding's Fourth Amendment rights, Barker and Martinez sought to discover and present evidence as to the reasonableness of their belief in Hunt's authority to conduct the Fielding operation. Their motion for discovery and their proposed instruction based on the defense of reasonable reliance on Hunt's apparent authority were denied by the District Court.⁸ At trial both defendants were never-

⁵ Although De Diego was indicted under § 241 along with the other defendants, the District Court on May 22, 1974, ordered the indictment as to De Diego dismissed without prejudice on the ground that the Government could not meet its burden of showing that its case was not tainted by the use of immunized testimony. This court reversed that order, *United States v. De Diego*, 167 U.S. App. D.C. 252, 511 F. 2d 818 (1975). The Special Prosecutor, however, subsequently elected not to pursue the prosecution.

⁶ Barker visited and telephoned Hunt in his Executive Office Building office, and also received letters from Hunt on White House stationery, all serving to corroborate Hunt's employment.

⁷ The Barker-Martinez brief notes (p. 12) that with respect to Martinez's reporting "Eduardo's" visit to Miami to his CIA case officer, "[t]he failure of his case officer to respond on the first occasion was significant to Martinez because normally when he reported the presence of someone associated with the CIA in Miami he was told whether the person's name was cleared. (M., Tr. 2167-58). On the second occasion the case officer's denial that 'Eduardo' was in the White House, something which Martinez knew to be a fact, led Martinez to conclude that his case officer either was not supposed to know about Hunt or that his case officer did not want to convey Hunt's importance. (M., Tr. 2137) At a later point Barker told Hunt that he had also assumed at the time that Hunt was still with the CIA and simply had been positioned at the White House by the agency, a customary CIA practice. (Hunt, Tr. 918-20)."

⁸ See *United States v. Ehrlichman*, 376 F. Supp. 29, 85-36 (D.D.C. 1974); Barker Appendix at 104-05. The text of the proffered instruction is set out in note 15 *infra*.

theless given latitude to testify extensively about the circumstances underlying their involvement in the Fielding break-in. The jury was advised that to convict they had to find the purpose of the break-in was to enter and search Dr. Fielding's office without a warrant or permission, and that the conspirators were governmental employees or agents acting for governmental rather than purely personal purposes. The court further instructed the jury that a mistake of fact may constitute a defense to the conspiracy charge, so that if a defendant honestly believed a warrant had been obtained, this mistake of fact would render him innocent, because it would not be said he intended a warrantless search.⁷

II. AFFIRMATIVE DEFENSES

The defendants' principal argument on appeal is the claimed error of the District Court in refusing them a defense based upon their good faith reliance on Hunt's apparent authority. They say the *mens rea* required for a violation of section 241 was negatived by a mistake of fact "coupled with" a mistake of law.⁸ They amplify: "The mistake of fact was the belief that Hunt was a duly authorized agent; the mistake of law was that Hunt possessed the legal prerequisites to conduct a search—either probable cause or a warrant."⁹ In the alternative, they contend that Hunt's inducement estops the government from prosecuting under entrapment principles. I turn to the entrapment question first.

A. Entrapment

The defense of entrapment, developed as a construction of legislative intent, has been evolved for the case of an otherwise innocent person who has been induced to commit a crime by a law enforcement agent whose purpose was prosecution. Recognition of the defense works as an estoppel on the government, preventing it from reaping the benefits of the prosecution and conviction it sought to obtain by unconscionable means.¹⁰

The entrapment rationale is wholly inapplicable to this case. In recruiting Barker and Martinez, Hunt was not acting as a law enforcement official seeking to induce their participation in order to have them prosecuted and punished. He instead sought their aid for other governmental ends which his unit judged best served by illegitimate invasion of the rights of others. The true entrapment defense seeks to prevent government officials from realizing benefits from unlawful inducement, and thereby to deter official illegality. Extension of the defense to reach Hunt's inducement of Barker would serve to reinforce the illegal conduct of the government agent, who could then delegate the "dirty work" to private citizens shielded from responsibility by the defense that they had been recruited by a government agent.¹¹

B. The Claim of Mistake of Fact

It is settled doctrine that an honest mistake of fact generally negatves criminal intent, when a defendant's acts would be lawful if the facts were as he sup-

⁷ Tr. 2524-26. While the trial judge said "valid warrant," there was no testimony or contention that defendants had a belief that a warrant had been obtained. A person can act upon the basis of a warrant that has been issued in fact, even though it is later held invalid, without incurring personal legal responsibility. This would come within the narrow class of cases where a reasonable mistake of law does constitute a defense, as set out in Part IID2, of this opinion. See also Model Penal Code § 2.04(8)(b) (P.O.D. 1962).

⁸ Barker Br. at 31.

⁹ Barker Br. at 81-82.

¹⁰ See, Hughes, C.J. in *Sorrells v. United States*, 287 U.S. 435, 448 (1932): "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. . . . This, we think, has been the underlying and controlling thought in the suggestions in judicial opinions that the Government in such a case is estopped to prosecute or that the courts should bar the prosecution."

Sorrells was followed in *Sherman v. United States*, 356 U.S. 369 (1958), and *United States v. Russell*, 411 U.S. 423 (1973). In *Sherman*, 356 U.S. at 372 Warren, C.J., in a passage quoted in part, with approval of Rehnquist J. in *Russell*, 411 U.S. at 434, stated: "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. . . . Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."

¹¹ Congress is presently considering a major extension of the entrapment defense in the bill proposed to codify and revise title 18, §. 1, § 551, 94th Cong., 1st Sess. (1975). As of the present, it is not known or knowable whether or in what form this proposal will be passed, and what Congress may contemplate as to cases previously tried.

posed them to be.¹³ This is considered a matter of essential fairness.¹³ Even had the facts been as Barker and Martinez claim now to have supposed them, however, their Fielding break-in would still have contravened the clear requirement of the Fourth Amendment.

Classifying mistakes as either of fact or of law is not always an unambiguous task.¹⁴ At trial, defendants offered an instruction that rather elusively muddled the two types of mistakes, and set them in an incorrect context as to the "specific intent" required for the crime.¹⁵ The brief before this court attempts to correct that prior lack of clarity by advancing the proffered defense with a closer attention to the discrete policies underlying the mistake of fact and mistake of law defenses. It may be convenient to take up the appellants' defense in terms of the recognized doctrinal distinctions before turning to the applicability of exceptions.

For purposes of this appeal it can be assumed that Barker and Martinez undertook the Fielding break-in while believing that the ultimate "target" was a foreign security risk for the United States. The defendants do not simply claim that they were factually mistaken about the purpose of their mission, however; they also urge that their error in believing that Hunt was a "duly authorized" agent was a factual error. Although defendants claim to maintain a distinction between mistake of fact and mistake of law, this contention entirely erodes the distinction. Defendants did not claim, or offer to prove a belief, that the President or Attorney General personally authorized the break-in; nor did they seek to advance any other specific factual basis for the belief that Hunt was "duly authorized." They certainly did not offer to prove that they believed John Ehrlichman "expressed or implied that the break-in of Dr. Fielding's office was legal under a national security rationale." (Merhige, concurring at 8). They did not seek outside advice about the factual requirements necessary for such an undertaking. The appellants do not claim they mistakenly believed they were acting under a warrant. Nor do they claim any other representation of fact, express or implied, or mistake of fact.

Martinez says he believed that Hunt was still employed by the CIA. He has apparently put himself in a no-lose position on this point, for when his CIA case officer replied to his inquiry that Hunt was not then employed by CIA, he assumed this answer was a ruse or cover. But this mistake of fact—whether reasonable or not—was irrelevant, for even if Hunt had then been employed by CIA, his employment would not have validated the break-in and search.

At bottom, the defendants' "mistake" was to rely on Hunt's White House and CIA connections as legally validating any activities undertaken in the name of national security. They had been told that the matter was something that could not be handled by the FBI because of court decisions or by the CIA because of its limited jurisdiction. Martinez conceded in testimony that he was aware that

¹³ See, e.g., *United States v. Feola*, 420 U.S. 671, 686 (1975); 1 Wharton's Criminal Law and Procedure § 157 (1957); G. Williams, *Criminal Law, the General Part* §§ 52-74 (2d Ed. 1961); *Model Penal Code* § 2.04(1) (P.O.D.) (1962).

¹⁴ See H. M. Hart, Jr., "The Aims of the Criminal Law", 23 *Law and Contemporary Problems* 401, 414 (1958). Cf. *Morissette v. United States*, 342 U.S. 246 (1952), and discussion in note 49 *infra*.

¹⁵ Generally, Glanville Williams distinguishes between them as follows: "[A] fact is something perceptible by the senses, while law is an idea in the minds of men." Williams, *Criminal Law, the General Part* (2d ed., 1961), § 100, p. 287.

¹⁶ Defendant's proposed instruction read: "You have heard evidence during the course of the trial pertaining to the state of mind of certain of the defendants at the time they agreed to participate and thereafter did participate in the September 8, 1971 entry of the office of Dr. Lewis J. Fielding. I instruct you that a defendant's motives in committing acts which the law forbids are not germane to whether an offense has been committed. However, since specific intent is an essential element of this offense, if a defendant acted out of a good faith belief that what he was doing was with authority of law and not in violation of the law, that is a defense to the crime charged, even if that sincere belief that his actions were lawfully authorized was erroneous."

"This is not to say that a mistake of law on the part of a defendant would constitute a defense to the crime charged. Neither ignorance of the law nor mistake of law would excuse the criminal conduct in this case. However, if actions are taken as the result of mistake of fact, as opposed to ignorance or a mistake of law, then the defendant has not formed the requisite intent for the crime charged. Accordingly, if you find that a defendant believed he was acting out of a good faith reliance upon the apparent authority of another to authorize his actions, that is a defense to the charge in Count I, provided you find that such a mistake by a defendant was made honestly, sincerely, innocently and was a reasonable mistake to make based upon the facts as that defendant perceived them." Barker App. 104-05.

To the extent defense counsel was of the view, as appears from the third sentence of his proposed instruction, that a good faith mistake of law negates the specific intent required for the crime, this is not sound. See Sec. IIE of this opinion and Sec. IIA of our opinion in *U.S. v. Ehrlichman*, issued today; *United States v. Guest*, 383 U.S. 745 (1966); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941).

the operation might have been illegal for a "normal citizen" (Tr. 2170). Barker and Martinez did not consider themselves "normal" because of their putative status as CIA-White House operatives. Their mistake as to who or what the law authorized or required cannot be repackaged as a mistake of "fact" that Hunt had been duly authorized.

It can be assumed for present purposes that defendants mistakenly believed they were entering Dr. Fielding's office in order to get information on some other person who was a "traitor." However, their actions taken pursuant to that mistaken belief did not conform with the law's requirements. The fundamental right to be free from warrantless physical searches has been clear since *Boyd v. United States*¹⁷ recognized that such cases as *Entick v. Carrington*¹⁸ so intensely affected the framers that those cases have long been taken "as sufficiently explanatory of what was meant by unreasonable searches and seizures."¹⁹ Even when the Executive acts to avert foreign security dangers, no Federal judge, indeed no Department of Justice submission, has ever suggested that action otherwise clearly prohibited by the Fourth Amendment would be valid in the absence of explicit authorization by the President or Attorney General. No generally delegable power to authorize such searches is reconcilable with the requirements of the Fourth Amendment.¹⁹

On the separate issue of whether physical searches can properly be included in a foreign security exception to the warrant requirements, the Special Prosecutor says No, while the Attorney General has filed a short memorandum saying Yes, if specifically authorized by the President or the Attorney General.²⁰ The fact that defendants do not assert a belief that the President or Attorney General authorized their violation of Dr. Fielding's fundamental right to be free of warrantless government forays into his office takes this case outside the mistake of fact defense, for whatever defendants' other beliefs as to the facts, they would not, if true, establish exculpation.

In an earlier case involving these same defendants, and roughly the same defense as that advanced here, Judge Wilkey rejected the argument that "an error as to the legality of a particular activity, even if based upon the assurances of a governmental official" can be treated as a mistake of fact. He recognized the importance of the issue, for a mistake of fact defense would justify conduct whenever the mistake was honest whether reasonable or not, while the mistake of law defense, if held applicable, justifies conduct only if the mistake is reasonable. *United States v. Barker*, (dissent) 168 U.S.App.D.C. 312, 514 F.2d 208, 264-68 & n.76 (1975). I subsequently consider whether the mistake of law defense should be expanded to reach this case. But certainly this should not be done behind the screen that what is involved is a mistake of fact. Defendants cannot avoid the limitations that have historically shaped exculpation because of legal mistake, by characterizing as factual error their belief that a generalized aura of executive branch authorization warranted their nighttime intrusion.

C. Mistake of Law—Generally

Viewed as a mistake of law, the defense raised by defendants requires us to confront a fundamental tension in our criminal law. The criminal law relies in general on the contempt of culpability or blameworthiness as a prerequisite to guilt, expressed as a requirement of *mens rea*.²¹ The Supreme Court has,

¹⁷ 116 U.S. 616 (1886).

¹⁸ 95 Eng. Rep. 807 (1765). Lord Camden upheld damages against Lord Halifax, the Secretary of State who issued the general warrant to seize papers in a case of seditious libel, holding this had never been authorized by a court, other than Star Chamber, and was not a valid justification for a trespass.

¹⁹ 116 U.S. at 627.

²⁰ See discussion in the companion opinion of *United States v. Ehrlichman* at Sec. IIR1, and the District Court's reliance on the defendant's failure to allege Presidential or Attorney General authorization, 376 F. Supp. at 34.

²¹ The fact that the Attorney General has recently—and so far as we are aware for the first time—made the claim that there is a "national security" exception that would permit physical intrusion in a citizen's home or office on specific approval of the President or Attorney General, even in the absence of a warrant, does not mean that the law on this position is now to be regarded as clouded with doubt so as to remove such actions from the scope of section 241.

²² H. Packer, *The Limits of the Criminal Sanction* 112-21 (1968), explains the use of culpability as an "appropriate criterion for limiting the reach of state intervention", "transcending a calculus of crime preventing." But see J. Hall, *General Principles of Criminal Law* 77-83 (2d ed. 1960), concluding that even in the earliest cases *mens rea* was concerned with the intentional doing of a wrongful act and not a general notion of moral blameworthiness; Seney, "When Empty Terrors Overawe—Our Criminal Law Defenses," 19 Wayne L. Rev. 947, 969 (1973), conceptualizing criminal law as imposing a positive duty upon individuals to refrain from antisocial conduct.

however, rejected Blackstone's formulation that a "vicious will" is necessary to constitute a crime, see *Lambert v. California*, 355 U.S. 225, 228 (1957), and as a society we have stopped short of requiring a subjective behavioral assessment of each offender's individual stock of knowledge about the law and its applicability.²² Instead, "the rule that 'ignorance of the law will not excuse' . . . is deep in our law." *Lambert v. California*, 355 U.S. at 228, quoting *Shelvin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910). The Supreme Court has generally refused to recognize a defense of ignorance of, or mistake as to, the requirements of the law violated, even when the mistake refutes any subjective moral blameworthiness in the offender. See, e.g., *United States v. Park*, 421 U.S. 658 (1975); *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971). *United States v. Freed*, 401 U.S. 601 (1971); *United States v. Dotterweich*, 320 U.S. 277, 284 (1943).²³ Similarly, the A.L.I.'s Model Penal Code § 2.02(9) defines the requirements of culpability so that "neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense unless the definition of the offense or the Code so provides."²⁴

The general principle that rejects the defense of ignorance of the requirements of the criminal law, or of mistake as to those requirements, is not a casual or happenstance feature of our legal landscape. It formed a part of English and canon law for centuries and all the time with recognition that it diverged from an approach of subjective blameworthiness.²⁵ Its continuing vitality stems from preserving a community balance, put by Holmes as a recognition that "justice to the individual is rightly outweighed by the larger interests on the other side of the scales."²⁶ Great minds like Holmes and Austin have struggled with the tension between individual injustice and society's need and have concluded that recognition of the mistake of law defense would encourage ignorance rather than a determination to know the law, and would interfere with the enforcement of law, because the claim would be so easy to assert and hard to disprove.²⁷

In some aspect the doctrine may be viewed as a doctrine of negligence, holding individuals to minimal conditions of responsibility and making acting without legal knowledge blameworthy for the failure to obtain that knowledge.²⁸ Hall suggests in addition that the rationale can be expressed in terms of ethical policy—that the criminal law represents certain moral principles and that to recognize ignorance or mistake of law as a defense would contradict those values.²⁹ Still, it must in the last analysis be recognized that at its core, the basic mistake of law doctrine imposes liability even though defendant acted in good faith and made a "reasonable" mistake. Otherwise, criminal statutes would be in suspense on any point not authoritatively settled.³⁰ In a particular case adherence to a

²² But see Hall and Sellman, "Mistake of Law and *Mens Rea*," 8 U. Chi. L. Rev. 641 (1941). (Hereinafter cited as Hall and Sellman). Of course, totally subjective assessments of an accused's state of mind can never be fully realized. For example, a finding of the subjective intent required for a first degree murder conviction may be and frequently is based on objective inferences from evidence other than direct evidence of the state of mind.

²³ Only where scienter is "historically required", as in embezzlement or larceny (see *Morrisette v. United States*, 342 U.S. 246, (1951), discussed in *U.S. v. Freed* 401 U.S. at 607 n.13), or where the circumstances requiring the law's application do not "alert the doer to the consequences of his deed" (*Lambert*, 355 U.S. at 228) has ignorance of the law been recognized by the Supreme Court as an excuse.

²⁴ (P.O.D. 1962). See also S. 1, *supra* note 11, § 303(d)(1) "Existence of Offense—Proof of knowledge or other state of mind is not required with respect to: (A) the fact that particular conduct constitutes an offense or is required by or violates a statute or a regulation, rule, or order issued pursuant thereto; (B) the fact that particular conduct is described in a section of this title; or (C) the existence, meaning, or application of the law determining the elements of an offense. This careful specification of the elements of an offense is consistent with "[t]he modern practice in drafting penal legislation . . . to specify defenses when intended." *United States v. Moore*, 158 U.S. App. D.C. 375, 413, 486 F. 2d 1139, 1177, cert. denied 414 U.S. 980 (1973).

²⁵ See Hall & Sellman's summary, *supra* at 643-46.

²⁶ Holmes, *The Common Law* 48 (1881).

²⁷ As to the doctrinal support for their positions, an excellent summary is presented in Hall & Sellman, *supra* at 646-651.

²⁸ Hart, "The Aims of the Criminal Law," 23 *Law and Contemporary Problems* 401, 413 (1958).

²⁹ "The criminal law represents an objective ethic which must sometimes oppose individual convictions of right. Accordingly, it will not permit a defendant to plead, in effect, that although he knew what the facts were, his moral judgment was different from that represented in the penal law." Hall, "Ignorance and Mistake in Criminal Law," 33 *Ind. L.J.* 1, 21 (1957), quoted in Report of the Senate Committee on the Judiciary, *Criminal Justice Codification, Revision and Reform Act of 1974*, Vol. II, p. 96.

³⁰ It would fairly be argued that no liability attaches for e.g., action taken under a "reasonable", though erroneous, forecast of how far the courts might go in confining a statute through the doctrine of strict construction. Litigation could come to depend not on what the statute meant, but the reasonableness of a legal view of its meaning.

generally formulated rule may seem to work injustice, but the jurists pondering the general doctrine have both deemed such individual hardships outweighed by the common good, and have taken into account that certain features of the overall system of criminal justice permit amelioration and relief.³¹ These flexible opportunities for mitigating the law's impact—through prosecutorial discretion,³² judicial sentencing, and executive clemency—avoid the necessity of bending and stretching the law, at the price of undermining its general applicability.

Every mature system of justice must cope with the tension between rule and discretion. Rules without exceptions may grind so harsh as to be intolerable, but exceptions and qualifications inflict a cost in administration and loss of control. The balance struck by the doctrine with which we are now concerned provides for certain rigorously limited exceptions (inapplicable to defendants' claim) but otherwise leaves amelioration of harsh results to other parts of the system of justice. In my view, history has shaped a rule that works, and we should be slow to tinker. Consequently, defendants here must be held to a responsibility to conform their conduct to the law's requirements. To hold otherwise would be to ease the path of the minority of government officials who choose, without regard to the law's requirements, to do things their way, and to provide absolution at large for private adventurers recruited by them.

D. *Exceptions to the Mistakes of Law Doctrine*

I do not discount defendants' claims that their background, and particularly their previous relations with the CIA³³ and Hunt explains their good faith reliance on Hunt's apparent authority and their consequent failure to inquire about the legality of the activities they were to undertake on his request.³⁴ I feel compassion for men who were simultaneously offenders and victims, and so did the trial judge when it came to sentencing. But testing their special circumstances against analogies they rely on to project a mistake of law defense, leads me to reject their claim to be relieved of personal accountability for their acts.

1. *Claim of Good Faith Reliance on an Official's Authority*

Appellants invoke the acceptance of good faith reliance defenses in the Model Penal Code. However, the American Law Institute carefully limited the sections cited to persons responding to a call for aid from a police officer making an unlawful arrest,³⁵ and to obeying unlawful military orders,³⁶ and specifically rejected

³¹ If the social harm in a particular case is slight and the ignorance of the law on the part of the offender is fairly obvious, the state may wisely refrain from prosecution in his case. In certain other cases ignorance of law may be considered by the court in mitigation of punishment, or may be made the basis of an application for executive clemency. But if such ignorance were available as a defense in every criminal case, this would be a constant source of confusion to juries, and it would tend to encourage the ignorance at a point where it is peculiarly important to the state knowledge should be as widespread as is reasonably possible." R. Perkins, *Criminal Law* 925 (2d ed. 1969). (footnotes omitted).

³² The Justice Department decision against prosecuting Richard Helms may be a sound example of prosecutorial discretion shielding against the cut of the law. It should be noted that unlike the defendants in this case, Helms arguably acted in obedience to a duty imposed by statute, and thus might have come within the compass of a mistake of law defense grounded in the actor's being under a duty to act.

³³ However, the CIA's authority does not extend to domestic intelligence activity. 50 U.S.C. § 403(d) (3) (1970).

³⁴ Although Barker and Martinez are American citizens, they are in a sense arguing that they could not be expected to make the right judgments about the requirements of American law because they were accustomed to Cuba's more authoritarian culture. See Bazelon, J. concurring in *United States v. Barker*, 514 F. 2d at 235 n. 38. However under American jurisprudence an alien or naturalized citizen status does not excuse compliance with the criminal law. Cf. *United States v. De La Garza*, 149 U.S. App. D.C. 200, 462 F. 2d 304 (1972).

³⁵ See e.g., Model Penal Code § 3.07(4) (P.O.D. 1962):

(4) *Use of Force by Private Person Assisting an Unlawful Arrest.*

(a) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that he does not believe the arrest is unlawful.

(b) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that (i) he believes the arrest is lawful, and (ii) the arrest would be lawful if the facts were as he believes them to be.

³⁶ See Model Penal Code § 2.10 (P.O.D. 1962). (See also Williams *Criminal Law* § 105, 206-301; *United States v. Calley* 22 U.S.M.C.A. 534 (1973).

the defense for other mistake of law contexts.³⁸ In both instances, the A.L.I. recognizes limited curtailment of the doctrine excluding a mistake of law defense on the ground that the actor is under a duty to act³⁹—to help a police officer in distress to make an arrest when called upon, or to obey military orders. In each case, society has no alternative means available to protect its interest short of imposing a duty to act without a correlative duty to inquire about the legality of the act.⁴⁰ Punishing an individual for failure to inquire as to the lawful basis for the officer's request would frustrate the effective functioning of the duly constituted police (and military) force and in its operation on the individual would compel a choice between the whirlpool and the rock.⁴¹

There is no similar incapacity of the government to act to protect its ends when a citizen takes action when he is under no duty to do so. Thus under the Model Penal Code, a citizen who volunteers to assist another citizen, or volunteers to assist a police officer in making an unlawful arrest, cannot avail himself of the defense—available to a person responding to an officer's call—that he participated without making an inquiry as to whether the arrest was lawful. The volunteer is exculpated only if he believed that the arrest was lawful and believed in the "existence of facts which, if they existed, would render the arrest valid."⁴² Thus, even if private citizen intervention appears socially desirable in a particular case, the citizen's scope of action and protection in the event of mistakes are narrow, because overall forceful citizen enforcement of the law is susceptible of abuse⁴³ and mischief.

Barker and Martinez were under no tension of conflicting duties comparable to that experienced by a soldier or citizen responding to orders. They had and claim no obligation to aid Hunt. Nor did they have a belief of fact rendering their voluntary assistance lawful within § 3.07(4), *supra* note 33. Nor is there a compelling social interest to be served in allowing private citizens to undertake extra legal activities, acting simply on the word of a government official. The purposes of the law in rejecting such a defense are underscored by the very kinds of extra-governmental, outside-normal-channels conduct that Barker and Martinez engaged in here. Government officials who claim to be seeking to implement the ends of government by bypassing the agencies and personnel normally responsible and accountable to the public transmit a danger signal. Barker and Martinez acted to help Hunt on his explanation that he sought their recruitment because the FBI's "hands were tied by Supreme Court decisions and the Central Intelligence Agency didn't have jurisdiction in certain matters."⁴⁴ There is reason for the law to carve out limited exceptions to the doctrine negating defenses rooted in mistake of law, but the pertinent reasons have minimal weight, and face countervailing policies, when they are invoked for situations that on their face are outside the basic channels of law and government—in this case, requests for surreptitious or, if necessary, forcible entry and clandestine files search. These are plainly crimes, *malum in se*, unless there is legal authority. Citizens may take action in such circumstances out of emotions and motives that they deem lofty, but they must take the risk that their trust was misplaced, and that

³⁸ When § 3.07(4) does not specifically apply, § 3.09(1) withdraws any justification defense to the use of improper force where the actor's "error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the legality of an arrest or search." The Commentary explained that provision as dealing with a "body of law [which] is not stated in the Code and may not appear in the form of penal law at all. It seems clear, however, that the policy which holds mistake of penal law to be immaterial applies with no less force to the law of arrest or search." A.L.I. Model Penal Code § 3.09(1) comment referring to § 3.04(1) comment (Tent. Draft. No. 8, 1958), at 18.

³⁹ An analogous defense under proposed S. 1 is § 541 (Exercise of Public Authority), which justifies conduct by private individuals done at the direction of a public servant where the conduct was required or authorized by law. Because their conduct was neither required nor authorized, Barker and Martinez fall outside the scope of this proposed exception.

⁴⁰ A similar rationale underlies the exception for reliance on government authority when acting under a public duty. See Model Penal Code § 3.03 (P.O.D. 1962).

⁴¹ Even under circumstances of conflicting obligations, the reasonableness of a soldier's obedience to an unlawful order is tested against the objective standard provided by "a man of ordinary sense and understanding." 22 U.S.C.M.A. *supra*, at 542-43. See also footnote 31a *supra*.

⁴² A.L.I. Model Penal Code, § 3.07(4)(b), see note 83 *supra*; Comment (Tent. Draft No. 8, p. 85 (1958)). Cf. Proposed S. 1 § 544(b) (similar provision for recognizing defenses based on justifiable conduct predicated on a mistake about the factual situation).

⁴³ See, e.g., *U.S. v. Hillsman*, 522 F. 2d 454, (7th Cir. 1975), holding that defendant's attempted citizen's arrest of a fleeing felon was improper under Indiana law because validity of such an arrest rests on whether a felony (a question of fact and of law) had in fact been committed by the arrestee, and no felony had in fact been committed.

⁴⁴ Barker, Tr. 2197.

they have no absolution when there was no authority for the request and their response. If they are later to avoid the consequences of criminal responsibility, it must be as a matter of discretion. To make the defense a matter of right would enhance the resources available to individual officials bent on extra-legal government behavior. The purpose of the criminal law is to serve and not to distort the fundamental values of the society.

2. Exception for Official Misstatements of Law

Although defendants relied on the analogy to a police officer's request for assistance, Judge Merhige votes to reverse on the ground that appellants could claim as a defense that a citizen has a right to take action in reliance on a government official's assurance that such action is permissible. The Model Penal Code has addressed itself to that broad problem, and has approved a defense that is narrowly confined in order to protect social interests.⁴³ Its provision yields no excuse for defendants' conduct. Section 2.04(3) of the Code provides a carefully and properly drawn recognition of a defense based on reasonable reliance on a statute, judicial decision, administrative order or "an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense." Mainly directed to the *mala prohibita* offenses, the categories protected "involve situations where the act charged is consistent with entire law-abidingness of the actor, where the possibility of collusion is minimal . . ."⁴⁴

The section contemplates both accountability and responsible action on the part of the government official giving advice about the law. But defendants do not claim they received any advice, either express or implied, from Ehrlichman, and Hunt had only an *ad hoc*, undefined position in the White House.⁴⁵ He had no on-line enforcement or interpretative powers or responsibilities. His undifferentiated power stemmed solely from membership in a large White House bureaucracy.⁴⁶ The potential for official abuse of power would be greatly magnified if such a government official can recruit assistance from the general public, constrained neither by accountability guidelines guiding agency action under statutorily mandated powers, nor by the recruited citizen who, under the defendants' formulation, would be under no duty to inquire about the legality of the official's request.⁴⁷

To stretch the official misstatement of law exception for the facts of this case is to undercut the entire rationale for its recognition as an exception. The Model Penal Code hedges in the defense to permit reliance only on an "official interpretation of the public officer . . . charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense." (emphasis added). Certainly Hunt cannot sensibly be described as having been charged by law with responsibility for interpreting or enforcing either § 241, or the Constitution from which the violations of § 241 in this case sprang. Nor can it be said in any meaningful sense that he had the power to provide an official interpretation of the law. These restrictions on the applicability of the official statement exception did not arise haphazardly; they were deliberately drafted to allow, and indeed to promote, good faith reliance on official pronouncements with objective indicia of reliability—those made by officials specifically charged with interpreting or enforcing the specific law defining the specific offense charged against the defendant. A defense so confined has values for the law: It avoids punishing those who rely on a crystallized position taken by the officer or body charged by statute with interpreting the law in a particular area.⁴⁸ The

⁴³ A similar approach appears in § 552 of S. 1, *supra* note 11.

⁴⁴ Model Penal Code, Tentative Draft #4 Commentary at 138 (1955).

⁴⁵ The Room 16 unit did not even have an Executive Order formally creating it or endowing it with any powers. Cf. the classified Executive Order used to create the National Security Agency (Nov. 4, 1952, U.S. Govt. Org. Manual 185-86 (1969-70)), discussed in Walden, "The CIA: A Study in the Arrogation of Administrative Powers" 39 Geo. Wash. L. Rev. 66, 67 (1970).

⁴⁶ The way that bureaucracy acquires power and handles its conflicts with agency personnel and policy is examined at length in Thomas, "Presidential Advice and Information: Policy and Program Formulation, 36 Law and Contemporary Problems 540" (1970).

⁴⁷ The potentially broad range of illegal activities that a government official might request a private citizen to do, would make it impossible to rely on the educational value that normally inheres when mistake of law is recognized as an excuse in one case that serves to define the law for similarly circumstanced offenders in the future. See, e.g., Fletcher, "The Individualization of Excusing Conditions," 47 So. Cal. L. Rev. 1269, 1304-05 (1974).

⁴⁸ Cf. *National Automatic Laundry and Cleaning Council v. Shultz*, 143 U.S. App. D.C. 274, 287-289, 443 F.2d 689, 702-04 (1971).

officer's position in a channel of authority is readily identifiable; any mistakes he makes can be remedied by readily perceived and structured avenues of relief. There is no opening the door to justification for serious offenses based on unrecorded discourse from someone who has an undefined but high-sounding berth in the government.

The "official interpretation" defense thus structured is a functional analogue of the defenses of reliance on a statute, judicial decision or administrative order. It is justified by its twin underlying assumptions that the official is one to whom authority has been delegated to make pronouncements in a field of law, and that the authority can be held accountable by explicitly grounding it in the hands of an identifiable public official or agency. So grounded, the interest of both private citizens and government is served by protecting actions taken in reliance on that interpretative authority. But *none* of these safeguards of regularity is present in this case. A staff man or even a lower echelon official of the White House may be taken as a man of presumptive standing and even influence, but not seriously as a source of official interpretation of law, much less of such matters as the validity of a stealthy breaking and entering. Even cases postulating a national security exception for wiretaps have never suggested more than that the President or the Attorney General could have authority to evaluate and authorize an exception. No claim of Presidential or Attorney General authorization has been made in this case. The official misstatement of law defense embodies a fundamental requirement that the erroneous interpretation be made by an official in fact possessing the power to make a binding interpretation; it is wholly inapplicable to a case like this, of a claim of reliance on a government official in an area in which he has no power to interpret. And it is blatant incongruity to stretch an escape clause for mistakes of law arising in the innately public business of official interpretations of law to immunize a secret conference for planning a stealthy entry into a private home or office.

S. The Inapplicability of Other Exceptions

While a mistake of law may negative a specific element of certain crimes,⁴⁸ or may be accepted where the mistake pertains to a violation of purely civil law as contrasted with the requirements of the criminal law,⁴⁹ none of these carefully wrought exceptions have application to the case at bar. Defendants' mistake of law did not pertain to some rule irrelevant to or remote from the criminal law. Nor does section 241 recognize a mistake of law defense or require a specific intent like the statute at issue in *People v. Weisa*, 276 N.Y. 384, 12 N.E.2d 514 (1938), punishing a "willful" seizure of a person with "intent to [act], without authority of law."

E. The "Specific Intent" Requirement of the Civil Rights Offenses

This brings me to the question whether the civil rights offenses involved here are of such a character, either in terms of required intent or affirmative defense, as to make available an extension of criminal defenses to include mistake of law. I conclude, on the contrary, that this consideration reinforces the rejection of the proffered defense.

The court is dealing here with violations of civil rights. We all agree that "the law is clear that Dr. Fielding's Fourth Amendment rights were breached when the defendants broke into and searched his office without the requisite judicial authorization" and that they acted with "a purpose to invade constitutionally protected interests." (*Ehrlichman* slip at 32). Unless we are willing to undercut criminal enforcement of the civil rights offenses, it is entirely imper-

⁴⁸ See e.g. Mistake § 521 in S. 1: Model Penal Code § 2.04 (P.O.D. 1962). The possibility of a definition of particular crimes to permit exculpation by mistake of law does not contradict the general rule denying exculpation. "The prevailing general rule for criminal responsibility is that, unless the legislature indicates its intention to make it so, ignorance or mistake of law is no defense." Report of the Senate Committee on the Judiciary, Criminal Justice Codification, Revision and Reform Act of 1974, Vol. II, p. 94.

⁴⁹ See e.g., Williams, *Criminal Law: The General Part*, § 117, Fletcher. "The Individualization of Excusing Conditions, 47 *So. Cal. L. Rev.* 1269 (1974) at 1272. Williams suggests that a mistake as to purely "civil" law is exculpatory while a mistake as to the "criminal" law is not. See G. Williams, *supra* §§ 107-117, p. 804-451. Hart, *supra* at 431 n. 70 explains *Morissette v. United States*, 342 U.S. 246 (1951), as a "claim of right" civil law mistake.

missible to stretch doctrines of mistake of law to reach the result of excusing that violation of Fourth Amendment rights. The majority excuses defendants' conduct on their contention of mistaken reliance on official lawlessness—even though conspiracy for illegal government purposes with government officials is the gravamen of the offenses charged. What the reversals accomplish is an erosion of pertinent Supreme Court rulings rejecting contentions based on "specific intent."

Conviction under Section 241 requires that the offender acted with a "specific intent"⁵⁰ "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ." This does not mean that he must have acted with subjective awareness that his action was unlawful; nor need the defendant have thought in constitutional terms while acting. *See, e.g., Screws v. United States*, 325 U.S. 91, 104-07 (1945). It is enough that the constitutional right is clearly defined and that the conspirators intend to invade interests protected by the Constitution.⁵¹

In essence, defendants Barker and Martinez claim that the destructive social impact wrought by their invasion of another's civil rights is exonerated by the law so long as an individual is acting at the request of a government official and on his implication that he has legal authority. The price to society of tolerating reliance on the very official misconduct § 241 was directed against, forces us to reject defendants' argument.⁵² As the Supreme Court made clear in *Screws*,⁵³ the scope and significance of the all-important civil rights criminal statutes are not to be cabined or cut down, either by expanding scienter requirements to include knowledge of law or by enlarging defenses based on ignorance or mistake of law. A private citizen must start with a beginning point in his understanding of what the law requires. Breaking and entering a home or office is *malum in se*—a gross and elementary crime when done for personal reasons, a gross and elementary violation of civil rights when done with the extra capability provided by a government position. Defendants were charged and convicted of violating a clearly defined constitutional right.⁵⁴ They were not acting in an official law enforcement capacity. *Of. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).⁵⁵ Their defense instead reduces to an arguable but interested speculation that their otherwise unlawful behavior would be vindicated by a foreign security exemption to the Fourth Amendment's protections. In regard to subjective "good faith," they are indistinguishable from any other criminal defendant who deliberately breaks the law in the mistaken expectation that he can assert a constitutional defense at trial or one who is civilly disobedient because his framework for moral action does not coincide with his society's legal

⁵⁰ *See, e.g., United States v. Guest*, 388 U.S. 745, 753-54 (1968).

⁵¹ As our companion opinion in *United States v. Ehrlichman* illustrates, Dr. Fielding's right to be free of a warrantless search was clear at the time of the break-in.

⁵² *See United States v. Konovsky*, 202 F. 2d 721, 730-31 (7th Cir. 1953):

"If a police officer acts intentionally under color of his office to subject a citizen to deprivation of his constitutional rights, he cannot justify his action in that respect by orders from his superiors . . . [A]ny instruction to the jury must carefully point out the distinction between the duty of an officer to allow [sic] his superior's instructions in the performance of his duty and the equal duty not to aid and abet in the deprivation of citizens' rights."

⁵³ 325 U.S. 91 (1945).

⁵⁴ *See* part II of this opinion.

⁵⁵ The *Bivens* court balanced the need to protect agents' lives in the course of their duties with the citizens' constitutional rights and held that "it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search" to a damage action based on unconstitutional search and seizure. 456 F. 2d at 1348. Although it is not clear that recognized civil defenses should be automatically applied to the criminal law context (*see e.g. O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *Imbler v. Pachtman*, 98 S. Ct. 984 (1978)), the defense recognized in *Bivens* does not in any case aid defendants here. The *Bivens* defense is applicable in an official law enforcement context where the complex law of probable cause must be applied to widely differing congeries of facts; by contrast, the law governing search and seizure without a warrant or Presidential/Attorney General approval is clear and plainly applied to prohibit the conduct Barker and Martinez engaged in. *See also Wood v. Strickland*, 420 U.S. 308, 322 (1975) (on remand, *Strickland v. Inlow*, 519 F. 2d 744 (8th Cir. 1975) holding a school board member in a 42 U.S.C. § 1983 (1970) action to a standard of conduct based "on knowledge of the basic, unquestioned constitutional rights of his charges." Barker and Martinez had a similar responsibility to "know the law.

framework.⁶⁶ Such persons frequently act on a high plane of patriotism, as they view it, but that does not allow them to proceed in ignorance or disregard of the requirements of law.⁶⁷

III. CONCLUSION

I do not propose to consider whether appellants were unreasonable in accepting a particular view of the law. In the first place, Barker and Martinez do not urge as justification that they had a specific view of the law, but rather that they are entitled to absolution because they relied on a government employee's credentials and his assurance, by implication, that their action was lawful. Even so, one might well raise the question as to how appellants could reasonably believe that what they were doing was lawful when they were told they were called in because the action would have been unlawful for the F.B.I.

The ultimate point is that appellants' mistake of law, whether or not it is classified as reasonable, does not negative legal responsibility, but at best provides a reason for clemency on the ground that the strict rules of law bind too tight for the overall public good. Any such clemency is not to be obtained by tinkering with the rules of responsibility but must be provided by those elements of the system of justice that are authorized by law to adjust for hardship and to provide amelioration. We should refuse to cut away and weaken the core standards for behavior provided by the criminal law.⁶⁸ Softening the standards of conduct rather than ameliorating their application serves only to undermine the behavioral incentives the law was enacted to provide. It opens, and encourages citizens to find, paths of avoidance instead of rewarding the seeking of compliance with the law's requirements. The criminal law cannot "vary legal norms with the individual's capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable, such as the mental disease or defect that may establish irresponsibility. The most that it is feasible to do with lesser disabilities is to accord them proper weight in sentencing."⁶⁹

The sentence performed its proper function here. Our system is structured to provide intervention points that serve to mitigate the inequitable impact of general laws while avoiding the massive step of reformulating the law's requirements to meet the special facts of one hard case. Prosecutors can choose not to prosecute, for they are expected to use their "good sense . . . conscience and circumspection" to ameliorate the hardship of rules of law.⁷⁰ Juries can choose not to convict if they feel conviction is unjustified, even though they are not instructed that they possess such dispensing power.⁷¹ In this case, Barker and Martinez were allowed to testify at length about the reasons motivating their involvement in the Fielding

⁶⁶ See, e.g., *United States v. Cullen*, 454 F. 2d 386, 392 (7th Cir. 1971) ("proof of motive, good or bad, has no relevance to [proving requisite intent]"); *United States v. Malinowski*, 472 F. 2d 850, 856 (8d Cir.), cert. denied, 411 U.S. 970 (1973) ("We agree with the district court that 'whatever motive may have led him to do the act is not relevant to the question of the violation of the Statute.' Were the state of the law otherwise, a defendant's transgressions would go unpunished so long as he proved a sincere belief in the impropriety of the statutory goal"); *United States v. Moylan*, 417 F. 2d 1002, 1009 (4th Cir. 1969) cert. denied 397 U.S. 910 (1970). It has been suggested, but not as yet implemented, that defendants in test cases should be allowed to assert their good faith belief in the unconstitutionality of a law as a mistake of law defense. See Dworkin, "On Not Prosecuting Civil Disobedience," 10 *N.Y. Rev. of Books* 14 (June 6, 1968). One commentator dealing with assessing criminal responsibility of the political offender concludes, however, that considering motive as a factor in mitigation of sentence rather than as an exculpating excuse would be the "most pragmatic proposal" for dealing with such offenders. Note, *Criminal Responsibility and the Political Offender*, 24 *American U. L. Rev.* 797, 833 (1975).

⁶⁷ Barker and Martinez contend, as a separate point, that they lacked "specific intent" to violate a federal right of Dr. Fielding, because the warrantless entry and search of his office were only incidental to their primary purpose of photographing Daniel Ellsberg's medical file, an objective they characterize as at best a state offense outside the reach of section 241. The Supreme Court's most recent pronouncement on the requirements of section 241 in *Anderson v. United States*, 417 U.S. 211 (1974), makes clear that "if one of [the purposes of the conspiracy]—whether primary or secondary—be the violation of federal law, the conspiracy is unlawful under federal law."

⁶⁸ My rejection of the defendants' mistake of law defense also leads me to reject defendants' contention that failure to present evidence on their claimed defense to the grand jury requires dismissal of the indictment. Nor is an indictment subject to dismissal because of challenges to the competency or sufficiency of the evidence before the grand jury. See *United States v. Calandra*, 414 U.S. 388 (1974); *Costello v. United States*, 350 U.S. 359, 363-64 (1956).

⁶⁹ A.L.I. Model Penal Code § 2.09, Comment (Tent. Draft No. 10, 1960), at 6.

⁷⁰ *U.S. v. Dotterwelch*, 320 U.S. 277, 285 (1943), quoted in part in *United States v. Park*, 421 U.S. 658, 669-70 (1975).

⁷¹ See *United States v. Dougherty*, 154 U.S. App. D.C. 76, 473 F. 2d 1113 (1972).

operation. This was an exercise of discretion by the judge that gave elbow room to both defendants and jury.⁶²

In sentencing Barker and Martinez after they were convicted, to only three years probation, the trial judge made a subjective evaluation of the defendants' conduct in light of the goals of the criminal law.⁶³ Barker and Martinez's patriotic motives, good intentions, and prior experience with the CIA and Hunt must all have influenced with sentence imposed.⁶⁴ The trial judge exercised his sentencing power to distinguish, in terms of degree of moral guilt, between appellants Barker and Martinez and codefendant Ehrlichman. But sympathy for defendants, or the possibility that their mistake might be considered "reasonable" given their unique circumstances, must not override a pragmatic view of what the law requires of persons taking this kind of action. I come back—again and again, in my mind—to the stark fact that we are dealing with a breaking and entering in the dead of night, both surreptitious and forcible, and a violation of civil rights statutes. This is simply light years away from the kinds of situations where the law has gingerly carved out exceptions permitting reasonable mistake of law as a defense—cases like entering a business transaction on the erroneous advice of a high responsible official or district attorney, or like responding to an urgent call for aid from a police officer. I dissent.

⁶² While not strictly congruent with the law underlying the instructions later given to the jury it did not involve the judge in an affirmative mis-statement of the law. The extra latitude in terms of what may be presented to the jury may be viewed as a historic resonance in practice from the days when juries had the power to set punishment as well as to convict, and evidence was admissible at trial in mitigation of punishment. Williams, *Criminal Law supra* at 291.

⁶³ I am well aware that there are differences between probation and acquittal—the judgment of leniency being made by a judge and not a jury and a felony conviction having possible collateral effects in such matters as voting and employment. But if the situation does not prompt a failure to prosecute, the possibility of suspension and imposition of sentence and probation remains an important amelioration that avoids a breach in the law's resolution of interests.

⁶⁴ Establishment and vindication of the law need not be accomplished by a heavy penalty. See e.g., Hall and Selligman, *supra* at 650; Note, Political Offenders, *supra* at 828-832.

Moreover, the trial judge took account of sentence served for the Watergate break-in. (Sentencing Tr. p. 10). It is not uncommon for trial judges to provide for concurrent service of sentence on unrelated crimes; here, the confinement on the prior sentence had already terminated.

FBI OVERSIGHT

Attorney General's Guidelines for FBI Activities and Additional Legislative Proposals

THURSDAY, JUNE 10, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2226, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards and Butler.

Also present: Alan A. Parker, counsel; Thomas P. Breen, assistant counsel; and Roscoe B. Starek III, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Good morning. Today we continue our hearings designed to provide this subcommittee with a wide range of views as to how the Congress should set the policy for the Federal Bureau of Investigation. Our particular concern at this time is the domestic intelligence function of the FBI.

Our witness today is William K. Lambie, Jr., who is the associate executive director of Americans for Effective Law Enforcement. Mr. Lambie is a lawyer who received his law degree at Vanderbilt and is admitted to the bar of the State of Tennessee and the Supreme Court of the United States. He was formerly a special agent with the FBI and has been involved in law enforcement and national security studies for many years.

We might have some interruptions, Mr. Lambie, because the House is going into session 2 hours early today, but you will forgive us if we leave from time to time. We are delighted to have you here and, without objection, your full statement will be made a part of the record.

[The prepared statement of William K. Lambie, Jr., follows:]

STATEMENT OF WILLIAM K. LAMBIE, JR., ASSOCIATE EXECUTIVE DIRECTOR OF
AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., EVANSTON, ILL.

My name is William K. Lambie, Jr. I reside at 723 Hillside Avenue, Glen Ellyn, Illinois, 60137. I am Associate Executive Director of Americans for Effective Law Enforcement, Suite 960, State National Bank Plaza, Evanston, Illinois, 60201.

I am an attorney, holding a J.D. degree from Vanderbilt University and am a member of the bar of the State of Tennessee, and of the bar of the Supreme Court of the United States and the U.S. Court of Appeals for the Fourth Circuit.

My law enforcement background consists of over three years of service as a special agent of the Federal Bureau of Investigation during which time I worked on both criminal cases and security cases. From 1959 until 1972, I served as Research Director and Administrative Director of the American Security Council and was responsible for the administration of the nation's largest privately held library on national security matters. I have been associated with Americans for Effective Law Enforcement since 1972.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizen's organization incorporated under the laws of the State of Illinois in 1966.

The purpose of AELE is to provide responsible support for proper law enforcement. AELE is not a "police, right or wrong" organization. We do *not* support abusive or unprofessional police practices of any sort; rather, we call for a balance which takes into consideration the rights of the law-abiding and of the innocent victims of criminal acts as well as the rights of the criminal accused.

Let me state at the very outset that speaking as a single former agent of the FBI, I have no apologies to make to anyone for any activity in which I may have been involved while a special agent of the FBI or for any activity in which the Bureau may have been involved at any time.

I doubt that anyone has had the time or diligence to read the many thousands of words published in the news media or in releases or "leaks" to the news media about the FBI, but relying on what I have read, I see almost nothing for which to apologize.

It seems to me that the Bureau has fully understood its mission and that it has fulfilled that mission faithfully to the best of its ability, and, almost without exception, in the best interests of the nation. The mere fact that we can discuss this issue in this forum is some testimony to that fact.

I have spoken to many former FBI agents about this subject and while we may disagree on many things—including things I may say here later—none have disagreed with the feeling I have stated thus far. I might add that more than 6,000 former agents may form a body of opinion that ought to be heard in this forum through the Society of Former Special Agents of the FBI.

The question of Congressional oversight of the FBI's activities has certainly received the full attention of the Congress in recent months and years. That fact, in and of itself constitutes one of the first problems that the Congress must solve. I do not recall that I have ever heard Director Kelley address himself to the subject in any way other than to approve reasonable Congressional oversight of the FBI but it seems perfectly clear that "oversight" by a dozen competing and contending committees or subcommittees of either the House or Senate not only eliminates the most liberal standard of "reasonableness" but also taxes the Bureau's capacity to respond with any degree of real depth or meaning.

So it is that one of the very first tasks of the Congress, if it wishes to further oversee the activities of the FBI, should be to vest oversight jurisdiction either in a single joint Senate/House Committee or at the outside, a single committee or subcommittee in each the Senate and the House. The reason for this is, of course, a practical one. The Director of the FBI as well as other senior FBI officials who have historically been willing to cooperate with reasonable requests from the various committees of this Congress, perform critical duties that do not allow them a great deal of time to spend on days of largely redundant responses to a multiplicity of Congressional inquiry, some of which has been clearly and obviously intended only to achieve publicity for the Congressional personalities conducting the hearings.

I hasten to add that I do not include the Senate or House Judiciary Committee or any of their subcommittees in that statement. Indeed, it seems reasonable to me—a mere tax-paying observer of Congress in this case—that the function of FBI oversight properly lies either with the Appropriation Committee (where it has historically been, even though there has been disagreement on its effectiveness) or with the Judiciary Committee. It does not appear to me that any of the current subcommittees of House or Senate Judiciary has any special jurisdiction that would produce a natural "home" for FBI oversight functions and perhaps new Subcommittees could be created—hopefully without increased staffing requirements.

If anything is clear based on the masses of paper now emerging from Senate and House Committees, the Comptroller General, the General Accounting Office

and from the Justice Department itself, some means must be found to educate those exercising oversight authority in some of the practical realities of law enforcement activities and especially in the much more rarified area of counter-intelligence activity or domestic security work. It is now difficult to tell whether the present utter absence of understanding is deliberate or simply springs from ignorance, but it is painfully obvious to anyone with law enforcement experience that its absence is a fact.

This Subcommittee has indicated a special interest in the FBI's activity with respect to its functions in the domestic security field, a relatively small part of the FBI's overall functions. It must be noted that the "domestic security" function of the Bureau is an intelligence gathering and preventive function as opposed to the FBI's traditional role as a law enforcement agency. Rarely is it the goal of a domestic security investigation to discover the commission of a crime, to gather admissible evidence or to seek prosecution. It should not be. It is an utter distortion of the function to relate it to the more traditional law enforcement mode. Indeed, it is almost too basic to bear repeating but, in the national security context, once the activity rises to the level of a crime having been committed, the investigative agency charged with the security mission will have already failed miserably in that mission.

It should be noted at this juncture that this mission—the preventive and intelligence gathering function as related to domestic security—is by no means an exclusive federal function. Not too many years ago it was thought to be the sole prerogative of the FBI, but this is certainly no longer the case—nor should it be. The tremendous upsurge in various forms of terrorist acts within the past few years has presented local law enforcement departments with a pressing need to acquire much more knowledge of the highly volatile activities of an entire spectrum of criminals whose motivation is "political" rather than for profit.

When a bomb explodes in a New York restaurant or airport, when a corporate executive is kidnapped for ransom or when a bank is robbed, the character of the act is not altered by its having been committed in the name of, or to raise funds for a cause ardently believed by the subjects to be "political". It is certainly irrelevant to the victims and it is equally irrelevant to the local police officer who is most likely to be first on the scene and who may well face the danger of having to cope with the violence of an escaping perpetrator.

Yet in the January 24, 1975, bombing of Fraunces Tavern in New York's financial district, the New York City Police Department was seriously hampered in its investigation because, out of some sadly warped sense of political expediency, New York Mayor John V. Lindsay had earlier ordered the Department's Bureau of Special Investigations to destroy their excellent intelligence files on organizations deemed to be "political." Among the files destroyed were the results of years of background data collected on Puerto Rican Nationalist and terrorist movements in the City. It is possible to speculate that had the N.Y.P.D. had been more aggressive in their coverage of such groups rather than less so, the bombing might have been thwarted. As it is, the bombing has not even been solved.

Perhaps the use of informants or the keeping of intelligence files on such groups has a "chilling effect" upon them. I for one am perfectly willing to trade that "chill" for the lives of the four wholly innocent victims of that terrorist bombing. I might add parenthetically, that I have failed to notice any perceptible "chilling effect" on extremist groups.

There are so many areas of debate with respect to FBI activities in the security field that it is difficult to limit the scope and breadth of discussion much less to try to make specific recommendations for tightly drawn, definitive legislation.

We must begin with the premise that the FBI was formed as a law enforcement body and that its jurisdiction has been generally proscribed by the bounds of the laws that it enforces. Among these laws—in the field of domestic security or national security are those prohibiting espionage, sabotage and sedition. This brings us instantly to the first barrier since no effective counter-espionage agency in the world acts like a law enforcement agency. The law enforcement mode is to gather evidence of the commission of a crime to the end that it will be presented in court against those charged with the offense in an effort to prove them guilty beyond a reasonable doubt. The only possible justification for any such approach in the classic espionage case is for the propaganda value of the trial itself. In short, no competent chief of a "counter-espionage" force seeks prosecutions. This is a world-wide fact of life and everyone in this room knows it.

The proper mission of counter-intelligence efforts is the gathering of intelligence and the neutralization of the enemy's intelligence mission. The agency charged with this mission therefore need not—indeed should not—be concerned with the admissibility of evidence or with any of the other constitutional safeguards that we apply when we deal with our own citizens in the traditional law enforcement mode.

Some have suggested that there ought to be a separate agency to handle domestic intelligence or national security matters. I would respectfully suggest that many of those who have made that suggestion have done so in a context that would destroy our national capacity to legitimately defend ourselves rather than from the standpoint of improving a necessary national function that may now suffer from over-zealous, self-imposed restraints.

I do not agree that a separate new agency is needed or particularly desirable. I firmly believe that the FBI can do an effective job in the national security field. I believe that the Bureau ought to be allowed—more properly, encouraged—to do that job better, using every device and technique appropriate to the task.

At this point, it seems inevitable that someone with raised eyebrows will ask, "You mean that you believe that the end justifies the means?" When we are dealing with the security of the nation within the dimension of international intelligence, the only reasonable answer is, "Of course!"

The establishment of a new Senate Intelligence Oversight Committee, empowered to politicize our intelligence gathering and counter-intelligence capacity may do wonders for the political career or some otherwise undistinguished member of the Senate, but will, with more certainty, do real damage to the nation's safety.

This activity, whether carried out by the FBI or by some new organization created as an American counterpart of the British Secret Service, has a clear constitutional mandate based upon the exclusive duties of the Executive Branch to conduct the foreign affairs of the United States, to preserve and protect its constitution and to guarantee a republican form of government. Under the doctrine of separation of powers, the Congress has limited authority to thwart the Executive in guarding the nation against the threat of hostile *foreign* forces.

"Oversight" of an agency of the Executive Branch in this constitutionally restricted area may thus make for good news media copy, or as it has in recent months, a deafening roar of wholly political drum-beating, but it cannot alter the fundamental jurisdiction over, and responsibility for, the nation's basic security.

The area of responsibility for countering threats to our national security posed by revolutionary or terrorist groups of a wholly domestic nature, despite self-proclaimed allegiance to some foreign nations or ideologies is, admittedly, not so clearly mandated. However, I am convinced for example that the voluminous report of the Comptroller General and the General Accounting Office proves conclusively only that accountants, even those who may have law degrees, should never be taken seriously when they begin using words instead of numbers. Their rationale applied to FBI jurisdiction in the domestic security field is little more than an exercise in bureaucratic nit-picking that may do justice to the craft but does little more. Suffice it to say for the purposes of this statement that I wholly disagree with the GAO's conclusion that the succession of Executive Orders under which the FBI now claims jurisdiction are not sufficient to confer that jurisdiction. As the report notes, there are also a number of criminal statutes, notably 18 U.S.C. 2383, 18 U.S.C. 2384, 18 U.S.C. 2385 and others cited and reported under which the FBI has investigative jurisdiction in domestic security matters. Should the Congress desire to define some other area of jurisdiction it could certainly do so by writing another criminal statute. I question both the need and the wisdom of such an act. I respectfully suggest that a restriction imposed by Congress upon FBI activities that are properly the subject of Executive Orders takes the Congress onto shaky constitutional ground.

In a release dated May 25, 1976, the American business community, speaking through its professional corporate security executives, recommended an amendment to the Smith Act (18 U.S.C. 2385) that would strengthen the hand of the FBI in the domestic security field. The American Society for Industrial Security has acted formally through its Board of Directors to urge the Congress to remove from the act the court-interpreted requirement for an overt act in order to gain a conviction. It must be pointed out, however, that such an amendment probably would not change FBI jurisdiction with respect to intelligence gathering.

I do not suggest that the Executive may act unchecked in the domestic intelligence field. Our system of checks and balances, at least in theory, leaves no

function of any separate Branch unchecked. I do suggest, however, that the most appropriate application of that balance may be found in the Courts or, if in the Congress, in the Committee on Appropriations where the oversight responsibility has rested all along.

I would suggest further that the alleged need for "oversight" of the FBI (and for that matter the CIA and other agencies as well) has been magnified out of all reasonable proportion by the near paranoid reaction of some to the shameful tragedy of Watergate and the wholly irresponsible craving for the political glow reflected from the lights needed to produce color television.

The latter reaction, I would add, has been far more prevalent on the other side of Capitol Hill than on this side.

It was the Duke of Wellington who once said that the whole business of life was to know what was going on on the other side of the hill. Every police officer, every soldier and indeed, every politician knows that this is true and that prevention and counter-action depend on knowledge—the gathering and maintaining of data of all varieties—in short, intelligence.

No one doubts that terrorism is on the rise in the United States. Last year saw nearly three times the number of deaths from bombings (69) as in any prior year and 1976 opened with 11 fatalities in the bomb blast at LaGuardia Airport.

The terrorist directs his activities specifically at the structure of government. The victims of the terrorist usually are completely incidental to him. There are, to be sure, cases in which individual victims are selected because of *who* they are, but in the majority of instances, the victims of terrorism are not sought out by the perpetrator, although they may be selected as targets solely because of what they represent, as in cases of ambush attacks upon law enforcement officers.

The thrust of terrorism is directed at some abstraction; government, the "establishment", law enforcement, "environment polluters", and the like. The terrorist sets about his business with the single-minded objective of bringing his target to its knees through the use of terror and violence.

David Abrahamsen, M.D., an expert on violence, lawlessness, and terrorism, told *U.S. News and World Report* in 1974:

I believe it is quite clear that we are now getting a kind of terrorism that is familiar to Europeans but not to Americans. By that I mean terrorism that is well organized and planned, and has definite long-term aims.

I also believe that this terrorism is going to continue and perhaps grow among a segment of young people who see no other approach to problems such as poverty and, accordingly, become desperate and extremely disturbed—perhaps almost deranged in some cases.

Asked if the aim of terrorists was to make law enforcement officials and authority in general look impotent, Dr. Abrahamsen replied:

Yes. If terrorists can disable authority, it makes authority invalid and encourages the feeling that nobody can stop their terrorism.

Yet, it is also true that terrorists are possessed of an idealism that is Utopian and unrealistic, and borders on the irrational.¹

This notion of the "idealism" of the modern terrorist is sometimes called upon to justify his lethal activities. David Ellsberg, for example, testified at a sentencing hearing for Karl Armstrong, who had pleaded guilty to the bombing of the mathematics building at the University of Wisconsin in which a thirty-one year-old graduate student was blown to bits. Ellsberg told the judge that it would be wrong to punish Armstrong for setting the bomb.²

Many take a "so what?" attitude toward the work of the terrorist bomber, and tell us that the loss of a few lives is simply the price we must pay in order to vindicate others' conceptions of constitutional rights and the right to privacy. Consider, for example, the position of Professor Vern Countryman of Harvard University Law School. In a two-day conference sponsored by the Committee for Public Justice at Princeton University in October, 1971, Countryman and Frank G. Carrington, AELE's Executive Director, engaged in a strange colloquy, one that brings what we have called the "Total Privacy Mentality" sharply into focus. The following conversation concerned the right of the FBI to use infiltration techniques to prevent or solve bombings, specifically bombing by the Ku Klux Klan of several school buses in Pontiac, Mich.

Countryman: Well, my judgment would be that if the only way to detect that bombing is to have the FBI infiltrating political organizations, I would rather the bombing go undetected.

Carrington: No matter whether somebody was killed?

¹ "Political Terror in U.S. What Next?" *U.S. News and World Report*, March 4, 1975.

² "Peace Activists Defend Bomber", *New York Times*, October 25, 1973.

Countryman: Yes. Yes, there are worse things than having people killed, When you have got the entire population intimidated, that may be worse. We put some limits on law enforcement in the interests of preserving a free and open society or at least we try to, and every time we do that—things like the privilege against self-incrimination, things like the Fourth Amendment—every time we do that, that involves a judgment that even though some crimes and some crimes involving the loss of life will go undetected, it is better in the long run to have a society where there is some protection from police surveillance.

Carrington: I'm not really that sure that the family of Robert Fassnacht, who was blown up at Wisconsin, or the families of the kids that were killed in the Birmingham church bombing would agree with that.

Countryman: I'm sure that the families of the victims would not agree in any of the instances that I've mentioned but I don't believe that most of us would say that for that reason we should repeal the Fourth and Fifth Amendments.

This comes very close to expressing the position of advocates of the "Total Privacy Concept". While they may not be quite so rash as to come right out and say that death or injury at the hands of the terrorist is actually *irrelevant*, their efforts in the name of privacy—which will render the police basically impotent to prevent terroristic crime and to act effectively against the terrorist—have almost the same effect as the apologists on the grounds of idealism.

Those who are so concerned with the motivation and "idealism" of the terrorist might consider the impact of his activities on his victims. One such victim was three-year-old Jodi Della Femina, injured by a terrorist bomb in New York in 1971. Her father described the attack and his reaction to it:

I am writing this column at 4 a.m. while sitting in a waiting room at New York Hospital. Inside, about 50 feet away, my three-year-old daughter, Jodi, is sleeping in a crib with both of her hands tied to her sides to keep her from touching the 100 stitches she has in her face. You see, Jodi, made a terrible mistake a few hours ago. Almost a fatal mistake.

She trusted the world of grownups.

Like a million other three-year-olds all over the world, she took her mother's hand and walked with her to go out and play in the park. They walked past a building where a young militant had just placed a 15-inch pipe bomb. I guess it was bad timing on Jodi's part because she passed the building at the same time the bomb went off.

The blast sent a rain of jagged glass into her tiny face. Now we all know that the militant didn't set out to injure Jodi. No. What he was looking for was "justice." My little girl just got in his way and I'm sure that some people will tell you that Jodi being a three-year-old member of the establishment was at fault. Because when a man is looking for "justice" or looking to right the wrongs of the world with a bomb it's your fault if you get in his way. The Mark Rudds of this world will tell you that the man who placed the bomb that went off in Jodi's face was merely defending himself from society, merely choosing his way to be heard and listened to.

The Angela Davises of the world might tell you that three-year-old Jodi is just paying "dues" for several hundred years of oppression.

The Eldridge Cleavers of this world might tell you that Jodi is only an early casualty of the war that's coming between the races. As I said before, there are a lot of people who can give you a lot of good reasons, they say, for throwing bombs, and killing cops, and burning, and rioting, and looting and hating.

Just before I sat down to write this I walked into Jodi's room to check and see if she was asleep. I guess I made a little too much noise and I woke her. She smiled with her ripped up lips and said, "Daddy, I ran and I fell."

You see, Jodi being only three doesn't know what a bomb is or what it does. She still thinks she fell and cut herself. For a second, I wanted to explain to her what had happened and then I realized how ridiculous it was and so I did something I haven't done since I was a little kid. I cried.

How do you tell a kid that a man took dynamite and buckshot and made a bomb that blew up and ripped your face? He did it in the name of "justice" and "freedom".

How do you explain?

Maybe the Mark Rudds or Angela Davises or Eldridge Cleavers of this world can explain to Jodi why her face had to be ruined this morning in the name of "justice."

Because, God knows, I can't.¹

¹ Jerry Della Femina, "The Bombing", Marketing/Communications, October, 1971.

This is a very eloquent description of the suffering terroristic acts produce and each of the victims of similar attacks can tell similar stories. Those who wish to pass off terrorism as some sort of inevitable social phenomenon must close their eyes to the suffering of Jodi Della Femina and countless others like her.

Let's not deceive ourselves or others that this is not the proper backdrop against which to judge the FBI's role in domestic security investigations. In terms of the threat presented to the nation, the distinctions between foreign intelligence efforts and domestic terrorism seems wholly artificial and arbitrary.

The British and many other counter-intelligence forces have always recognized that successful counter-intelligence has two functioning parts, one defensive and one offensive. For a brief period at the end of the 1960's the FBI operated in both modes, using—although in somewhat unsophisticated ways—its own counter-intelligence program (COINTELPRO) as an offensive arm.

It has been this activity, together with certain "defensive" intelligence gathering techniques that has brought about the vast bulk of criticism of the FBI. The remainder of that criticism seems to stem from the undeniable fact that the FBI has, in the past, responded to the best of its ability to requests for investigative action originating in the office of the President of the United States.

In obvious response to the criticism, the Attorney General has prepared and issued guidelines under which FBI activities in these highly sensitive areas are to be governed. It is my understanding that additional sets of guidelines are being prepared to cover other aspects of FBI investigative jurisdiction. The guidelines were not hastily prepared to meet some artificial deadline but, rather, were prepared after a great deal of serious consultation and in an effort to try to put together standards that would not impair FBI efficiency yet would allay the fears of FBI critics.

It may well be an accurate measure of these guidelines to note that I find them much too restrictive while my friends in the Civil Liberties Union find them far too permissive.

Legislation by default, restricts flexibility and the exercise of discretion, qualities that seem to me to be vital to the proper approach to domestic security investigations. The FBI's jurisdiction with respect to investigating violations of criminal statutes is, I believe, already delineated. With respect to the Bureau's jurisdiction in the field of foreign counter-intelligence, we are dealing in an area that is, I submit, the exclusive prerogative of the Executive and within which, therefore, the powers of the Congress are limited. The only remaining areas, therefore, are those covered in the Attorney General's guidelines which may not fully suit any of us but which may be the best compromise we can achieve.

The FBI as a part of the Department of Justice is responsible to the Attorney General and, through him, to the President. It has been asserted that Presidents have misused the Bureau. If, by "oversight" Congress seeks to change that line of authority so that the FBI is responsible to the Legislative Branch rather than to the Executive, it will simply multiply the potential for abuse by a factor of precisely 533.

The most fundamental of all civil and constitutional rights involves the right not to be murdered or maimed in the name of some abstract "political" cause. For those who adopt the "Total Privacy" concept of Professor Countryman, no amount of restriction upon FBI domestic intelligence activity will be regarded as excessive.

We at AFLE simply do not accept or agree with that philosophy. We believe that the more valid concern of the Congress ought to be for the potential victims of future acts of terrorism and violence that might be prevented by the use of FBI intelligence gathering techniques most appropriate to meet that threat.

I hope you will forgive a final, personal note. I first met Clarence Kelley when I reported as a new FBI agent to the Bureau's Kansas City Office in 1950. He was then a supervisor in that office and because, even then, he made a lasting impression upon me, I followed his career in the FBI and later as Chief of Police in Kansas City. During those years I was gratified to note that he gained a national reputation for integrity and innovation. When I heard a rumor that he was being considered for the position of Director of the FBI, I wrote to the President urging his appointment because I believed him to be uniquely qualified for that very demanding job. I still do although I have not necessarily agreed with everything he has said or done as Director.

He has been his own man, much to his credit. It is my deep feeling—and I have no special knowledge—that he desires nothing more than to let the FBI

get back to its job and that he is willing to take whatever reasonable steps that may be needed to get back to devoting *his* full time to directing the Bureau. This subcommittee could perform no more useful service to the Nation than to allow him and the FBI to get back to their jobs.

Mr. EDWARDS. Unless my colleague from Virginia has an opening statement—

Mr. BUTLER. No, Mr. Chairman.

Mr. EDWARDS. Then you may proceed.

TESTIMONY OF WILLIAM K. LAMBIE, JR., ASSOCIATE EXECUTIVE DIRECTOR, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

Mr. LAMBIE. Thank you, Mr. Chairman.

Mr. Chairman and ladies and gentlemen, I am glad to be here and am glad to have an opportunity to express a viewpoint, that I would add, is not just my own but rather is the position of Americans for Effective Law Enforcement as an organization.

As you noted, you have my prepared statement. I will, if you have no objection, hit a few high spots in that or, if you would rather, we can go right into some questions and answers. But I would point out at the very beginning that Americans for Effective Law Enforcement is an organization that has been in existence for 10 years. It is a privately supported not-for-profit corporation, based in Evanston, Ill.

It was founded by a group of Illinois attorneys: Fred Inball, who is a professor of law at Northwestern University; Richard Ogilvie, who was, at the time of founding, president of the Cook County Board and later Governor of Illinois; Mr. James R. Thompson, who was then on the Northwestern law faculty and is now a candidate for Governor of Illinois and a former U.S. attorney for the northern district; Harold Smith, who was the head of the Chicago Crime Commission; and Orlando W. Wilson, then superintendent of the Chicago Police Department.

It was their feeling, 10 years ago, that the balance in the criminal justice system had swung so far to the side of protecting the rights of the accused criminal, that the innocent victims of crime and the law-abiding public's rights had been forgotten. It is our purpose, as an organization, to try to restore some semblance of balance.

That has taken us into support of what we believe are proper and professional law enforcement practices and techniques; hence, our interest in this area, and our interest generally in the criminal justice system.

Again, I would emphasize that interest is expressed from the point of view of the crime victim and of the law-abiding public.

It is our feeling that the mission of the FBI has been adequately and sharply defined in legislation presently on the books, in Executive orders, and in over 40 years of practice, that has been for the most part highly professional and highly effective. I think that the Bureau has performed its mission quite well and in the best interest of the Nation for the most part.

Certainly I think that the mission has been performed in good faith on the part of all the agents of the FBI.

I might add that over recent history there has been a certain amount of publicity given to the views of a few dissident former special

agents of the FBI, but there are over 6,000 former special agents, who are associated in the Society of Former Special Agents, and I think that that body of opinion, particularly in this area of concern, might be one that merits some consideration. I understand that the society has expressed a willingness to take a position in this area. I hope that the subcommittee will consider hearing their point of view.

I do not recall ever hearing Director Kelley suggest that he is not willing to accept, live with, and cooperate with reasonable oversight of the FBI by some committee or committees of the Congress. From a purely practical point of view, I think the first mission in the oversight field should be to define the jurisdiction for oversight. There are now perhaps a dozen committees or subcommittees on both sides of the Hill competing and contending to some extent for jurisdiction in the oversight area both with respect to the FBI and perhaps the CIA and other intelligence and counterintelligence agencies.

The Bureau is not typical of Government organizations in the sense that it has a cadre of individuals, who are almost professional witnesses. I know that the demands on the Director and on a number of other senior Bureau officials have been tremendous in the area of responding to requests to appear before various committees here. I think that the Bureau has tried to do this responsively, and I think the Bureau has tried to do it diligently; but it has been quite a strain.

I think that much of the testimony has been redundant. Therefore, I would hope that at the outset there is some defining of jurisdiction.

I think if what I read is correct, that a joint Senate-House special committee has been ruled out; but I would hope that at some point jurisdiction for oversight could boil down to a single committee here in the House and in the Senate, or a subcommittee. I think, as I have indicated, that the most natural place for jurisdiction in this area is either in the Judiciary or a subcommittee of the Judiciary on either side of the Hill or in Appropriations, where oversight historically has been vested whether or not we agree it was done well.

The system of checks and balances with respect to congressional control or oversight of the executive functions provides perhaps the most effective check in the power of the Committee on Appropriations; that is, the funding power. I think that most executive agencies are more responsive to that than to many other areas of oversight. At any rate, I think that we can talk about either a committee or a subcommittee of the Judiciary Committee or the Appropriations Committee from the standpoint of jurisdiction.

I would certainly hope that at some point the various committees here on the Hill could get together and decide, now that there is going to be an oversight committee—and I think that is a foregone conclusion—certainly decide on where that jurisdiction will lie.

In the domestic security field—and I know that you are addressing yourselves primarily to that issue—I would point out that that is a relatively small part of the FBI function. I think that the Bureau estimates perhaps 20 percent of its total function is involved in domestic security areas, and that is divided into both foreign and domestic intelligence matters.

Skipping nearly to the end of my prepared testimony, I would point out that I think that the distinction between foreign intelligence or counterintelligence operations and domestic security or domestic intel-

ligence operations is somewhat artificial and arbitrary. I would go to the Supreme Court decision in the *United States v. U.S. District Court*—that is, the *Keith* case—a decision with which I disagree profoundly insofar as it creates the distinction between “foreign intelligence” and “domestic intelligence” organizations.

I think that the distinction is, in fact, artificial and arbitrary and loses sight of the practical realities of the law enforcement or counter-intelligence agencies that must cope with the problem. I say that because while dealing in the foreign area, the threat is one of sabotage or espionage conducted by a foreign nation or agents. Those matters are defined by statute.

The threat on the domestic side is one of terrorism, violence, or the potential for terrorism and violence. These are crimes in every jurisdiction: State, local and Federal.

The character of the individuals who may commit these crimes is not changed very much by the fact that they may be subservient to or answerable to a foreign ideology or a domestic ideology. Again I think that is an artificial distinction.

It is my very strong feeling that the mission of the FBI and, Mr. Chairman, to a very large extent the local police authorities as well in the domestic intelligence field is a mission of prevention, counter-action, the gathering of knowledge, the gathering of information upon which an informed decision or informed action can take place if the need arises. Hence, I do not really believe that the traditional law enforcement mode should be applied in the intelligence-gathering field, whether that is a domestic intelligence area or a foreign intelligence area. I don't believe that it is the fundamental or basic mission of the FBI or any other law enforcement body to gather admissible evidence to proceed to prosecution on the basis of a criminal act having been committed or potentially being in the offing. When that happens in the foreign intelligence area, I think a trial is largely for propaganda purposes. When it happens in the domestic intelligence area, I think the mission of the agency itself has already failed because prevention has not happened.

I would cite the most recent series of bombings in downtown Chicago occurring within the past few days in which a number of people were injured. The Chicago police and certainly the Bureau failed in their intelligence-gathering mission simply by virtue of those bombings having taken place.

I know it has been pointed out, and I think it was the General Accounting Office who did so in a rather voluminous report, that the preventive mission has failed because terrorism and acts of violence have not abated; and, indeed, have increased over the past few years. But I am not sure that is a proper measurement of success or failure because in any area of deterrence, it is impossible to measure success or failure because it is impossible to prove a negative. It is impossible to compile statistics on crimes that do not occur.

We don't know what might have occurred in the realm of domestic violence attributable to political causes had not there been an active, working counterintelligence or intelligence-gathering mission performed by the FBI or by local police. I think it may be a matter of coincidence, but I think it is appropriate to point out that in the city of Chicago during the many years when violence was increasing

on a considerable scale in many urban areas across the Nation, that Chicago was relatively peaceful. There were few bombings or few acts of politically inspired violence in Chicago after the word got out that the Chicago Police Department had a very smoothly functioning and very active countersubversive unit in the department. It was known locally as the Red Squad by many of its detractors. But it was nonetheless an extremely effective body.

It was only after a series of Federal suits were filed in the Federal District Court in Chicago to enjoin that unit from intelligence-gathering activities that we have now two series of bombings. As I say, that may be a matter of coincidence, but I think that it possibly is not.

There has been talk—and I tend to share this view to some extent—talk about the chilling effect of intelligence-gathering activities. I find it very difficult to distinguish between—and I suppose it depends on what side of the question one is arguing—to distinguish between “chilling effect” and “deterrence.” None of us want to suppress opinions, views, positions, and legitimate political activity. The widest spectrum of opinion is usually the spectrum that provides ultimately, Mr. Chairman, wisdom. And no one wants to see that spectrum stop short of acts of violence, terrorism, and of revolution itself.

Now I don't presume to sit here and suggest to you that revolution is imminent. It is not. Good heavens, we are in an election year in which the process is once again proving its viability. I think we have come very close, however, to serious domestic problems in the realm of violence and terrorism; and I would not be surprised to see acts of terrorism continue to escalate, but I think we are a long way from facing an immediate threat of domestic revolutionary activity.

That does not change the fact that the FBI must gather intelligence data; that it must acquire all of the knowledge that it can acquire; that it must be prepared to offer the executive branch choices in the decisionmaking area based on the most informative knowledge and the most complete knowledge that can be obtained. I think that the guidelines, that the Attorney General has set down most recently, which have not been lashed together simply to satisfy any particular committee of Congress or to satisfy the news media or public opinion but rather, I think, have been put together after many, many hours of consultation between the Attorney General and the Bureau and the people here on the Hill and others, represent about as well-defined a set of guidelines as can be defined for the FBI in the domestic intelligence area.

It may be a measure of the success or the workmanship in those guidelines, Mr. Chairman, to note that I find them much too restrictive while my friends in the Civil Liberties Union find them much too permissive. Perhaps that is a good example of a good compromise that has worked. I think they are guidelines that the Bureau feels it can work with. I would hope that they were guidelines that Members of the House and the Senate feel they can share.

I don't think that new legislation is necessary to define the mission of the FBI. I think that in most instances the least legislation we can have, perhaps is the best. I would hope that all of you here on the Hill will allow the FBI to get back to its fundamental job of enforcing the laws, gathering intelligence, performing the mission that, I think, has been defined, and doing what they are chartered to do.

Mr. EDWARDS. Thank you very much.

The gentleman from Virginia.

Mr. BUTLER. Thank you very much. I think that is a very fine statement. Certainly, your conclusion is one that merits careful consideration. Since you have raised the question about the guidelines and have suggested that you find them much too restrictive, I ask you, would you like to specify the areas in which you find them too restrictive?

Mr. LAMBIE. Well, I certainly would, sir. I think that a hallmark of the Bureau's performance and part of the Bureau's success throughout its history, Mr. Butler, has been the initiative and discretion allowed the individual agents in handling cases assigned to them, in opening new cases and conducting investigations. And I think that initiative and that discussion probably works best when it is allowed to operate within the bounds of rules and regulations to be sure, but within an area of freedom of inquiry.

The typical way in which a domestic intelligence case is opened in the FBI is through information coming through an agent from an informant or perhaps just an average citizen. The agent writes a memorandum that goes into the file, and the case is opened either under the name of an organization or under the name of an individual, and then the investigation goes forward.

Now the guidelines tend to restrict the opening of new investigations to threats of violence or potential violence, which is all right. That is still the basic threat. But in the preliminary stages it is difficult to know whether or not an organization poses a threat of violence or potential violence. It is very difficult to know in many cases what the organization is.

Part of the lawsuit in the Chicago police case has to do with the fact that the Chicago police have informants or undercover agents in organizations that have been described as "neighborhood civic groups." That is a perfectly just and justifiable description of some of the groups. But you cannot determine that, Mr. Butler, until you have conducted an investigation. You cannot determine that a group is indeed just a political group and that it has purely political motivations without an investigation. If you have been previously told by an informant that the group poses a threat of violence and is just—oh, for want of a better word—that it is a "far-out" organization.

Let us say that is the only information you have. Well, you must be able at least to do enough investigation to determine what that group is.

Mr. BUTLER. How do you interpret the guidelines as affecting the discretion of the individual agent in a situation? Pick a situation that you think—

Mr. LAMBIE. OK. If I read the guidelines correctly, the guidelines suggest or say that, You won't open a case until the information that you receive initially indicates that the group poses a threat of violence or some imminent or present danger. You are then in the preliminary investigation stage. If the preliminary investigation yields facts that confirm the initial assumption, you can go into a full-field investigation.

I just think you ought to be able to open and close a case on the vaguest information.

Mr. BUTLER. You were talking about opening rather than closing a case, were you not?

Mr. LAMBIE. Opening a case, yes. I don't think anybody is harmed by this; if you assume that you go forward with an inquiry and that you find out what is going on and close the case if it merits being closed. I don't think that putting a few memorandums in the files harms anyone's right to privacy or anyone's right to political freedom.

Mr. BUTLER. Do you think that, Mr. Lambie, absent this authority, that perhaps some situations are being allowed to develop that could be headed off if the FBI had ready discretion? Is that what you are saying?

Mr. LAMBIE. Oh, I suspect that situations, that pose a real threat of violence, will come to light under the guidelines ultimately.

You know, the guidelines seem sufficiently broad to allow for investigation of a really serious threat. I think that the difficulty may be that the investigation may begin later than it ought to, and may not identify all the potential perpetrators of violence because of the guidelines.

Mr. BUTLER. Well how do you have any specific suggestions as to changes you would make in the guidelines in this area, or have you gotten that far in your analysis?

Mr. LAMBIE. Well, I would tear them up and throw them in the wastebasket and revert then to the FBI's Manual of Rules and Regulations.

Mr. BUTLER. All right. I thank you.

Mr. EDWARDS. Mr. Lambie, we appreciate your statements. Quite a number of people within the FBI would agree with your views. Some people will not. And the Attorney General——

Mr. LAMBIE. Certainly.

Mr. EDWARDS [continuing]. Might have disagreed with you because you did not express great shock with the COINTEL program.

Mr. LAMBIE. Not at all. Not at all. Just to give you some indication of my feelings about COINTEL, in preparing a study of the FBI, in 1972, for Americans for Effective Law Enforcement, we had been very critical of the FBI for not having engaged in active counterintelligence measures. After we had completely written the study and it had almost gone to press, the COINTEL program was made public. I must say its existence was extremely well guarded because I certainly was not aware of its existence.

We had to go back and scrub a number of pages of the book and say we weren't going to criticize the FBI on this basis because they had in fact been doing something.

I think much of the program or parts of the program were conducted quite well. I think that a counterintelligence mission includes, if you will, a Department of Dirty Tricks. I think it is quite proper. I think it is the name of the game. I do not condone some of the things that occurred as part of that program, but the program itself is one that I quite agree with.

Mr. EDWARDS. Well you certainly don't condone what they did to Dr. Martin Luther King?

Mr. LAMBIE. Not at all.

Mr. EDWARDS. Well how about radicals on campuses where they would write anonymous letters, false anonymous letters stating they

were having extramarital affairs and they were just trying to disrupt the employment of people that certain agents thought were inappropriately employed?

Mr. LAMBIE. If we could assume that the definition has been done properly in the first instance, if we define the organization or the individual properly, I have no quarrel with doing something like that. I don't mind that kind of dirty trick. I will be honest about it. I think that the situation that occurred too often was one of misplaced definition rather than that some of the things that happened were bad.

I don't mind, for instance, a counterintelligence effort intended to sow dissent or dissension in a group; if the group has been properly defined. I don't mind the notion that you reduce the potential of an organization to do harm by causing that organization to burn up its energies fighting among its own members. I think that is a useful function. I think that is a proper function. I think it is better to do that than to wait until crimes have been committed, until people have been victimized, and then proceed in a law enforcement mode to try to jail people.

Mr. EDWARDS. The GAO report you mentioned, Mr. Lambie, examined to a certain extent, or at least made us aware of 19,700 open files on domestic intelligence in 10 field offices of the FBI, but they found practically no crimes. I think three or four cases of local crimes went to trial but not cases of Federal crimes.

Do you think they should have 19,700 open cases in 10 field offices on American citizens where there is no probable cause of a violation of any criminal law?

Mr. LAMBIE. I find no objection to that whatsoever as I indicated earlier. I think that proceeding to gather intelligence data through a law enforcement mode is just not the way you do it. I think that the field of intelligence and counterintelligence activity simply is not a traditional law enforcement kind of field. The British, I think, have defined the mission perhaps more accurately by having three separate organizations that operate in the intelligence and counterintelligence agency. And I never am sure which is which, whether it is MI-5 or MI-6, Mr. Chairman, but, as you know, there is one agency charged with the gathering of foreign intelligence—it is like the CIA—and there is a second category, a second agency charged with the counterintelligence mission, and there is a third agency, which is part of the police function. It conducts law enforcement mode counterintelligence investigations leading up to prosecutions.

Maybe that is a good division of authority. Certainly in the counterintelligence field the British have never been—nor has any other nation of the world I think—been very touchy about proceeding in a non-law-enforcement mode in the counterintelligence area. It has never been the mission of counterintelligence agents to gather admissible evidence leading to prosecutions; it is their mission to gather intelligence, to gather data, to gather knowledge against the potential of future harm—however we may define that.

Now we may argue very much about the definition, but the mission itself is not a law enforcement mission; it is an intelligence-gathering mission. And I find no problem whatsoever with the mere opening of a file or the conduct of an investigation. I don't think anybody has ever defined the intelligence-gathering mission from the subject's point of view any more precisely than the mayor of the city of Chicago.

This occurred a number of years ago during the time that the Senate was conducting hearings on an Army intelligence unit operating in the Chicago area, and operating quite badly, I might add. But one of the allegations that was made during the Senate hearings was an allegation that the Army intelligence unit had covered a political gathering at the Adlai Stevenson farm at Libertyville, Ill., at which a number of prominent members of the Democratic Party, including the mayor of Chicago, were present. The mayor, as you know, meets with the press every day. On the morning after that disclosure, one of the members of the press asked the mayor how he felt about having been the subject of an Army intelligence-gathering mission. The mayor looked back at him and said, "Well, you know, when you are in public life you expect that everyone looks at everything you do every day; that is part of being in public life." And then he added—"And I think that this is the essence of what we are talking about"—and he said, "If you haven't done anything wrong, you don't have anything to worry about."

Mr. EDWARDS. Does your organization, or do you, maintain a liaison with the FBI?

Mr. LAMBIE. Very informally. We have—well, part of what we do as an organization is to compile data, to write briefs, and to conduct workshops in the area of civil liability matters as they affect law enforcement. We do have an informal relationship with the Bureau in that area. We have had some of the Bureau people at our civil liability workshops and we work with the office of the legal counsel in the civil liability area.

Mr. EDWARDS. Have you discussed the subject of domestic intelligence with existing FBI officials?

Mr. LAMBIE. No.

Mr. EDWARDS. Now, Mr. Lambie, you said that if an informant would report to an agent that there is a "far out" organization that might be capable of violence, that an investigation should be opened on, we will say, an organization or person. What would this investigation consist of? What means or what avenues of inquiry should be pursued by the agent?

Mr. LAMBIE. Obviously, if we are talking about an organization, you identify the people who are associated with it.

Mr. EDWARDS. How do you do that?

Mr. LAMBIE. Pardon me?

Mr. EDWARDS. How would you identify them?

Mr. LAMBIE. Probably the least intrusive method of finding out about an organization is through informant coverage. I know that there has been a great deal of opposition to the use of informants, but if the informant is in fact a typical individual, a typical informant operating covertly, it is probably the least intrusive method—if he is not an agent provocateur. I think there have been very, very few instances of that, although there have been informants who have gone off on their own, to be sure—but if what you are dealing with is simply an undercover person operating covertly within an organization, that is probably the best means of acquiring information about who is in the organization, its purposes, its goals, what it is really out to do. And this can be done in a manner that does intrude into the activities of the organization or does not change the purposes or goals of the organization.

So if it is an intelligence-gathering mission, I think that informant coverage is the least intrusive method of gathering that kind of information. I think that is the best way to go about it.

Mr. EDWARDS. Suppose there is no informant?

Mr. LAMBIE. Well then you have to go out and interview people, knock on doors, talk to neighbors, go through the basic investigative mode, which is almost always unproductive. I don't know any substitute for going that route. As I say, it is not the most productive way to do it. I don't think that there are going to be very many instances in which you have to go that route. I think you can probably be patient enough to go the informant route in most cases or to simply collect public data, collect leaflets, collect pamphlets, writings, or what have you.

One of the things I don't like about the guidelines is that it imposes time limitations on the scope of the investigation. I think that if you seriously believe that you should have an investigation, you ought to be patient enough to do it properly and to do it without the imposition of a time limitation. I know the reason for a time limitation is to protect the organization that has been found to be innocent in its activities and to close the case, which is all well and good; but the imposition of a time limitation can be, I think, detrimental in some instances.

Mr. EDWARDS. Well, say that the organization is named the Young Radical League and there is no informant--just the original informant--and you got no further information. Now he understands it is a far-out organization capable of violence. How would the agent go into the neighborhood? Would it be as an FBI agent or under subterfuge?

Mr. LAMBIE. If he went personally and physically into a neighborhood-type investigation, he would probably go as an FBI agent. One of the areas in which we have been somewhat critical of the Bureau, has been the Bureau's reluctance to allow agents to operate in an underground capacity; that is to say, as underground agents as is done by police departments and other Government agencies. The Treasury Department does it for instance. The Bureau traditionally has not permitted the agents to operate in an underground capacity--for one reason or another, best known to them.

I think that that would be a useful way of going about it. Again I think it is less intrusive than going out into a neighborhood with the credentials and the badge and knocking on doors and saying "I am investigating so-and-so on such-and-such."

Mr. EDWARDS. Would the subject's employer be interviewed?

Mr. LAMBIE. Very likely.

Mr. EDWARDS. By an FBI agent?

Mr. LAMBIE. Very likely.

Mr. EDWARDS. What kind of questions would be asked?

Mr. LAMBIE. I would not say "very likely" on that. I think it would depend very largely on the circumstances and on the facts. I think that we make a serious error if we assume that the initial stages of an investigation are designed to disrupt the life of the individual who is being investigated, Mr. Chairman, in terms of his neighbors, in terms of his employment or in any other way.

The purpose of an investigation is to acquire knowledge and data and information. If you go to the employer as an agent, you are going

to make it a very routine-sounding inquiry. You are going to conduct an interview that sounds like an applicant type of investigation. It may not be very productive and all you may really be seeking is to discover how long he has worked at that particular job, what the work is, where he lives, his past address, his past employment, and very routine kinds of stuff. You are not going to go to the employer and tell him about Joe Smith being a member of the Young Radicals.

Mr. EDWARDS. Thank you.

Mr. Parker?

Mr. PARKER. Thank you, Mr. Chairman.

Mr. Lambie, you state that the Americans for Effective Law Enforcement, Inc., is a national not-for-profit citizens organization. Do you have mostly individual citizens as members of that organization or do you have organizational members?

Mr. LAMBIE. Our support is the typical not-for-profit mode in that it comes from foundations, corporations, and individual citizens. We have about 23,000 individual members. We also receive financial support from a number of foundations and corporations. We do not accept any kind of Government funding. Our Board will not let us.

Mr. PARKER. There are some, I would suspect, in our society who might say that yours is essentially a "far out organization."

Mr. LAMBIE. That is very possible.

Mr. PARKER. And if you want to take that as an example—

Mr. LAMBIE. I do not accept that, but it is possible.

Mr. PARKER [continuing]. And say that the thought and trend in America changes and we decide there is somehow a threat to democracy contained in groups who get together and are strongly in favor of law enforcement and where the membership is made up of, let us say, ex-law enforcement people—who might have a propensity for violence if they think there is something wrong going on in society—and I take it you would not be bothered if the FBI were investigating your organization?

Mr. LAMBIE. Not at all.

Mr. PARKER. Looking at counterintelligence and dirty tricks or those types of things, which you indicated you condone in the COINTEL program activities, if there were letters sent, anonymous letters sent to your bank or some potential employer or some other member of your organization, or if they were intending to disrupt the Board within your organization, I take it you would think that was all right also?

Mr. LAMBIE. If I thought I had it coming. Now that is a very subjective point of view. But we are dealing in a very subjective area that I think is almost incapable of tightly drawn definitions. At some point—and I think this is true of law enforcement generally and it is also true, I might add, of every other function of Government—at some point we have to be able to trust the people who enforce the laws, who write our laws, who administer our laws.

The purpose of what I gather to be oversight, Mr. Parker, is to measure that trust from as much of an objective point of view as can be brought to bear. But there will still be highly subjective decisions made by individual agents, individual police officers in any law enforcement system.

Any of us may disagree with any of those decisions. That is all well and good, but I do not think that we should write some sort of legislation that prohibits those decisions being made.

Mr. PARKER. This morning you have indicated that you think that groups need to be properly defined. And on more than one occasion this morning you talked about definition. Who is it that would make these definitions?

Mr. LAMBIE. That again, within bounds, probably is a subjective rather than an objective decisionmaking process. I think that it is a decisionmaking process that in the FBI occurs, Mr. Parker, probably at the level of the supervisor in a field office. The agent certainly makes a decision if it is reported to him by a citizen or by an informant or in some other way that *any* organization has been involved in such-and-such activity, whatever it might be.

The first decision, as is true in every other form of law enforcement, is made by the agent who first receives the information. That is a subjective decision. Then it goes to a supervisor and he makes a subjective decision whether or not to open a case or whether or not to go forward. The special agent in charge probably has to make a subjective decision based on the knowledge he acquires from the agent or from the supervisor. And you have a whole series of decisions that are made within very broad guidelines, but they are all subjective as to whether, for instance, a group is a potentially revolutionary organization? Is it, maybe, an organization that has the potential for producing violence?

Perhaps that is the broadest or most restrictive kind of definition you could put on it. You know, I do not think that you can write a set of guidelines to define organizations that might be investigated simply for the purpose of gathering intelligence data.

Now if you are going ahead with an investigation that is based on the commission of a crime, then you have the statute, you have the elements of the statute, you do have a definition there, and you have the bounds of the rules of evidence and admissibility. All of your guidelines are very tightly drawn. But in the purely intelligence-gathering area, you see, you have a much broader scope of discretion and judgment and evaluation. I would hate to see very many limitations placed on it, because all you lose is knowledge.

Mr. PARKER. There are those who would say we have criminal laws with respect to subversion and espionage that do give us guidelines in this area as well, and that outside of that we should not be engaging in any intelligence-gathering matters, or any intelligence gathering of any nature. What would you base the intelligence gathering on? What is the jurisdiction, the policy, the authority for the FBI to do that in the first instance?

Mr. LAMBIE. I think the Executive orders that have come down are adequate in terms of jurisdiction. I say that because the Executive orders, that began in 1938 and have been added to, are very broad and allow the kind of discretion, the kind of intelligence-gathering activity that I am talking about. I would hate to see any definition that restricts the Bureau from gathering data and keeping files on any organization. Why not? The more you have, the better informed you are and the better decision you wind up making if you have to make a decision ultimately.

I do not accept the position that there is essential harm in the gathering of intelligence data and the maintaining of intelligence data. I recognize the potential for harm, goodness knows, but that assumes a fundamental change in the character of our Government and in the character of our Nation, which I do not foresee.

Mr. PARKER. We have seen, I think, examples over the last 2 years in terms of the revelations that are both occurring in the House and in the Senate, Mr. Lambie, as to the harm that can occur from unlimited intelligence gathering. And you admit you see the potential for harm, but what would you do to prevent that kind of harm?

Mr. LAMBIE. I have read a lot about allegations of abuse. In all honesty, with a few notable exceptions, I do not see that much harm has occurred. We talked about the situation with respect to Dr. King. And I think that was an area where very little harm occurred. It was wrong, goodness knows, but he was not deterred certainly in his mission nor was the organization deterred—wrong though that activity may have been. Cite some specific harms and I will answer.

Mr. PARKER. The Attorney General has recently embarked on a program in which the Attorney General's office is notifying those individuals, who are subjects of COINTEL investigations, who have been or were subject of some kind of harm, that would be determined by a panel over in the Attorney General's office. So they obviously have seen circumstances or instances in which there is harm.

Mr. LAMBIE. They may have. I am not familiar with any of the specific examples.

Mr. PARKER. Are there no limitations you would place on the domestic intelligence-gathering activities of the FBI? You used the phrase in your statement that you would "allow them to use every device and technique appropriate to the task."

Mr. LAMBIE. That is right.

Mr. PARKER. I assume you were talking about legal devices or techniques appropriate to the task, or are you not?

Mr. LAMBIE. Yes, except that I would revert to a constitutional argument in this sense, Mr. Parker, in which I suggest to you that, for instance, the use of a wiretap without a warrant is deemed to be illegal under Federal statutes and under State statutes in many instances, yet the courts have upheld the use of warrantless wiretaps in foreign intelligence cases, most recently in the *United States v. Ivanov* in the Supreme Court. It implies, Mr. Parker, in all the decisions, that the executive branch may use warrantless wiretaps in the foreign intelligence-gathering field because of certain constitutional prerogatives; the exclusivity of the executive branch in the conduct of foreign affairs, for instance, is one.

Now I think the warrantless wiretap, the Federal Communications Act notwithstanding, is a legal act. If you accept that definition of "legal," then, yes, I would say every legal tactic can be used.

Mr. PARKER. One last question. You stated in your statement that from 1959 until 1972 you served as research director and administrative director of the American Security Council and that you administered the Nation's largest privately held library on national security matters. Is that group and library still in existence?

Mr. LAMBIE. As far as I know, it is.

Mr. PARKER. What would a library on national security matters contain?

Mr. LAMBIE. In that particular situation, the national security matters dealt with foreign policy matters, national defense matters, the entire spectrum of national security, and it is public data.

Mr. PARKER. I take it there was no classified data in the library?

Mr. LAMBIE. No.

Mr. PARKER. I have no further questions.

Mr. EDWARDS. Mr. Starek?

Mr. STAREK. Thank you, Mr. Chairman.

Mr. Lambie, I believe that during your statement this morning you noted that any counterintelligence-gathering function of the FBI should include a group which would carry out dirty tricks; a dirty tricks department as I think you referred to it. I wonder if you could elaborate a little bit on that and explain to the subcommittee how—if we had the kind of dirty tricks that were carried out against some of the citizens of this country during the COINTEL program—how we would insure that would not occur? In particular, use the Martin Luther King case as an example; that is, how we could insure those actions could not occur in the future if the FBI were to have such a department?

Mr. LAMBIE. You cannot insure that it would not occur in the future. Obviously, I accept the possibility of abuse. Certainly it could occur. Hopefully there might be a remedy for that abuse. I noticed recently that someone introduced legislation that would allow a right of action against Federal employees, a civil right of action which amounts to the same cause of action that exists in section 1983 of the Civil Rights Act, as that which applies to local police officers. I would have no problem with that. I would broaden the civil remedies available to a citizen who may have been damaged by police action.

I think that the citizen should have more access to the courts in terms of civil remedies. But saying that, still presumes that there will be or could be the possibility for abuse, but not necessarily that there will be.

But no matter how you write a set of definitions, no matter how narrowly you limit activity of any Government agency or any other agency, the potential for abuse still exists. You cannot change that simply by writing legislation.

As I said before, you wind up having to look at the FBI as a group of well-trained and very professional people, who have operated with a great tradition of protecting the rights and liberties of our citizens for a long time now. And you have to trust somebody at some point.

Obviously it can go wrong. It can go haywire. I simply don't foresee that happening in our system as it exists today though.

Mr. STAREK. With respect to the dirty tricks department, Mr. Lambie, how would agents involved in this work decide which groups were deserving of dirty tricks and which groups were not? I believe earlier you said—

Mr. LAMBIE. I don't think that the agent would make that kind of decision. I think that when you get into the kind of program you are talking about with the COINTEL program, the decision has already been made by virtue of the organization having been the subject of an intensive ongoing investigation for some time. That definition would already have been made not by an agent, but by the Bureau, by the appropriate Bureau officials. I think an agent would unquestionably be severely disciplined if he got into that kind of free-wheeling activity on his own initiative. I certainly wouldn't condone that, but that is a matter of internal discipline.

Mr. STAREK. All right, agents then, how would the Bureau officials

make the decision? I am curious as to how, under this authority, about how we would select out groups which were deserving of dirty tricks?

Mr. LAMBIE. I think you would select out groups based on the same parameters, whatever those parameters might be, that caused you to open the investigation and continue the investigation in the first place. You find the group as a revolutionary group, for instance, as a group that seeks to deprive individuals of their civil rights, as a group that has potential for terrorism or violence. So whatever causes you to maintain the investigation in the first instance, is probably the same definition you would use in terms of getting into the dirty tricks area.

Maybe the dirty tricks just consist of cutting holes in the Klan's sheets, but what the heck? Why not do it?

Mr. STAREK. Then you do not think that the domestic security guidelines which provide timetables for closing investigations would be helpful in determining which groups need dirty tricks?

Mr. LAMBIE. They might very well be helpful, but probably not in terms of any counterintelligence activity, but certainly in terms of the organizations that prove out to be legitimate and proper organizations. The difficulty is that the guidelines are probably redundant there because the Bureau itself does not want to maintain a whole lot of open and active investigations of organizations that don't lead them anywhere.

I don't know an agent in the Bureau who does not already have too many cases assigned to him. I think it is a misconception to charge that the Bureau wants to maintain open cases in situations in which the need or the feeling is that you should not have an open case. I think the Bureau is anxious to close cases. I think the Bureau has closed cases. And the imposition of the time deadline, once a decision has been made to go forward with an investigation, probably is artificial in terms of how long the investigation ought to continue.

Mr. STAREK. With respect to terrorist activities, and I am referring to bombings in particular, it seems that the evidence that we have shows that the Bureau has really not been able to do an effective job in preventing these activities. And I wonder how the guidelines—

Mr. LAMBIE. I don't know where that evidence comes from. As I said earlier, terrorist activities have occurred for sure, and are occurring, and are occurring on an escalating basis; but I don't think we can very accurately suggest that there has been no deterrence or prevention. The Bureau has been able to prevent some things from occurring. I don't know how many things you have to prevent or deter to constitute a deterrence. My feeling would be if you deter a single bombing that might kill people, then you have performed an effective job of deterrence.

Mr. STAREK. All right. I agree with that, but what I am getting at is—whether or not there has been an effective job in the past—as to—

Mr. LAMBIE. How do we measure that? How can you compile statistics on crimes that don't happen? That is the question.

Mr. STAREK. Well, I think one of the ways is to count how many bombs the FBI finds that did not go off, but I don't want to debate that. What I am curious about is how do you see the domestic security guidelines limiting the Bureau's capability of continuing to provide a deterrent activity against terrorist activities?

Mr. LAMBIE. They may not. If we can assume that you can maintain an investigation over a long enough period of time to get the kind of coverage you need, the guidelines may not. I am not that unhappy with the guidelines. I would prefer to see, as I say, the guidelines torn up and revert to the Manual of Rules and Regulations; but I think that the FBI has indicated it can live with the guidelines. And so in that sense I am not all that unhappy with them.

Mr. STAREK. I have one final question. I was somewhat confused during your testimony as to where you would envision the most effective congressional oversight for the Bureau. I think you indicated in your statement that either the Appropriations Committee or the Judiciary Committee should probably have that oversight function.

Then at another point you said—

Mr. LAMBIE. I have a strong faith in the power of the purse. I don't mean to take it out of the Judiciary but, as I say, I have a strong faith in the power of the purse.

Mr. STAREK. But at another point, as I recall, you were advocating one oversight committee holding the jurisdiction. I wondered if you meant, Mr. Lambie, one committee within each House of the Congress or if you think just one committee—

Mr. LAMBIE. My personal preference would be a joint Senate/House committee. I think that has been pretty well ruled out. And in the absence of that kind of a function, I would prefer to see just a single committee or subcommittee in the House and in the Senate. My reasons for that are purely practical; and that is to really allow the Bureau to have the Director and senior Bureau officials, Mr. Starek, to be able to respond meaningfully and in depth to a single body rather than to be up here on the Hill every other week in testimony that is largely redundant, and before a great many committees or subcommittees. I think that there has been too much of that already.

Mr. STAREK. Thank you, Mr. Lambie. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Lambie, I have just a couple of more questions. Do you think the Ku Klux Klan should be under surveillance?

Mr. LAMBIE. Absolutely.

Mr. EDWARDS. At the present time?

Mr. LAMBIE. Absolutely. I think it is a pretty miniscule organization and they probably cannot mount much of a threat in many areas, but I absolutely believe that they should be under surveillance.

Mr. EDWARDS. Do you think there should—by the FBI COINTEL program—there should be disruptions going on within the Ku Klux Klan?

Mr. LAMBIE. Yes, sir.

Mr. EDWARDS. How about the Black Panthers?

Mr. LAMBIE. There are a lot of organizational problems with the various Klan groups there, as you know, and I would exacerbate those with every chance I got.

Mr. EDWARDS. How about within the Black Panther party?

Mr. LAMBIE. I think the Panthers have gone largely political now. If we take something like the Black Revolutionary Army, or whatever that is these days, the violence-prone groups, I would accept exactly the same definition, yes.

Mr. EDWARDS. How about the American Communist Party?

Mr. LAMBIE. Yes.

Mr. EDWARDS. Do you think, they should be—I mean, they are a legal political party and they run candidates, but do you still think the FBI should infiltrate and disrupt it?

Mr. LAMBIE. Absolutely.

Mr. EDWARDS. How about the Socialist Party?

Mr. LAMBIE. The Socialist Party—Socialist Democratic Federation? No; the Socialist Party has certainly never advocated violence or revolution.

Mr. EDWARDS. How about Jesse Jackson's PUSH in Chicago?

Mr. LAMBIE. No.

Mr. EDWARDS. But who makes that judgment?

Mr. LAMBIE. Let me say this. Regarding about finding out what PUSH is about and what they do, I don't think there is anything wrong with having a file on PUSH. I think PUSH is a legitimate political social action organization. I don't think the organization or Reverend Jackson or anyone else is damaged by the Bureau having that much in its files, which will reflect precisely that.

Now counterintelligence activity? No; of course not.

Mr. EDWARDS. But if a supervisor in the Bureau and maybe Mr. Kelley came to the conclusion that PUSH was a dangerous organization and might someday result in some violence, then you would approve of infiltration and disruption?

Mr. LAMBIE. Well, now we are speculating on somebody in the Bureau making a really bad decision on bad facts. That can happen, sure. But as I said before, you can't make any legislation that is reasonable in my view, that can prevent bad judgment. You can write legislation that simply forbids a whole range of activity, but I think that the Nation is the loser rather than anything else, if you do indeed do that. I think that goes much too far.

Mr. EDWARDS. Any further questions?

Mr. PARKER. No.

Mr. STAREK. No.

Mr. EDWARDS. Mr. Lambie, we thank you very much for coming to Washington and testifying. We have had a very interesting time. Thank you.

[Whereupon, at 11 a.m. the subcommittee recessed subject to the call of the Chair.]



FBI OVERSIGHT

Freedom of Information Act Compliance by the FBI and Plan To Eliminate Backlog

THURSDAY, JULY 29, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice at 9:35 a.m. in room 2237, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, Dodd, and Butler.

Also present: Alan A. Parker, counsel; Thomas P. Breen, assistant counsel; and Rocoe B. Starek III, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today we will hear from representatives of the Federal Bureau of Investigation regarding their compliance with the Freedom of Information Act and the Privacy Act.

A continuing concern of this subcommittee, which has legislative and oversight jurisdiction over the FBI, is to understand how the Bureau is allocating its total resources to the numerous responsibilities imposed on the Bureau by statute.

Along with that basic concern is added our growing concern that requests under these two acts are not being processed in a complete and timely fashion.

Today we will have the benefit of testimony from FBI personnel who deal with the requests on a daily basis. We trust that we will be better informed as to how each request is processed, and the levels of decisionmaking required by those requests, as well as some information on the costs and problems encountered by the FBI.

Our witnesses today are James M. Powers, Section Chief of the Freedom of Information-Privacy Act Section of the FBI. Mr. Powers is accompanied by Richard C. Dennis, Jr., Unit Chief of the Privacy Act Unit of the Freedom of Information-Privacy Act Section, and by James W. Awe, Unit Chief of the Records, Systems, and Training Unit. Gentlemen, we welcome you. Mr. Powers, you may proceed.

TESTIMONY OF JAMES M. POWERS, SECTION CHIEF, FREEDOM OF INFORMATION-PRIVACY ACT SECTION, FEDERAL BUREAU OF INVESTIGATION, ACCOMPANIED BY RICHARD C. DENNIS, JR., UNIT CHIEF, PRIVACY ACT UNIT, FREEDOM OF INFORMATION-PRIVACY ACT SECTION, FBI, AND JAMES W. AWE, UNIT CHIEF, RECORDS, SYSTEMS, AND TRAINING UNIT, FBI

Mr. POWERS. Thank you, Chairman Edwards, Mr. Butler, and counsel.

I am here today specifically at your invitation, as contained in your letter of June 30, to discuss the impact of the FOIPA on the operations of the FBI, as well as explore any alternatives by which we might reduce our backlog of FOIPA requests presently pending at the Bureau.

With the intention of being as responsive as we possibly can, I have brought with me today Mr. Dennis and Mr. Awe so that we might be in a position to respond to any questions you might have in this area.

Although I have a prepared statement, with your permission I would just as leave enter it into the record and just summarize very briefly, if I may, some of the high points in the statement. And then we can go from there.

Mr. EDWARDS. The full statement will be made a part of the record. And you may proceed.

Mr. POWERS. In 1974, the FBI received 447 requests under the FOIA. In 1975, calendar year 1975, we received 13,875 requests. To date this year—and this is as of the 23d of this month—we have received 10,836 requests. For 1974, we averaged a little less than 2 per day; in 1975, an average of about 55 a day; and so far this year we are running at an average of about 73 a day.

The previous high that we had ever had in the FOIPA section had been in August of 1975 when we received 2,095 requests. In June of this year, we received 3,357 in that 1 month. In 1 week, we received 1,355.

I refer you to exhibit A in my statement, which sets forth in detail the number of requests received by week since January of this year, along with attendant correspondence. While the latter are not included as requests, they do have a great bearing on our work in the section.

In recognition of the increased workload—and I imagine what you gentlemen are specifically interested in is the extent to which we have made a good faith effort to keep pace with this volume, we have diverted substantial resources. From an increase of 8 to 16 personnel in 1974, we went up to 153 in 1975, and at the present time, we are at 194. And we have approval—this is the approval of Director Kelley—for a further anticipated increase of up to 220.

Exhibit B, which is attached to the statement, gives a breakdown by month of how the complement has increased, and corresponding workload.

Mr. DRINAN. Mr. Chairman.

Mr. EDWARDS. Yes.

Mr. DRINAN. May I ask you, what would be the figure that you people have calculated as to how many you will need on a permanent basis? I don't think the number of requests is going to continue at the

same level. It might even escalate. But how many in the ideal would you need to keep ahead of it?

Mr. POWERS. I have no idea, Congressman Drinan.

Mr. DRINAN. Shouldn't you have some idea? I think if you come to Congress with a request for personnel you ought to know that.

Mr. POWERS. There are too many uncontrollable factors in handling the requests. I could give you a rough basis on what it would take to process an average request, but there are so many other factors that come in litigation cases that no matter what computations we have made, it puts them out of whack. So that poses a difficult question.

Then there is the volume of requests that may come in. If you will look at that exhibit, you will see that we are running about 55 a day pretty constantly with the exception of those 2 weeks in June. There was no reason that we could find to account for an influx of that nature. And I have no idea of the volume of personnel that we would have to have to deal with a situation such as that.

Mr. DRINAN. Assuming that 55 a day kept coming in, how many would you need for that?

Mr. POWERS. At the rate of 55 a day we were just about holding our own and working into the backlog. We were reducing the backlog in that manner.

Mr. DRINAN. But not by very much, though. There are still months and months of backlog.

Mr. POWERS. Sure.

Mr. DRINAN. My point is, assuming that the 55 continues, and you get rid of the backlog, 6,000 or whatever it is, will the 220 people you request be able to keep up and clean up the backlog?

Mr. POWERS. Yes; if there is no backlog.

Mr. DRINAN. Thank you.

Mr. POWERS. I was talking about personnel and the number assigned exclusively in the FOIPA section. This has not taken into account a number of other personnel in the Bureau who are affected in peripheral fashion because of the work required by our FOIPA actions. The number of personnel we have assigned exclusively at FBI headquarters right now to handle FOIPA matters is greater than that in 47 of our field offices, and in 6 of our 13 headquarters divisions. I point that out just to show the effort that we feel that we have made in an attempt to keep up with the influx of requests.

I am not going into the personnel assigned. Certainly, I don't want to minimize the value and efficiency of those assigned. It is in the statement. They have been drawn from all walks in the Bureau. They are a dedicated group, and they have a firm commitment to comply with the FOIPA in the best manner that they can.

I will not go into the question of costs. Originally estimated at \$100,000 a year for 5 fiscal years following the implementation of the amendments for all executive agencies, our first fiscal year cost was about \$160,000, and it is projected at \$3,427,000 for fiscal year 1977.

In short, I think we have made a sincere good faith effort to try and comply with the act and the proper allocation of personnel to the act, and to our primary function, the conduct of investigations.

Set forth in my statement is a brief résumé of some of the conflicts as we in the FBI perceive them between the Privacy Act and the FOIA. It is these conflicts that cause us the problem in processing the records for release.

Basically, the Privacy Act permits you to obtain information about yourself. Basically, the FOIA permits you to obtain information about someone else or an event.

Although criminal files are exempt under the Privacy Act, the Department of Justice in its discretion has pronounced that although exempt under the Privacy Act investigatory records will be processed under the FOIA. This insures an individual that he will have the most liberal access to records under both acts.

But because of caveats in the FOIA as to investigatory records, they may be released only to a certain extent, that is, for example, one that would constitute an unwarranted invasion of privacy. This causes us difficulty in processing our records in determining what may or may not be an invasion of privacy and what may or may not be an unwarranted invasion of privacy.

There are a number of other factors set forth in the statement that compound our backlog and delinquency, and I don't mean to minimize them by just alluding to them briefly. They are set forth in the statement: Appeals, litigation, *Vaughn v. Rosen* type inventories, et cetera.

Affording preferential treatment to a case in a court-ordered accelerated deadline compounds our backlog. And rather than having an analyst working on one case and finishing that case because of a court-ordered deadline, we may be required to put 5 or 6 people to work on one case, or 15 or 16 people to work on the case. And we have had one case where for a period of 3 months we had over half of the entire complement of the FOIPA section working on one request. This compounds the backlog and delays other requests. It is not the most efficient way to do it. But it is something that has a drastic effect on our orderly processing of requests.

On my last page of the statement I said that there are no easy solutions to the problem. I come here in a very candid manner, and with a desire and attitude and hope that we can discuss and answer any questions that you may have in this area. We regret in the FBI-- and I speak not only for myself but all those in the section--I believe the entire FBI regrets the delay being caused the requestors. It is not intentional. It loses us friends. We are not in a position to handle them in a most expeditious manner. But at the present time, given the task we have at hand, and despite our effort, we are behind.

That is about all I have to say. And I refer back to my statement. And I will be happy to answer, Mr. Dennis, Mr. Awe, and myself, any questions that you may have in this area. Thank you.

[The prepared statement of James M. Powers follows:]

STATEMENT OF JAMES M. POWERS, SECTION CHIEF, FREEDOM OF INFORMATION-
PRIVACY ACTS SECTION, RECORDS MANAGEMENT DIVISION, FEDERAL BUREAU OF
INVESTIGATION

I have been asked to appear here today to provide information on the allocation of total FBI resources with respect to Freedom of Information/Privacy Acts (FOIPA) matters. You also requested information as to the impact of FOIPA on FBI operations and what action might be taken to reduce our backlog of FOIPA requests. In connection with your interest in this matter, you may be assured of the FBI's complete cooperation.

Before detailing the specific, substantial, affirmative action the FBI has taken to comply, to the maximum extent possible, with FOIPA requests, an awareness of the magnitude of the problem confronting the FBI in this area is, I believe, essential.

Congress when it wrote the latest version of the FOIA, which went into effect February 19, 1975, did not provide any agency with additional funds for implementation.

In House Report, No. 93-876 captioned, "Amending Section 552 of Title 5, United States Code," Known as the Freedom of Information Act" and dated March 5, 1974 (to accompany H.R. 12471) the House Committee on Government Operations estimated the total cost of the FOIA amendments for all Federal agencies to be \$50,000 in fiscal year 1974 and \$100,000 for each of the succeeding five fiscal years. This House Report further stated that "this legislation merely revised Government procedures under the FOIA but does not create costly new administrative functions. Thus activities required by this Bill should be carried out by Federal agencies *with existing staff* so that significant amounts of additional funds will not be required."

In actuality, however, the impact of the FOIPA on the FBI has been formidable necessitating a substantial diversion of our resources in terms of personnel and finances at the expense of other vital services.

During the year 1975 the FBI received 13,875 requests for access to FBI records under either the FOIA or Privacy Act of 1974. This constituted an average of 55 requests every work day. During the month of August, 1975, 2,095 requests were received which was the high for any one month during 1975. As of January 2, 1976, we had a backlog of 6,176 requests. Of these 6,176 requests, 1,004 were actually being processed and were in various stages of completion. There has been no decline in the volume of requests in this calendar year. To the contrary the volume is running at a pace greater than 1975. An average of 43 per work day were received during the month of January, 1976; 71 per work day during the month of February, 1976; 54 per work day during the month of March, 1976; 51 per work day during the month of April, 1976; 64 per work day during the month of May, 1976; and 153 per work day during the month of June, 1976. During the month of June, a total of 3,357 requests were received which marks the high water mark to date, of FOIPA requests made of the FBI during any one single month. A list setting forth volume of FOIPA requests and attendant correspondence received on a weekly basis during 1976 is attached to this statement as Exhibit A. The backlog of 6,176 as of the start of the year increased to a high of 6,782 during the latter part of March, 1976. Although this figure was reduced to slightly under 6,000 by the beginning of May, 1976, primarily because of the massive influx of requests in June of 1976, it rose to 8,435 as of July 22, 1976.

By way of comparison during all of 1974 only 447 requests under the Freedom of Information Act were received for an average of less than 2 per work day.

There are a number of uncontrollable factors which preclude at this point an estimation of future receipts of FOIPA requests. As indicated by the figures mentioned and exhibit attached, the monthly receipt of requests and backlog delinquency, instead of decreasing as might be expected, continues to grow.

During 1974, in anticipation of the increased workload in FOIPA matters, the number of FBI employees assigned to the processing of requests for records was increased from 8 to 16 employees. Periodic increases during 1975 and 1976 in an effort to keep pace with the volume of requests have resulted in an approved complement of 194 in the FOIPA Section with a further approved anticipated increase up to 220. Of the approved complement 24 legal-trained Special Agents and 158 clerical employees as of this date are actually on board. A more detailed explanation of complement increases is attached as Exhibit B to this statement.

These figures do not include other personnel assigned exclusively to FOIPA related matters by other Headquarters divisions or field offices nor does it take into account personnel who spend a substantial portion of their time on FOIPA matters as an indirect result of requests for documents under the FOIA or the Privacy Act. The number of people assigned exclusively to FOIPA matters at Bureau Headquarters is especially meaningful when you realize this figure exceeds the number assigned to 47 of our 59 field divisions and 6 of 13 Headquarters divisions including those two divisions which are responsible for the supervisory overview of all criminal investigations conducted by the FBI.

Personnel assigned have been of the highest caliber and chosen from the most experienced and productive. Reassignments were made based on the FBI's need to comply with the FOIPA, and the relative importance of their last assignments was not allowed to render them unavailable. While most Special Agents assigned to FOIPA matters at Bureau Headquarters would prefer field assignments, more reflective of career interests, they have pledged themselves to implementation of the intent of Congress in their present assignment.

The average experience of the Special Agents assigned to the FOIPA Section is 13 years. They include former Supervisors of squads handling Organized Crime in Baltimore, White Collar Crime in Detroit, Civil Rights in Boston and Chicago, Counter-Intelligence (foreign) in New York, the Night Supervisor in Washington, D.C., and the Assistant Special Agent in Charge in Chicago. Most divisions at Headquarters contributed men, including men from the three Investigative Divisions, an experienced Document Examiner from the Laboratory, and members of both the Inspection Staff and the Office of Planning and Evaluation. Individually and as a group they possess sufficient experience to understand their task, yet their relative youth and ability make them innovative managers with a firm commitment to the successful implementation of the FOIPA. We share with the members of this Subcommittee a concern that both the letter and the spirit of the FOIPA be served without compromising the ability of the FBI to fulfill its primary mission. We have found our assignment a unique challenge and continue to so regard it.

The Research Analysts have from 2 to 34 years of experience, again with an average of 13 years. They constitute an experienced and productive group. Highly motivated personnel to start with, they have had responsibility placed upon them considerably beyond that normally expected of our clerical employees. Although the backlog of requests and our inability to comply with the deadlines imposed presents a morale problem to personnel whose character and background have instilled in them a "can do" attitude, they have not despaired, and remain convinced that solutions will be found, that perseverance will enable us to cope with our problem.

Actual costs incurred and those anticipated by the FBI in implementing the FOIPA are in stark contrast to the initial estimate of the House Committee on Government Operations for all Federal agencies previously cited.

Actual cost incurred by the FBI in processing requests soared from \$160,000 in fiscal year 1974 to \$462,000 in fiscal year 1975 to an estimated \$2,675,000 for fiscal year 1976 and a projected \$3,427,000 in fiscal year 1977.

Salaries alone for full-time personnel processing the FOIA request for the files concerning the investigation of Julius and Ethel Rosenberg totaled more than \$215,000 during the period August 18, 1975, through November 15, 1975, the court ordered deadline date. This did not include the cost of numerous additional personnel who had to furnish part-time support for this processing in addition to their normal duties. The deadline imposed in the Rosenberg case was met at an enormous cost to the FBI and the public at large in terms of money spent and delay caused other requesters. It is interesting to note that while the deadline was met and the documents ready for release in the Rosenberg case on November 15, 1975, they were not picked up by the requester until February 4, 1976. This matter is still in litigation and continues to occupy the full-time services of a substantial number of personnel with attendant cost.

In summary we have made a good faith effort to strike a proper balance between allocation of sufficient personnel (1) to permit reasonable compliance with the FOIA and Privacy Act given the volume involved and (2) to permit us to perform our primary function, the conduct of official investigations.

At this point I would like to furnish a brief explanation of the relationship between the Freedom of Information Act and the Privacy Act because of the theoretical conflict between these two laws. Both Acts authorize access to Government records by individuals. The Privacy Act is directed at providing an individual with information about himself. It does not provide a vehicle whereby an individual can gain access to information about another individual. The FOIA, on the other hand, can be utilized to seek access to information about oneself or another party.

The laws also differ greatly concerning the degree of access allowed to Government records. Under the Privacy Act criminal files are essentially exempt in their entirety if the agency promulgates the necessary regulations. Under the FOIA criminal files must be processed document-by-document and withholding of information must be similarly justified. Therefore, two separate avenues are open to a potential requester, offering varying degrees of access dependent on the nature of the files being sought.

The Department of Justice has taken a position based on the limited legislative history of the Privacy Act that any request for records by an individual about himself is to be handled under the Privacy Act. If the records are exempt under the Privacy Act the FBI will process the requested documents under the FOIA as a matter of administrative discretion. By means of this procedure an individual obtains the most liberal access afforded by both laws.

Although the Privacy Act is aimed at allowing an individual access to information about himself, it also strictly limits dissemination of information about individuals to a third party. Initial versions of the Privacy Act would have required that Government agencies secure the permission of individuals mentioned in the files before information about such individuals could be released under the FOIA. As it stands now if a document is *required* to be released under the FOIA, the Privacy Act does not prohibit the disclosure. However, if a release would constitute an unwarranted invasion of privacy of a particular individual, release is not required, and disclosure is prohibited by the Privacy Act. Additionally, disclosure under the FOIA may violate the very principle from which the Privacy Act was spawned, the abuse of individual privacy by accessing personal information collected in Government files.

To reiterate, the FOIA dictates that documents may be released, though concerning another individual, unless the invasion of privacy is unwarranted. Such a judgment is extremely difficult for an individual reviewing a file to make. How does one know if an invasion of privacy will occur? How does one know if it is warranted? Judicial interpretation of this question requires that balance be struck between the public's right to know and the individual's right to privacy. Such balancing requires the wisdom of Solomon and the legal acuity of Brandeis. It is not a process which lends itself to an immediate response. I must point out also that prior to the passage of the Privacy Act, where this question existed one could look to the legislative history of the FOIA which suggests close questions should always be decided in favor of disclosure. With the advent of the Privacy Act and its policy against dissemination, one can no longer lean always toward disclosure.

The typical FOIPA request is one received from an individual desiring documents regarding himself from an FBI file compiled during a security or criminal-type investigation.

The request will be backlogged approximately 9 months, and will require an average of 5 days to complete when it is reached in chronological order for handling.

Factors affecting the processing of a typical request include:

- (1) Further correspondence with a requester for necessary identifying information or clarification of request.
- (2) Searching required.
- (3) Accelerated processing necessitated by court imposed deadlines.
- (4) Type and sensitivity of information germane to the request.
- (5) Administrative appeals.
- (6) Litigation, including preparation of affidavits and inventories showing detailed justification for material withheld.

Court orders requiring preferential treatment of a particular request have a drastic effect on the orderly processing of other "routine" requests. The court imposed deadline in the Rosenberg case necessitated assignment of over half the entire complement of the FOIPA Section to this one request. Other court orders, while not as individually devastating as the Rosenberg case, cumulatively have the same effect.

At the present time we are working on 20 requests which have been afforded preferential processing by the courts. Six of them require completion by the end of August, 1976. One such matter, which required completion by July 26, 1976, necessitated the full-time services of 18 people for almost a month and mandated overtime and weekend work as well.

Another court ordered deadline case has required the full-time services of 10 people since April 1976 and is still going on.

Every time preferential handling of a request is necessary the backlog of regular requests increases geometrically, the delay in handling the backlogged requests increases in time span, and this in itself causes more requesters to institute litigation, thereby coming full circle. Some of our requests encompass documents of such voluminous nature that there is no end in sight, while others are replete with premature litigation since we are required by law to notify a requester of the appeals procedures with every release of material wherein deletions or excisions have been made, which in numerous instances has led to appeals and litigation within a request prior to the completion of processing the documents pertinent to that request.

Administrative appeals compound the work of personnel assigned to processing requests since many of the steps taken in order to respond to the request when initially received must be repeated in the course of the appeal. In other

words all records involved must again be brought together by FBI personnel for examination by a Department of Justice Appeals Unit attorney who reviews in detail the handling of the request. In addition, the individual Agent or Research Analyst who processed the request must be available to discuss in detail with the Department of Justice attorney the nature of the records involved and the legal grounds for each exemption from disclosure which was asserted.

Litigation diverts FOIPA personnel to assist Department of Justice attorneys in the defense of these lawsuits. Preparation of factual affidavits used in answering interrogatories, requesting stays of proceedings pursuant to Title 5, United States Code, Section (a) (6) (C), and defending the application of the exemptions are examples of the type of work engaged in by FOIPA personnel when litigation arises.

Litigation to date has centered on two major issues:

(1) The time within which any compliance with or denial of a request must be made and whether the FBI is operating under exceptional circumstances and exercising due diligence to qualify it for a stay of proceedings in the litigation pursuant to Title 5, United States Code, Section (a) (6) (C).

(2) The application of the exemptions to the documents in question.

Recently in the case of *Open America, et al. v. The Watergate Special Prosecution Force et al.*,—F.2nd—, (D.C. Cir., 1976), number 76-1371, decided 7 July, 1976, this court recognized the exceptional circumstances under which the FBI is operating and that it is exercising due diligence with respect to requests received.

Certainly the aspect of litigation under the FOIA which presents the most time consuming effort on the part of the FBI is the preparation of detailed affidavits demonstrating the proper application of the FOIA to the documents in question.

The landmark decision in this area is *Vaughn v. Rosen*, 484 F.2d 280 (D.C. Cir., 1973), cert. denied, 415 U.S. 977 (1974). See also *Vaughn v. Rosen*, 533 F.2d 1136 (D.C. Cir., 1975). This decision set forth and clarified the burden placed on the Government in defending these suits. The statutory mandate that the Government has the burden of proof together with our adversary system of adjudication requires the agency to come forward with sufficient information concerning the documents so that the plaintiff may intelligibly argue the application of the exemption. This is done by way of affidavit and is being referred to as a *Vaughn* showing or detailed refusal justification.

The *Vaughn* showing necessitates describing the document or portion thereof withheld without revealing that which is properly withheld. At best, this is a difficult task and incredibly time consuming.

An example of the court order which *Vaughn* and its progeny have spawned is that which was issued in the United States District Court, District of Columbia, in *Allen Weinstein v. Edward H. Levi*, (Civil Action No. 2278-72); on 2 April, 1976. The court required specific factual and evidentiary material adequately describing in non-conclusory terms the nature of the deletions and the reasons therefore. Attached as Exhibit C to this statement are five examples of the 540 prepared from the *Vaughn* inventory in this case. This order has been adopted by other judges in the District of Columbia.

Illustrative of the *Vaughn* requirement is the case of *The Founding Church of Scientology of Washington, D.C. Inc. v. Edward H. Levi, et al.*, (U.S.D.C., D.C.), Civil Action No. 75-1577. Of the 324 documents identified to plaintiff's request the FBI released 244. Of the 80 documents not released, 33 were documents prepared for the purpose of litigation. Thirteen others were other agency documents and referred to those agencies for direct response to plaintiff. The FBI prepared an affidavit detailing the application of the exemptions used which the court ultimately felt contained too general a description of the exempted material. The affidavit included as an exhibit a copy of the documents released pursuant to the request. The court held in an order issued 10 June, 1976, that "Although defendants have disclosed a large number of documents . . . the index . . . and the affidavit . . . do not comport with the requirement for a detailed description of withheld material and of refusal justification." (citation omitted) The court ordered that the FBI describe in detailed, non-conclusory terms, the documents withheld from plaintiff in whole or in part, specifically justifying each exemption. The approach seems to be a mathematical justification—a line-

by-line, deletion-by-deletion justification. The demands of the court to justify each and every deletion are extremely time consuming and require delicate handling, describing what has been withheld without disclosing that which must be protected. The preparation of these *Vaughn* showings requires a significant amount of time which would otherwise be spent in the processing of other requests.

Setting aside the difficulties caused by the sheer volume of requests, the staggering quantity of records encompassed by certain requests, appeals and litigation, why can't requests be expedited by the FBI and the backlog reduced?

Any answer to that question can only begin by posing additional questions with which each of us assigned to FOIPA matters in the FBI must answer on a daily basis:

What is Privacy?

Is a particular release an unwarranted invasion of privacy?

Do the circumstances underlying receipt of a particular piece of information imply confidentiality?

Even if the circumstances imply confidentiality, can portions of the information be released without revealing the identity of the source?

To what extent may related enforcement proceedings, if any, be compromised by release of this information?

If any exemptions are relied upon to withhold material in the circumstances suggested, can the Government demonstrate without revealing the material it seeks to protect, that the exemption is justified if judicial review is invoked?

This list of perplexing problems is by no means exhaustive of the myriad of issues concerning thousands of requests involving literally millions of pages; decisions are time consuming and require meticulous examination of material on a line-by-line basis. Extreme situations where a gross invasion of privacy is apparent or the material is totally innocuous are the exceptions. Reasonable disagreement not only among agencies, but within the FBI itself is common place with regard to the vast majority of these daily decisions.

May I cite just a few examples without identifying the requesters or subjects by name to illustrate the problem.

Case 1. A child is kidnaped, but almost miraculously found safe in the room where the subject had placed her. The kidnaper was ultimately arrested and successfully prosecuted. Now only a few years later, the kidnaper, eligible for parole next year, requests the investigatory file. The child's description of her terror and the events which occurred during the kidnaping clearly relate to the subject.

Does the victim enjoy a right of privacy regarding her interview?

Are the facts concerning the kidnaper and his victim so inextricably intertwined as to preclude reasonable segregation and release?

Presumptively, should the FBI assume that publicity attendant to the investigation and/or the trial itself remove forever any right of privacy by the victim?

At the visceral level, does one rebel at the thought of making available to a child-kidnaper the victim's description of her terror.

Case 2. A request is received and following a check of indices, the FBI determines that no record exists for the requester. A few months later a second request is submitted by the same requester. Indices are rechecked and it is discovered that during the intervening period requester has been the subject of an investigation involving contact with a suspected foreign espionage network. The investigation of the requester has been closed upon the determination that no law had been violated. The dilemma is readily apparent. What response does the FBI now make to the requester? Use of exemption (b) (1), indicating the documents are withheld as classified, (b) (7) (A), that release might endanger an ongoing enforcement proceeding or (b) (7) (E), that release would jeopardize an investigative technique, will enable the requester to logically deduce the thoroughness of the FBI's investigation concerning the suspected espionage network.

What logical response can the FBI lawfully make to this request without jeopardizing national security?

Case 3. The leader of a group subject to investigation submits a request for his records. Upon receipt of the released documents, the requester is made aware by

virtue of the exemptions cited and records released that certain members of the groups are probably informants. This leader instructs each member of the group to submit FOIPA requests and insists that he be allowed to examine the responses given.

In order to avoid compromising the identity of the confidential source, and possibly his/her physical safety, should the FBI be permitted to establish national records concerning the informant, with his consent, in order to allay suspicion and avoid physical harm?

If the Government must respond accurately and the informant is injured or indeed killed because of failure to protect or human error, is the Government prepared to assume liability?

Case 4. Requester, a member of the news media seeks the investigatory record of a living elected member of a legislative body, who has plead guilty to an offense directly related to the conduct of his election campaign.

Should the FBI treat this request concerning the criminal investigation of a living third party as an obvious invasion of the legislator's privacy?

Does the fact that the legislator plead guilty in open court waive any or all privacy aspects of the case?

Would it be reasonable to say "personal privacy" is protected, but private conduct directly related to public office is not protected by an exemption using the language "... unwarranted invasion of personal privacy?"

Case 5. A third-party requester asks for information concerning deceased persons of public prominence, from the world of sports, the theater, the business world, a former President of the United States, a famous civil rights leader.

Should the FBI recognize a right to privacy in the heirs, such as a spouse and children?

Does public prominence justify release of derogatory information even though the prominence of an individual is unrelated to a law enforcement investigation?

Is requester's motivation, a relevant consideration if privacy is no longer to be considered because the subject of the request is deceased? Are the heirs to be without any rights? What exemption is applicable for exercising a sense of decency and good taste on behalf of deceased persons concerning whom records are requested?

It is incredibly difficult as the two Acts are now written to promulgate universal rules to govern all matters dealing with sensitive records. The one alternative which the FBI rejects outright that could expedite FOIPA requests is to compromise legitimate interests of the Government in successful law enforcement or the privacy of third parties by less than careful analysis of any requested records.

It is obvious that I have no easy solutions to propose. Indeed, as our record of good faith efforts to comply demonstrates, we would have adopted any such solutions over the past year and a half, if they existed.

What I can promise, however, for myself and on behalf of the FBI, is a complete willingness to discuss our problems with candor, and to explore with the Congress and its staff, any new approaches showing even the slightest promise of offering a partial solution or some relief to our backlog and to the requesters who must endure seemingly interminable delays.

This is not a new attitude on our part, although we are grateful to this Subcommittee for its invitation to air it publicly.

Nor is our sensitivity to the predicament of our requesters new. Delay costs us potential friends and places us in an untenable position.

We have not lost the "can do" attitude which I mentioned before, but frankly, at the moment we are at a loss as to what further action we might take, given the task at hand.

This concludes my statement. I will be happy to respond to any questions.

VOLUME OF FOIPA REQUESTS AND ATTENDANT CORRESPONDENCE

Date	Incoming requests	Incoming correspondence	Total
Jan. 5, to 9, 1976.....	224	213	437
Jan. 12 to 16, 1976.....	200	215	415
Jan. 19 to 23, 1976.....	233	262	495
Jan. 26 to 30, 1976.....	229	197	426
Feb. 2 to 6, 1976.....	413	223	636
Feb. 9 to 13, 1976.....	344	218	562
Feb. 17 to 20, 1976.....	201	136	337
Feb. 23 to 27, 1976.....	385	290	675
Mar. 1 to 5, 1976.....	264	249	513
Mar. 8 to 12, 1976.....	239	241	480
Mar. 15 to 19, 1976.....	298	218	516
Mar. 22 to 26, 1976.....	291	360	651
Mar. 29 to Apr. 2, 1976.....	265	227	492
Apr. 5 to 9, 1976.....	244	213	457
Apr. 12 to 16, 1976.....	255	229	484
Apr. 19 to 23, 1976.....	245	225	470
Apr. 26 to 30, 1976.....	268	219	487
May 3 to 7, 1976.....	298	163	461
May 10 to 14, 1976.....	378	232	610
May 17 to 21, 1976.....	271	201	472
May 24 to 28, 1976.....	334	284	618
June 1 to 4, 1976.....	204	206	410
June 7 to 11, 1976.....	268	263	531
June 14 to 18, 1976.....	1,355	256	1,611
June 21 to 25, 1976.....	1,194	250	1,444
June 28 to July 2, 1976.....	539	221	760
July 6 to 9, 1976.....	328	213	541
July 12 to 16, 1976.....	383	271	654

FOIPA SECTION COMPLEMENT

	Special agents	Research analysts	Stenographers secretaries	Clerical support	Total
October 1973 ¹	3	3	1	1	8
August 1974 ²	5	7	2	2	16
February 1975 ³	5	17	2	3	27
May 1975 ⁴	12	55	16	18	101
June 1975 ⁵	12	55	27	18	112
August 1975 ⁶	19	70	30	31	150
September 1975 ⁷	22	73	33	35	163
January 1976 ⁸	25	90	38	37	190
July 1976 ⁹	25	90	38	41	194
September 1976 ¹⁰	28	114	38	40	220

¹ Unit in external affairs division.

² Unit in legal counsel division; 2 special agents to prepare for amendments.

³ Ten research analysts ready for anticipated increased workload.

⁴ Section in records management division; 7 special agents and 38 research analysts to staff 10 teams; 1 secretary and 13 stenographers already added.

⁵ Ten more stenographers and a stenographic supervisor.

⁶ Reorganized as units within section; 7 special agents and 15 research analysts for project requests.

⁷ Privacy unit to study and prepare for possible further expansion; 3 special agents, 3 research analysts.

⁸ Privacy unit expansion completed; 3 special agents, 17 research analysts.

⁹ Present status.

¹⁰ Planned immediate expansion; 3 special agents, 24 research analysts.

VAUGHN V. ROSEN INVENTORY

(Section 2 Serial 82 dated 12-10-48 consisting of 2 pages with the release of 2 pages)

Teletype from Milwaukee to Director, FBI furnishing information from records of Northwestern Mutual Life Insurance Company, Milwaukee, Wisconsin, on Thomas Francis Grady.

Excision made on page 1 consisted of information of a personal nature and not pertinent to investigation. Excision on page 1 exempted under (b) (1) (C).

The deletions made from this document were of a purely personal nature

concerning background and reference information provided by Thomas Francis Grady to the Northwestern Mutual Life Insurance Company in an application for an agent's contract. The release of this material would constitute an invasion of the privacy of Mr. Grady and of those listed on the application as references, and further, would have no bearing upon this matter.

The two pages as released are attached.

DIRECTOR, FBI, AND SACS,
Philadelphia and New York

Jay David Whittaker Chambers, was, perjury, espionage R. retel Philadelphia to Milwaukee and Cleveland instant date one twelve p.m. Records Northwestern Mutual Life Insurance Company, Milwaukee, Wis., show one Thomas Francis Grady made application for agents contract December nine, nineteen thirty, giving address. Perry, Secretary, Northwestern, received letter this p.m. from Martin, making further suggestions as to sources of specimens. As a result, this office has obtained four additional typewriter specimens, all from claim file of Thomas L. Fansler. Two are letters from Martin in August, nineteen twenty nine, one a change of beneficiary from Fansler in August, nineteen twenty nine, and the fourth a letter from Priscilla Hiss dated at Washington, D.C., June Eight, nineteen Forty, advising company that Timothy Hobson is a party in interest under one of the policies of Thomas L. Fansler, at that time deceased. Originals forwarded AMSD laboratory today, photostatic copies to Philadelphia AMSD.

JOHNSON.

(Section 3 Serial 173 dated 12-9-48 consisting of 1 document)

Memo from Fletcher to Ladd regarding Ward Pigman and brother George Pigman.

Excision on page 1 exempted under (b) (7) (C).

The material excised from this document concerned travel and other activities of George Pigman which was of a personal nature and the release of which would be an unwarranted invasion of his privacy. His travel and the activities mentioned had no relationship to any contact with Chambers, and can be described as unrelated personal background data.

The one page as released is attached.

OFFICE MEMORANDUM

U.S. GOVERNMENT,

December 9, 1948.

To: Mr. D. M. Ladd.

From: H. B. Fletcher.

Subject: Jay David Whittaker Chambers, with aliases, perjury, espionage—R.

You will recall that Whittaker Chambers stated that one Ward Pigman and his brother, George Pigman were contacts of his during 1936 and 1937, and that they were both employed by the Bureau of Standards in Washington, D.C. Chambers stated that Ward Pigman gave him material from the Bureau of Standards. He advised that his attempts to cultivate George Pigman for the purposes of securing material from him were unsuccessful.

Bureau files contain no information concerning Ward Pigman. The following information is available in the files of the Bureau regarding George L. Pigman:

A preliminary inquiry was conducted by the Washington Field Office in October, 1948 to determine if a full field loyalty investigation should be conducted. Insufficient derogatory information was found and therefore no further investigation was made.

George Pigman is presently employed as Chief of the Structural Section, Experimental Section, Civil Aeronautics Administration, Indianapolis, Indiana.

Instructions have been issued to the Field to immediately interview George Pigman in Indianapolis, and his brother, Ward, who is working and residing in Appleton, Wisconsin.

ACTION

The foregoing is for your information.

(Section 5 Serial 315 dated 12-20-48 consisting of 1 page)

Memo from FBI Director to Washington Field disclosing information from a foreign source.

Document denied in total under (b) (7) (D).

The material from which this document was prepared was received from a foreign government. Information furnished in this manner must be treated with the utmost confidentiality and is provided the United States under an implied assurance of non-disclosure. To compel release of information furnished by a foreign government would place in jeopardy the orderly exchange of information between the United States and other foreign countries. It should be noted that this government was contacted in during 1975, regarding possible release of information it provided during the investigation of Julius and Ethel Rosenberg, et al. At that time the Bureau was advised that government requested non-disclosure of information provided in that matter as well as in all other cases in which it furnished information.

(Section 19 Serial 939 dated 1-3-49 consisting of 6 pages)

Report from FBI, Charlotte reported by SA J. Hugh Smith reflecting investigation concerning John Koral.

Excision made on pages 4 and 6 exempted (b) (7) (C) and (b) (7) (D).

The information excised from this document concerned the identity and background data regarding the individual who provided his knowledge of John Koral. This person specifically requested his identity be protected for fear of bodily harm to members of his family. In addition, information regarding the identity and remarks of persons attesting to the good name of the informant was protected for reasons of personal privacy.

The 6 pages as released are attached.

FEDERAL BUREAU OF INVESTIGATION

SYNOPSIS OF FACTS

Informant reported that in 1944, while stationed at * * * John Koral, member of * * * related his uncle, also named John Koral, made trips during 1937 and 1938 from Washington, D.C., to New York City for Alger Hiss. Koral was paid \$300 to \$500 for the trips and received secret papers from an unknown individual on the streets of Washington to take to Hiss who stayed at the Koral home in New York City while the trips were being made. Description of soldier, Koral set out. Description of uncle, Koral, unknown to informant. Informant is native * * * and presently resides at * * *. Reported to have good reputation and to be reliable. Former SA Roy L. Morgan, Greensboro, N.C., advises unable to supply typewriting specimens from Hiss. He has never corresponded with Hiss and was in his home only on one occasion in 1934. No typewriter seen at that time.

RUC

REFERENCE

Charlotte letter to Bureau dated 12-17-48. New York teletype to Charlotte, 12-29-48. Charlotte teletype to Bureau and New York, 12-31-48. Washington Field teletype to Charlotte 12-29-48. Charlotte teletype to Bureau, New York, and Washington Field, 12-31-48.

DETAILS

The following investigation is predicated upon information furnished to SA Stanley C. Settle, at the United States Attorney's Office, Asheville, N.C., December 10, 1948, by Confidential Informant T-1.

The informant advised that while he was in the * * * stationed * * * and a member of the * * * John Koral was a * * *. According to the information furnished Koral is a nephew of John Koral.

In 1944 while both were stationed at * * *, Koral related to the informant in confidence that his uncle, John Koral, made several trips to Washington, D.C., for Alger Hiss, presently a subject of an investigation being conducted by the House Un-American Affairs Committee. These trips were made by Koral's uncle for the purpose of receiving from an unknown person in Washington, D.C., top secret papers from the State Department and carry same to Hiss who was staying in New York City. As payment for these trips, Koral's uncle was paid \$300 to \$500 for each trip. Three trips were made in 1937 and one trip was made in 1938. These papers were obtained from the unknown person on a street corner in Washington, D.C. While these trips were made by the former soldier's

uncle, Hiss stayed at the residence of Koral which was at that time in New York City. The present address of Koral, according to the informant, is 36 Arthur Street, Hempstead, N.Y.

The informant stated that since the House Un-American Affairs Committee investigation began on this subject, he made several trips to the Charlotte Office of the FBI to report the information in his possession, but he never contacted the FBI for reason he was afraid of what might happen should Koral discover the source of the information.

The foregoing was furnished to the Bureau and the New York Office by letter dated December 17, 1948.

By teletype dated December 29, 1948, the Charlotte Office was requested by the New York Office to interview the informant again for a detailed description of John Koral and that the reliability of the informant be determined.

At Hendersonville, North Carolina

Confidential Informant T-1 advised he never saw the uncle, John Koral, and the nephew never described his uncle.

Following is a description of the nephew, John Koral, as furnished by the informant:

Name, John Koral; military rank—PFC; Residence—36 Arthur Street, Hempstead, N.Y.; Race—white; sex—male; age—31 (1944); height—5'3-4"; weight—175 pounds; build—heavy (fat); hair—dark brown (thin in front); eyes—dark brown; complexion—dark (rough); peculiarities—square jaws—thin tight lips; civilian occupation—tailor.

The informant added that in 1944 at Fort Jackson, S.C., he was assisting John Koral in cleaning up the * * * during a period when most of the men of the outfit were on furlough and the two were discussing the disease, polio. The informant mentioned that his sister had two small children and should they take the disease he did not know how the family could exist financially. Koral mentioned that his uncle, John Koral, had had some tough luck in that he had incurred large bills because of a sick child and that if it had not been for Alger Hiss he didn't know what his uncle would have done.

Koral continued by saying that Hiss, a high government official, had paid his uncle from \$300 to \$500 per trip to bring important papers from Washington, D.C., to New York City. The informant stated he then asked Koral several questions and from the answers obtained the information previously set forth in this report.

According to the informant the nephew Koral's family was residing with the uncle, John Koral, at this time. He added that the soldier Koral always seemed to be able to obtain fairly large sums of money from his family by sending a wire to the family requesting that spending money be sent to him.

The informant said KORAL never appeared to be the type to brag and that following the conversation requested the informant not to mention what had been said for it might get his uncle in trouble. The informant added that at the time of the conversation he had no idea who Alger Hiss was and only recently through reading the daily papers did he realize the identity of Hiss.

At Greensboro, North Carolina

Former SA Roy L. Morgan advised he was well acquainted with Alger Hiss in 1934 when both were employed as attorneys for the Agriculture Adjustment Administration but was unable to supply typewriting specimens from Hiss.

Mr. Morgan stated that he has never corresponded with Hiss. He recalls being in Hiss's home only on one occasion in 1934. Mr. Morgan does not recall seeing a typewriter at the time of his visit to Hiss's home. He identified Robert M. McConnaughey, Security and Exchange Commission, Lee Pressman, Nat Witt, Jerome Frank, Francis X. Shea, John Abt, Abe Fortas, Mrs. Fuller, relative of Senator Burns, and Gertrude Samuelson, secretary of Jerome Frank, as associates of Hiss. All the above-named were with the Agriculture Adjustment Administration in 1934. Morgan further advised that Justice Frankfurter, Supreme Court, Chester Davis, Sr., Federal Reserve Bank St. Louis, Mo., Chester Davis, Jr., Winston-Salem, N.C., and Ed Stettinius, Charlottesville, Va., were all closely acquainted with Hiss. Morgan believed that Stettinius, Frankfurter, Jerome Frank, Chester Davis, Sr., and McConnaughey were most likely to have personal correspondence from Hiss.

Mr. Morgan advised that Hiss, Frank, Pressman, Witt, Fortas, Shea and Abt formed a clique in the Agriculture Adjustment Bureau which was very

liberal and adhered closely to Wallace's liberal policy. Of this clique, Morgan believed Pressman and possibly Witt were definitely Communists but others only liberals. Morgan advised that Pressman, McConnaughey, and Shea were classmates of Hiss at Harvard. Hiss was described by Morgan as being considered in 1934 as absolutely sincere, honest, intelligent, and of high integrity and character with a tremendous capacity for work. He was classified as an idealist with liberal tendencies such as belief in socialized medicine, government control of some industries, and a follower of Roosevelt's policies.

Mr. Morgan believed that Gertrude Samuelson, former secretary of Jerome Frank, could supply additional information as to clique in the Agriculture Adjustment Administration, but believed that background information should be secured before interviewing her.

The addresses of all parties not supplied are either known to the Bureau or can be secured from the files of the Agriculture Adjustment Administration of the Department of Agriculture.

CONFIDENTIAL INFORMANTS

Confidential informant T-1

(Section 22 Serial 1112 dated 1-7-49 consisting of 2 pages)

Memo from I. Whitson to H. B. Fletcher reporting interview of Whittaker Chambers by agents of Washington Field.

Excisions made on page 1 and 2 exempted under (b) (7) (C) and (b) (7) (D). In addition these excisions are exempted under (b) (1).

An excision was also made regarding the identity of a third party not involved in this investigation. The release of this individual's identity would constitute an invasion of his personal privacy since it infers the individual was connected with espionage activity.

Paragraphs 1 and 2 on page 1 and the last 3 words on line 1 in the last paragraph on page 2 of Section 22, Serial 1112 are claimed by the defendants as exempt under 5 United States Code, Section 552(b) (1). The document was classified "Top Secret" on 4/19/76 pursuant to Executive Order 11652 and it bears the classifying officer's number 4417 which identifies the official responsible for it. It is considered exempt from automatic declassification under Section 5(b) (2) of the Executive Order as the claimed exempt portions contain information furnished by another government agency which has so classified this information. With the deletion of the claimed exempt portion the remainder of the document would not be classified.

Two pages as released are attached.

OFFICE MEMORANDUM

U.S. GOVERNMENT,
January 7, 1949.

To: Mr. H. B. Fletcher.
From: I. Whitson.

Whittaker Chambers was interviewed on December 31, 1948, by agents of the Washington Field Office, at which time in speaking of Laurence Duggan, Chambers recalled that about 1937 J. Peters had told him that Frederick V. Field was operating an apparatus in New York which included Joseph Barnes, formerly of the New York Herald Tribune, now co-owner of the New York Star. This apparatus, according to Chambers, may have included Barnes' brother, Howard Barnes, although Chambers was not certain of this. Chambers mentioned that Frederick Vanderbilt Field and Barnes had swapped wives. He mentioned this only as a matter of interest. Chambers stated that this group used an apartment donated for the purpose by the mother of Frederick Vanderbilt Field, which apartment was located on Central Park West in New York City. Chambers advised that he became aware that Duggan and Field had been classmates, probably at Princeton University (Harvard, according to Duggan) and J. Peters introduced Chambers to Field for the purpose of recruiting Duggan. Chambers stated that Field proceeded to Washington, D.C. to see Duggan and Duggan had brushed him off indicating to Field he was already active in an apparatus. This is what led Chambers to feel that Duggan was part of or associated with the apparatus of Hedi (Massing) Gomperz.

In connection with Joseph Barnes, Paul Massing has * * * as a person whom he suspects of being possibly engaged in Soviet espionage. Paul Massing said that he has no basis for this suspicion other than a feeling. Paul Massing said that while Barnes was the Herald Tribune correspondent in Moscow he had seen Barnes play tennis on the NKVD tennis courts. * * * reflect Barnes a Harvard graduate, was born in Montclair, New Jersey, on July 26, 1907. He is married to the former wife of Frederick Vanderbilt Field. Barnes went to Moscow during the 1930's as a foreign correspondent of the Herald Tribune and remained until 1939. He then became the foreign editor of the Herald Tribune. In September, 1941, he became the deputy director of the overseas branch of OWN. He accompanied Wendell Wilke on his trip to Russia in 1942. Barnes has written for the magazine "New Masses". He has also been named as pro-Soviet by a number of persons. He testified on one occasion before the Civil Service Commission stating that he had never been a member of the Communist Party. At the same time he testified that he did not believe the Spanish Loyalist forces were controlled by Communists.

RECOMMENDATION

In view of the new information developed from * * * it is recommended that Barnes be interviewed along the lines being pursued in other interviews in the Hiss-Chambers case.

Mr. EDWARDS. On page 10 you say :

The typical freedom of information request that one receives from an individual desiring a document regarding himself from an FBI file compiled during a security or criminal type investigation.

What percent of the 50 to 70 requests you get a day are people requiring their own record, asking for their own records?

Mr. POWERS. The overwhelming majority.

Mr. EDWARDS. Ninety percent, would you say?

Mr. POWERS. I would say that 90 percent of the requests that come in are Privacy Act requests from an individual for information about himself.

Mr. EDWARDS. When one comes in do you immediately check your files to see whether or not you have a record on this person?

Mr. POWERS. That is the first initial step, yes, sir.

Mr. EDWARDS. And what percent do you have no record on?

Mr. POWERS. I don't have any accurate figure on the number of "no records". Initially I have been in the section since December of 1975 and January of 1976, and initially no records were kept as to how many were "no records." I have attempted to try and retrieve that at this time. The best estimate that I have is, I would say that of the total number of requests that we have received, about 9,000 have been no records. Now, that is not a precise figure. But that is about the best I can come to. I think if anything I would be erring on the side that that is perhaps more no records than we have.

Mr. EDWARDS. And those are answered immediately, then, within a few days, you write the person?

Mr. POWERS. Yes, sir.

Mr. EDWARDS. They are not put into the files?

Mr. POWERS. No; if it is a no record, it is cleared up and a response is made.

Mr. DRINAN. Would the chairman yield?

Nine thousand out of how many?

Mr. POWERS. We have received a total, Congressman, since January of 1975, up to July 23, of 24,375 requests.

Mr. DRINAN. So probably one-third?

Mr. POWERS. Approximately.

Mr. DRINAN. Thank you.

Mr. EDWARDS. Your average is about the same as the CIA's, then. In 1975 they received 7,393 requests, 4,577 were no record. So there were 62 percent that they had no record of. So they were able to solve those problems of 62 percent immediately. Only 38 percent of the requests had a record in the CIA. Now, are you telling us that about 38 percent of the requests received have a record, or what percent is it again?

Mr. POWERS. We would be talking, I guess, about 66 percent, then.

Mr. EDWARDS. Have a record or do not?

Mr. POWERS. Have a record.

Mr. EDWARDS. Sixty-six percent have some sort of a record?

Mr. POWERS. Correct.

Mr. EDWARDS. Now, suppose it is a very easy one, and it can be handled in 1 or 2 or 3 days. Do you put that at the bottom of the pile for 8 months later treatment?

Mr. POWERS. Yes, sir; we do. And if I may, rather than just answering it so tersely, because what you are suggesting or what you are referring to here, when I first came to the section, and because of the backlog we had, it was one of the first things that I had addressed myself to. The problem is that if we are going to make someone wait for 6 months, and then go back to them and say, here are two pages, two documents, whatever it may be, but something very minimal, that I know myself that I would be quite upset at that, that I had to wait 6 months, and then I get two pages. Or that we were not able to positively establish the identity of the individual coming in, and from our review of our central indices we can only tentatively say that a record in there may be identical with that individual, and then 6 months later go back to him and say, now that we have had a chance to look at it, it isn't you. That is almost as bad as the first instance. If there was some way that we could determine the volume of documents or records that may be involved in a particular request, go through and get rid of all the easy ones, and if we had 6,000 requests, maybe there were 4,000 easy ones, and we could do that in a few months. And then we would have that 2,000 hard core that may take months and months to do. But at least we would have satisfied 4,000 people.

But the problem in doing that, and in trying to be fair, and then looking through initially to determine the size— and we opted for the fairness doctrine, I know I can hardly say fairness when we have the backlog, but that was the intention at least of putting everyone in chronological order, that everyone was out in the same position, and when you come in to be fair and impartial to all, you would be handled in the order in which your request had been received, other than those in which there was no record. And in those cases then we would make that prompt first response and tell them so.

Mr. EDWARDS. What percent of the requests have to do with subjects or people in your domestic intelligence area as opposed to the criminal investigative files?

Mr. POWERS. I have no idea, sir. We do not keep any records on something like that, whether it alludes to criminal or security—

Mr. EDWARDS. Could either of the other gentlemen hazard a guess on that?

Mr. POWERS [continuing]. Other than just saying, a large percentage maybe.

We are in the area of speculation. I truly have no figures, other than a canvass of everyone and just say, based on what you have received.

From what I have observed I could go and say that the majority would be, in quotes, of a security nature as opposed to criminal, the majority. The precise number I cannot tell you.

Mr. EDWARDS. I think it is pretty clear that it must be. And I think you would have a much more accurate guess as to that, one of you gentlemen should. You have only since 1974 maybe 150 or 200,000, whatever the figure might be, domestic intelligence cases. That is so much larger than the criminal cases that the Bureau would have open at the time. So there must have been people more curious about their own records with regard to domestic intelligence, not criminal intelligence.

Mr. POWERS. We received a number of requests concerning matters of a criminal nature and from prisoners alluding to a matter on whom we have a criminal investigatory file.

Mr. EDWARDS. Would you furnish something for the record, a typical month's group of requests, broken down that way, or over a period of time, and spot checking it. I think it would be helpful to us.

Mr. POWERS. Yes sir, we will give it to you during a given period.

Mr. EDWARDS. The gentleman from Virginia.

Mr. BUTLER. Thank you, Mr. Chairman.

I appreciate the opportunity to share this information with the rest of the committee. It is very helpful to me to have these figures in some perspective.

But the thing that is beginning to concern me is the diversion of the personnel. Does this operation adversely affect the primary mission of the FBI itself? Where are you finding the personnel you keep transferring to this function?

Mr. POWERS. Well, when the FOIPA section was staffed, it was staffed in a sense really by robbing from our other divisions, and field offices, particularly in the Records Management Division, a number of highly qualified and experienced personnel were taken to initially set up for the reviewing of the files.

Mr. BUTLER. Are we going to be getting behind in other aspects of the ordinary administration of the FBI if this takes place?

Mr. POWERS. There have been some instances where we are behind. Jim, could you help me?

Mr. AWE. It definitely affects the records operation, because a lot of qualified employees that we have had in the Records Management Division have been sent to the FOIPA section. And we have lost a lot of experience, and we have to try to get new employees, we have to go through a training program with them, and it makes it less efficient for us in doing it in this fashion.

Mr. BUTLER. I can see that. That is the fairly obvious answer to it. What I am trying to figure out is whether you have a personnel training program for this particular aspect of the FBI, as obviously it appears to be a permanent problem, whether you are going to be robbing from the other divisions? Over the long haul, how will the Bureau provide the personnel to handle this?

Mr. POWERS. Sir, as we stand now, with an approved complement

of 194, and a further increase up to 220, this next increase will cause us to take personnel from other divisions. There is no getting away from that.

Now, once we reach the point where we feel we are able to handle the requests and cut into the backlog, I do not foresee at this time any further massive increases in complement. So that all we would be talking about at that time would be normal attrition for any number of a variety of reasons, for all we would then be needing would be one person who left or one agent who may be reassigned or moves upward, something like that. Outside of this next push of 24, I cannot foresee any further major increases. We sincerely hope, with this number being assigned, with the problems we have because in our own division in the FBI because of the lack of space by taking over every room that we come by, personnel and equipment, and so forth, that we have now reached the point that we will be able, barring anything unforeseen in the influx of requests, to handle that. And it won't have that effect. Then we will be in a sense our own training ground. Employees will perhaps not come right into that section. We will still take experienced personnel, but it won't be such a drastic import at any one time.

Mr. BUTLER. You are finding that it takes some degree of sophistication to handle this responsibility?

Mr. POWERS. Yes, sir, I certainly do. I have been here for, say, 7 or 8 months now. I will be very candid, I still do not feel that I have a complete grasp of the nuances of both of these acts that we spend considerable time on. Among the agent personnel, and in conferences, we have conflicts among ourselves as to the interpretation, good intentioned conflicts. And it is very seldom that we really get a consensus of opinion, because variances of facts may just change everything in a given case. And yes, we put quite a responsibility on our clerical employees in doing this type of work. And that is why we feel right now that we need the degree of supervision that we have in overseeing their work. Those who have been here for a year or so are doing a remarkable job. But it does take time, I would say 6 months, before we really are getting our money's worth out of that employee as regards FOIPA moneys.

Mr. BUTLER. Have you reduced this particular problem to guidelines or a manual?

Mr. POWERS. Not yet, sir. We are going in that direction, instituting almost a specific unit now for that purpose, so that as these problems come up we are getting additional guidance and instructions from the Department in connection with our appeals, judicial guidance from court interpretations, yes, we will be reaching that point when that can be done. We have not arrived at that goal as yet.

Mr. BUTLER. One more suggestion. You dispose of several inquiries on the basis that you have no record. That is fine. Is there any way you can determine how accurate you are in making that determination? For instance, do you have an error rate?

Mr. POWERS. We have a few examples. I would say it would be really minuscule. When I say a few, in human error we have missed. I think two to my knowledge since the time that I have been there. And those are the only two that I know about. And then another agency had a request made to them. They had notified the requester that they had some documents from the FBI, and would we recheck our records. To my knowledge that was just a human factor.

Mr. BUTLER. So you feel pretty good about that?

Mr. POWERS. Yes sir.

Mr. BUTLER. And this does not indicate any fallacies in your indexing system?

Mr. POWERS. No sir. They receive the same service—we would for an agent writing in to try and find out something about a bank robber or a kidnaper. They receive the same type of treatment. And we have the expertise, and the desire, if there is a record to locate it.

Mr. BUTLER. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you very much, Mr. Chairman.

And thank you, gentlemen.

I have some strong feelings about this question, because I corresponded with Clarence Kelley for months and months before I got the 81 pages that the FBI kept on me.

Let's get to the heart of this thing. Most of this junk ought to be destroyed. And the Attorney General himself says that. Here is a letter of June 11, 1975, from Edward Levi to me:

A Committee of the Department of Justice attorneys is now at work, they meet several times a week, putting together proposals for an Attorney General's directive on FBI file keeping. The problem, as you know, has many facets. The burdensome cost of keeping a lot of innocuous, irrelevant paper is only one of them. However, the Committee's work is proceeding well, and I hope we can soon resolve the questions you have raised.

That is 13 months ago. Has anything happened to destroy some of these things so that you wouldn't have to keep them?

Mr. POWERS. I do not know what the present status of that inquiry with the Attorney General and the Bureau stands, Congressman.

Mr. DRINAN. You are not telling us anything, sir. You should know. You want to reduce your problems. I don't want to say that you are stonewalling, but you say you have no figures on criminal security. You can't tell us about COINTELPRO. You can't tell us why you can't release all of them, or why you aren't working with the Attorney General. You can't tell why you are so unprepared. You say delay is not intentional. I have to say, just putting it on the efficiency basis, I can't conceive of General Motors or any corporation or any bank operating this way. I have to say that the delay is intentional, that there are ways by which you can correct this situation. I have all types of correspondence from constituents who are annoyed and perplexed and worried that the FBI goes on month after month in defiance of what the intention of Congress is. So I say that the delay is intentional. And you say that 220 people can correct it. When is that going to happen, when are you going to get rid of the backlog? Do you have a target date?

Mr. POWERS. If I may address myself to one of the points that you had, the number of individuals only making one request, I wasn't sure that that had been addressed to me. I don't know if you are talking about individual requests or what, sir.

Mr. DRINAN. I have the ball park figure of 9,000 out of 24,000 for whom you have no record. But respond, if you will. I am dissatisfied, and I read all the material yesterday. I am just dissatisfied with the nonprogress that is being made.

Mr. POWERS. Well, with regard to the destruction of records, if rec-

ords were destroyed and we did not have them to assess, we would certainly be able to expedite requests. There is no question on that. There are certain archival rules with respect to destruction which must be observed. Perhaps Mr. Awe would be able to furnish something in that respect. And with respect to the inquiry between the Attorney General and the Bureau, I am under the impression, but I am just speculating, that that may still be an ongoing stage, I don't know if there has been a resolution. I can just go on what we have now for destruction of records, pursuant to archival authority.

Mr. DRINAN. Would you agree with Mr. Levi that a lot of the material that you hand out is innocuous and irrelevant? That is what it was in my case. You started keeping a file for some unknown reason in 1958, when I was dean at the Boston College Law School and conducted a civil rights conference addressed by the Governor. Some Agent in the FBI in Boston started a file in the central Headquarters on me. It continued year after year, when I was in the civil rights movement and the peace movement. The whole thing is just absolutely outrageous. Edward Levi has said that and other people have said it. I assume that this goes on; I have no indication that it has terminated. Do you see new papers coming in as irrelevant and innocuous as I said?

Mr. POWERS. I should have mentioned, too, on the destruction of records the moratorium that we are under as it concerns intelligence, security, and extremist files, which has a definite bearing on the destruction of records.

Mr. DRINAN. What do you mean the moratorium? You don't collect those anyway?

Mr. POWERS. No. We are not permitted to destroy any such records.

With respect to your question, is there any information in our files which may—and I forget the exact words—but perhaps is not entirely relevant or pertinent? Yes sir, there have been some instances.

Mr. DRINAN. I mean all of this 81 pages is irrelevant to anything the FBI is supposed to be doing by law.

Mr. POWERS. Now, with respect to your other question, are we trying to do anything about that? Yes sir. Once again, in the light of the Privacy Act, the instructions have been issued to the field, a reminder to them that in connection with an authorized lawful investigation, the facts to be determined should just be germane to the investigation, and they should have a reawareness of first amendment rights so that what is collected is only pertinent to—

Mr. DRINAN. There is no investigation. Let me make it clear, Clarence Kelley said to me: You have not been the subject of an FBI investigation, and our records contain the following. So it is not an investigation. All right? But are you still investigating? Are you still having all of this innocuous and irrelevant material coming in? I quote Mr. Levi.

Mr. POWERS. No. At the present time Mr. Levi and the Bureau, if they do not have them already, have established guidelines as to what may be the proper subject of investigation in the security field.

Mr. DRINAN. OK. I have seen guidelines before that have been violated egregiously. How much comes in day after day from the COIN-TELPRO successors regarding present extremists and the alleged subversives?

Mr. POWERS. I have to say that I am not in a position, I am truth-

fully not, to comment with respect to the guidelines on its overview and just what they constitute. I can either try and get that information for you, or refer you to a proper party either in the Department or in the Bureau. But I know the guidelines have been established, sir, and that there is going to be an overview by the Department to insure that instances such as you are referring to in the past will not occur again in the future. I cannot respond to what has gone on, we are only trying to look ahead as to how we may rectify what may have been wrong in the past.

Mr. DRINAN. On the financing of this, Clarence Kelley said that I owed him \$8.10. Have you collected from everybody?

Mr. POWERS. Yes. We charge 10 cents a page, unless the individual shows indigency.

Mr. DRINAN. How many don't pay? It was a very sloppy way of collecting it from me. I could have forgotten about it. I don't think anybody would have checked up.

Mr. POWERS. Well, the system that is in effect now is that the documents are not sent until the money is received first.

Mr. DRINAN. How much money comes in?

Mr. POWERS. I have not totaled it up. I have the figures by months.

Mr. DRINAN. What do you do up there if you don't total up the sum? That is sort of essential. You say you need 220 people. How much comes in? Give me a ballpark figure.

Mr. POWERS. I am going to say perhaps—I can give you a figure in just a very few minutes on that, because I have it by month, and it would just be a matter of taking a look and totaling it up. And we have our Finance and Personnel Division which keeps an accounting of all moneys received in connection with FOIPA requests.

Mr. DRINAN. Is it insignificant in relation to the cost of this program?

Mr. POWERS. It certainly is, that I can say without any doubt.

Mr. DRINAN. Do you think, sir, that a year from now we will have another hearing like this and I will still be annoyed at the backlog that is still there?

Mr. POWERS. No sir.

Mr. DRINAN. What is your prediction? What is the probability? Can I tell a constituent when I have an angry letter about the FBI, can I tell him this afternoon that I have assurance from the highest official in the Department of Justice that within 6 months or 1 year there is not going to be any backlog?

Mr. POWERS. Well, not any backlog, sir, I can't promise that.

Mr. DRINAN. That is the essential request; that is why we called you together. If you can't promote that, then I have to weigh your testimony as zero. We, as the Oversight Committee, want the FBI to comply with the law insofar as possible. You are saying that you have no plans to get rid of the backlog; that is the way you talk to me.

Mr. POWERS. That is not entirely fair, that we have no plan.

Mr. DRINAN. Will it have disappeared substantially in 1 year?

Mr. POWERS. Substantially, I believe so, in the absence of something like that which occurred in June, when we received 3,357 requests, in the absence of that—

Mr. DRINAN. I think you should expect more requests, right? Because everybody is telling people, yes, you ought to get your FBI file.

Why should they keep a file? When they see that the second highest guy in the FBI, a guy who is now in the papers this morning, engaged in dirty tricks to harass and discredit alleged political radicals you are going to have a lot of new requests. I am certain. So it is going to go up. Is that the intention of the FOIPA?

Mr. POWERS. Well, with the experience that we are gaining, with many of the problems that we had initially being resolved, with the increasing complement, and with the acquisition of more space, perhaps some mundane things, but just from an administrative standpoint, and the actual processing of documents, that is, how the information is actually taken out, and improvement in that area, with the expertise gained by the personnel that have been here, I truthfully, I sincerely, hopefully believe that there will be a substantial reduction in the backlog. But whether it will be a complete reduction in the backlog, that I cannot promise, because there are a number of factors—

Mr. DRINAN. Mr. Powers, if you don't have a plan, we are going to impose a plan, right? If you don't have a plan to phase out this backlog over the year the Congress will have to insist upon something.

Mr. POWERS. I believe that we have a plan.

Mr. DRINAN. What is the plan? I don't hear a plan.

Mr. POWERS. With our increase in personnel and the experience that has been gained, the continuing move to expedite the actual processing of the documents, the plan all revolves around that. There is no dramatic thing that I can suggest to do it.

Mr. DRINAN. Mr. Powers, 8,400 Americans right now, who have filed, have been waiting for months—8,400. What is the phaseout plan; 800 a month, 1,000 a month, 2,000 a month? Take your choice. I want action within a year, and I want to be able to tell this constituent, a very important lawyer, that you said or you didn't say, Mr. Powers, that within a year you will have retired these 8,400. I don't want equivocation, I want a categorical answer. If you say you can't promise that, I will tell him that, and he will be indignant. I and the Congress will say that we will try to impose a plan because you cannot meet the basic requirements of the Freedom of Information Act.

Mr. POWERS. I am sorry, I cannot give you a promise.

Mr. DRINAN. I yield back the balance of my time.

Mr. EDWARDS. The gentleman from Connecticut.

Mr. DODD. I have an opening statement, Mr. Chairman, that I won't read—

Mr. EDWARDS. It will be made a part of the record, Mr. Dodd.

[The statement referred to follows:]

OPENING STATEMENT OF HON. CHRISTOPHER J. DODD, COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, JULY 29, 1976

I want to thank you, Mr. Powers, and your associates, for coming before this body today to provide us with some information on the problems the FBI is experiencing with respect to the processing of Freedom of Information and Privacy Act requests. I am confident that you and your staff share my concern and frustration about the delays which are occurring in the processing of these requests, and I look forward to working with you to find the best ways to cope with this problem.

It is my opinion that there have been few legislative initiatives that have sparked the enthusiasm and controversy that has emerged since enactment of the Freedom of Information Act Amendments and the Privacy Act; the basic concept

is very sound, and it is incumbent upon us to make the Acts work as they were intended.

Several of my own constituents, who have submitted requests for access to information they believe is contained in FBI files, have found it wholly unreasonable to be told that it will take nine months for the processing to begin. I would have to agree that not only is this delay unreasonable, it is totally unacceptable in view of the statutory requirement for processing new requests within ten days of receipt.

Perhaps the most malignant aspect of these delays is that they perpetuate the public's fear of our law enforcement and intelligence agencies. The revelations of the FBI's illegal domestic counter-intelligence activities, and their invasion of people's privacy and abuse of civil rights, has left an unfortunate atmosphere—one which must be cleared. Long delays in responding on Freedom of Information and Privacy Act requests tend to give the impression—real or imagined—that the FBI is "stonewalling"—intentionally withholding material that might prove embarrassing.

I am sure that you are as interested as I in eliminating all basis for this view.

In order to find the most effective ways of coping with the influx of requests, and eliminating the present, unacceptable nine month backlog, several of my colleagues on this Subcommittee, and on the House Government Operations Subcommittee on Government Information and Individual Rights, have joined me in asking the General Accounting Office to look into the matter and make legislative and administrative recommendations. This study, in concert with hearings by this Subcommittee and your cooperation, should provide an effective vehicle for defining the problems and planning corrective measures.

Thank you, Mr. Chairman.

Mr. DODD. The current backlog indicated to the committee is totally unacceptable. And I suppose that the most serious question one would raise to the backlog is not so much the inconvenience to the requester, but what this could mean in the minds of the people that are making the request for information in terms of the feeling about our intelligence community. So I would certainly hope that every effort will be made to bring the backlog up to date.

Let me ask you a serious question, if I may. You know, I presume, that some of us on this committee and the Government Operations Committee have requested the General Accounting Office to conduct a study of the FBI process, its practice in responding to the freedom of information request. I wonder if you might tell us whether or not the records that you keep are in such a manner that would enable the General Accounting Office to determine the time spent at each step of the process of responding to FOIA?

Mr. POWERS. Yes, I believe so.

Mr. DODD. Then you will be able to determine that based on the records you keep?

Mr. POWERS. Yes, sir.

Mr. DODD. I received, as did Father Drinan, quite a few letters from constituents. Would the present backlog of FOIPA requests to the FBI be eliminated with the present staff? I wasn't sure of your response. Would the present staff of the FOIPA section be able to cope with the current influx of—what is it—the 55 or 60 requests you are getting a day?

Mr. POWERS. Yes, it would.

Mr. DODD. You feel you would be able to handle it?

Mr. POWERS. I do.

And if I may—and perhaps I am doing a disservice to the section which I am here representing today when we are talking about delay—I can understand the concern of those who have written in and have not received a prompt response. I share that concern. We are con-

cerned also. And I certainly don't want to leave any impression that we enjoy or that we are being dilatory for any other reason other than just an overwhelming number of requests. We are trying to do what we can and making a sincere effort. And we would be in a much better position in the FBI if we were able to respond within 1-day or 2, depending on the volume of requests. As a general rule it goes right back on a no-record response. I look forward to that day. Certainly that is what we are striving for within the section. And I don't want to leave any impression that what we are doing right now is intentional, because it certainly hurts us, there is no question about that.

Mr. DODD. I understand that, Mr. Powers. I know you don't want to leave that impression. But unfortunately the impression exists. And something has got to be done about it.

I wonder if you might tell me whether or not you have a system by which at the time of initial request there is an immediate examination of the files to determine whether or not any information exists on that individual or not, an instant check, or preliminary instant check?

Mr. POWERS. Yes; to determine whether there is or is not a record. And if there is no record, then we do respond to that individual, and so tell him.

Mr. DODD. How long does that take? Suppose you take a request and find out there is nothing there, how much time does that take?

Mr. POWERS. We are trying to do that within 10 days. And we have reorganization underway now that will improve that so that we can do it in 1 day or 2. Because the volume of mail being received, not only with requests but everything attendant thereto, with the increase in personnel we hope to reorganize and have a group or unit doing nothing but just responding to that incoming mail.

Mr. DODD. What I am getting at, if you make an examination initially of the various files—and there are some 59 million headings, I understand—

Mr. POWERS. When a request comes in, and we make a search and there is no record that—

Mr. DODD. Is there an initial preliminary search?

Mr. POWERS. Yes, that is the first step.

Mr. DODD. Not going into the specifics of what the information is?

Mr. POWERS. Right.

Mr. DODD. How long a time does it take?

Mr. POWERS. Just a few days to make that initial search, and then a few days to get the communication back to the individual.

Mr. DODD. Of the 14,500 or so requests made to the FBI in 1975, do you have any indication of how many of those requests indicated that there was no information at all on the individual request?

Mr. POWERS. We have gone over—and of the total number of requests—I don't know the particular number during that year, but of the total number of requests—there are about 24,000 or 25,000—about one-third was a no record.

Mr. DODD. According to the Department of Justice Annual Report dated March 15, 1976, the FBI received 14,000-plus FOIPA requests during the calendar year 1975. Did you mean you received actually more than that, but these were the only ones there was information on?

Mr. POWERS. No. Of the 13,875 received during calendar year 1975, about one-third had no record.

Mr. DODD. Do you have any indication as to how it is going to be this year?

Mr. POWERS. Yes. Quite heavy. In fact, we averaged about 55 a day in 1975, and we are averaging about 73 a day this year, which is not really a true figure, because we had two extremely heavy weeks in June. The average was running about the same, about 55 a day this year. But the two heavy weeks we had in June upped that average considerably. There is an exhibit that states that, and it gives the receipts by week.

Mr. DODD. This would indicate, then, that this is not something that is going to die away. What did you attribute that to? Do you think this is an indication of the kind of load that you will expect as more and more people become aware of their right to have access to this information? Or do you think this figure is going to stabilize and level out and top off?

Mr. POWERS. Well, I would anticipate that the number of requests would decline at some unforeseen time in the future. I would anticipate, based on last year, and the receipts this year, other than those 2 weeks, that they would have averaged at about 55 a day.

Mr. DODD. That the theory under which the FBI is operating, that this is going to drop off, that the people are just taking advantage of something that is new, and when the interest dies down that the requests will die down, is that the presumption that exists at the FBI, overall, about the act?

Mr. POWERS. Well, the assignment of personnel that we have to the section is on the assumption that the caseload is going to continue as it is right now, other than those 2 weeks at the rate of 55 a day. We can handle that and make a good inroad into the backlog. And then if anything in the future happens so that the requests decline—

Mr. DODD. Is that just your personal guess, or is that a philosophy which exists in the FBI for the future?

Mr. POWERS. Our philosophy is to assign personnel to do the job as indicated by the number that we have assigned. If the requests drop off to nothing for the month of August, it would allow us to get into the backlog that much more deeply.

Mr. DODD. What I am trying to get at is this. If the attitude is such in the FBI today that this is something that is only going to go on for another, maybe, 4 or 5 years, and after that this thing will die down, the people aren't going to bother with the requests—and that indicates a certain kind of procedure to handle this kind of load that exists today—if the attitude is such that one believes that this is going to be a continuing situation, where people are going to make requests and more and more people become aware of this act, then you have to apply the standard and set up a procedure for a long-running operation in the future.

Mr. POWERS. With the amount of personnel it hasn't been the idea or belief that it is going to die out. It will not for a long, long time. And if it were not, we would not have assigned the substantial amount of personnel that we have to it. This will be with us for a long, long time, there is no doubt in my mind. And that is our feeling and philosophy and belief in the Bureau, we just don't foresee at any time in the future that it will die.

Mr. DODD. Correct me if I am wrong, but as I understand it now,

when the inquiries are made on behalf of people, and if confidential material appears in the requested file, is it then referred to the Intelligence Division by the FBI?

Mr. POWERS. If it is classified information, yes, it would be referred to the Intelligence Division.

Mr. DODD. And they make the decision in the Intelligence Division as to whether or not that information can be released or not?

Mr. POWERS. As to the classified aspects—we are the final arbiters in the FOIPA section as to everything else, but as to the classified nature—

Mr. DODD. They make the decision in that particular section?

Mr. POWERS. Correct.

Mr. DODD. Now, do you think that we might be able to train FOIPA section people who might be able to do that step? Is there any reason that by proper training you could cut out that step entirely? I presume it is going to be time consuming.

Mr. POWERS. Well, it is going to be time consuming whether we have it on the fourth floor where they are located presently, and if it is done down there by a group of personnel, or if that group of personnel is brought into the FOIPA section. It needs to be done. And by having those with the expertise in that particular area, we believe that the job is done faster by having them do it, individuals who have more familiarity with the overall nature of the information.

Mr. DODD. That is because your own people are not trained in making those kinds of decisions that the Intelligence Division can make?

Mr. POWERS. They are already trained; they have allocated the personnel, and they are doing the job.

Mr. DODD. I am just trying to suggest a possible way of cutting into some of the backlog. When you are shuffling papers around from one division to another it is time consuming. By the time you send something to one division and get a response and it comes back, it takes time. You could save time on that one. You may be correct, that you could possibly train the FOIPA people to make those kinds of decisions. But certainly you could save time by having your own section people make those determinations if they had the proper training.

Mr. POWERS. I don't really think so, because the only time we would be talking about would be the actual transmission, the messengers between floors. And I think it would really be minimal in nature, because then the work has to be done, whether it is brought into a room right next to you on the floor and done there or somewhere else.

Mr. DODD. What special training do the FOIPA section people have now?

Mr. POWERS. We have a week of initial training when they come in the section, including on-the-job training. And we go over the act and the evolution of the act to date. And then close supervision thereafter.

Mr. DODD. And that first session is all 1 week on-the-job training plus going over what the act says and means, and so forth?

Mr. POWERS. Right. And actually how documents are excised, and going into the court decision, and where we are right now, and what constitutes a certain violation, and what constitutes a certain exemption, and how it should be applied, and what to look for. And it boils down to really that the bottom line would be the judgment of the individual, an awareness of what to be looking for, particularly in the areas of privacy, which causes us so much concern.

Mr. DODD. That is all that week period?

Mr. POWERS. Right.

Mr. DODD. And after that you have close supervision?

Mr. POWERS. And conferences, weekly conferences with the personnel. And then, remember, in our particular section that we have, we are really broken down into teams. So there would only be five or six on a team under the immediate supervision of a special agent to provide closer supervision and continuing training.

Mr. DODD. Do you have a specific training schedule that you use for every person that comes in? Is there a definite training program? In printed form saying that this is the training schedule?

Mr. POWERS. We have a general outline in that area, but it has changed as those who have been on the job suggest where they feel that further training in a particular area would have been of value.

Mr. DODD. I ask that that schedule be submitted for the record.

Mr. EDWARDS. Yes, without objection that may be received and made a part of the record.

Mr. DODD. May we have that, that printed schedule that you have? My time has expired.

Mr. EDWARDS. Mr. Powers, how many cases do you resolve in an average day and solve and mail the stuff out?

Mr. POWERS. If we do just perhaps work on the average case and I could tell you exactly what the average case would be, we have found that the analyst can close about two cases a week—now, this is not on any record, but the actual completion of a case, and all that is attendant to it, and getting that case out to a requester—between one and two cases per analyst per week. And we have 90 analysts at the present time. That is going to be increased. The problem in trying to project this over any period of time is that there have been very few instances in the past 6 months when we have not been forced to pull off analysts to one court special or another. And aside from the requests that take periods of time from a week to a month and the few instances where there was no real special diversion and they were diverted, the average that we had found was that an analyst can do about 100 to 110 pages a day of processing of documents.

Mr. EDWARDS. That is somewhere in excess of 15 cases a day that you are resolving?

Mr. POWERS. We are talking about 90 cases a week that we are doing, or between 350 and 400 a month. And that is why with the number of requests coming in, we are just about equaling the number coming in with the number we are closing.

Mr. EDWARDS. You are falling further and further behind then, if the requests keep coming in at the same rate?

Mr. POWERS. At the rate that we have this year. Of course with the increased personnel, no, it won't. That will probably account for that. And it has dropped back slightly under that deluge that we received in June. And then with the increased personnel, we should be able to get into that backlog even more. It is so difficult to give you an idea, because on the requests you come across there may be very little involved in, and those can be handled very rapidly. And then if you get a request that involves 10 or 15 volumes of files, it is going to take considerably longer. And we have no way of knowing and looking at the number of requests there, what they constitute, whether it may be only 3 documents, or 1 volume, or 10 volumes. And that is why—

I am not trying to beg the question, but that is why it is hard to say just what that volume of work constitutes, those requests, that they are all relatively small. We do know in our project area—and we consider a project that is anything over 15 volumes, some of those can run up as high as 200 volumes. And that will require one individual, an analyst, months and months to do, or longer than that. So for all intents and purposes the services of that individual are lost.

Mr. EDWARDS. You point out on page 1 of your testimony the cost, and you point out how much the House Committee on Government Operations estimated wrongly how much compliance with the act would entail in expenditures. And yet you do not put in your statement the net cost. You didn't put in how much you collected for providing this information to various people.

Mr. POWERS. No, sir. I can get that exact figure for you, what we have collected.

Mr. EDWARDS. It would have been more realistic to put that in the statement, would it not, Mr. Powers?

Mr. POWERS. Right. That money does go, of course, to the Treasury and not to the FBI.

Mr. EDWARDS. But it is still a collection for the benefit of the taxpayers?

Mr. POWERS. Yes, sir. I can tell you, though, that the amount collected in no way approximates the expenditures that we have made.

Mr. EDWARDS. I believe in 1975 you billed for \$34,000, and collected that less the \$20,000 you waived for the Rosenberg search.

Mr. POWERS. Well, in salaries alone during the 3-month period on the Rosenberg case we spent over \$215,000. And the only fees collected in that, since the search fees were waived, was about \$3,000 for the number of pages we released to them. That was the only charge made. And that, of course, is not the typical case, but \$3,000 was received as against \$215,000 expended.

Mr. EDWARDS. I think your statement should have provided that information, Mr. Powers. And also what your prediction will be on collections for 1976 and 1977. And I think your statement also should have provided, and you have agreed to provide for the committee, the breakdown of how many—what percentage of the inquiries have to do with domestic intelligence cases as opposed to criminal cases. And I think your statement should have made a prediction, which you state that you cannot make, as to how you are going to resolve the backlog, or what the recommendations are going to be to resolve the backlog. I know we have been talking a lot about that. But in a nutshell, what is your prediction about the backlog? What is going to happen to it?

Mr. POWERS. Well, as I say, I cannot really make any prediction. I would hope that with the increased personnel and all the other actions that we have taken, that barring any influx, unusual influx of requests, that we will be able to substantially reduce the backlog in the coming months. And we have received some relief, some court recognition in the *Open America* case, that has accelerated the processing. If we receive further relief in that area, with the increase in personnel, and some other just general in-house reorganization that we have made, which I believe will all go in a sense to improving our posture, I believe that there will be a reduction. I don't think that we will within a

year, unless the requests would drop off drastically, reduce the entire backlog. I would hope so. But I sincerely feel, and it is our intention and goal, that there will be a reduction, and a fairly substantial reduction.

Mr. DRINAN. Mr. Chairman.

Mr. EDWARDS. I yield to Mr. Drinan.

Mr. DRINAN. Just one suggestion, Mr. Powers. I think that everybody here, including yourself and your colleagues, would say that a year is a reasonable time to bring the backlog of 8,400 down to zero or something very small. Mr. Chairman, I would suggest that we request from Mr. Powers and Mr. Clarence Kelley a plan for reducing the backlog, including goals, timetables, and need for additional funds and staff. I would suggest that in the spirit of the FOIA you do that within 20 working days.

Mr. EDWARDS. Will you be able to provide that, Mr. Powers? We would like to make that request. Or a reply, if you can't provide such a plan.

Mr. POWERS. The plan that we have in mind for reducing the backlog?

Mr. EDWARDS. Do you want to restate it, Mr. Drinan?

Mr. DRINAN. Yes. I think that all of us would want to be able to say a year from now, say next July, that we have worked together as colleagues in government to bring about a plan by which the people of this country would have their rights satisfied under the FOIA. I suggest, Mr. Powers, that you and Mr. Clarence Kelley and other relevant people produce for this subcommittee within 20 working days a plan for reducing the backlog, including goals, timetables, and the need for additional funds and staff.

Mr. POWERS. May I also include in that statement what action we have taken to date to try and arrive at that position?

Mr. DRINAN. I think, Mr. Powers, you have indicated that today. What I am anxious for, and I think the subcommittee is, is that we carry out our duty to seek to help the FBI to get rid of this backlog. We simply want a plan so that 10 months or 12 months from now we can proceed in an orderly way. It may be there will be some miscalculation and inadvertence, or some other things will happen. But you should make those assumptions; that so many will come in a day. You should consider the contingency that 55 grows to a 100, and figure how many personnel you will need. We just want, in other words, to carry out our oversight functions on the implementation of the Freedom of Information Act.

Mr. POWERS. I will make every attempt to do so within the—we can, but this will be difficult probably within the time frame which you set—once again, it will just be taking personnel away from doing requests, which is almost what we are faced with in our court-ordered deadlines. It will be done. But I think then we are not going to the basic problem that we are having. And that is in our conflicts between the two acts, because when we get down to what we are intending to do on this in implementation of the act, and as it stands right now—now, not what is going on before, but as it stands right now in the FOIPA section, our concern is for the privacy of the others. And there is hardly a file in the FBI on which a request is made that just deals with that individual alone. And for us in order to do what we feel

the Privacy Act calls for, which is a page-by-page, paragraph-by-paragraph, line-by-line review—and there is no other way that that could be done—

Mr. DRINAN. I think we all know that. I just want a headline coming out from this subcommittee saying that the FBI and the Congress are working together to outline a rational plan over the next year to reduce the backlog. And right now if I were a reporter I would say that Mr. Powers, a high official of the FBI, refuses to outline a plan and refuses to give any guarantee that even within 12 months this act will be working as Congress intended it to work. Take your choice.

Mr. POWERS. Well, it is not a choice. I have indicated that we will be happy to comply.

Mr. DRINAN. Are you going to comply with the subcommittee's request that the chairman has ratified, that within 20 working days we have a plan?

Mr. POWERS. Yes, sir; we will.

Mr. EDWARDS. We will recess for 10 minutes to vote.

[Recess.]

Mr. EDWARDS. The subcommittee will come to order.

Mr. Parker?

Mr. PARKER. Mr. Powers, I have been listening to the questions this morning and to some of the figures which have been used. It is a little difficult to draw conclusions from those figures. But the prime problem raised is the reduction of the backlog. As I understand it, you have told us that it takes an analyst—and as I understand it further, it is the analyst who does the actual review of each request, is that correct?

Mr. POWERS. That is correct.

Mr. PARKER. It takes an analyst a week to finish approximately one to two cases.

Mr. POWERS. Under optimum circumstances, yes.

Mr. PARKER. If we use the figures of 55 requests a day—and I think you even used the figure today of 73 coming in in 1976—

Mr. POWERS. Right.

Mr. PARKER. But, the average in 1975 was only 55 a day, of which one-third, approximately, have no record, so we can deduct 18. That leaves us with 37 that do have a record. Times 5 days a week is approximately 185 cases a week. You presently have about 90 analysts, is that correct?

Mr. POWERS. Correct.

Mr. PARKER. Which means that the backlog is going up at the rate of about 90 or 100 cases a week?

Mr. POWERS. Well, the backlog has progressed from 6,172 at the beginning of the year—it was worked down to a little under 6,000. And at the present time it has increased to a little over 8,000. It is going up. there is no question about that. And how much it will go up will depend not only on the number of requests being received, but how many other special things that may happen that require our taking away the analysts from their regular work on a case to handle a special project.

Mr. PARKER. Has your department done any kind of projections at all in terms of the number of analysts that will be needed to handle just the incoming cases?

Mr. POWERS. In any projection there are many things that we can't take into account—call them special cases—in the litigation and the court-ordered deadline. We have no idea how many of those may arise, and what impact that they will have on us, how close the deadline may be. And I refer back to the *Rosenberg* case again, when half the entire complement in the section was assigned for a 3-month period to that one request. And I point out that certainly is not typical, that is drastic. But we have a number of other cases. And I believe that I have in my statement that since April we have been working five or six individuals on one particular request to get out 4,000 pages a month, and another one that we had to complete by the 25th of this month. So those are the ones that I can't account for. If we are working under the optimum conditions—

Mr. PARKER. It is certainly clear that you are going to have peaks and valleys in terms of these special cases, like the *New York* case and some of the others. Have you given any thought to administratively dividing your section so that you will have whatever it takes to handle those 55 or 73 cases a day and work on the backlog, and then have some other unit, a special unit, which expands and contracts to meet these court cases.

Mr. POWERS. We have taken it into consideration in the *Open America* case, where we pointed out that we were in a sense running a two-track system in regard to project cases, those over 15 volumes, that we will have x amount of personnel assigned there, and the majority of personnel assigned to, for want of a better word, the routine requests coming in, the normal requests coming in. So that they will at least move ahead a little faster. The only problem is that we don't know, even with that system set up in recognition of not just assigning one voluminous case to each of the analysts—and then we would really only say, we are working on 90 cases in the whole of the FBI from anywhere in a period of months, and each case would have a backlog.

Mr. PARKER. On what basis do you presently make a decision on a project or nonproject case?

Mr. POWERS. If it is over 15 volumes.

Mr. PARKER. Would you explain that term. What do you mean by over 15 volumes?

Mr. POWERS. A file may consist of a volume, that is the first volume, the first recording, the first record. And a volume, just approximately, consists of 200 pages. And just from the size of it, to put anything more than that in, to give or take a few pages, just becomes cumbersome. Then you would go onto volume 2.

Mr. PARKER. So if it goes to 3,000 pages, it becomes a project?

Mr. POWERS. That is correct.

Mr. PARKER. Does that mean that each individual might have something mentioned about them on each of the 200 pages, or possibly only 1 of the 200 pages?

Mr. POWERS. It would not necessarily be true that they would be mentioned on every one.

Mr. PARKER. It just means that you have to read through.

Mr. POWERS. We have to read through each one, and we have no way of knowing.

Mr. PARKER. You use a computer for certain kinds of information in the Bureau. You have certain personnel information in the computer

and you use a computer at the National Crime Information Center, and your CCH information is on computers. Has any thought been given to computerizing or automating any of the central files?

Mr. POWERS. If I may, I would like to let Jim Awe answer that.

Mr. AWE. Yes, considerable work is in progress to automate our general indices. However, the indices are large, and it is an extensive project, it is the type of thing that will take time, that will make our operation more efficient once it does become automated. And a considerable effort is going into this, to automate our entire record system as much as you can.

Mr. PARKER. When you are talking about the indices are you talking about those approximately 58 million cards?

Mr. AWE. Yes.

Mr. PARKER. How long would it take to computerize those?

Mr. AWE. We think that within 3 years we will have a workable automated index. That will not include all of the 59 million cards. The cost factors alone wouldn't permit us to automate all of that. The state of the art just won't let you do it.

Mr. PARKER. Assume for the moment that that is done, would that make the initial record check almost instantaneous in FOIA or PA?

Mr. AWE. Not necessarily, because the automated index will just lead you to a final number. But the file itself must be looked at.

Mr. PARKER. Let me change the subject for just a minute to something that came up this morning that piqued my interest when Father Drinan was talking about the time and trouble it took to get his own file. It appears that there are some basic conflicts between the FOIA and the Privacy Act. If I as a citizen write to you, to the FBI, and ask for the file of Father Drinan, would I receive it under the FOIA?

Mr. POWERS. I cannot give you a flatout answer "Yes" or "No" on that. And I think it goes right to the heart of the problem that we are faced with. My initial reaction would be, under the Privacy Act, certainly not, not without the permission of Congressman Drinan.

Mr. PARKER. What if I phrase it as a Freedom of Information Act request?

Mr. POWERS. The same would apply. The question that arises, and where our time comes in is in processing, is the question of whether it is an unwarranted invasion of privacy, because of the prominence of Congressman Drinan, would there not be an invasion of privacy perhaps with respect to some things therein, or if there was an invasion of privacy, would it be an unwarranted invasion of privacy.

Mr. PARKER. If I requested the file on Mr. Tom Breen, who is a member of the staff of the subcommittee, would your answer be flatly "No"?

Mr. POWERS. My answer, and in the FBI, would be flatly "No." without permission from Mr. Breen. I do not know if that is the same in all agencies. They may interpret differently in some agencies what is an unwarranted invasion of privacy, balancing the public right, and the public need to know, and the public interest.

Mr. PARKER. Let me ask you further. Let's assume that you decide in the case of Father Drinan, because he is a Member of Congress and a prominent public figure, that there are portions of that file that you would release to me under a Freedom of Information Act request? The Privacy Act was really designed, as I understand it, for an

individual to be able to look at their file, update it and make sure that everything that is going to be disseminated in the file is accurate. Would you then notify Father Drinan that you were going to be disseminating portions of his file, and that he had a privilege under the Privacy Act to see if it was correct and that no erroneous information was being sent out?

Mr. POWERS. No; I don't know that we would. And I would like Dick Dennis, the head of our Privacy Act unit to comment a little further on that.

Mr. DENNIS. On the Freedom of Information Act dissemination we would not have to check with the individual. It would be our decision. If Congressman Drinan gave a speech and it was in his file, the question would be, is that an invasion of privacy to give that out. The argument is that it is. We would probably take the position that to give out anything in the file would be an invasion of privacy. But if it is a Freedom of Information Act question we at least consider touching base with the individual.

Mr. EDWARDS. How about Judith Exner, if somebody asks you about her?

Mr. DENNIS. The same thing. If the information is a matter of public record, then that would enter into it, whether or not it would be constituted an invasion of her privacy. That is the position we would take in most instances. But there may be public source information in the file.

Mr. EDWARDS. But you are not supposed to be a collection agency of public information. That is not in the purvey of the Privacy Act.

Mr. BUTLER. May I ask a question?

Do you require any particular standing for the inquirer?

Mr. DENNIS. Under the Freedom of Information Act that is one of the problems we have, that an eighth-grade student can come in and ask for the *Rosenberg* case, and if he has the money to pay for the charges, he gets it the same as a Ph. D. The act does not differentiate between individuals.

Mr. BUTLER. I am talking about the standing of the inquirer when determining whether Judith Exner has achieved the prominence of Father Drinan so that his file would be made generally available to the public. Does the standing of the inquirer make any difference?

Mr. DENNIS. No; it does not.

Mr. DRINAN. Mr. Chairman, I might say for the record that my file doesn't have anything in it. You can see how futile the whole thing is.

Mr. PARKER. My time has expired.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. I have no further questions.

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Just a couple.

If the requester makes application for his file under the FOIA, and certain information is withheld from that file, is the requester notified at the time that the information can be released, the fact that there is additional information that cannot be released?

Mr. POWERS. Yes, sir.

Mr. DODD. They are notified that there is other material that cannot be released?

Mr. POWERS. Right. And the reason why it was withheld.

Mr. DODD. The broad reason under the specific exemption of the statute.

Mr. POWERS. You would cite the specific exemption. And he is, of course, advised of his right to appeal.

Mr. DODD. On page 5 of your prepared statement you state, talking about the personnel that are assigned to a particular section: "While most Special Agents assigned to FOIPA matters in the Bureau at Headquarters would prefer field assignments more reflective of career interests, they have pledged themselves to implementation of the intent of Congress in their present assignment." Do you have any kind of rotation system? How do you know that most of them are unhappy? Have they stated such? Have they stated on their application or questionnaire?

Mr. POWERS. No, not in that manner. But we are a particularly close group in the FOIPA section, which is a relatively new section. Because of the very nature of the work we have continuing and ongoing conferences. There is very little established policy in this field. And I think that is why the continuing necessity for the conferences and the getting together. It is an extremely difficult job to do. I don't know just how to put it, but in talking about the FOIPA section at this particular time, I know of no other section within the FBI that is working as hard, I mean at night and on weekends, on a continuing basis.

Mr. DODD. What is going to be done about that? You have got some people here who apparently are not happy about the fact that they are working in the FOIPA section. Is there a rotation system whereby you will get them out of there?

Mr. POWERS. There will be a rotation system. But I did not intend that that be interpreted in any way, about being unhappy, that it would in any way reflect on their work. We would like to consider ourselves as professionals, and they will do the job, and they have a commitment to do it. As a very human factor, though, it is a difficult job. And I imagine, yes, they will be happy when they can move on for other assignments, after they have done this one.

Mr. DODD. But do you have any intention of putting in a rotation system?

Mr. POWERS. Oh, certainly, yes. I would assume, while we haven't gone into that in any depth, but in line with our regular career development program, that no one would stay there forever. And I would foresee that perhaps a 2-year stint or tour for an agent in that section would be long enough.

Mr. DODD. One of the questions that I don't believe you really touched on is, assuming that there is a request, and there is a file that exists on an individual—and I realize that depending upon what kind of information in the file that the answer to the question is different, but given the normal file, let's say there is not any classified material—and we are not talking about the intelligence division, so there is nothing that would be exempted from the requester having access to it—how many people, or how many divisions or steps does that file have to go to before it is released to the requester, given the normal file without the intelligence division, deciding whether it is information that he or she could have access to; what are the steps, and how many people are involved in touching upon that problem?

Mr. POWERS. The steps, if you are talking about something like that, in the absence of something unique, it would not go to any other division or anywhere else, that is the first step. And then the steps would be in reviewing the file, the file is Xeroxed, so that based on the Xerox copies a determination is made as to what is to be taken out and what will be left in—

Mr. DODD. But is that all one person who is assigned to it?

Mr. POWERS. We assume that it has been searched and now it is just handed to the analyst.

Mr. DODD. And that is it?

Mr. POWERS. That is it. And that individual just goes through. There is a research assistant to assist the analyst in making maybe Xerox copies of things. But in the absence—

Mr. DODD. There is no additional screening process on that individual decision, it is an analyst's decision to release that information?

Mr. POWERS. Are you talking about supervisory review?

Mr. DODD. Yes.

Mr. POWERS. Well, in a typical case, no intelligence or classified information, the analyst has a file, and reviews it, usually working in close conjunction with the team captain, who's an agent. It is then reviewed by the team captain. The extent of that review will depend a great deal on the knowledge and expertise of that particular analyst, that is, is it one who has been onboard for 3 months, or a year. From the team captain it goes then through a unit chief, who usually has four or five agents under him, for a modicum of review, depending on the complexity of the case, what may be involved, and any specific factors like that. But if it is just that routine case, it will then pass on either to myself or my No. 1 man, and that is it.

Mr. DODD. So it goes from the analyst to the team captain, to the unit—what do you call it?

Mr. POWERS. The unit chief.

Mr. DODD. The unit chief—

Mr. POWERS. Right.

Mr. DODD. In a normal case without involving anything else?

Mr. POWERS. Well, really if you are talking about review, three steps; not counting the analyst, four, if you do.

Mr. DODD. Based on the request that the subcommittee has made for outlining some specific proposals to deal with the situation of backlog, is my understanding of what you have said correct, that the FBI is presently examining, one, the kind of information that is going to be collected in the first instance, the buildup in these files?

Two, how serious is the examination of the classification of documents and the reexamining of that?

And then three, the point raised by counsel staff of the implementation of the compilation of information, and flexible information? Are you saying that that is something that we are going to have to think about down the road, or is there something really going on down there that is going to see these considerations bear fruit in the very short term, in the near future? Or is it something that is being bandied about?

Mr. POWERS. This is something that has already been offered as instruction for the field as far as those already engaged in investigation.

Mr. DODD. But it seems to me that in response to Father Drinan's

question you weren't real sure about the kind of information that is coming in today as opposed to what was coming in a year ago.

Mr. POWERS. That is an extremely broad question, because I don't see the information in a sense coming in right now.

Mr. DODD. You must see the kind of information that is in the files. I presume you are reviewing it.

Mr. POWERS. But if we are talking, then, about a current file, it wouldn't be susceptible to review, probably, because we would assume that it would interfere with a law enforcement proceeding, and it would not then have to be addressed as to implementation of the Privacy or FOI Act right at that time. If it is an ongoing investigation, we would not have to look at it at that particular time. However, some court decisions suggest processing is required to identify any "reasonable segregable" information.

Mr. DODD. My time is up. Thank you.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. POWERS, I assume that you have read in the Washington Post this week four or five long articles. Have they been fair to the FBI?

Mr. POWERS. I have not seen anything unfair—I can't recall the articles in total—I can't recall any specific thing.

Mr. DRINAN. This article states that the Defense Department has processed 44,403 requests with no backlog whatsoever, and that DOD has the policy of releasing more things even where there is a doubt. Apparently DOD has the best reputation of any agency in town. Why is the FBI so far behind when the DOD can process those things and keep up?

Mr. POWERS. Well, let's assume that we are not deciding that that is an accurate figure of what DOD is processing. One, I do not know what they consider to be a request. I have no idea in that light.

Now, just to finish that up, I think the second most important thing is, I have no idea what type of record that they are referring to. I can only speak for the FBI. And in connection with our records, and our performance, it is doubtful that we would be able to match that. I don't know if you are talking about the difference between apples and oranges. If we are talking in the same general area, then I would be most happy to get together with the Department of Defense officials and see if they have any system or methods which we might be able to use.

Mr. DRINAN. Coming back to the FBI directly, Mr. Harold Tyler, Deputy Assistant Attorney General, was quoted as saying "What has been allocated now to the Freedom of Information section is more than a general allocation of resources." That seems to be a variance from your testimony. Mr. Tyler said that you have got these people, Mr. Quinlan Shea stated that is what you have got. I don't hear that from you. You have promised us that you are trying to undo this backlog. Yet it is going up to a 100 a week. Is that a contradiction, yes or no?

Mr. POWERS. On the contradiction I would have to direct you to Mr. Shea. I am telling you that we are going to increase.

Mr. DRINAN. Mr. Harold Tyler said that what you have got now is generous, there is no way you are going to get a new allocation of resources. That is the way the Washington Post reports it. Who's right?

Mr. POWERS. I am telling you that we are increasing.

Mr. DRINAN. Then he is wrong, or he is misquoted.

Mr. POWERS. I will have to see.

Mr. DRINAN. You have the duty to know, sir. If that is contrary to the authorized statement that you are making, that you are going to get more personnel and you are going to clean up this backlog, then you have the obligation to say Harold Tyler was misquoted or he didn't say that. Obviously he is the second in charge.

Mr. POWERS. Perhaps Mr. Tyler was not aware of the increase which we have now, which was just recently approved. The only thing I can do is, if you will permit me to check on that and find out, all I can do is tell you that we are going ahead with that increase contingent upon the acquisition of space, and so forth, because it has been approved.

Mr. DRINAN. If I may add a qualification, a condition to the report that I think we have agreed you submit in 20 working days, I would like to have the Department of Justice and Mr. Harold Tyler, or the Attorney General, say that they will back up the request or the commitments that the FBI will make to us hopefully within 20 days.

Now, on the question of appeals, there are now 500 appeals pending. It is my understanding that one-fourth or one-third of those come from the FBI. The FBI apparently is much more careful or scrupulous or wrong in withholding information. Do you have any comments on that? What group of cases or what group of petitioners go into court on appeal the most?

Mr. POWERS. Well, I would prefer to look at it with respect to the appeals that are in your first two words, that we are careful and scrupulous.

Mr. DRINAN. The courts aren't necessarily so fine. As I read the case law, they haven't so stated. They said that in one case that extraordinary circumstances were present. But that question has not been resolved. The volume of cases that are being appealed from the FBI is extraordinary. I frankly almost thought of appealing myself. I went to a lawyer who specializes in this. I could figure out with his help that all the information that was withheld was withheld on a very silly basis, that you could piece together in fact what was withheld. But other people may expect that they have a right. Frankly, I think the FBI was ridiculously scrupulous in cancelling out things here. For example, they sent me a copy of an antiwar petition published in the Washington Post or the New York Times. They went through it and blanked out the names of other people who signed it—a public record in the New York Times. That is on its face ridiculous. But has this question come up, that you are inviting loads of appeals?

Mr. POWERS. What we are faced with—as I put in my statement, we can reject just going through and releasing everything without examining the documents. I believe we are careful and scrupulous. We intend to be so. I spoke about Mr. Shea before. And Mr. Shea has indicated to us that he thinks the FBI does an excellent job in the processing of documents. There has been evolution over a period of time in our understanding and interpretation of the act and court decisions. There were some things that were perhaps taken out a year ago for one reason or another. I would anticipate that there will be further evolution. We are trying to get to that point, that we are doing everything possibly we can to implement the act without affecting any vital Government interest. We hope we are working toward that end.

Mr. DRINAN. Is this the position of the Department, that Quinlan Shea said he would like to have a flat exemption for investigative records in the current law, including the right to not necessarily admit that we have such a file? Is that the official position of the Department of Justice, that you want to narrow and weaken the law?

Mr. POWERS. Not narrow or weaken the law, but with respect to the particular thing in an ongoing case, that we would just have—there would be a flat exemption.

Mr. DRINAN. Is that the official position of the FBI?

Mr. POWERS. That would be of major assistance to us.

Mr. DRINAN. In other words, you are pushing that?

Mr. POWERS. In connection with an ongoing investigation.

Mr. DRINAN. What about including the right not necessarily to admit you have such a file?

Mr. POWERS. There are instances, which I have put in my prepared statement, that a procedure to that effect would be of immeasurable help.

Mr. DRINAN. It would be beautiful if you could say we don't have a file on the American people.

My time has expired. I look forward to the reporting within 20 working days. Thank you.

Mr. EDWARDS. Mr. Powers, what would you do under the Freedom of Information Act if you get a request for your files on Lou Gehrig and "Babe" Ruth, both deceased athletes, what is your next step?

Mr. POWERS. At the present time it appears that we will have to process such a request, and that certain portions of that file, if we do have such a file, may be released. It will then boil down to a question as to what may and what may not be an unwarranted invasion of privacy.

Mr. EDWARDS. So you would release the information. But, if a private citizen wrote in and said, please send me the criminal records of Lou Gehrig and "Babe" Ruth, you would say that your regulations prohibit that?

Mr. POWERS. I'm sorry, Mr. Edwards, I don't—

Mr. EDWARDS. Well, the criminal records are public records, the arrest records, conviction records of the people, those are public records. But the dissemination thereof, of which there are a collection at the FBI headquarters—they are confidential insofar as private individuals are concerned, you cannot write in as a private citizen and ask for my criminal record—you could write but the FBI would say: "No, I am not going to send it to you, we are not in that business." And yet I can't understand, under the Freedom of Information Act you can send out information that you have collected about other American citizens that might be derogatory.

Mr. POWERS. I don't know if I can take your first premise that that is true. That is the problem that we are faced with. I mean I cannot give a specific answer now. If someone writes in and asks for a record of a Congressman, then what we are faced with then is, with respect to certain information, if there is any in the file, would the release of that be an unwarranted invasion of privacy. If the particular prominent individual involved did have an arrest record we will ask, since it is in a sense a public record, would the release of that be an unwarranted invasion of privacy to that individual.

Mr. EDWARDS. You wouldn't release it? There are some laws in certain States that would make it a crime.

Mr. POWERS. Right. But it would be something that would have to be looked at, I mean it would not be a flat out "No." And, specifically, when we are not talking about a deceased but a living individual, we would go to that individual and ask him to seek the authority of the person about whom they are requesting the record.

Mr. DENNIS would like to add a word to that if he may.

Mr. DENNIS. Could I just add, if an individual wrote in and asked to have an arrest record of the Rosenberg's, we would probably give that out.

Mr. EDWARDS. Not under your guidelines you would not.

Mr. DENNIS. We have already given it out under the Freedom of Information Act, under instruction from the Department. And to go on down to whether or not Tom Breen has an arrest record, under our procedure we would not do it. But the invasion of privacy goes all the way from the Rosenberg's down to Tom Breen. And under the Freedom of Information Act, in a balancing of the public need to know versus the right of privacy, does the public need to know what is in the files of the Rosenberg's. The Department says yes.

Mr. EDWARDS. That is quite a judgment to ask you people to make.

Mr. DENNIS. That is what I am saying.

Mr. EDWARDS. I wonder why you have not had meetings with the Department of Defense and the CIA at the middle or high level to try to determine what their policy is.

Mr. POWERS. We have had meetings with a number of other agencies, Mr. Edwards.

Mr. EDWARDS. I am afraid we have to go.

Unless there is objection, we will terminate these hearings now.

Thank you.

Mr. DRINAN. Thank you.

And I want to thank you, Mr. Powers. And we look forward to hearing from you.

Mr. EDWARDS. We all thank you.

I think we are discussing the subcommittee visiting your shop perhaps next week or the week afterward to get an idea as to what your problems are.

Mr. POWERS. We would welcome that.

[Whereupon, at 11:50 a.m., the subcommittee adjourned subject to the call of the Chair.]

FBI OVERSIGHT

Freedom of Information Act Compliance by the FBI and Plan To Eliminate Backlog

THURSDAY, SEPTEMBER 16, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:05 a.m., in room 2226, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, and Butler.

Also present: Alan A. Parker, counsel; Catherine LeRoy, assistant counsel; and Roscoe B. Starek III, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Good morning. Today we continue our oversight hearings which we began on July 29th, looking into the compliance of the Federal Bureau of Investigation with the Freedom of Information and Privacy Acts.

At our previous hearing on July 29th, we requested the Federal Bureau of Investigation to prepare for us a proposal relative to Freedom of Information and Privacy Act requests which would specifically address itself to the means of disposing of the existing backlog of such requests and additionally be able to handle on a current basis the incoming future requests. We asked that that proposal be prepared and presented within 20 working days.

On August 26th, I received a letter from the Director, Mr. Kelley, which was distributed to all the members of the subcommittee and which I will now enter into the record, unless there is objection, informing me that the proposal would be completed on September 1st and forwarded to the Department of Justice on that same date.

[The letter referred to follows:]

UNITED STATES DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., August 26, 1976.

Hon. DON EDWARDS,
*Chairman, Subcommittee on Civil and Constitutional Rights, Committee on the
Judiciary, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: Your Subcommittee requested during the testimony of Mr. James M. Powers of this Bureau on July 29, 1976, that the FBI submit a proposal relative to the administration of Freedom of Information Act requests. This proposal was to specifically address means of disposing of the backlog of such requests. Due to the complexity of the problem in drafting such a plan, it will not be possible for the FBI to complete its work on this project until Sep-

tember 1, 1976, at which time it will be forwarded to the Department of Justice for their review and forwarding to the Subcommittee. I hope you can understand the problems which make necessary the delay in the submission of this proposal.

Sincerely yours,

CLARENCE M. KELLEY, *Director.*

Mr. EDWARDS. Today we have invited representatives of both the Department of Justice and the FBI to be here with us this morning to discuss the proposal and its implementation.

I would also like to enter the proposal into the record, unless there is objection, and we can then proceed to discuss it.

Our witnesses today are Quinlan J. Shea, chief of the Freedom of Information and Privacy Appeals Unit of the Department of Justice; L. Clyde Groover, section chief of the budget and accounting section of the finance and personnel division of the FBI; James M. Powers, section chief of the Freedom of Information-Privacy Act section of the records management division of the FBI; and Michael L. Hanigan of the Freedom of Information-Privacy Act section, records management division, FBI.

Gentlemen, we welcome you and thank you for your diligent efforts in preparing and forwarding to us this proposal.

Mr. Drinan, do you have a statement?

Mr. DRINAN. I thank these gentlemen for coming. I am particularly pleased to see Mr. Quinlan Shea here with whom I have had association for many years. I look forward to their testimony.

Mr. EDWARDS. Gentleman, we welcome you, and will you raise your right hand to be sworn?

[Witnesses duly sworn.]

Mr. EDWARDS. We welcome you. I believe that Mr. Shea has an opening statement. Mr. Shea, you may proceed.

TESTIMONY OF QUINLAN J. SHEA, CHIEF, FREEDOM OF INFORMATION AND PRIVACY APPEALS UNIT, DEPARTMENT OF JUSTICE, ACCOMPANIED BY L. CLYDE GROOVER, SECTION CHIEF, BUDGET AND ACCOUNTING SECTION OF THE FINANCE AND PERSONNEL DIVISION, FBI; JAMES M. POWERS, SECTION CHIEF, FREEDOM OF INFORMATION AND PRIVACY ACTS SECTION OF THE RECORDS MANAGEMENT DIVISION, FBI; MICHAEL L. HANIGAN, FREEDOM OF INFORMATION AND PRIVACY ACTS SECTION OF RECORDS MANAGEMENT DIVISION, FBI; AND RICHARD M. ROGERS, DEPUTY CHIEF, FREEDOM OF INFORMATION AND PRIVACY APPEALS UNIT, OFFICE OF THE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. SHEA. Mr. Chairman and members of the committee, I am Quinlan J. Shea, Jr., chief of the Freedom of Information and Privacy Appeals Unit, Office of the Deputy Attorney General. I am accompanied by my deputy, Mr. Richard Rogers. I appreciate the opportunity to appear before you today on behalf of Attorney General Levi to comment on the proposal prepared by the Federal Bureau of Investigation at your request.

That proposal, itself, recites the magnitude of the administrative burden which has befallen the Bureau in the area of Freedom of In-

formation Act and Privacy Act operations. It also recites the totally unforeseen commitment of resources in this area that has already been effected by Director Kelley.

As we all know, however, not even this very generous commitment of resources could keep pace with the increasing magnitude of the problem. The Bureau's proposal is a sincere and conscientious attempt to formulate a plan to clear up the large and growing backlog of unprocessed requests and to achieve a posture in which incoming requests can be processed efficiently.

The Department of Justice has considered the Bureau's proposal as thoroughly as the constraints of time have allowed. We continue to agree totally with its basic premise that the sensitivity and importance of many of the Bureau's records mandate careful review prior to release, in order to insure that no vital interest of the Government is compromised.

Once that premise is accepted the only real question remaining is whether the various assumptions as set forth in the proposal are valid.

The most important of these are the number of requests that will be received, the number of pages that will have to be reviewed and the processing rates that can reasonably be expected to be achieved. We in the Department are satisfied that, taken together, these assumptions are a reasonable projection of what the future is likely to bring.

Against this background, the Bureau's conclusions become a matter of simple, inexorable mathematics, coupled with what we believe is a valid apportionment between structural reorganization and the temporary diversion of personnel to this area of operations.

The current budget for fiscal year 1977 includes some \$3.4 million for direct FOIPA operations. I add parenthetically that that is for the Bureau.

To accomplish the goals of the proposal, it will be necessary to divert additional personnel resources to this area and the total estimated cost for fiscal year 1977 will be \$11.8 million. Again, that is only for the FBI.

Manifesting his own perception of the importance of the proposal and convinced that there is no alternative to it, Director Kelley has already initiated certain preliminary phases of the plan. The Department of Justice supports the Bureau's proposal—drastic situations require equivalent remedies—and we will seek the requisite authority to submit to the Congress a request for any necessary supplemental appropriations for fiscal year 1977.

What the Department does not accept is the projection of the FOI/PA branch into the indefinite future, at an estimated noninflation adjusted cost of \$6.4 million per year. We are committed to the maximum practicable release of departmental records, but we simply cannot accept the proposition that such a continued expenditure of money and the full-time activities of almost 400 persons are appropriate, when weighed against the other important missions assigned to the FBI.

We believe that there is a better long range solution—a reasonable reformulation of the access provisions of these laws in light of the peculiar and complex considerations presented by records created and maintained for law enforcement purposes, or, in the alternative, separate statutory provisions governing access to such records.

Mr. Chairman, this subcommittee had already expressed a willing-

ness to explore with us these matters of mutual concern and we are most appreciative of that fact. We hope that our willingness to support the Bureau's proposal, at least for fiscal year 1977, will be accepted as proof of the present commitment of the Department of Justice to responsible openness in Government.

Our department accepts without reservation the proposition that the American people are entitled to know, to the greatest extent practicable, what their Government is doing, how it is doing it and with what results.

We assert with equal vigor, however, the proposition that so-called openness which impedes legitimate law enforcement processes does not serve the American people well and is contrary to their interests and desires.

On a number of occasions, Deputy Attorney General Tyler—who is responsible by delegation from Attorney General Levi for the day-to-day operations of our department in this area—has offered both personally and through his staff to join in a reasoned and constructive mutual effort to identify the principal sources of administrative burden under these statutes with a view to modifying those which provide no comparable public benefit in the area of records compiled and maintained for law enforcement purposes.

On behalf of both Attorney General Levi and Deputy Attorney General Tyler, I renew that offer today. There are certainly areas in these two statutes which could be clarified. One is the extent to which privacy considerations should or should not preclude releases to third-party requesters.

The third-party privacy area under the standards of unwarranted and clearly unwarranted invasions of personal privacy has turned out to be incredibly complex and time-consuming. Another matter warranting clarification is the precise quantum of information actually contemplated by the last sentence of section 552(b) requiring the release of any reasonably segregable portion of any requested record. The reasonably segregable provision requires the total review of records within the scope of a request, even where there is no possibility of the release of any significant information from those records to the particular requester.

Other questions for consideration are whether we should have to admit the existence of an open, active investigation in order to claim the 7(A) exemption; whether the protection of the reputation of a dead person is of any interest to our society at all and whether a reexamination of the fee provisions of these two statutes is not overdue.

Should we be able to substitute "information" for actual "records," at least when it would help to preserve the identity of a confidential source?

Is there a reasonable way to distinguish—in terms of the applicable time limits—between a request by, for example, an anti-Vietnam war activist for records we may have pertaining to himself and a request encompassing thousands or tens of thousands of pages on some broad subject of general interest? As this subcommittee fully realizes, this list of topics could easily be expanded, but there is no need to do so at this time.

In conclusion, the Department of Justice supports the proposal of the Federal Bureau of Investigation for fiscal year 1977. During that

time we urge this subcommittee and the Congress to work with our department in reconsidering carefully the proper interrelationship between two very important societal interests—openness in Government and the valid needs of the law enforcement process.

That concludes my prepared statement, Mr. Chairman. Mr. Powers and I would welcome the opportunity to respond to any questions the subcommittee may have.

Mr. EDWARDS. Thank you, Mr. Shea. The gentleman from Massachusetts, Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman, and thank you, Mr. Shea. I note in the document that you sent to us here, the proposal to clear up this backlog, that a large number of files have been destroyed. My recollection is it is in the area of a million.

There are files, I understand, on 6.5 million Americans and most of them are not related to law enforcement at all. I read from the report, I-4, from beginning to end, that the 6.6 million investigatory files encompassed information concerning many who are innocent and many implicated by association only, including those who cooperated with the Government as well as persons who may be brought to trial.

A lot of these have been destroyed under powers that you feel you have. I read from II that, of these 6.6 million cases, 1 million have been destroyed pursuant to the authority of the National Archives and Record Services.

Why didn't you destroy most of them? It is just a ballpark figure here: 1 million were destroyed pursuant to authority, 1.7 million exist on microfilm, and 3.9 million are hardcase files.

Mr. HANIGAN. Our position is that we would like to pursue the file destruction program. However, for the past year, as you know, we have been operating under a moratorium in cooperation with Congress.

Mr. DRINAN. When did you destroy the million?

Mr. HANIGAN. The million had been destroyed during the history of the FBI.

Mr. DRINAN. How did you select the million? Why didn't you select another million?

Mr. HANIGAN. We pursue the regulations in agreement with the National Archives. It is their responsibility as well as ours to agree on which records can be destroyed. Pursuant to that authority, 1 million have been.

Mr. DRINAN. What happened to that authority?

Mr. HANIGAN. That authority was temporarily suspended in agreement with Congress.

Mr. DRINAN. What body of Congress?

Mr. HANIGAN. It was the minority and majority leaders of the Senate.

Mr. DRINAN. What did they say?

Mr. HANIGAN. They did not wish to have any of the files destroyed.

Mr. DRINAN. You should not capitulate to politicians if you have the power. Why did you capitulate? If you had the inherent power to destroy 1 million, maybe there is another 3 million you could destroy.

Mr. HANIGAN. I think the Director felt it was a reasonable request.

Mr. DRINAN. Well, he is wrong again.

I read all of this and we could go on this way for months and months. If you don't want to do it, you don't want to do it. If you really wanted

to do it, you could do it. For example, back in the days of civil rights and the freedom movement, the civil rights division needed extra help and attorneys from other divisions were temporarily assigned to civil rights.

Has the FBI requested the Attorney General to make such temporary assignments during this crisis?

Mr. POWERS. I believe the Director has taken an extraordinary step already with respect to the overall plan and a reorganization of our personnel right now is ongoing in an attempt to put us in a status or posture whereby we will be able to handle requests on a current basis.

You say we do not want to do it or reasons could be thought up why we would not do it, but I want to point out that we have already commenced an effort to comply to the maximum extent that we can right now. We have taken some affirmative action in that regard.

Mr. DRINAN. You are asking for \$11 million plus. In the recent budget request that you made, how many additional funds did the FBI ask for this FOIA backlog and what happened to that?

You knew months ago that this was a problem you had and it was not, contrary to what Mr. Quinlan Shea says, totally unforeseen. It was not unforeseen nor unforeseeable. What was the response of OMB and what happened in the appropriations committee?

Mr. POWERS. The amount asked for was \$3.4 million for 202 employees and it was approved.

Mr. DRINAN. It was foreseeable then that that was much too small.

Mr. POWERS. At that time the allocation of resources was felt to be a substantial diversion bearing in mind our basic mandated investigative function.

Mr. DRINAN. It is just totally contradictory. You did not foresee what you were supposed to do under the law. You said well, we are not going to enforce that law. It was foreseeable at that time that \$3 million was not enough if today you say you need almost \$12 million to do it.

You didn't foresee the needs, that is all. You are coming to us and saying we need this. I am prepared to recommend a supplementary appropriation.

All I can say is you miscalculated. Mr. Shea, do you have any thoughts on that?

Mr. SHEA. The only thought I have on that is one of, I think, perhaps frustration would sum it up as well as anything else. We started in this area--I was up in the civil rights division and just before Mr. Silberman went to Yugoslavia, the last thing he did was to recruit me and then go. We really anticipated that maybe the 100 appeals of the prior year would go to 300 or 400 the next year and I and maybe a secretary or two and a couple of lawyers would handle all of the appeals.

A 300- or 400-percent increase was what we thought. I am now authorized, for just appeals in the Department, a staff of 26 persons and I have a backlog on the appeal level. Every time we have tried to anticipate the future, we have been wrong and we have been wrong in one direction. We have been low.

The proposal says we think that the increase will--the new requests will come in as they have come in in the past. The September issue of a newsletter sent by American Express to its 7 million cardholders tells them how to request their files from the FBI.

We have consistently underestimated.

Mr. DRINAN. So you are agreeing with me. My time has been consumed. Mr. Chairman, I want to come back to that agreement, which I never heard of before, with the leaders of the Senate.

I never heard about that. I thought this subcommittee had jurisdiction over this matter and here we are told, after two, or three, or four hearings on this matter, that they told you not to fulfill your statutory powers and destroy these records, many of which are useless.

My time has expired.

Mr. EDWARDS. The gentleman from Virginia, Mr. Butler?

Mr. BUTLER. Thank you, Mr. Chairman.

I appreciate the testimony of the witnesses. It is my understanding our function today is to examine the report requested by this subcommittee outlining the proposal to eliminate the backlog. The Bureau was given only 1 month to carry out this extensive study and draft a proposal and I have reviewed it, and I want to compliment the Bureau for its thorough work in compiling the data.

My real concern is whether the Federal Bureau of Investigation is still involved in law enforcement. How much further did we fall behind in processing requests during the time that went into preparation of this proposal?

I will not put you in the position of answering that, but my conclusion is that you have done a very good job in response to our requests. I think you are swimming upstream. I appreciate the problems you have.

It seems to me that the problems are going to grow. We have to work together and do the best we can to cooperate with the Bureau and see how we can be helpful to you in meeting your statutory requirements. I am not upset about the moratorium on file destruction which was worked out with the leaders of the Senate.

One question still lingers in my mind. Exactly how fast do you process a particular request? Does a lawyer have to review each and every request?

Mr. POWERS. We feel, sir, because of the complexities of the two acts that at this particular point in time, yes, having that type of a background is essential. As time goes on, and I believe it was set forth in the plan, perhaps a reevaluation may be made at some time.

But at this point in time, I honestly feel that it is essential. Sir, we have a number of meetings with Mr. Shea on a continuing basis. I would not say daily, although there are some weeks that it is on a daily basis, with his associate, Mr. Rogers, personnel from the FOIPA section at the FBI and we have a number of discussions among ourselves, the purpose and intent being to comply to the maximum extent possible with the acts.

We have a number of reasonable differences, I would say, between both the Department and the FBI and within the FBI, among agent personnel, in interpreting how a particular exemption should, in a sense, be handled.

It is extremely difficult.

Mr. BUTLER. Are you making any effort to train what we would call paralegals in the private sector to pursue this and assume this responsibility?

Mr. POWERS. No, sir, not at this time. You could say that our analysts

are now in that position. Hopefully, with the separation of the branch as we now envision it, between a pure disclosure section so that information will get out in a rapid manner, and an operations section to support that function and look into the aspect you mentioned—something like that may be feasible at some future time.

Mr. BUTLER. Explain, if you will, the administrative appeal processes. What prompts an administrative review and who can initiate one?

Mr. POWERS. I will defer to Mr. Shea on that since it is with Mr. Shea's unit that that particular process occurs.

Mr. SHEA. Did you mean administrative appeal to the Deputy Attorney General, sir?

Mr. BUTLER. Yes.

Mr. SHEA. The requester initiates the appeal. It can either be from a failure to get a response or it can be on the merits or it can be both. At that time, and we also follow the sequential process, the case is assigned to one of our attorneys or the paralegals.

They go over and they review either all or certainly a very substantial representative sample of the documents that were withheld. After that, they draft a memorandum addressed to the Deputy Attorney General who personally decides every single one of these appeals within the Department of Justice from all components, not just the FBI, although they certainly are my principal client.

They are not my sole one. That memorandum—some of them are generic. Occasionally we will get a bunch of appeals that deal with different ramifications of a problem. I remember spending the best part of a couple of weeks doing a memorandum to the Deputy on the question of third-party privacy considerations in the context of a historical interest case such as the Rosenberg and Hiss records.

You have the feeling you are counting jurisprudential dancing angels by the time you get through addressing the societal interests involved in that. The Deputy makes the call and then his decision is sent to the appellant. The appellant can go to court and many of them go to court first and that has turned out to be a contributing factor to the backlog.

The court, understandably in light of the provisions of the statute which say give these cases top priority, will do it. In the Meeropol case for Rosenberg records, the Bureau to comply had to put something like 60 people on it and pull them off processing other requests to processing *Rosenberg* case records.

That sort of thing just wreaks havoc with any administrative system that you have set up. We also—I am also the Deputy's adviser on general questions in this area and try to assist him in every way that I can to oversee his responsibility from the Attorney General, which is to run this. Mr. Tyler's instructions to me are very simple. He read these statutes and he said, in effect, it is loud and clear. Congress has said, release every record that you can.

They have said that there are certain kinds of records that you may withhold but they have also made it clear that if you don't have to withhold those records, they would prefer that they be released to the requesters and to the public. His instructions to me are to enforce the letter and spirit of that law.

Mr. BUTLER. That is the basic policy on which you are proceeding?

Mr. SHEA. That is it, sir.

Mr. BUTLER. Thank you.

Mr. EDWARDS. The subcommittee asked for a plan and you have given us a plan. And now is the Department of Justice going to ask for the money to implement the plan?

Mr. SHEA. Yes, sir. But I must say that I speak just for the Department of Justice. I can't speak for the Office of Management and Budget.

Mr. EDWARDS. It is going to take 591 people in two sections, one using 200 agents to get rid of the backlog in the crash program and the other raising the 220 currently allocated slots to 391 to process incoming requests. That is roughly what it will entail.

But I don't understand one part of your study. It says here on page 29 that slightly over $17\frac{1}{2}$ requests per-working day constitutes new material to be processed and yet on page 78 on the top you indicate that the backlog increases an average of 100.7 requests per week. That $17\frac{1}{2}$ requests per working day does not seem to me to be too much of a statistical burden.

Mr. POWERS. Well, what we are talking about—Mr. Chairman, the 18 requests per day out of the number received are those that are going to actually be processed. That constitutes a little over 18,000 pages a day that need be done.

In that light, rather than just the number of requests, gives you a better idea of the volume of work involved. I think it may be well at this time to make a point, too, which I do not believe that I made at the last hearing with respect to the number of requests that we have received.

There was some comparison with requests received by other agencies. Up to this point in time, we have considered it as just one request when an individual writes in even though that individual may be asking for, let's say, about 51 different people.

If you gentlemen remember, at the time you visited the Bureau following our prior meeting, that was discussed. There can be and are a number of instances in that regard. While we say it is one request because it came in from one person, it could be for just that individual or relate to 5, 10, or in one particular case 51 separate things.

Mr. EDWARDS. But you would receive, perhaps 75 requests or whatever the average is—what is the average?

Mr. POWERS. Seventy-two requests per day.

Mr. EDWARDS. But only $17\frac{1}{2}$ of them are going to entail work. Is that what you are saying?

Mr. POWERS. Of these 72—our average per day this year—35 percent, based on the review we have done, amounts to a no-record request; that is, we have no record of that individual or whatever incident there may be in our files. Well, let's work on the basis of 100 requests being received. Of those, 35 are no record.

Following that, 40 percent are thereafter closed on an administrative basis at the time we get to processing the request. We may find that the files reflected from the search are not identical with the individual requesting the record.

At that time we would so tell him. Additionally, there will be instances where we have asked certain information necessary to even comply with a request, that is, sufficient descriptive information, other

administrative things and no reply is made. If the requisite information is not received, they are not processed further. That amounts to 75 percent. Of every 100 we would actually be going forward and working on 25 percent of the requests received. But even with that number, it puts us in the position that we are in now.

Mr. EDWARDS. On page 3 of your report, you describe the problem, that is the heading for that particular section. You don't really describe the problem to us so that we can understand it as well as you can.

We asked you at the last hearing for a breakdown of these requests, how many come in from people in prison, how many are security cases, just names that you have in your files of people, just security cases? How many are from different sources? Do you have that off the top of your head? Where is the big burden, from scholars asking for all the information you have on the Communist Party, for example, which really would be very distressing to get that and I think you did get that request.

Mr. SHEA. Yes.

Mr. EDWARDS. What are you going to do with that request? I hope you sent it back to him?

Mr. POWERS. I appreciate this opportunity. I was going to ask if I might get this on the record. At the time you did visit us, we had the answers to the questions you asked during my prior appearance and we had done a sampling of 100 closed requests and, for the record, I would like to tell you that at that time of the 100 that we had 36 were of a security nature, 41—this will be percentage—41 percent were of a criminal nature, 10 were of personnel files—that would be applicants and Bureau personnel requesting their files.

Mr. EDWARDS. Bureau personnel requesting their own files?

Mr. POWERS. Yes, either former or current personnel or other Government applicants.

Mr. EDWARDS. What percentage?

Mr. POWERS. Ten percent. These are individuals requesting their own files.

Mr. EDWARDS. Are these FBI agents?

Mr. POWERS. And FBI applicants also.

Mr. EDWARDS. Asking why they didn't get accepted.

Mr. POWERS. Additionally, 2 percent were informants, individuals who had been informants previously and were requesting information. Eleven percent relates to general matters, material, administrative measures, a wide variety of matters.

Of the 100 requests, 72 were from citizens, 6 were from attorneys acting for someone, 3 from scholars, 5 from the news media, 2 from students and 12 from prisons.

Mr. EDWARDS. That was a breakdown of the 41 percent?

Mr. POWERS. No, that was of the 100 reviewed.

Mr. EDWARDS. The gentleman from Massachusetts?

Mr. DRINAN. Thirty-six percent were for security. How many relate to the domestic intelligence program?

Mr. POWERS. I would have no way of knowing without the actual review of the files, which this survey did not include.

Mr. DRINAN. What harm would be done if you sent everything to them? The law says that, and Mr. Quinlan Shea agreed. Why not

adopt the rule: When in doubt, let it out? Why don't you just take it all and send them? What harm would it do? All the Socialists are going to be asking for their information.

What benefit is done in keeping it? Why don't you send it to everybody? It would be cheaper.

Mr. POWERS. I believe there are valid considerations here not only for danger to some individuals, but for those who have furnished information on a confidential basis and those that have assumed an informant's status.

Mr. DRINAN. Putting aside the question of informants, take the thousands of people who are going to write in pursuant to the revelations regarding American Express. They are just ordinary people. Maybe there is a file on them. Why don't you just take the file and send it to them? These are ordinary people like myself.

You have sent a million away already to the archives. How many files do you think are absolutely useless? If you sent a million away, 15 percent of all the stuff you have, how many more millions could you send away with no casualties to anybody?

Mr. POWERS. Well, we will not know that unless we review the file.

Mr. DRINAN. You sent a million away.

Mr. POWERS. The act requires that certain information not be released.

Mr. DRINAN. When did you send the million away?

Mr. HANIGAN. That was over the entire history of the FBI.

Mr. DRINAN. You must have some norms. Why can't you use those norms? Isn't that one of the ways to get rid of this problem?

Mr. POWERS. That would certainly be of assistance to us in the FOI section if the files were not there. [Laughter.]

Mr. DRINAN. I am going to help send those files to the Archives or something. I don't know about the moratorium. That may or may not be wise. All I can say is if you have some standards for the destruction of these 1 million files, there is probably another 2 million which can be destroyed also. I believe the committees in the Senate will say go ahead.

I think that frankly you can't come forward and ask the Congress for \$12 million when you don't give us any norms as to how many of these 6.6 million files could easily and really should be destroyed.

More than one-third involve so-called "national security." You say security and that is a big, tight word as if they are all spies. It does not mean a thing. It just means that they were against the war.

Mr. HANIGAN. Mr. Powers said that more than one-third requests involved security files. He did not say more than one-third of the files of the FBI involve security matters.

Mr. DRINAN. One-third of all these people bothering the FBI every day with requests involve security matters. That means that they are against the war or they wanted civil rights. Why don't you impound or destroy all those cases or send them out blanket?

With one-third of the 72 every day, there shouldn't be any problem at all. If they are security, just send it by return mail. One-third of the problem goes away.

Mr. HANIGAN. We don't include civil rights investigations. That is an interesting point you made. We don't consider civil rights investigations as security files. We have had a number of requests from the subjects of civil rights matters.

Let's take a police brutality case. There is a police officer who would like to have the names of all the witnesses and the statements of the victim and all the information so he can pursue whatever his own purposes may be. We have also had a number of requests from the victims in such cases.

We don't consider, first of all, that that is a security investigation. It is a criminal violation which we pursue pursuant to the direction of the Civil Rights Division of the Department of Justice. Are you suggesting that we should release those in toto?

Mr. DRINAN. Don't put words in my mouth. You say 41 percent are criminals. Why don't you carry out the guidelines of Elliot Richardson who says if the file is over 15 years old, release it.

Just send it out. Why do you need lawyers to review it? There is no harm in sending it out. When in doubt, let it out.

That is the whole thrust of the problem. Everything has to be reviewed as if you have some secrets there. It is a lot of junk that you have, for example, clippings from newspapers. Send it out. People will think more of the FBI.

Mr. POWERS. We have an obligation to the people regarding information in the files. Because of the very nature and structure of our files, that tack cannot be taken.

Mr. DRINAN. I disagree with that because I know dozens of people who have written to me that there is nothing in their files which you sent to them that has any national security implications. Until you come forward and say that a number of these things contain something that could be dangerous, I am not prepared to give you the \$12 million.

I will be insisting more and more that you release everything. You have the burden of showing that in these cases. I have seen hundreds of files of people which contain nothing. You should not have been collecting them in the first place.

This is obvious. All I say is release it and the people will know that this was collected foolishly and unwisely, but that it is no longer there. You have the burden to say we have to go over every single one of these 36 percent of the cases which are security.

I repeat to you, and I say categorically, that means they were against the war or they were for civil rights.

Mr. POWERS. We have that burden because that is imposed by the act.

Mr. DRINAN. If you want the \$12 million to clear up the backlog, you have to demonstrate to me that you have to go through this procedure in these cases where this procedure is a waste of time. You have not carried the burden and demonstrated the need. I say release those things, release 36 percent just like that by return mail.

I see no reason why you have to go through all this elaborate procedure and withhold this and withhold that. I think that you are in violation of the FOIA which says if in doubt, release it.

My time has expired.

Mr. EDWARDS. Mr. Butler?

Mr. BUTLER. I think the Bureau has made a pretty good case for the additional money, and I would expect to support it when the opportunity arises. I have no questions, Mr. Chairman.

Mr. EDWARDS. What are you going to do if you don't get the money?

Mr. POWERS. Well, Director Kelley has authorized that we do go ahead and we have gone ahead already with a reorganization. He is

confident that the funds will be forthcoming, recognizing the intent of Congress of what they hoped would be done by these acts. He is willing to take that step and has taken that step.

I feel very strongly, sir, and I am sure that Mr. Shea will have a word on this, that this is not the final solution. The only solution can come with some legislative relief with respect to the acts themselves. This will have an impact on the operations of the Bureau and I think the funds being expended is going to cause concern to a great number of people.

While we are willing to go forward and have started, I think there are a number of other areas that have to be looked into.

Mr. EDWARDS. Mr. Shea, in his statement, made a case that we will discuss later for legislative changes, which incidentally are not the responsibility of this committee. Also throughout the report is a theme that you need lawyers to properly analyze these various requests.

Yet I notice that out of 8,000 special agents in the FBI, 1,258, or only 16 percent, are lawyers. I know that is not the subject of this hearing today but I cannot but express some dismay that, in the good old days when I was an agent, it was almost 100 percent lawyers and CPA's. Now you are down to 16 percent. Those few lawyers that you have left as special agents must have more of a burden than I would like to think about.

Mr. Powers, would you care to comment on that?

Mr. POWERS. It will have an impact with that number. The staff that we have on hand right now and the task force of 200 starting in January will substantially affect field operations in certain areas. They will have to prioritize certain investigations in the field. I believe, because of the complexity of the act, that attorneys are needed.

I think they will be able to proceed faster in the processing of requests and they will serve the ultimate function of being available, through a training program, to assist field operations. That is a subsidiary benefit but it will be of some value.

I actually think at this point in time that it is essential that we continue on, that agents engaged in the processing of these requests have a law background. If I may, Mr. Edwards, in responding to your other question when you were asking about the numbers from whom the requests were received and what they thrust toward, you had also requested—asked me at the last hearing—and although I have advised you orally, I would like to put on the record the question of funds received pursuant to FOIPA matters.

During fiscal year 1974, the FBI, just dealing solely with FOIPA matters, expended \$160,000. During fiscal year 1975, \$162,000 and during fiscal year 1976, \$2,591,000. To date since 1973, we have taken in in toto \$29,064.72. When I say taken in, not that we are running a market, I mean the charges for the duplication of documents and any search fees.

The sum was, as of September 15, \$29,064.72.

Mr. EDWARDS. Thank you for those figures.

I might add as an aside that the subcommittee is making a study of the personnel practices which would have to do with the low percentage of lawyers now in the FBI. Assuming the subcommittee is still in existence next year, after the next Congress, there will be a series of hearings with the purpose of assisting the Bureau in analyzing better their personnel practices and possibilities for improvement.

I have one last question before my time expires. I notice that the law requires that you prepare a report or implement the act when an alien living abroad makes a request. Do you have to process that under the law?

Mr. HANIGAN. Yes, we do.

Mr. EDWARDS. Suppose somebody from Moscow writes you a letter?

Mr. SHEA. Mr. Chairman, in fairness to the Bureau, I think I should say that we overruled them on that. The Privacy Act says that a requester under the Privacy Act must be a citizen or a resident alien but the Freedom of Information Act says any person.

The Bureau said if he is an alien living overseas, he can't make a request under the Freedom of Information Act. We said that is not what the statute says. We overruled them on that.

Mr. EDWARDS. So someone in Moscow, asking for all the information you had on Chairman Mao, you would go ahead with it?

Mr. SHEA. We feel they are required by law to do so. I hope they would not bend too far over backwards to help them out.

Mr. EDWARDS. I think you have unanimity on the subcommittee hoping the same thing.

Mr. Drinan?

Mr. DRINAN. I want to get back to the guidelines by which you destroyed a million of these files. I assume you are not building up files that are needless and that will be the subject of requests later on. When you did destroy these million files over a period of time, I assume you had some guidelines.

If so, I would like to see them.

Mr. POWERS. I would be happy to respond for the record as to the Bureau's efforts in that connection, the procedures and norms that you refer to.

Mr. DRINAN. Generally what were the norms?

Mr. POWERS. Time plays a factor in it. I do not have with me the exact guidelines or destruction rules but if you recall the last time we were here, one gentleman from the records branch was here and he would have been in a far better position to furnish you in entirety what the norms are and procedures would be.

It is governed by the Code of Federal Regulations and I would be happy to respond for the record and give it to you in entirety, sir.

Mr. DRINAN. All right. But if someone had not agreed to this moratorium, and I don't know the nature or the extent or the time duration of it, but if that were lifted, would the destruction of these files pursuant to those amended guidelines or guidelines, would that be a way of getting some relief?

Mr. SHEA. Yes, sir. I do think there is a countervailing situation—a consideration that is running here. There is a feeling within the Department and without the Department that to the extent that individuals have perhaps been injured by record—Mr. Levi's COINTELPRO outreach program, to review records of people who were hurt and contact them and also for people who we would not make that judgment on, to give people who were in the movements you are concerned with a reasonable opportunity to come in and ask for their records and let them make their own judgment as to whether or not they were unfairly treated or in some way harmed by Bureau activities.

We also feel that in the long run, certainly, the best solution, because the record that no longer exists cannot hurt anyone any further, is for a record that was either improperly collected or is no longer necessary because it does not pertain to a current need or mission of the FBI, it should be destroyed.

It should not be a matter of permanent record if it is not a proper record to be kept.

Mr. DRINAN. Did you make these arguments to the leadership of the Senate?

Mr. SHEA. I was not involved.

Mr. DRINAN. You are involved in it in spades, sir. You are asking us for \$12 million to produce documents that you think should be destroyed.

Mr. SHEA. Mr. Drinan, there is something called the Interdivisional Information System which is sitting locked up down in the Department. It has been deactivated and we don't need it anymore. We have decided it probably violates E-7 of the Privacy Act because it definitely gets into exercise of first amendment rights.

During the summer, Mr. Tyler sent a letter to Dr. Rhodes, the Archivist of the United States, asking that that record system's contents be evaluated to see if anything in there had historical value in which case we would want to transfer it to the Archives.

[The letter referred to follows:]

THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., May 20, 1976.

Dr. JAMES B. RHODES,
Archivist of the United States,
Washington, D.C.

DEAR DR. RHODES: The Department of Justice maintains a system of records known as the Inter-Divisional Information System (IDIS), which was designed to store information relating to civil disturbances. The system was deactivated on October 17, 1974, and is no longer necessary for any operational or administrative purpose within the Department.

The system is composed of information on magnetic computer tape and on approximately 88,320 5x8 cards, which were generated by the information contained on the computer tape. These cards consist of "subject" cards (white or green) and "incident" cards (orange). They are filed alphabetically by individual name. They are also cross-filed by the names of particular organizations and by geographic areas (city or state). The "subject" cards number roughly 28,000 and contain such information as name, aliases, date of birth, address, membership in organizations, FBI file numbers, arrests and criminal record, spouse, and information relating to activities. The "incident" cards contain information such as name, a description of a particular civil disturbance incident, the use of weapons and the identification of any vehicles used at the incident. Also included within this system of records are master computer printouts, computer flow charts, documentation of the computer program and various memoranda relating to the system. In total, these records occupy six card file cabinets, two safes and one locked file cabinet.

I have determined that it is improper for the Department of Justice to maintain a deactivated system of records concerned, to a great extent, with the exercise of free speech, association and assembly. In fact, its continued existence within the Department may well violate the Privacy Act of 1974, specifically 5 U.S.C. 552a(e) (7). On the other hand, I am not convinced that destruction of this particular system of records, in whole or in part, is in the public interest, given its probable historical value. Whether that historical value exists and, if so, to what extent are judgments that must be carefully made. It may be that the potential danger in preserving at least some of this material is sufficient to outweigh its historical value and warrant its destruction. Perhaps an appropriate balance can be struck by eliminating at least some individual identifiers. The fact remains, however, that if we, as a government, are to learn from our mistakes, we must not lightly destroy the records of these mistakes.

In light of the serious questions raised by the continued maintenance of this file by the Department of Justice, I am requesting that the National Archives and Records Service evaluate the IDIS files pursuant to 5 U.S.C. 552a (b) (6) to determine if these records have sufficient historical value, in whole or in part, to warrant preservation. Access to these records may be obtained by your staff at their convenience by contacting Mr. Donald E. LaRue at 376-8728.

Your assistance in this matter is greatly appreciated.

Very truly yours,

HAROLD R. TYLER, JR.,
Deputy Attorney General.

Mr. SHEA. If it didn't, we would request destruction authority. This was the biggy, so to speak. Well, one of the things that is alluded to in the letter from Mr. Tyler—I might add copies of which were sent to Senators Scott and Mansfield, and Representative Rodino in his capacity as chairman of your committee, Representative Abzug in her capacity as chairperson of the Oversight Committee and Senators Ribicoff and Kennedy—and there is a statement in there that this should be looked at very carefully. "The fact remains, however, that if we as a government are to learn from our mistakes we must not lightly destroy the records of these mistakes."

There are some considerations in here, Representative Drinan, that warrant very careful consideration. I think that there probably are records that should be destroyed eventually. I think we should take all steps in the interim to insure that such records are not further accumulated.

If it has been established by our guidelines committee that it is improper to do so—this is a very complex area.

Mr. DRINAN. That does not quite add up in my mind.

Mr. BUTLER. Will the gentleman yield?

Mr. DRINAN. Yes.

Mr. BUTLER. When you listed the people to whom you sent copies of Mr. Tyler's letter, I noticed you did not send any to Republicans except Senator Scott. Is that an oversight? I won't require the gentleman to answer, but I hope you will convey that message.

Mr. DRINAN. Mr. Shea, another point in this long document here, it is repeatedly stressed that the problems arise from the FOIA and the Privacy Act, but that is not substantiated by the figures that follow.

The privacy exemption is relied upon only 117 times to deny information. Interagency memo is relied upon 99 times. Internal personnel rules is relied upon 781 times. Exception 7, the investigatory file was relied upon several thousand times. This does not seem to be important, relatively speaking.

Mr. SHEA. Representative Drinan, the Privacy Act only came into effect late last year and it was sometime before the full impact developed. One of the first conflicts which turned into a major crisis in the Department was whether the Privacy Act had repealed the access provision of the Freedom of Information Act as to records of individuals.

Were they complementary statutes or were they exclusive statutes? They were complementary. Under our departmental regulations, we go both ways. The conflicts involve primarily—within the FBI itself not very much because all of their investigatory records have been exempted from the access provisions of the Privacy Act except for those that get into these areas of applicants and background investigations conducted by the FBI.

That did require a revamping because K-5 of the Privacy Act which permits you to attempt—and I only say attempt—to conceal the identity of your source is not coextensive with 7(D) of the Freedom of Information Act which permits you to withhold information obtained only from a confidential source.

We keep getting into it.

The two statutes don't mesh 100 percent. I think that is a charitable understatement. These problems are not major because the FBI is doing the great majority of them and their investigatory records have been exempted from the access provisions of the Privacy Act.

But it did complicate our life further.

Mr. DRINAN. That is interesting but not responsive. My time has expired.

Mr. EDWARDS. As soon as the second bell rings, we will recess for a minute. But did you say the investigative files are exempt?

Mr. SHEA. The Privacy Act permits the head of an agency to exempt under sections J or K certain types of records from the access provisions of the Privacy Act. Not ununderstandably, that was seized upon as a basis for an argument that led to this question of whether in effect it meant that people could not get access to records within the scope of the Privacy Act.

The departmental regulations on it require that any record contained in a system of records which has been exempted from the access provisions of the Privacy Act will nevertheless be reviewed under the same old standards of the Freedom of Information Act that had always been in effect.

So in operation, the individual gets access to whichever way of looking at it gives him the greatest access to his records. We felt that although the language was not crystal clear perhaps on the interphase that that was the intent.

That was the Deputy Attorney General's decision when this matter was formerly presented to him within the Department.

Mr. EDWARDS. The House of Representatives had millions of files for a long time on radicals, left and right. You know how we handled it? We had the Judiciary Committee study the matter and the Judiciary Committee, the full committee of which this is a subcommittee, decided to take all of those files and lock them up forever, 50 years or whatever. And of your 36-percent security files, quite a number of those files, I would presume, would fall into the category of radical files. Is that correct?

Mr. POWERS. A main portion, yes, sir.

Mr. EDWARDS. That is something that you could consider asking permission to do.

Mr. DRINAN. If the chairman would yield, that is precisely the point I was getting at. Of the 36 percent, more than one-third of the burden could be eliminated. They are not lucky enough to be Members of Congress so they can't be sent away on that basis.

But it would help if you would determine that a number of those files involve so-called radicals or extremists, call them what you will, and either send them directly to the people and no harm will be done, or impound them and put them under the Archives.

You have the power to do that.

Mr. EDWARDS. The subcommittee will recess to move to the floor of the House for 15 minutes.

[Voting recess.]

Mr. EDWARDS. The subcommittee will come to order.

Mr. Parker?

Mr. PARKER. Thank you, Mr. Chairman. Mr. Shea, on August 18, 1976, Chairman Edwards wrote a letter to the Attorney General. In that letter, he requested that any and all instructions given by the Department to the Bureau relative to processing requests under the Freedom of Information and Privacy Acts, be forwarded to the subcommittee.

As of today, I do not know of my knowledge that we have received an answer to that request.

Mr. SHEA. Sir, we did send an answer to that letter. I will certainly furnish an additional copy. It was an interim response which in effect indicated that there are two matters covered in the letter, the guidance and the plan and that we were trying to work on the plan and we would comment on the plan and we would be putting the other stuff together.

Most of the guidance to the Bureau is in the form of the decisions of the Deputy Attorney General, unless through the consultative, persuasive process. Under this my personnel reach agreement as to whether a supplemental release is appropriate.

The bulk of the formal guidance is simply the decision, the letter back saying it is modified, the records that were withheld, one, two, three, four, and five shall be released to the appellant.

Mr. PARKER. I assume there are a number of interdepartmental memoranda indicating the policy which the Bureau is to follow with respect to Freedom of Information and Privacy Act requests. You talked earlier about some collision between the Privacy Act and the Freedom of Information Act. Some of that has been reduced to writing, hasn't it?

Mr. SHEA. Yes.

Mr. PARKER. Do you know what the decision is by the Attorney General and whether we will receive that material?

Mr. SHEA. I have not been apprised of the decision. We will be getting to that matter now that we have got the plan and have come up with the assessment on the plan as indicated earlier. We have been doing that and trying to do the other things, too, and we will respond.

Mr. PARKER. I am sure you can understand that we feel there is some interrelationship between the FBI and the Department of Justice in how these requests are answered.

Mr. Powers, when the chairman said what are you going to do if you don't get the money, you said that Director Kelley has already authorized you to go ahead with the reorganization. Could you be a little more precise about that? Does that mean you are presently engaged upon enlarging the division to 391 personnel?

Mr. POWERS. That is correct.

Mr. PARKER. So, the structure which is outlined just after page 38 of your proposal which shows the breaking up into disclosure section and operation section is going to go ahead?

Mr. POWERS. That is what we propose doing.

Mr. PARKER. Then I ask the question again, what if you don't get the money? Does that mean that all of the personnel will be taken from somewhere else within the Federal Bureau of Investigation?

Mr. POWERS. That is correct.

Mr. PARKER. That would be an additional 137 people transferred from other sections?

Mr. POWERS. Whatever personnel would be needed to raise our complement from its present onboard quota right now of 194, up to 391, yes, would be absorbed from other areas within the Bureau.

Mr. PARKER. Does that also mean that the crash program—I don't know the specific name that you give the program to get rid of the backlog, but which is bringing in the 200 special agents, that has been authorized and will go forward?

Mr. POWERS. At this point in time, the Director has informed the Department in the transmittal of the plan to the Department that he was taking the extraordinary step of going forward with the reorganization.

He reserved, if that is the correct term, he reserved for himself the prerogative that if the funds were not forthcoming, he would reconsider his stance at that time.

Mr. PARKER. Does that mean that the timetable included in your proposal is operative—the administration's word—that it is going forward according to the timetable in the proposal?

Mr. POWERS. As close as we possibly can, yes. There are a number of problems with respect to space as well as personnel. But, we have gone forward where we could acquire space.

The building is fully occupied right now. We have, however, taken some affirmative steps.

Mr. PARKER. Just to make it perfectly clear again, subject to whatever minor delays there are in acquiring or changing personnel and getting some space, we can assume that this whole proposal is being implemented as of today?

Mr. POWERS. The reorganization aspect of the plan is ongoing right now. The crisis or task force aspect will be dependent upon the funding. It will be up to the Director as to what course of action he will take at that point in time.

With reference to the plan as to the reorganization, we are going forward. As to the January special aspect in bringing in the personnel, the Director at some point in time will make the decision and I assume it will be dependent upon the financing as to if and how that phase of the plan will go.

Mr. EDWARDS. If the gentleman would yield, in accordance with the guidelines of the Attorney General with regard to the domestic security cases, the Bureau has substantially reduced the number of open cases. It closed the Socialist Workers Party the other day which I am sure will lessen the workload of the Bureau.

There are \$60 or \$70 million spent per year on domestic cases. Thousands of cases will not be opened and thousands of cases have already been closed according to the testimony received by this committee.

Perhaps there were 100,000 or 200,000 open security cases in field offices that have now been reduced to almost 2,000.

I hope the Bureau and the Department of Justice are keeping that in mind, that there may be personnel released and available for this kind of work because that is not anywhere near the burden that it was 1, or 2, or 3 years ago.

Mr. SHEA. Well—

Mr. POWERS. Well, I would assume—I am not privy to as much information as you have, but I would assume that planning on an on-going basis as the Director does, that it would be up to him to prioritize his objectives. If, assuming personnel would be available from a decline in a specific area of investigation, he would then take into consideration where that personnel would and could go.

There may very well be a number of other areas that he would like to intensify and has not had the luxury of available personnel. I would leave that up to Mr. Kelley.

Mr. PARKER. Thank you.

Mr. EDWARDS. Proceed.

Mr. PARKER. Back to my original question. I don't mean to try your patience. On page 55, you have your time schedule for both the FOIPA Act and the backlog. In September, there are personnel notified by September 30, and do I understand from your answer that that will go forward?

Mr. POWERS. What are you talking about?

Mr. PARKER. In the box in the lower left-hand corner. It says personnel selected on September 25, 1976, and personnel notified on September 30, 1976, that they are going to be part of that backlog plan. I assume you are going to keep that timetable subject to a review of moneys available in January.

Mr. POWERS. Right. Everything will be dependent upon the receipt of the funds. But Mr. Kelley has said he is taking this extraordinary action to show his good faith that he is going forward.

Some of the aspects in the plan involving reorganization will be dependent upon the acquisition of space within our own building. With regard to the backlog we may institute some procedures, testing, or planning for the personnel who will go into that phase.

We may not take the final step of acquiring the personnel to eliminate the backlog if the necessary funding is not forthcoming. We are trying to hedge our bet in a way.

Mr. PARKER. Your response to me is limited to just the backlog plan. You are going to implement the entire branch reorganization regardless of the availability of funds?

Mr. POWERS. Yes, we are going forward but it is with the expectation that the funds will be forthcoming.

Mr. PARKER. Then I am back to where I started from with my first question. Director Kelley has authorized you to go ahead with the reorganization. Is that dependent on getting the money or are you going ahead with the reorganization within the Bureau and the Department of Justice regardless of any future supplemental authorizations?

Mr. POWERS. If Mr. Groover would like to answer, he may have some input, but I want to make it clear that this entire effort is dependent on ultimately receiving the funds.

Mr. PARKER. All you are going forward with is planning for the reorganization?

Mr. POWERS. No. We are going further than that. We are actually making some moves toward the acquisition of certain personnel right now. We are going forward. Ultimately, the effort is dependent upon the receipt of funds and with the thought that the funds will be received.

Mr. PARKER. Do you have some other incremental plan in mind besides the one which you have supplied the committee? Is that what you are talking about?

Mr. POWERS. No.

Mr. GROOVER. Mr. Parker, the staffing for the reorganization plan will take place by taking people from other divisions at FBI headquarters and in the field who are now doing jobs which we consider essential but which can be delayed for a period of time.

Our hope is that our funding will be received which we are requesting for the Freedom of Information-Privacy Act work.

At that time we would then put those people with that money back where they came from that we are devoting to FOIPA at this time. The work that we are taking them away from can't be delayed indefinitely.

Mr. PARKER. My question goes back to the chairman's question, if you do not get the funds, do I understand it that the implementation of the reorganization will cease and those people will be sent back to their regular units?

Mr. GROOVER. If we do not get an indication that the funds are forthcoming, Director Kelley, with our staff, will have to decide whether we are going to delay something else further and continue FOI--whether the work that is being given up temporarily now to staff the FOIPA work should continue to go lacking or whether we should take the people back out of FOIPA and handle more pressing matters.

Mr. PARKER. I think the ball goes into the Department of Justice's court, Mr. Shea, your statement says you support the plan. You don't support it ad infinitum. Are we to assume that the Department of Justice is going to exercise all of its authority with OMB and the administration to get this plan funded so it does come into being?

Mr. SHEA. The supplemental as such is being picked apart by our Management and Budget people in the Department right now, as you would well imagine and expect. That is why I said to the extent that the Department determines it is necessary to go for a supplemental appropriation in this case, the Department will go to OMB.

Mr. PARKER. That decision has not been made?

Mr. SHEA. I have not been apprised. I don't have an answer to the question, Mr. Parker.

Mr. PARKER. I see my time has expired.

Mr. EDWARDS. Mr. Starek?

Mr. STAREK. Thank you, Mr. Chairman.

I would like to follow up on a point the chairman made with respect to lawyer special agents. How many lawyer special agents are there assigned to field offices and how many are in headquarters?

Mr. POWERS. I believe there is a total of 1,258. I do not know of my own knowledge what number of attorneys are at headquarters and what number are assigned to the field. The far greater proportion are, of course, out in the field offices as it were.

I can't give you a precise figure.

Mr. STAREK. With respect to the 200 special agent attorneys who are going to be brought to Washington from the field offices, I do not understand how you reach the conclusion that this would not necessarily place any undue burden on the field offices?

Mr. POWERS. I certainly hope I have not left the impression or inference or by any other means implied that that would not pose any undue burden on our field offices because it certainly will.

There is no question about that. I wish I could tell you that by doing this two less bank robberies will be solved, eight less fugitives will be apprehended, but there is no litmus paper test I can propose.

We all know that if a kidnaping goes down it will be handled. But it will have an impact on our operations. There is no question about it.

Mr. STAREK. Does a lawyer special agent have any different role in a field office than a nonlawyer special agent? Do they work in particular areas in which nonlawyer agents would not pursue?

Mr. POWERS. That is a difficult question. I am going to say that in specific areas for legal counsel and guidance in the field they do.

But as a general rule, an agent is supposed to be prepared to handle a variety of matters and would do so. There might be some particular area where a legal background would be an advantage.

Then he would specialize in that particular area. We might feel that in this particular area, a legal background is necessary. Other than that, I can't pin it down more precisely.

Mr. STAREK. I thank you.

Mr. EDWARDS. Mr. Drinan?

Mr. DRINAN. Thank you very much.

No further questions.

Mr. EDWARDS. From your statement, Mr. Shea, I think you are inferring that the Department of Justice will have some suggestions to make for amendments to this legislation. Is that correct?

Mr. SHEA. There is nothing final in terms of specific proposals or anything of that sort. We have had—I believe there have been legislative proposals with the Judiciary Committee for at least 3, possibly 5 years, to deal specifically with law enforcement records as a category of records.

That is one way of doing it. Another way is to try to deal with what is essentially sort of a vertical compartment of law enforcement records within the framework of horizontal statutes that cut across the board. We will have been under the amendments to the act for almost 2 years when the new Congress comes into session in January.

We certainly are looking very hard at our experience. I do anticipate there will be something to be said.

Mr. EDWARDS. Well, we thank you very much for helpful testimony. We will schedule a hearing for the latter part of January of 1977. We hope to discuss the matter again with you at that time.

If there are no further questions, we thank the witnesses and the subcommittee is adjourned.

[The following was submitted for the record:]

**FBI PROPOSAL TO EFFECTIVELY ADMINISTER FREEDOM OF INFORMATION AND
PRIVACY ACTS REQUESTS**

PREFACE

This report, submitted for the consideration of the Civil and Constitutional Rights Subcommittee of the House Committee on the Judiciary, is in response to their request for a proposal from the FBI that will demonstrate a current operational capacity to make timely responses to all Freedom of Information and Privacy Acts (FOIPA) requests and within one year, eliminate the existing

FBI backlog of FOIPA requests. The Subcommittee requested the FBI to complete this analysis, prepare and submit this proposal in twenty days.

The FBI has been advised by the United States General Accounting Office (GAO) that they will conduct a review of our FOIPA facility and procedures. GAO has advised they expect their review to be completed within 5 months. Although only 20 work days were involved in the actual preparation of the FBI's proposal, it nevertheless represents the contributions and analyses of over 300 person years of experience in administering requests under the amended Freedom of Information Act and the Privacy Act.

Submission of any proposal to eliminate the backlog of FOIPA requests would prove futile unless coupled with an equally effective plan to enable the FOIPA Section to keep abreast of future requests. To do otherwise would allow regeneration of another backlog and diminish the significance of the extraordinary effort proposed to eliminate the existing backlog. This is an inescapable conclusion to which analysis leads when one realizes the present backlog resulted not from any failure of will by the FBI to respond to FOIPA requests, but instead was caused by the volume of requests acting upon an extensive records system created during the past 60 years.

Individuals, researchers, historians, members of the media and all others seeking information pursuant to the FOIPA are primarily accessing the Central Records System retained at FBI Headquarters. With the exception of the Identification Division records containing fingerprint cards pertaining to applicants, armed forces personnel, persons arrested for Federal, state and local charges, admissions to penal institutions and citizens voluntarily submitting their fingerprints, all other FBI record systems are miniscule by comparison in terms of information contained. Even the Field Offices which collectively retain duplicates of their records submitted to FBI Headquarters have, under the existing file destruction program, relatively few documents over 10 years old. The central records system contains the recorded product of over 60 years of investigative effort, which correlates to a total of slightly more than 6.6 million cases investigated during the history of the FBI. Of these 6.6 million cases, 1 million were destroyed pursuant to the authority of the National Archives and Records Services, General Services Administration, 1.7 million exist on microfilm and 3.9 million are "hard copy" case files. This system is accessed through an indices that contains approximately 58 million cards. 19.3 million of these cards identify the suspect (s) or subject (s) of the investigation as well as the victims of particular crimes. An additional 38.7 million indices cards reference the names of associates, witnesses, relatives, neighbors, *ad infinitum* as well as the pseudonym or phonetically spelled counterpart of any of the above.

Both the indices and the records themselves require manual search and retrieval. To assure positive identification, a review of each record is necessary. This system was developed to be utilized on an exhaustive search basis only for major investigations. Contrary to public opinion it is not accessible by automated procedures, nor by pushing buttons on a computer.

A common misconception results from the casual application of the word "dossier," to the records of the FBI. Though some Government agencies may compile dossiers, the term is not meaningful when used in relationship to the FBI's jurisdiction. The FBI under current guidelines is concerned with a specific investigative task, i.e., the suitability of the applicant, the significance of a given security threat, the identification, apprehension and successful prosecution of the criminal. This purpose has not been confused with some vague, ill-defined responsibility to collect information concerning individuals, nor is our records system maintained on any such amorphous theory. The FBI does not collate information into dossiers.

A law enforcement investigatory file begins with a reported crime or an allegation of criminal activity in progress or being planned. At the outset of an investigation only those for whom involvement would have been an impossibility may be excluded as suspects. A gradual sifting process examining and recording the backgrounds and personal activities of many persons is necessary before a given investigation can focus on suspects, clearly identify subjects, proceed to those indicted and thereafter to persons convicted or acquitted by trial. From beginning to end, every one of the 6.6 million investigatory files encompasses information concerning many who are innocent, many implicated by association only, those who cooperated with the Government in resolving the matter under investigation as well as persons who may be brought to trial.

The FBI's success as an investigative organization depends upon and can be

attributed largely to the paper system which has developed. Our statutory responsibilities demand precision and objectivity, leading to judicial proceedings which require thoroughness and painstaking attention to detail. Our records system is a product of these demands and therein lies the difficulty. The information is received from, and concerns people to whom the Government, not just the FBI, owes a special responsibility. They have every right to expect the Government as custodian of such records, in this case the FBI, will insure the records are not misused or disseminated to their injury or embarrassment.

This FOIPA proposal is an endeavor by the FBI to cooperate with the Civil and Constitutional Rights Subcommittee to meet the challenge which "openness in government" legislation presents. As this worthy endeavor continues, care must be taken, and careful review given, to assure that any public benefits accrued by exercising the right to know are not achieved by sacrificing privacy rights or the effectiveness of responsible law enforcement.

Implementation of this proposal cannot be accomplished without the necessary additional funds and manpower as outlined.

OBJECTIVES STATEMENT--FBI PROPOSAL

1. To establish an operational structure possessing the capacity to provide timely, dispositive responses to incoming FOIPA requests.
2. To eliminate within one year the existing FBI backlog of FOIPA requests, contingent upon final implementation of this plan.

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A. THE PROBLEM

Simply stated, the problem faced by the FOIPA personnel of the FBI is that with the administrative structure and personnel on hand we have been unable to keep pace with the incoming requests due to their large numbers and due to the requirements to comply with court orders, thus leading to a lag-time in responses of some nine months to three years and a present backlog of unprocessed requests of 7,601.

HISTORICAL DEVELOPMENT AND FBI RESPONSE

Historically, the impact of the Freedom of Information Act, and subsequently the Privacy Act, upon the FBI, has developed from a nearly negligible figure in October of 1973, to one of huge proportions in August of 1976.

The commitment of personnel by the FBI to respond to requests has increased proportionally. When the historical records concept was implemented by then Attorney General Richardson's Order in October, 1973, it was in terms of requests for information contained in investigatory files compiled for law enforcement purposes which could be disclosed to a requester when the following criteria were met:

1. The requester is a bona fide scholar or researcher,
2. The investigatory file is over 15 years old, and
3. The subject matter is of historical interest to the general public.

At the time of this Order, the Freedom of Information Unit consisted of three Special Agents, three research analysts and two clerical employees.

From October thru December of 1973, only 64 requests were received amounting to an average of one per work day. This volume of requests was easily handled by the employees devoted to that task.

From January thru December of 1974, 447 requests were received averaging 1.29 per work day, again an easily handled work load.

The number of requests during 1975 averaged for the full year approximately 55 new requests per work day, totaling 13,875 with the largest single number having been received during the month of August, 2,095 requests. The last six months of the year 1975 averaged approximately 70 new requests per day.

The progression has continued through the year 1976. As of July 30, 1976, 10,841 requests were received averaging 72.75 per work day. Also during June, 1976, the all time high of 3,357 requests in one single month was reached. Illustrating further, during the two week period from June 14-25 of 1976, 2,549 new requests were received.

If the problem were merely a progression from October, 1973 of one request per working day to 73 by July of 1976, the proportionate assignment of personnel could conceivably have kept pace with incoming work. However, during this same period of time the complicating factors of court ordered preferential treatment to certain specific requests arose.

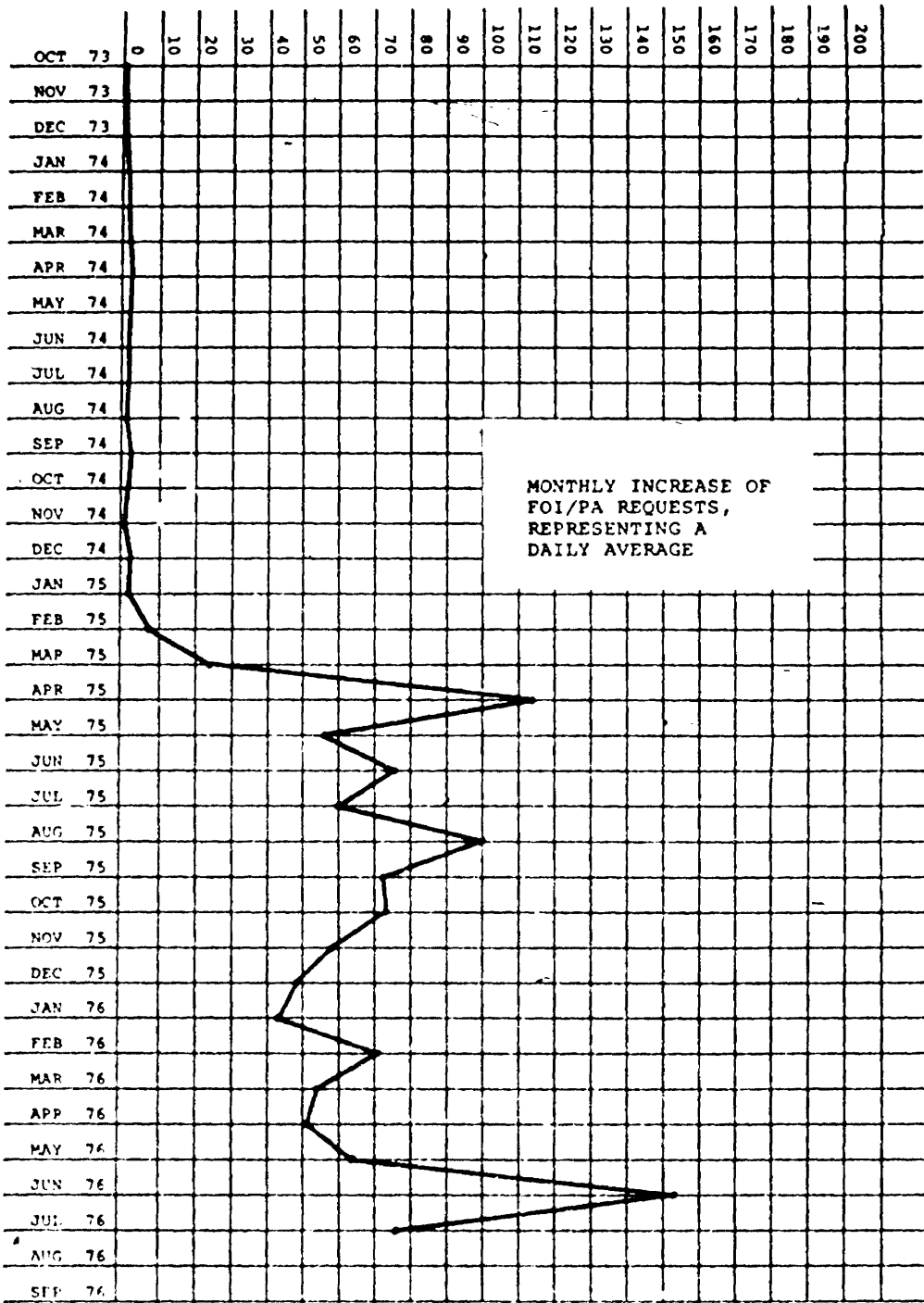
A detailed examination of all the requests assigned to the Section was made in July, 1976. This examination revealed that the FBI had "in house" 23 requests which at the end of July, 1976, required simultaneous preferential treatment by the FBI of 19, four having just been processed to completion with preferential treatment. Litigation problems, as will be explained subsequently, drain substantial numbers of personnel from handling other requests.

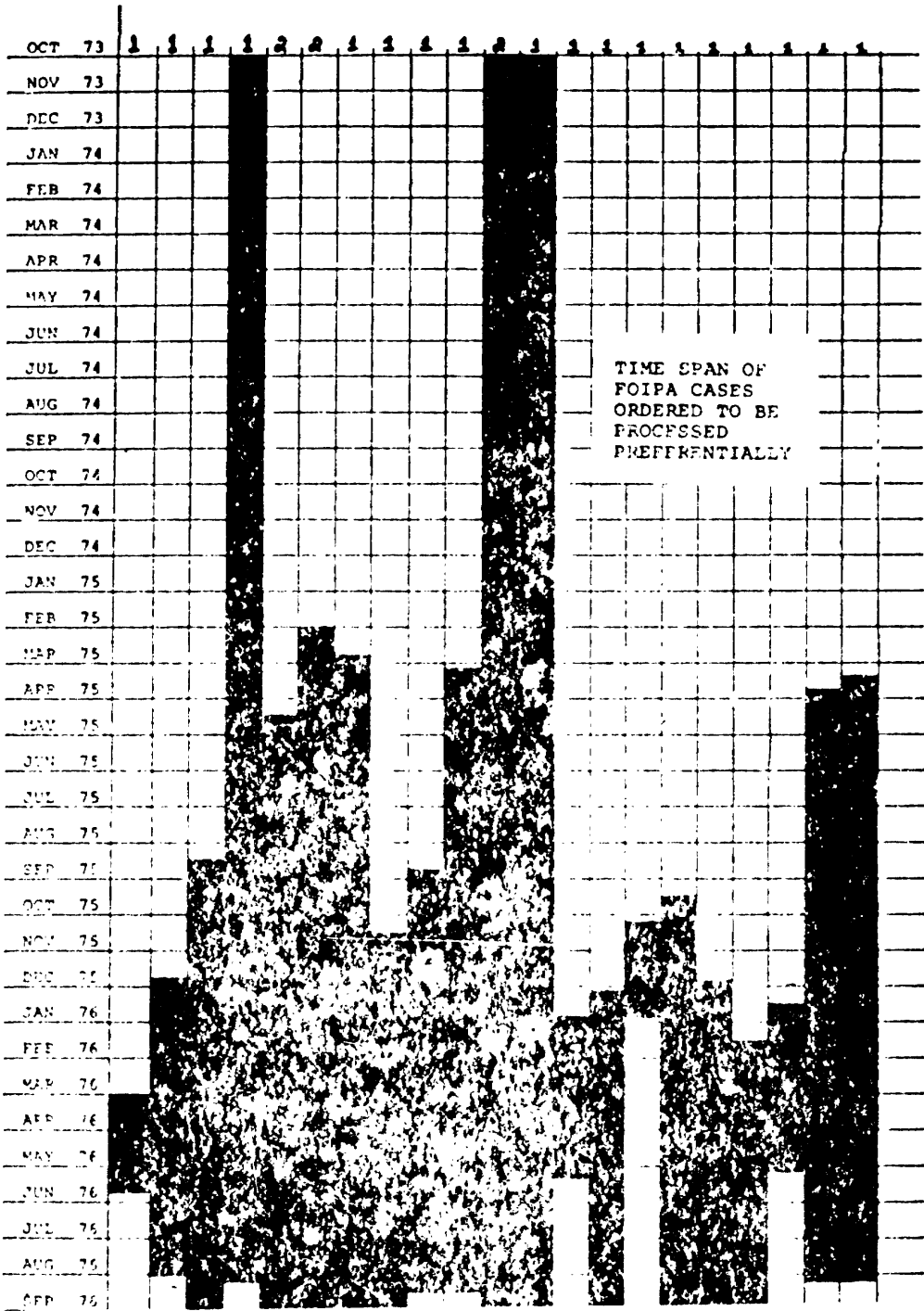
During 1974, the complement of the Freedom of Information Act Unit was gradually increased from 8 to 16 employees. In anticipation of the increase of work under the provisions of the new amendments to the Freedom of Information Act, the complement was increased to 105, then to 153 and at the present time the authorized complement stands at 220.

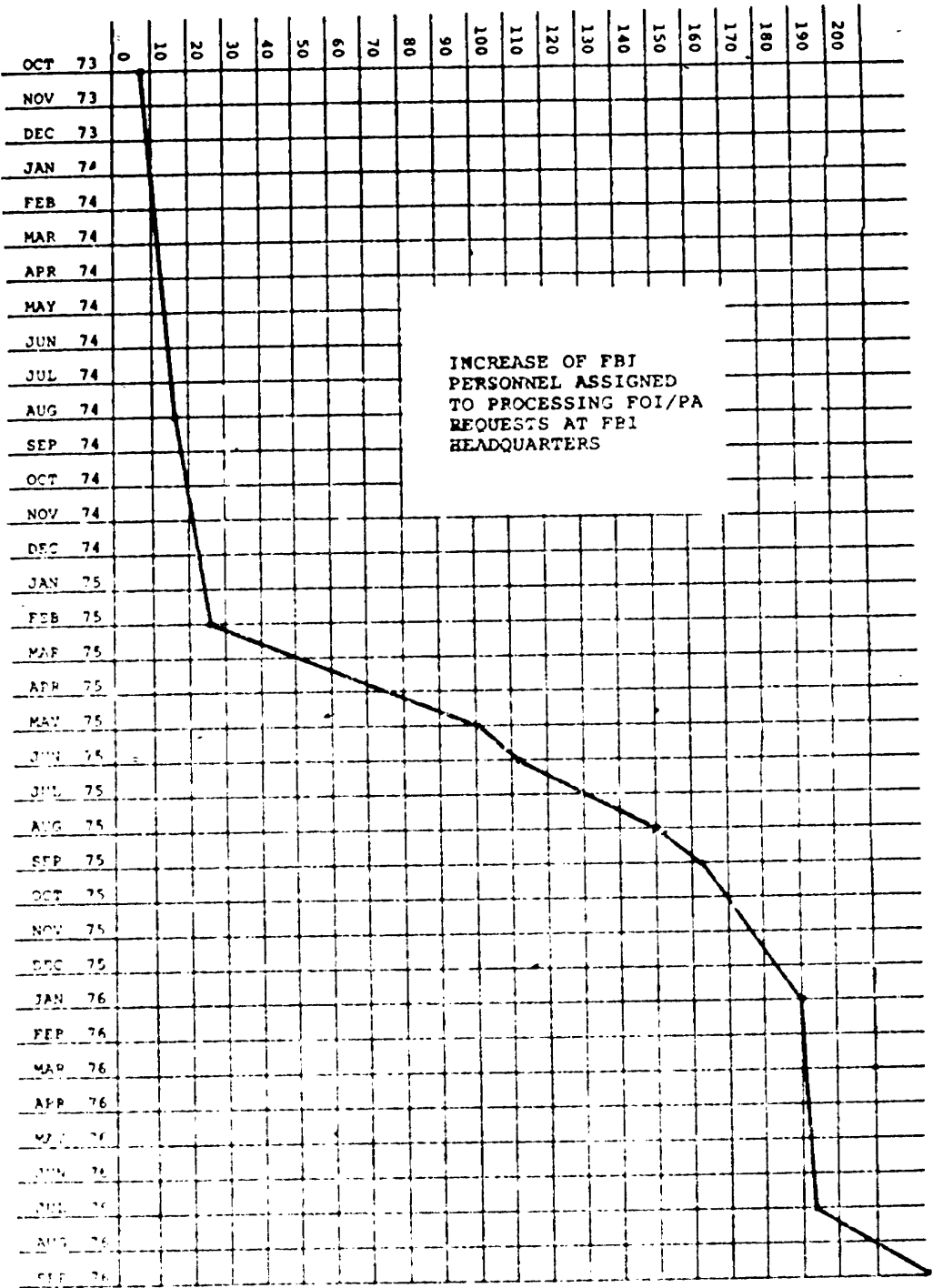
In an effort to deal with the incoming requests, the backlog of requests and court ordered preferential treatment, non-Agent personnel of the FOI/PA Section for calendar year 1975 and calendar year 1976 through August 18, 1976, worked 2,158 hours of overtime. Agent personnel from February, 1975, through July 31, 1976, worked 17,905 hours of overtime, which are the equivalent of 2,508 man days.

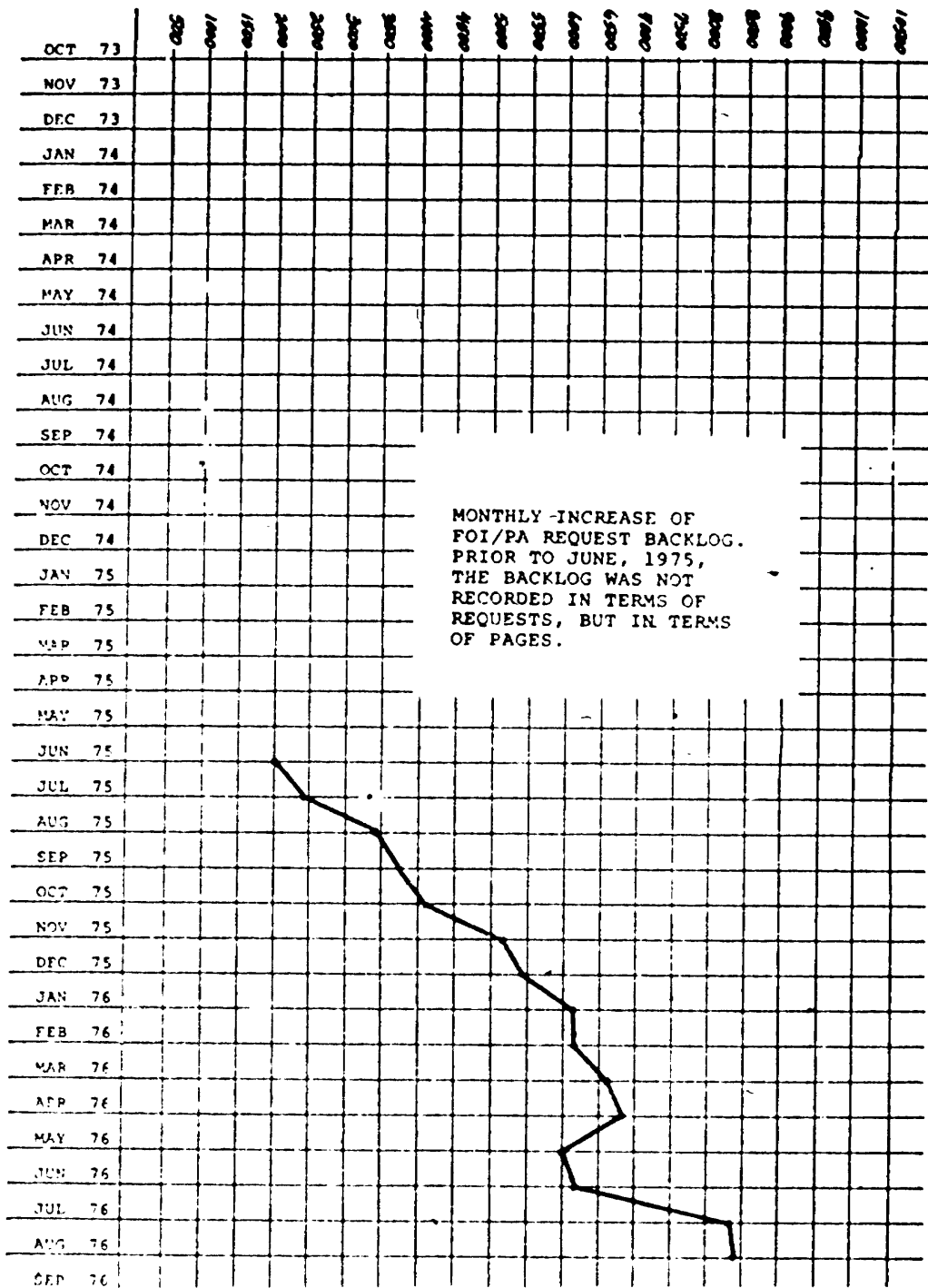
The pages following are graphic representations showing:

1. The increase of requests from October, 1973, thru July, 1976,
2. The period from inception to completion of 23 requests wherein preferential treatment was ordered, and affidavits necessitated,
3. Increase of FOIPA personnel,
4. The request backlog development.









B. INHERENT FEATURES OF THE FOIPA NECESSITATING SUBSTANTIAL PERSONNEL TO ADMINISTER REQUESTS

No conception of the need for the large number of skilled personnel can be grasped without examining specific features of the Freedom of Information Act, Title 5, United States Code, Section 552 (5 USC 552) and, to a lesser extent, the Privacy Act. Essentially, the burdens imposed by the statutes may be grouped as follows:

- (1) Access and records description,
- (2) Review,
- (3) Interpretation of exemptions, and
- (4) Litigation and proof.

ACCESS AND RECORDS DESCRIPTION

5 USC 552(a) (3) requires a dispositive response to "any requests for records which (A) reasonably describes such records . . ., provided the requester complies with any published regulations. Any person by himself or using an intermediary may request records concerning himself or others, living or deceased. The requester may be a citizen, resident alien, or possess foreign citizenship and reside abroad. He may ask for records concerning one matter or individual or may submit the names of a thousand individuals or describe innumerable separate incidents. The work must be done and search charges will not be imposed, provided the indices system is adequate to the task or, the requester seeks information concerning himself. Review and preparation of the documents will follow and the requester may choose only to examine rather than receive copies, thus avoiding duplication costs. Alternatively, a requester may elicit a fee waiver upon proof of indigency or justification of public interest.

As a repository for 60 years of investigative records, the FBI, subject to the FOIA, financed by the taxpayer's money, represents a real boon to the writer, historian, researcher, opportunist or "scandal sheet", seeking information for their varied purposes. With all the material being collated, reviewed and made available for a nominal fee by the FBI, why not? Requesters are not required to possess research credentials, nor are they required to limit their inquiries to matters of historic significance related to a specific crime or famous trial. They have only to submit a name, furnish identifying details and wait. The only restriction conceived by the statute is the limitation of human curiosity.

Under this legislation the FBI can be functionally considered just as much a component of the Library of Congress and the Government Printing Office as of the Department of Justice. Indeed requests are received addressed to the Federal Bureau of "Information", suggesting perhaps a derogatory connotation in view of recent criticism, but just as surely describing the function perceived. If the only relevant considerations were retrieval and duplication of material, the matter could be easily handled. 100 lower grade employees, 50 duplicating machines and a sizeable mailing staff would be adequate.

Serious considerations which are relevant to the records of the FBI however, cannot be overlooked. Ranging from classified materials effecting national security, through personal details involving the privacy of millions, to records that could endanger the lives of law enforcement officers and many citizens who have cooperated with their Government, these are records that cannot be accorded cavalier consideration.

REVIEW

Not only may one submit requests concerning any subject matter or person reasonably described, including oneself, the burden of review is the same for all requests. And that task is enormous 5 USC 552(b) reads in part, "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

This language has been interpreted to mean as few as three or four words on a single page regarding the subject matter; or, in some instances, it means nothing more than a person's name and address. Line by line review is compelled, whether the scope of the request is five pages, 500 or 5,000. The only computer available to perform this task is that of the human mind.

Review is an even greater burden than simply identifying that material which is not to be exempted. For in fact the analyst cannot look only for the material responsive to a particular inquiry, but must be able to justify the burden of

proof relating to any excision(s) within the record. Each excision requires a decision, regarding investigatory records, limited by the language that the exemption is applicable "only to the extent that production of the records would" result in one of six consequences (5 USC 552(b) (7)). The only guidance relative to this standard is the interpretation that the analyst must perceive a reasonable expectation that the consequence sought to be avoided will ensue if the contemplated excision were not made. Subjective at best, this standard is required to be applied to consequences of a general nature about which assayists, jurists or semasiologists could debate for years:

- (A) *Interfere* with enforcement proceedings,
- (B) Deprive a person of a *right to a fair trial* . . .
- (C) Constitute an *unwarranted invasion of personal privacy*,
- (D) *Disclose* the identity of a *confidential source* . . . and confidential information furnished *only* by the confidential source,
- (E) *Disclose investigative techniques and procedures*,
- (F) *Endanger* the life or physical safety of law enforcement personnel; (5 USC 552(b) (7))

Emphasis was added to underscore the language which allows for such a wide range of subjective interpretation. Resolving the correct application of these exemptions, and being able to sustain the burden that there exists a reasonable expectation that adverse consequences would result, consumes the best efforts of skilled personnel at a very high rate.

INTERPRETATION OF EXEMPTIONS

Interpretation was alluded to in the preceding paragraphs, but the emphasis was upon the requirement that each analyst must first decide the scope of the applicable exemption. What the exemption means in a given case becomes a completely different question that must be resolved before a response can be made to the requester. Taking the example of privacy and assuming one is talking about investigatory records for law enforcement purposes, administering the law requires a very precise delineation to be made. Information that is an invasion of personal privacy must be released. Only if the invasion is unwarranted may the material be withheld. If one turns to the general exemptions applicable to all records, i.e. "clearly unwarranted invasion of personal privacy", 5 USC 552(b) (6), the standard is obviously more severe, but the application is certainly not clear.

Does prior publicity preclude the application of the privacy exemption? To what degree, if any, does the public prominence of the subject of inquiry nullify the exemption? Can personal privacy ever be applicable to actions pursuant to public office or responsibilities?

Other exemption questions involving interpretations of extreme importance are those concerning protecting confidential sources and ongoing enforcement proceedings. A law enforcement organization is only as effective as its sources of information. Speculation will not solve crimes and the best of opinion is admissible only under very stringent evidentiary rules. Leads to the collection of admissible evidence come frequently from those persons who do not wish to testify or be identified, including persons whose lives or physical safety would be endangered if they were identified. Wherever such an individual is identified, that person and those of like mind become more reluctant to cooperate with their Government in the future. Many will adamantly refuse to "become involved" again. The analyst must recognize such persons from the records before him. The analyst must then determine if disclosure of the information would identify the source to a knowledgeable requester or his associates. This is an impossible task to achieve with certainty for the analyst possesses no crystal ball that would permit him to perceive information concerning which the requester is knowledgeable. And the statute as written allows few instances of total excision of informant information because the burden of establishing the information was available only from the confidential source is virtually impossible to prove. The current interpretation, refined by judicial decisions and the Department of Justice's Freedom of Information Appeals Unit's implementation of those decisions, is that informant information may be withheld only to the extent the identity of the source would be revealed.

As Congress correctly assumed, requesters would submit inquiries concerning ongoing enforcement proceedings and permitted denial of those, but only to the extent interference would result. Any reasonable segregable portion of such rec-

ords must be made available. Leaving aside the question of what records would interfere with any possible enforcement proceeding, the unresolved question arises when the very assertion of the exemption would thwart the investigation. Many times a successful law enforcement investigation hinges upon being able to prevent the suspect from becoming aware that law enforcement personnel have focused upon his activities.

Addressing these tasks of correctly interpreting and properly applying the exemptions takes time. And though reasonable people may differ as to what constitutes handling requests with all deliberate speed possible, no one can dispute the need for considerable deliberation.

APPEALS AND LITIGATION

The Freedom of Information Act provides not only for administrative review by appeal, but permits judicial review on an expedited basis with the Government paying the plaintiff's legal fees should the Court determine plaintiff substantially prevailed. Both procedures consume the time of those who must respond to other requests.

In conjunction with the Department of Justice Freedom of Information Appeals Unit, analysts re-examine all documents originally reviewed when an appeal is taken. Thereafter, attorneys assigned to the Appeals Unit confer with FBI personnel, examining the materials and discussing all issues raised by the application of exemptions to withhold certain records. Additional evaluations are prepared by the Appeals Staff for the Deputy Attorney General, but those aspects of the appeals do not generally involve time or effort by FBI FOIPA personnel. 511 appeals regarding FOIPA requests to the FBI have been completed. 377 remain to be dispatched.

As may be readily discerned from the foregoing discussion regarding access and records description, review and interpretation problems, and given the fact that the agency exempting any material bears the burden of proof, litigation represents perhaps the most severe drain on numbers of personnel and available expertise to successfully defend decisions made.

In order for the adversary system to function, short of total *in camera* review of exempted materials, the courts require submission of a detailed justification for every excision. Use of the word, excision, should not be confused with the exemptions listed in the statute. There are only nine exemptions, one of which contains six subparts. However, one or more of the exemptions or subparts may be used hundreds or even thousands of times in a given request. Each use is an excision. The detailed justification must describe in non-conclusory terms the factual content of every excision without disclosing the material withheld. The task is difficult enough to accomplish without jeopardizing the very interests sought to be protected by asserting the exemption; the affidavit which results is often as large as the package released and may be more voluminous than the records withheld. Four and five hundred page attachments to affidavits have already been required. Responding in this manner to the requirements imposed by litigation certainly necessitates the extensive use of personnel assigned to FOIPA.

Without belaboring the point, the statutory responsibilities of the Freedom of Information Act are considerable. The FBI as custodians for a repository of voluminous records concerning matters of great interest to the general public, has received and may expect to continue to receive, large numbers of requests accessing those records. Any feasible plan to provide timely, dispositive responses to anticipated requests will require the expenditure of several millions of dollars and the permanent assignment of many skilled personnel. Regardless of organizational structure or operational policy, though certainly important, the basic ability to accomplish the task will flow only from the commitment of substantial resources beyond those presently allocated.

C. CURRENT OPERATIONAL STRUCTURE

When a new request is assigned to a Research Analyst, the first processing step requires duplicating a complete copy of the documents contained in the files which are within the purview of the request. This is no small task when it is realized the average Non-Project request deals with 700 pages and the average Project request deals with 10,000 pages.

The next phase is the actual processing of the documents by a Research Analyst which may be a routine matter or extremely complex. In some instances maximum

possible disclosure may have been ordered by a court or the Department of Justice. In other instances very complicated issues of first instance may arise necessitating an internal policy determination or consultation with the Department of Justice. In any event, the documents are processed and will either be withheld completely, released in part, or released completely, depending on their content. Release may be accomplished by one communication enclosing all the documents to be provided the requester; or, in Project cases where the number of documents is voluminous, by partial, periodic releases. Few releases are made prior to receipt of payment for any fees due. Waiver of fees in the case of a requester who has furnished proof of indigency, or where great public interest is involved may occur. Requesters are notified of the appeal procedures available by statute in each letter enclosing, or denying documents.

CURRENT REVIEW, APPEALS, AND LITIGATION

All documents are reviewed on a page-by-page, line-by-line, word-by-word basis by analysts. The statutory requirement to release those portions of a document which are "reasonably segregable" from any portions that may be withheld, dictates this course of review. Analysts work under the direct supervision of Special Agent Attorneys to insure a proper understanding of the law.

Classified documents within the files which are FBI originated must be sent to the Intelligence Division for a determination of whether the document is currently and properly classified. Documents are forwarded by internal memorandum and the review and conclusions reached by the Intelligence Division are reduced to an addendum for recording, departmental review and litigation purposes.

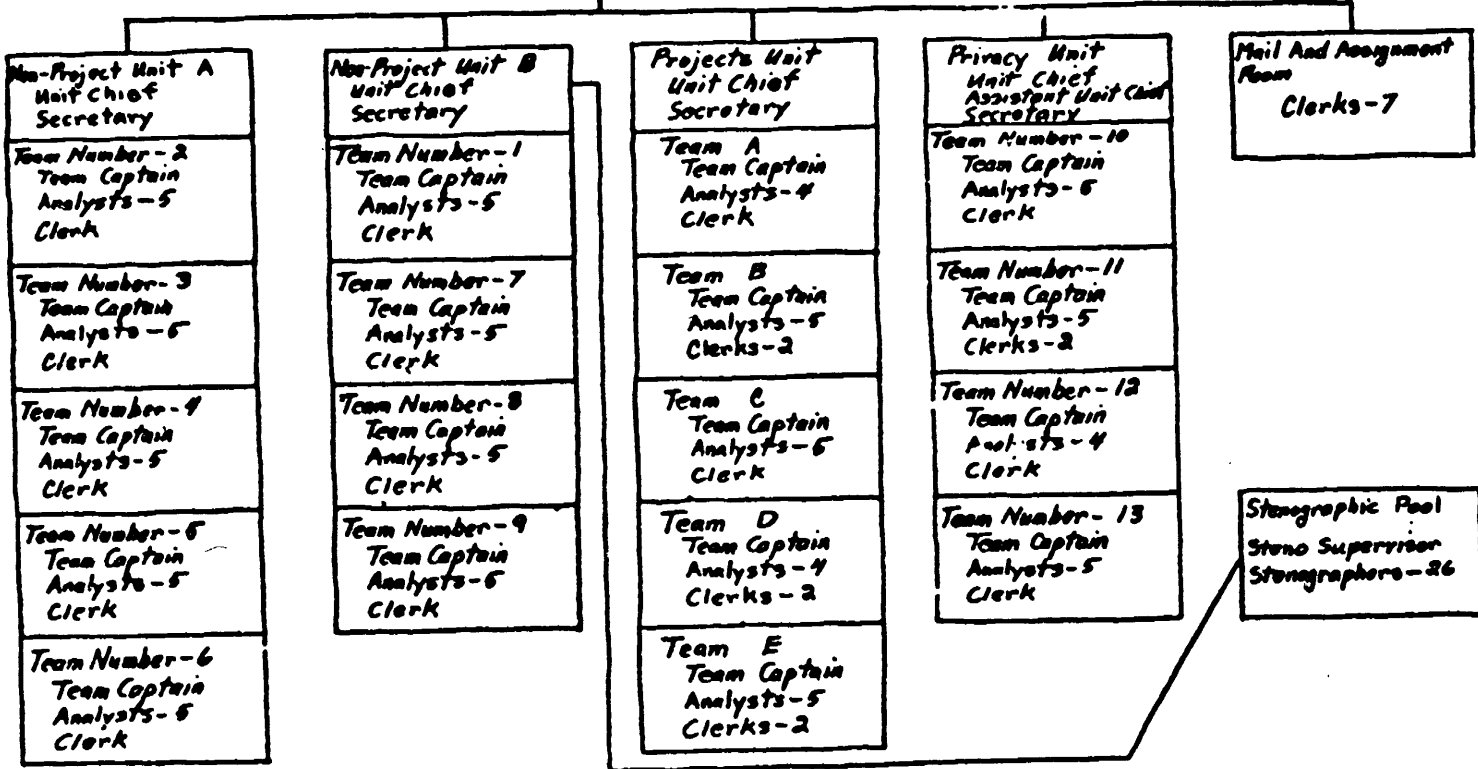
When all phases of "processing" have been completed, the material is subjected to review by Special Agent personnel. Succeedingly higher levels of review occur; normally three, but sometimes four, prior to release to a requester.

Following completion of processing and release, many requests move to the stage of administrative appeal, wherein the Department of Justice reviews the FBI's determination regarding withholding documents and/or portions of documents from a requester, and the FBI's determination is either upheld, denied or modified and the requester is so notified. The Research Analyst and the Agent Supervisor meet with a Departmental Attorney on this Appeal, often in lengthy sessions, and the rationale used in any challenged denial is examined.

A substantial number of requests lead to litigation. When litigation is instituted, almost without exception the Court will order affidavits to be submitted. In the event of litigation prior to the completion of processing, a "good faith" affidavit setting forth the reasons the FBI has been unable to comply with the timeliness required by the Acts is prepared. If the affidavit fails to convince the Court, an order is issued directing compliance by a specific date. If the Court is convinced the delay encountered is reasonable, the normal order will be more time for completion. Either situation has had similar effect on the FOI/PA Section. A request is taken out of order and given preferential treatment to comply with the Court's order, resulting in the shuffling of personnel from their current assignments to one that is most critical. And the backlog grows.

Many court orders to date have required the FBI to submit affidavits containing detailed justifications. When such an order is issued, its effect on orderly processing can be devastating. This type of order, based originally upon a decision that required detailed justifications only for a random sampling of the documents, has been extended to a point where every such order imposes an onerous burden.

FOIPA SECTION
 Section Chief
 Number One Man
 Secretaries - 2
 Clerks - 2 (T+A)



D. STATISTICAL ANALYSES AND CONCLUSIONS

FOIPA Section

INTRODUCTION

Contained in this section, discussing statistical analyses and the conclusions drawn therefrom, are four different groupings of figures.

First, the current work load of all analysts assigned to Non-Project work was analyzed.

Second, the current work load of all analysts assigned to Project work was analyzed.

Third, based on the figures derived from one and two above, there is a grouping of figures which explains the projected increase of analyst personnel needed to remain current with incoming work.

The fourth set of figures is a detailed examination dealing only with the progressive increase of the backlog, and has attached four tables which are applicable to that examination.

This discussion will separate the statistical analyses into two general categories. The first, which will encompass the write-ups of Non-Project, Project and the projection to the analyst complement needed, will constitute the projection toward Section reorganization. The second will deal only with the backlog problem. The statistical analyses from which conclusions were drawn are included in the appendix.

DAILY WORK DEMANDS ON THE FOIPA BRANCH

Based on the examination of incoming daily work, reduced by certain factors, we have determined that slightly over 17½ requests per working day constitute new material to be processed. Nearly 96 percent of the new work will be assigned to the Non-Project analysts and the remainder to the Project analysts. Having examined the currently assigned work loads of both groups, the average size, in terms of pages of work, were determined for the typical Non-Project request and for the typical Project request. These figures show that the FOIPA Branch must process and dispose of 18,253 pages of new work per day. In comparing the pages per day processed by the total analyst complement with the total pages per day of new work arriving, we have concluded that to remain current with incoming work would require 188 full-time analysts working under optimum conditions. Taking into account the unforeseen complications arising from litigation and also the size of the three Non-Project cases not included in the averaging, we have concluded that an additional 12 analysts above the 188 previously stated would enable the FOIPA Section to remain current with incoming work and have a slight hedge against contingencies. The FBI, therefore, concludes that for reorganization of the Section, 200 analysts are necessary.

WORK DEMANDS TO ELIMINATE THE FOIPA BACKLOG

Based on figures available on a weekly progressive basis we have projected that by January 13, 1977, the backlog will contain 9,917,161 pages of work to be processed. It will be a mixture of Project and Non-Project work and allowances for the different sizes have been made. After having arrived at the page count of the backlog, four charts have been attached projecting a number of personnel against productivity per person per day to arrive at a figure which is the number of months necessary to process the pages in the backlog. (See Appendix ppgs. 80-83)

Assuming prompt approval, the FBI has concluded that from September 1, 1976, due to the preparatory steps needed, we could not institute an effort of sufficient magnitude against the backlog prior to January 17, 1977. This leaves approximately 7½ months to complete the processing of the backlog and still be within the one-year time table requested by the Committee.

All four charts have a heavy line drawn in separating those figures which represent eight months or less from those figures that represent more than eight months. It then becomes a value judgment of how many Agents, from 1 to 500, processing documents at how many pages per day, varying from 50 to 375, modified by the days/hours this group of Agents could perform, to arrive at the final number of months chosen.

E. PROPOSED PLAN

1. PRESENT STATUS

To administer requests effectively, avoid serious error in coping with a task involving substantial legal complexity, and prevent impairment of the FBI's primary mandated responsibilities, certain essential policies were previously implemented. Each is considered vital not only to effective administration of the FOIPA, but also to the ability of the FBI to maintain a continuing capacity to meet its statutory obligations regarding Federal law enforcement and protection of the nation's internal security. For basic policies are involved:

(1) Use of law trained supervisors for all administrative positions within the FOIPA Section.

(2) Use of a two-track system separating the processing of voluminous cases from those involving considerably fewer pages.

(3) Use of a "see reference" policy approved by the Deputy Attorney General to expedite our response to requests, while preserving for the requester further opportunity to adequately identify any record not retrieved by the initial search.

(4) Use of Headquarter's personnel and the central records system to respond to most requests, although duplicate investigative files may exist in the Field Offices. Conversely investigations unreported to Headquarters are required to be processed by Field Office personnel, who are authorized to correspond directly with the requester.

The requirement of law-trained supervisors for the FOIPA Headquarters' operation is grounded in the legal complexities of the statutes, the necessity to provide proper instruction to the Field Offices to assure lawful compliance, and the aspects of advocacy and defense associated with appeals and litigation. With the passage of time, further judicial guidance in the interpretation of the statutes, and the development of a training and policy manual providing firm guidelines to new personnel, fewer attorney supervisors may be required. For the foreseeable future, their continued assignment is indispensable.

Adoption and continued use of the two-track system, recognized by the U.S. Court of Appeals for the District of Columbia as reasonable, permits effective control and proper assessment of personnel in responding to primarily non-voluminous or first person requests versus voluminous requests or those with historic or policy significance. (*Open America, et al. v. The Watergate Special Prosecution Force, et al.*, Case Number 76-1371, decided July 7, 1976). A balance of these interests is deemed appropriate in keeping faith with the public and the objectives of the Congress in promulgating the legislation. To reject this approach or emphasize one at the expense of the other would disrupt the FBI's efforts to act responsibly and to answer the public's needs equitably.

The "see" reference policy which concerns the search, retrieval and file review system used by the FBI to respond to FOIPA requests has been explained previously to Individual Members of Congress and the House Committee on Government Operations. Documents regarding its development, evaluation and the approval for its use by the Deputy Attorney General are contained in the appendix. (See appendix page 120). Despite the fact that the FBI's backlog has grown subsequent to the adoption of this policy, it has allowed concentration of existing personnel on their actual processing of material responsive to requests rather than using their services to review thousands of volumes, only to determine the material is either not identical with the requester or not responsive to the request. Continued application of this measure should add significantly to the FBI's endeavor to achieve and retain a current operational capacity. Furthermore the policy has considerable merit from a requester's viewpoint as it allows him to provide the detail that will permit the retrieval and identification of a record, which the FBI would otherwise have been unable to link with the requester or the subject matter of his inquiry.

Use of the Central Records System at Headquarters to comply with the requests of most persons is the policy embodied in Title 28, Code of Federal Regulations, Part 16.57(c). Conversely where investigations have not been reported to Headquarters, the requester is assured, by designation of the Field Office involved, of a complete search for any record of such an investigation. The importance may be overlooked in the rather simple statement set forth in the regulation; however, it was designed to preclude Field Offices from having to review and process voluminous case requests or a large number of less voluminous requests. Either or both situations would impact adversely upon the primary function of per-

sonnel in the Field Offices, investigation. As few Field Office personnel would be available to process requests, the burdens could become onerous overnight. Additionally there would be no way to balance a work load, governed solely by the choice of offices to whom requesters could; if the policy were abandoned, address their letters. Administrative complexities that would stem from having most of the work handled by 59 separate Field Offices are staggering to even contemplate. Common sense dictates no reversal or abandonment of this policy; and certainly to do otherwise would not further the objectives set forth at the beginning of this proposal.

An evaluation of current procedures provides the background against which proposed policy may be most critically examined. What follows is a bifurcated plan to meet the objectives established. Unquestionably problems will ensue and have to be resolved.

This proposal is intended to be a first step, and deals with very specific objectives. It is definitely not the final solution to the impact of the Freedom of Information and Privacy Acts upon the FBI. A proposal presented in any other perspective would be presumptuous; and is likely to be stillborn, despite the care taken in its conception. Necessary funding, and the further cooperation of Congress in the consideration of specific problems, will be necessary.

2. RESTRUCTURE OF FOIPA SECTION INTO FOIPA BRANCH

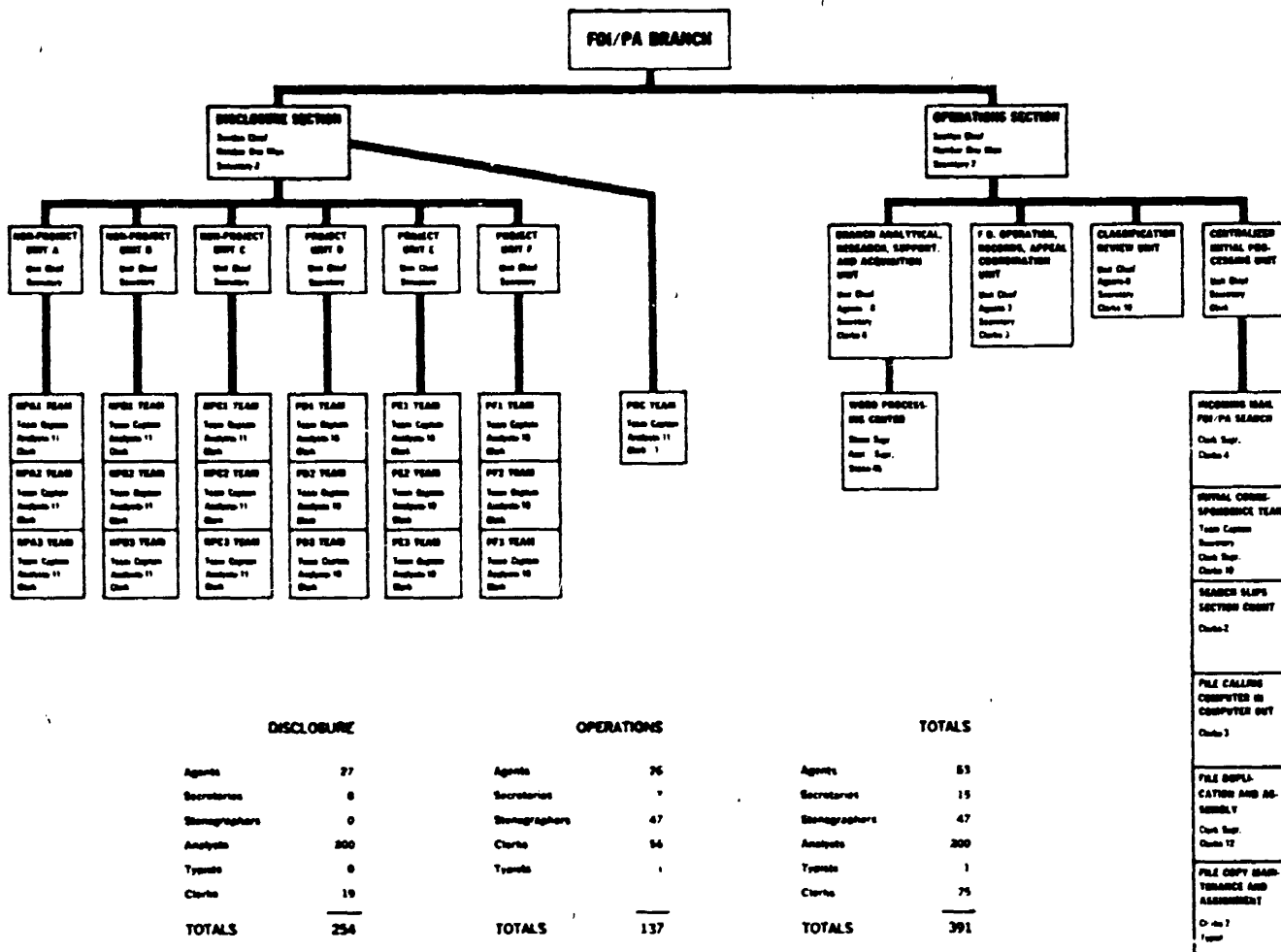
Attached immediately hereto is a chart showing the physical reorganization of the FOIPA Branch.

INTRODUCTION

The FOIPA Branch must have the capability to receive, process and make disclosure of a continuing daily work load of approximately 18,000 pages. The proposed reorganized structure is designed to achieve this capability. The Branch has been divided into two Sections, Disclosure and Operations.

This phase of the proposal deals exclusively with the Branch day-to-day operations and has been designed to achieve long range effectiveness, and the goal of maintaining a current status. However, it cannot be emphasized too strongly that without elimination of the backlog this plan cannot achieve an acceptable degree of success.

Disclosure and the essential support structure to allow the necessary level of productivity required, represent the basic features of this portion of the proposal.



A. DISCLOSURE SECTION

The Disclosure Section, headed by a Section Chief and a Number One Man, has been divided into six Units, three to handle Non-Project requests and three to handle Project requests, plus a floating Crisis Team. All Research Analysts are within this Section and have the responsibility of processing all documents. Two hundred Research Analysts have been chosen as the number needed to stay current with the new requests, with a Supervisor to Research Analyst ratio of 1 to 11 as the upper efficient level for this type work.

Past experience has proven that the greatest disruption to processing has been the shifting of Research Analysts from their own assignments to processing somewhere else on a crisis basis. Only one request has required the assignment of over 21 Research Analysts, and with the PRC Team, (Project Crisis Team), available to be assigned in whole or in part to a critical processing need, the effect of shifting personnel will be minimized.

The Disclosure Section will increase to 254 persons as indicated on the chart. Since the FOIPA Section as currently constituted is totally disclosure oriented, this represents an increase of personnel devoted to the disclosure function of 34.

A clear delineation of function is essential. Even with 254 people devoted to the Disclosure Section, it will not succeed unless the Operations Section is simultaneously implemented. The Disclosure Section must be freed from all things save the processing and release of documents.

B. OPERATIONS SECTION

The Operations Section, headed by a Section Chief and a Number One Man, has been divided into four Units.

A. The Branch Analytical, Research, Support and Acquisition Unit will be responsible for the continued monitoring of the Branch operation in terms of efficiency and effectiveness of function. It will perform all research dealing with legal developments as pertain to the Branch and will be responsible for a contemporaneous testing and acquisition program designed to fill vacancies within the Branch with an absolute minimum of delay. This Unit will supervise and assist in training all new personnel.

B. The Field Office Operational, Records, Appeal Coordinator Unit will have as its prime function the implementation, and monitoring for compliance, of FOIPA Branch, Department of Justice and Court mandated policy effecting the FBI's fieldwide compliance with the Acts. It will coordinate all administrative appeal activities, whether Headquarters or Field Office, and in conjunction with the ARSA Unit will promulgate research and analytical conclusions.

C. The Classification Review Unit will be responsible for review, under the guidelines of Executive Order 11652, of all documents pertaining to FOIPA requests, and the subsequent notifications and updating to which their reviews lead.

D. The Centralized Initial Processing Unit will be responsible for all initial aspects of handling FOIPA requests and preparing them as complete work packages prior to assigning them to Research Analysts for processing. Also included is computerized data capture and control of request assignment on a specialized basis. During the time span of the Backlog Elimination Plan, the CIP Unit will have the additional responsibility of preparing all backlogged requests for processing by the Agents on "Special".

C. COSTS- FOIPA BRANCH REORGANIZATION

1. Personnel, yearly		\$6,057,477
2. Space, yearly		241,741
3. Supplies, yearly		106,283
4. Equipment	\$126,001	
5. Transfers	102,581	
6. Communications	26,600	41,760
Total	255,182	6,447,261
Grand total		6,702,443

To reorganize the FOIPA Branch will cost \$6,702,443 during the first year, and will be reduced for each succeeding year upon removal of the one time costs of \$255,182 to a subsequent yearly cost of \$6,447,261.

D. OPERATIONAL POLICY

The FOIPA Branch will be guided by one over-riding policy, the quickest possible response to all requesters. The proposed reorganization plan has built-in features of self-monitoring, training refinement, personnel replacement and computerized data retrieval.

Front-end assembly line techniques will be instituted, and the total Research Analyst complement will be freed to concentrate on nothing but processing documents.

The Operations Section will serve to optimize the effectiveness of the FBI's response to the mandates of the Acts.

3. ELIMINATION OF THE FOIPA BACKLOG

A. INTRODUCTION

The FBI proposes a separate approach, dependent upon the reorganized FOIPA Branch as a support facility, to meet the objective of eliminating the FOIPA backlog within one year. This is to be accomplished by an extraordinary crash program utilizing a complement of 200 Special Agent Attorneys selected from the various FBI Field Offices. They would be lodged in the Washington, D.C., area on a per diem basis and work in the FBI Headquarters building, 10th and Pennsylvania Avenue. It is estimated that this complement working six days per week, ten hours per day, at an average page production per Agent per day, of 250, will have completely processed the 9.9 million pages in the projected backlog within six months from the date of inception, designated as January 17, 1977.

B. FUNCTIONAL FEATURES

This would place the complement of Agents, selected for the crash program to eliminate the backlog, contiguous to the reorganized FOIPA Branch that will support and supervise the program. Both the original files and pertinent communications, as well as the special services of the ARSAU and CRU would be immediately available to assist in the resolution of problems.

All agent personnel selected for the crash program will be attorneys. The purpose of this selection is to minimize the training required and to assure the most productive and correct application of the Acts. Presently, the total complement of law trained FBI Agents is 1,258. Adopting the principle of equitably distributing the selection among all Field Offices, with the slight added burden being placed on twelve offices having the largest attorney complement, no Field Office will be crippled by the personnel selection.

All materials needed by the special complement would be prepared by the Headquarters staff of the FOIPA Branch, particularly by the personnel assigned to the Centralized Initial Processing Unit. As the finished processed documents are produced, the necessary communications to furnish the released documents will be prepared and disclosure accomplished by the PRC Team. To expedite the release of all documents processed during the crash program, an extensive use of printed forms, explaining the exemptions cited, the appeals procedure and the right to judicial review is contemplated. Preparation of original transmittal communications can thus be kept to an absolute minimum. Analysis of this procedure for incorporation in the FOIPA Branch operation will be possible.

C. COST—MONETARY

The cost of the crash program will depend on the grades of the Agents designated to participate, and the rotation schedule chosen. It is felt that six months of concentrated six-day weeks at ten hours per day is beyond reason. Consideration has been given to various combinations of grade 12 and 13 agents, in two, 3 months shifts, and in three, 2 month shifts. The costs involved vary from \$4,911,764 to \$5,321,364 depending on the combinations selected. The Agent salaries and benefits are included as they must be allocated as a cost of the Special, however, their salaries would be a cost factor incurred wherever the Agents are assigned. Without the basic Agent salaries and the fixed costs included, the additional costs incurred vary from \$2,300,564 to \$2,341,764. Calculation of the high figure was arrived at as follows:

FOIPA backlog elimination plan—monetary (B)

1. Personnel costs-----	\$3,544,800
2. Travel costs-----	123,600
3. Reproduction costs-----	140,964
4. Per diem-----	1,512,000
Total -----	5,321,364

COSTS—SPACE REALLOCATION

Providing functional work space for 200 Agents will require approximately 18,000 square feet of space conducive to the meticulous examination of sensitive documents at an accelerated rate of production. Unspecified dollar costs may well have to be absorbed in making this space available.

It will be necessary for this space to accommodate desks and/or tables, have sufficient illumination for the processing task and telephones for consultations with other agencies, regarding their documents, with the CRU and with the FOIPA Litigation Unit assigned to Legal Counsel Division.

Orientation and initial training can be accomplished by using the Headquarters' building auditorium.

Decisions regarding the reallocation of space to accommodate personnel assigned to the backlog should be integrated, and compatible with, reorganization space needs for the proposed FOIPA Branch, as both are inter-dependent.

COSTS—AGENTS ABSENT FROM RESPECTIVE FIELD OFFICES

Once again, this is not a fixed dollar cost, but dilutes the operational efficiency of each FBI Field Office from which Agents are drawn, particularly with respect to attorneys. Every effort will be made to choose Agents not in key positions, preferably not on Field Office administrative staff, and not to reduce the attorney staff of any individual Field Office to a crippling point. As a matter of economics, the choices will be directed toward the lowest grades, and the closest Field Offices with a large complement of attorneys. The Implementation—Time Schedule shows September 25, 1976, as the date for notifying each effected Field Office of the Agents needed. This will allow our Field Office Administrators to prepare for the personnel loss, and permit reassignment of investigative matters. It will also allow Agents sufficient time to set their affairs in order preparatory to an extended absence. The Implementation—Time Schedule has been drawn with the holiday season in mind, and the only hardship anticipated in this respect is on the part of Headquarters personnel in the FOIPA Branch who will be required to complete all prerequisite preparatory steps during the interim from September 1, 1976, and January 17, 1977.

F. IMPLEMENTATION—TIME SCHEDULE

The reorganization of the Freedom of Information-Privacy Acts (FOIPA) Section into a Branch, and the implementation of the plan to eliminate the backlog are inseparable. Indeed, in implementing a time schedule to meet the Committee's request, it becomes apparent that Section reorganization is necessary before implementation of the backlog elimination plan.

The C.I.P.U. stands for the Centralized Initial Processing Unit. The function performed by the CIPU would include the handling of all incoming communications, searching them against pre-existing FOIPA requests, all preliminary communications between the FBI and a requester, searching of the FBI Headquarters Central Indices, calling for files to determine if identical with a request subject and counting the sections, the duplication of one complete file copy, computerized data capture for incoming and outgoing communications, preparation of pre-processing materials, including the file copy, into a package and the maintenance control and assignment to analysts of requests for processing. The Agent personnel are available or will be ordered in, five of the seven needed duplicating machines are available, approximately sixty percent of the space needed has been designated, and a number of the clerical personnel needed are available.

The A.R.S.A. stands for the branch Analytical, Research, Support and Acquisition Unit. This Unit would have the responsibility of analyzing, on a continuing basis, the efficiency and effectiveness of the disclosure operations of the FOIPA

Branch. It would also maintain a testing program and a listing of available employees to replace personnel within the Branch as vacancies occur. The Unit would have responsibility for filling vacancies with qualified personnel with a minimum of lag-time, and conducting the necessary research to keep the Branch abreast of current developments within the law regarding the Freedom of Information and the Privacy Acts. Court decisions in this developing area of the law have an immediate impact on the way documents are processed now, and the responsibility of following the applicable decisions and insuring the rest of the Branch is adhering to court decisions affecting policy would be a prime responsibility for this Unit.

The F.O.O.R.A.C.U. stands for Field Office Operational, Records, Appeal Coordination Unit. At this time, the FBI has two Agents in each of its 59 Field Offices designated for handling FOIPA matters in their respective Divisions. The FOIPA Section at FBI Headquarters is receiving increasing numbers of inquiries from the Field, and the coordination and handling of these matters by a specialized group is essential. Conversely, policy, administrative, and judicial determinations affecting the FBI's handling of FOIPA matters must be made uniformly available to our Field Office representatives, and this would constitute one of the chief tasks of this Unit. Additionally, administrative appeals at the Headquarters level are growing in numbers. Along with the Headquarters' appeals, more administrative appeals matters are being received from the Field Offices. It is essential that these appeals, to the extent possible, be handled by a specialized Unit, and not assigned to the Disclosure Section or any other Unit within the Operations Section. To do so would disrupt daily disclosure quotas of the FOIPA Branch.

C.R.U. stands for the Classification Review Unit. Inherent within the processing of documents in response to an FOIPA request is the need for paragraph-by-paragraph review of classified documents under the guidelines of Executive Order 11652. No other type classification review is usable to a Research Analyst processing documents under the FOIPA. This Unit and its staff exists intact in another Division at FBI Headquarters. Three additional Special Agents have been added to meet work load projections. Integrating this Unit with the FOIPA Branch, will require only slightly more space and equipment. It is felt the presence of this Unit is essential because of the many classified documents within files responsive to FOIPA requests. The members of this Unit could be most effectively utilized within the FOIPA Branch structure proposed, allowing their counsel to meld with the daily disclosure task of the Branch.

As can be seen from an examination of the time schedule chart, a prerequisite to the backlog elimination plan is that the C.I.P.U. personnel have completed and prepared a total working package to be handled by the incoming personnel on special assignment. This Unit must be ready as soon as possible since the job involves approximately 10 million pages of documents which must be reproduced. Time studies were conducted and strict adherence to the implementation schedule is required if the objectives are to be met.

The A.R.S.A.U. must be fully operational and prepared to conduct the essential orientation and training of all new personnel, including those on special assignment when they arrive.

The F.O.O.R.A.C.U. must be staffed, and available upon the arrival of personnel on special assignment as they will be charged with initial and continuing supervision of these personnel during the period of time necessary to eliminate the backlog. The C.R.U. must be in place in the FOIPA Branch Operations Section and ready to have representatives available from the first day to work with the personnel on special assignment. The C.R.U. will be able to furnish guidance and advise the processors on the special in addition to advising the Research Analysts assigned to the FOIPA Branch.

The date for implementation of all phases bearing on reorganization and backlog elimination has been chosen as January 17, 1977. The control date to determine that all prerequisite steps are proceeding on schedule has been chosen as December 1, 1976. Only after implementation of both phases, and a limited period of operation, can truly accurate predictions regarding this proposal be made with necessary adjustments to follow. It is estimated there will be a two week lag-time before the personnel on special assignment achieve a significant degree of productivity; and a somewhat longer lag-time is necessary before it can be

determined that the FOIPA Branch as reorganized is able to remain current with incoming requests. The monitoring, and subsequent modifications, if necessary, will be a joint responsibility of the A.R.S.A.U. and the F.O.O.R.A.C.U.

Because reorganization of the FOIPA Branch and elimination of the backlog are interdependent, adherence to the Time Schedule is essential to the success of this proposal.

FOIPA BRANCH REORGANIZATION AND BACKLOG ELIMINATION PLAN—IMPLEMENTATION, TIME SCHEDULE

	CIPU	ARSAU	FOORACU	CRU	Disclosure section
Branch Plan:					
Space allocation ¹	Sept. 1, 1976.....	Sept. 1, 1976..... Oct. 1, 1976.....	Oct. 15, 1976.....	Sept. 30, 1976....	Oct. 15, 1976
Equipment.....	Sept. 15, 1976.....	Oct. 10, 1976.....	Oct. 25, 1976.....	Oct. 15, 1976....	Nov. 1, 1976
Personnel selection.....	do.....	Sept. 10, 1976.....	Sept. 26, 1976.....	(?).....	Sept. 26, 1976
Personnel notification.....	Sept. 20, 1976.....	Sept. 15, 1976.....	Oct. 1, 1976.....	(?).....	Oct. 1, 1976
On the job.....	Sept. 26, 1976.....	Oct. 15, 1976.....	Nov. 1, 1976.....	Oct. 30, 1976....	Nov. 5, 1976
Training completed.....	On the job training	Nov. 1, 1976.....	Nov. 15, 1976.....	Trained.....	Nov. 15, 1976
Backlog Plan:					
Space allocation (Jan. 16, 1977) ¹.....	.....			
Equipment, materials (Jan. 17, 1977) ².....	.....			
Duplicated file copy (Jan. 17, 1977) ³ [Prerequisite].....	.....			
Personnel selected (Sept. 25, 1976) ⁴.....	.....			
Personnel notified (Sept. 30, 1976) ⁴.....	.....			
On the job (Jan. 15 to 16, 1977) ³.....	.....	Initial training.	Continued supervision.	Continued participation.	.....

¹ Initial space for ARSAU necessary, expanded to full space later.

² In tact from Division 5 personnel, plus 3 agents.

³ All dates set forth herein are progressive target dates with interdependence, as a control date Dec. 1, 1976, has been chosen.

G. LONG RANGE PROPOSALS

Concepts addressed within this portion of the proposal are not explored in depth, but are presented to permit a comprehensive evaluation of the ramifications of adopting the basic FOIPA proposal. Each concept discussed would effect either the work load (retrieval and quantity of records subject to review), the material to be examined and released (type of information recorded) and/or the number and job assignment of personnel needed to comply with the statutes.

Four actions are necessary. Others will undoubtedly arise as time passes and the FBI is able to more thoroughly assess its compliance and the impact of FOIPA requests upon this Bureau. The four considered are:

1. Development of an automated retrieval system for the indices to the Central Records System.

2. Further developments and reinstatement of file destruction efforts.

3. Revised investigative recording procedures as regards those matters mandated by the Privacy Act, and those procedures dealing with the content of investigatory files including retention policies relative to criminal investigations.

4. Regular re-evaluation of the need for the number of personnel assigned to this task with a view to reduction, when and if, feasible.

Both the feasibility study and development of an automated retrieval system for the central indices at FBI Headquarters are underway. Searches will be accelerated using an automated system.

A regular program to re-evaluate the continuing need for an operational structure of this size and cost is necessary. Only by initiating such a program at the outset can timely adjustment of manpower needs be made, and will be the function of the ARSA Unit.

II. CONCLUSION

Translated into work, the objectives of this proposal, require the daily retrieval, duplication and review of no less than 18,000 pages of material coupled with release to requesters of all that is not exempted, plus the eradication of a backlog consisting of nearly 10 million pages which must be taken through the same processes in one year.

Every day 8,000 Agents with thousands of support personnel are performing their mandated responsibilities, recording the investigative results, generating new records subject to future FOIPA requests.

As proposed, this plan will enable the FBI to comply with the time provisions of the FOIPA, eliminate the backlog, and achieve a current operational capacity.

It must be recognized this plan will be costly in terms of money. The first year of operations, including those for the "special" will be at least \$11,614,207 and may be as high as \$12,023,807. Costs above those presently authorized for the FOIPA operation will be at least \$8,204,207 and may be as high as \$8,613,807.

After elimination of the backlog, permanent costs for the FOIPA branch will annually be \$6,447,261.

A substantial re-allocation of space within the FBI Headquarters' facilities will be necessary causing displacement of some operations and temporary disruption of others. 19,174 square feet of additional space at the J. Edgar Hoover Building will be required on a permanent basis; and, another 18,000 square feet of space will be required for 6 months.

Of even greater impact is the diversion of 200 law trained Agents from their respective field office assignments for at least six months. To some extent this impact will be ameliorated by the training effect, particularly as these Agents return to their respective Field Offices.

The Federal Bureau of Investigation is prepared to proceed with this plan subject to the approval, support and cooperation of the Attorney General and the Congress. That cooperation and support is the sine qua non to the successful implementation of this proposal.

I. APPENDIX
NONPROJECT ANALYSIS
NONPROJECT—REQUESTS ASSIGNED—WORK ANALYSIS

	Requests	Sections	See references
Team 1.....	13	64	105
	24	40	60
	17	27	872
	12	25	69
Team 2.....	10	30	536
	20	77	.....
	14	28	.....
	13	22	.....
	22	61	.....
	19	34	.....
Team 3.....	2	3	.....
	12	25	.....
	13	35	22
	15	47	.....
	10	22	83
	7	10	.....
Team 4.....	25	202	.....
	11	17	.....
	18	67	71
	23	54	.....
Team 5.....	17	219	460
	12	288	.....
	12	61	.....
	12	26	.....
	5	23	.....
Team 6.....	13	25	.....
	13	56	.....
	10	15	.....
	18	36	.....
Team 7.....	36	78	.....
	21	23	30
	17	38	51
	17	68	78
	4	20	.....
Team 8.....	14	27	4
	20	35	153
	24	34	2
	5	12	.....
	12	31	127
	11	38	30
Team 9.....	17	39	33
	14	27	404
	15	59	12
	10	3	18
	8	16	70
Team 10.....	25	44	.....
	10	15	.....
	29	56	.....
	13	37	.....
	31	70	.....
	25	55	.....
Team 11.....	11	41	.....
	10	18	.....
	23	67	.....
	14	32	.....
Team 12.....	9	11	.....
	15	82	.....
	8	13	.....
	18	34	.....
	20	52	.....
Total (60 teams).....	908	2,820	3,290

The request assignments of 60 Non-Project analysts were examined. They consist of 908 requests involving 2,820 Sections and 3,290 see references. Equating 75 see references to one section raises the Sections involved to 2803.7 which when divided by the requests shows a non-project average sections per request of 3.15.

NOTE: The above figures represent the work load of 60 Non-Project analysts, of which there are a total of 60. The 6 others were not considered in this work load average as they dealt exclusively with referrals from other agencies. The average work assignment of the 6 individuals is equally divided among 300 requests which average 65 pages per request of varying magnitudes.

PROJECT ANALYSIS

PROJECT UNIT—REQUEST ASSIGNED AND BACKLOG—WORK ANALYSIS

	Requests	Sections	See references
Team A.....	5	383	.....
	7	40	400
	5	259	.....
Backlog.....	11	284	1900
Team B.....	20	723	.....
	12	266	.....
	2	211	.....
	4	131	.....
Backlog.....	6	1498	.....
Team C.....	9	1947	.....
	2	56	.....
	2	57	.....
	1	83	.....
	18	108	.....
Backlog.....	22	1654	.....
Team D.....	10	692	.....
	8	28	810
	7	110	5
	12	223	.....
	39	667	.....
Backlog.....	8	573	.....
Team E.....	10	526	.....
	4	925	.....
	10	1352	.....
	8	241	.....
	5	97	.....
	1	43	.....
Total.....	248	13,177	3,115

The total Project request load including backlog was examined. It consists of 248 reported requests, made up of 13,177 Sections and 3,115 see references. Equating 75 see references with a Section, the section count is increased by 41.5 to 13218.5, which when divided by the requests shows a project average section per request of 53.8 sections.

*Note: Three requests involving 38,400 and 2,228 and 2,582 Sections respectively were not included in these figures as they are extraordinary and would result in a distorted view of the average request.

PROJECTION OF ANALYSTS NEEDED

FOIPA Section—Analyst Complement Increase To Remain Current With Incoming Requests

A. FOIPA requests received per work day.....	72.5
(Result based on requests received from Jan. 5–July 16, 1976, 10,150, divided by work days from Jan. 5–July 16, 1976, 140)	
B. Reduced by the percentage of requests resulting in "no record" responses.....	45.56
(35.78 percent calculated on Apr. 1–Mar. 31, 1976, figures of 16,103 requests received and 5,702 "no record" responses)	
C. Reduced by the percentage of requests resulting in closing by means other than processing and "no record" responses.....	17.51
(40.08 percent calculated on Apr. 8–July 29, 1976, figures of 5,149 requests, 2,063.7 of which were closed other than by processing and "no record" responses ¹)	
D. FOIPA requests broken down by designation:	
1. Nonproject, 95.86 percent, or by requests per day.....	16.79
2. Project, 4.414 percent, or by request per day.....	0.72
(Based on backlog figures captured on July 29, 1976; section—8420–849)	

¹In further explanation of C (above), requests are placed in a closed status when requester fails to provide a required item, such as notarized signature, further identifying personal data, particulars regarding the documents sought, etc.

E. Average number of pages per section of file.....	200
(Based on preexisting figures, plus a random sampling count of 20 sections of file done on Aug. 5, 1976)	
F. Average daily pages processed per analyst:	
1. Nonproject	105
2. Project	90
(Based on a survey directed to all analysts previously as to their own output. Project is lower due to the complex nature of the files and attendant logistics problems)	
G. Analyst complement on hand and authorized:	
1. Nonproject (64 on hand, 20 increase authorized).....	84
2. Project (23 on hand, 7 increase authorized).....	30
H. Average sections of file to be processed per FOIPA request:	
1. Nonproject	3.15
2. Project	53.3
(Based on the work analysis of both groups, contained elsewhere herein)	
I. Pages of analyst output per day (current productivity):	
1. Nonproject (84)x(105)	8,820
2. Project (30)x(90).....	2,700
(Based on the project of all analysts on hand and authorized fully trained, and working under optimum conditions)	
J. Pages of processing work received per day:	
1. Non-Project (16.79)x(200)x(3.15).....	10577.7
2. Project (0.72)x(200)x(53.3).....	7675.2
K. With all factors remaining constant, and considering only the number of analysts needed to process this incoming work load and remain current, the project of analyst complement needed becomes:	
1. Nonproject (10577.7)÷(8820)x(84).....	100.73
2. Project (7675.2)÷(2700)x(30).....	85.28
L. With the deletion from the computations of three voluminous cases in the Project backlog, and based upon contemplated need for a certain number of analysts to constantly be devoted full time to other voluminous cases in litigation, and receiving Court ordered preferential processing, it is felt that a built-in additional group of analysts is needed to insure the rest of the complement devotes uninterrupted attention to current requests.....	13
M. Total projected analyst needs.....	200

BACKLOG PROGRESSION AND PROJECTION

An examination of the growth of the backlog from September 11, 1975 thru August 5, 1976 was conducted. Our procedure is to administratively take inventory on each Thursday. The increase in the backlog total and the actual increase per week is represented in the below figures.

Date	Backlog	Change
Sept. 11, 1975	3,745	
Sept. 18, 1975	3,873	+128
Sept. 25, 1975	4,081	+208
Oct. 2, 1975	4,233	+152
Oct. 9, 1975	4,459	+226
Oct. 16, 1975	4,740	+281
Oct. 23, 1975	5,004	+264
Oct. 30, 1975	5,137	+133
Nov. 6, 1975	5,276	+139
Nov. 13, 1975	5,324	+48
Nov. 20, 1975	5,481	+157
Nov. 26, 1975	5,421	+60
Dec. 4, 1975	5,544	+123
Dec. 11, 1975	5,646	+102
Dec. 18, 1975	5,832	+186
Dec. 24, 1975	5,862	+30
Jan. 2, 1976	6,176	+314
Jan. 8, 1976	5,964	-212
Jan. 15, 1976	6,092	+128
Jan. 22, 1976	6,055	-37
Jan. 29, 1976	6,252	+197
Feb. 5, 1976	6,313	+61
Feb. 12, 1976	6,457	+144
Feb. 19, 1976	6,544	+87
Feb. 26, 1976	6,612	+68
Mar. 4, 1976	6,715	+103
Mar. 11, 1976	6,532	-183
Mar. 18, 1976	6,673	+141
Mar. 25, 1976	6,646	-27
Apr. 1, 1976	6,782	+136
Apr. 8, 1976	6,350	-432
Apr. 15, 1976	6,085	-265
Apr. 22, 1976	6,120	+35
Apr. 29, 1976	5,989	-131
May 6, 1976	6,037	+48
May 13, 1976	6,001	-36
May 20, 1976	6,070	+69
May 27, 1976	6,115	+45
June 3, 1976	6,347	+232
June 10, 1976	6,314	-33
June 17, 1976	6,813	+499
June 24, 1976	7,795	+982
July 1, 1976	8,368	+573
July 8, 1976	8,599	+231
July 15, 1976	8,335	-264
July 22, 1976	8,435	+100
July 29, 1976	8,420	-15
Aug. 5, 1976	8,478	+58

Upon completion of this examination, it was determined that the total backlog increase from September 11, 1975 thru August 5, 1976 was 4,733 requests. This, when divided by the number of weekly periods covered, (47), shows an average increase of 100.7 requests into backlog per week.

On August 11-12, 1976, the full backlog in existence was reviewed and those requests in which requisite information essential to processing was lacking, despite repeated requests by the FBI for this information, were closed.

Taking the backlog as reduced by those requests the projected increase per week which can be expected in the following weeks is 82, which when projected to January 13, 1977, becomes 9487.9 requests.

With the backlog total on January 13, 1977, standing at 9487.9, there should be 95.80% or 9095.1 non-project requests and 4.14% or 392.8 project requests to process.

Projecting the two categories of backlogged requests, Project and Non-Project, to their respective page count, the result is set out below:

$(9095.1) \times (3.15) \times (200)$ equals 5,720,914 Non-Project pages.

$(392.8) \times (53.3) \times (200)$ equals 4,187,248 Project pages.

Total pages, 9,817,161.

Knowing the total pages that are in the backlog to be processed, and the time limits within which it must be processed, the only variables left to consider are the number of personnel doing the processing and the collective productivity of those people.

Following are four charts which project personnel utilized and productivity into a resultant expressed in terms of months. Each chart deals with a different working time frame.

- A. A five day work week, 8 hour day.
- B. A six day work week, 8 hour day.
- C. A five day work week, 10 hour day.
- D. A six day work week, 10 hour day.

BASED UPON 9,917,161 PAGES IN BACKLOG
8 HOUR DAY, 5 DAY WEEK,
RESULTANT IS IN MONTHS

OUTPUT										
Agents	50	100	150	200	250	275	300	325	350	375
1	9445	4723	3148	2361	1889	1717	1574	1453	1349	1259
10	945	472	315	236	189	172	157	145	135	126
100	95	47	32	24	19	17	16	15	14	13
125	76	38	25	19	15	14	13	12	11	10
150	63	32	21	16	13	12	11	10	9	8
175	54	27	18	14	11	10	9	8	8	7
200	47	24	16	12	10	9	8	7	7	6
225	42	21	14	11	8	8	7	7	6	6
250	38	19	13	9	8	7	6	6	5	5
275	34	17	12	9	7	6	6	5	5	5
300	32	16	11	8	6	6	5	5	5	4
325	29	15	10	7	6	5	5	5	4	4
350	27	14	9	7	5	5	5	4	4	4
375	25	13	8	6	5	5	4	4	4	3
400	24	12	8	6	5	4	4	4	3	3
425	22	11	7	6	5	4	4	3	3	3
450	21	11	7	5	4	4	4	3	3	3
475	20	10	7	5	4	4	3	3	3	3
500	19	10	6	5	4	3	3	3	3	3

BASED UPON 9,917,161 PAGES IN BACKLOG
 10 HOUR DAY, 6 DAY WEEK
 RESULTANT IS IN MONTHS

OUTPUT

Agents	50	100	150	200	250	275	300	325	350	375
1	6347	3174	2116	1587	1269	1154	1058	977	907	846
10	635	317	212	159	127	115	106	98	91	85
100	64	32	21	16	13	12	11	10	9	9
125	51	25	17	13	10	9	9	8	7	7
150	42	21	14	11	8	8	7	7	6	6
175	36	18	12	9	7	7	6	6	5	5
200	32	16	11	8	6	6	5	5	5	4
225	29	14	9	7	6	5	5	4	4	4
250	25	13	9	7	6	5	5	4	4	4
275	23	12	8	6	5	4	4	4	3	3
300	21	11	7	5	4	4	4	3	3	3
325	20	10	7	5	4	4	3	3	3	3
350	19	10	6	5	4	3	3	3	3	2
375	17	9	6	4	4	3	3	3	2	2
400	16	8	5	4	3	3	3	2	2	2
425	15	8	5	4	3	3	3	2	2	2
450	14	7	5	4	3	3	3	2	2	2
475	13	7	5	3	3	2	2	2	2	2
500	13	6	4	3	3	2	2	2	2	2

BASED UPON 9,917,161 PAGES IN BACKLOG
 10 HOUR DAY, 5 DAY WEEK
 RESULTANT IS IN MONTHS

OUTPUT

Agents	50	100	150	200	250	275	300	325	350	375
1	7556	3778	2519	1889	1511	1374	1259	1163	1079	1008
10	756	378	252	189	151	137	126	116	108	101
100	76	38	25	19	15	14	13	12	11	10
125	61	30	20	15	12	11	10	9	9	8
150	50	25	17	13	10	9	8	8	7	7
175	43	22	14	11	9	8	7	7	6	6
200	38	19	13	9	8	7	6	6	5	5
225	34	17	11	8	7	6	6	5	5	5
250	30	15	10	8	6	6	5	5	4	4
275	28	14	10	7	6	5	5	4	4	4
300	25	13	8	6	5	5	4	4	4	3
325	23	12	8	6	5	4	4	4	3	3
350	22	11	7	5	4	4	4	3	3	3
375	20	10	7	5	4	4	3	3	3	3
400	19	9	6	5	4	3	3	3	3	3
425	18	9	6	4	4	3	3	3	3	2
450	17	8	6	4	3	3	3	3	2	2
475	16	8	5	4	3	3	3	2	2	2
500	15	8	5	4	3	3	3	2	2	2

BASED UPON 9,917,161 PAGES IN BACKLOG
8 HOUR DAY, 6 DAY WEEK,
RESULTANT IS IN MONTHS

Agents	OUTPUT									
	50	100	150	200	250	275	300	325	350	375
1	7934	3967	2645	1984	1587	1442	1322	1221	1133	1058
10	793	397	265	198	159	144	132	122	113	106
100	79	40	27	20	16	14	13	12	11	11
125	64	32	21	16	13	12	11	10	9	9
150	53	26	18	13	11	10	9	8	8	7
175	45	23	15	11	9	8	8	7	7	6
200	40	20	13	10	8	7	7	6	6	5
225	35	18	12	9	7	6	6	5	5	5
250	32	16	11	8	6	6	5	5	5	4
275	29	14	10	7	6	5	5	4	4	4
300	27	13	9	7	5	5	4	4	4	4
325	24	12	8	6	5	4	4	4	4	3
350	23	11	8	6	5	4	4	4	3	3
375	21	10	8	5	4	4	4	3	3	3
400	20	10	7	5	4	4	3	3	3	3
425	19	10	6	5	4	3	3	3	3	3
450	18	9	6	5	4	3	3	3	3	2
475	17	8	6	4	3	3	3	3	2	2
500	16	8	5	4	3	3	3	2	2	2

FOIPA BRANCH REORGANIZATION COSTS

The following are the projected salary and personnel benefit figures projected to the proposed FOIPA branch structure. The last page shows in three steps current costs, currently authorized and projected costs corresponding to the proposed reorganization.

FOI/PA PROJECTION (BRANCH)

	GS	Salary 1 (Incl. AUO)
Front Office: Deputy Assistant Director	17	37,800
Disclosure Section:		
Section chief	16	37,800
No. 1 Man	15	35,015
Secretary	7	11,414
Secretary	6	10,610
Subtotal		94,839
Nonproject Unit A:		
Unit chief	15	35,015
Secretary	5	8,925
Agents (3)	14	97,071
Analysts (17)	9	229,194
Analysts (16)	7	182,624
Clerks (2)	5	19,638
Clerk (1)	4	8,508
Subtotal		580,975
Nonproject Unit B:		
Unit chief	15	35,015
Secretary	5	8,925
Agents (3)	14	97,071
Analysts (17)	9	229,194
Analysts (16)	7	182,624
Clerks (2)	5	19,638
Clerks (1)	4	8,508
Subtotal		580,975
Nonproject Unit C:		
Unit chief	15	35,015
Secretary	5	8,925
Agents (3)	14	97,071
Analysts (17)	9	229,194
Analysts (16)	7	182,624
Clerks (2)	5	19,638
Clerks (1)	4	8,508
Subtotal		580,975
Project Unit D:		
Unit chief	15	35,015
Secretary	5	8,925
Agents (3)	14	97,071
Analysts (15)	9	202,230
Analysts (15)	7	171,210
Clerks (2)	5	19,638
Clerks (1)	4	8,508
Subtotal		542,597
Project Unit E:		
Unit chief	15	35,015
Secretary	5	8,925
Agents (3)	14	97,071
Analysts (15)	9	202,230
Analysts (15)	7	171,210
Clerks (2)	5	19,638
Clerks (1)	4	8,508
Subtotal		542,597
PRC Team:		
Agent (1)	14	32,357
Analysts (5)	9	80,892
Analysts (5)	7	57,070
Clerk (1)	5	9,819
Subtotal		180,138
Project Unit F:		
Unit chief	15	35,015
Secretary	5	8,925
Agents (3)	14	97,071
Analysts (15)	9	202,230
Analysts (15)	7	171,210
Clerks (2)	5	19,638
Clerks (1)	4	8,508
Subtotal		542,597

FOI/PA PROJECTION (BRANCH)—Continued

	GS	Salary ¹ : (Incl. AUO)
Operations Section:		
Section chief.....	16	37,800
No. 1 Man.....	15	35,015
Secretary.....	7	11,414
Secretary.....	6	10,610
Subtotal.....		94,839
Branch Analytical Research Support and Acquisition Unit:		
Unit chief.....	15	35,015
Agents (8).....	14	258,856
Secretary.....	5	8,925
Clerks (3).....	5	29,457
Clerks (3).....	4	25,524
Subtotal.....		357,777
F. O. Operations, etc.:		
Unit chief.....	15	35,015
Secretary.....	5	8,925
Agents (3).....	14	97,071
Clerks (2).....	5	19,638
Clerks (1).....	4	8,508
Subtotal.....		169,157
Word Processing Unit:		
Steno supervisor.....	7	11,046
Assistant supervisor.....	6	10,610
Steno (45).....	4	358,920
Subtotal.....		380,576
Classification Review Unit:		
Unit chief.....	15	35,015
Agents (8).....	14	258,856
Secretary.....	5	8,925
Clerks (5).....	5	49,095
Clerks (5).....	4	42,540
Subtotal.....		394,431
Centralized Initial Processing Unit:		
Unit chief.....	15	35,015
Secretary.....	5	8,925
Clerk.....	5	9,819
Subtotal.....		53,759
Incoming mail, etc.:		
Clerk-supervisor.....	6	9,946
Clerks (2).....	5	19,638
Clerks (2).....	4	17,016
Subtotal.....		46,600
Initial correspondence team:		
Agent.....	14	37,357
Secretary.....	5	8,925
Clerk-Supervisor.....	6	9,946
Clerks (5).....	5	49,095
Clerks (5).....	4	34,032
Subtotal.....		134,355
Search slips:		
Clerk.....	5	9,818
Clerk.....	4	8,508
Subtotal.....		18,327
File calling:		
Clerks (2).....	5	19,638
Clerks (1).....	4	8,508
Subtotal.....		28,146
File duplication and assembly:		
Clerk-supervisor.....	6	9,946
Clerks (6).....	5	58,914
Clerks (6).....	4	51,048
Subtotal.....		119,908

FOI/PA PROJECTION (BRANCH)—Continued

File Copy Maintenance and Assignment:		
Clerk.....	5	9,819
Clerk.....	4	8,508
Typist.....	3	7,102
Subtotal.....		25,429
Total salaries.....		5,506,797
Personnel benefits (10 percent of salary).....		550,680
Total personnel costs.....		6,057,477

¹ Based on average grades of current complement.

FOI/PA Projection

Total current personnel costs.....	¹ \$2,703,407
Total authorized personnel costs.....	² 3,164,250
Total projected personnel costs.....	³ 6,057,477

¹ Based on personnel listing July 29, 1976, furnished by Division 4.

² Based on above personnel list plus additional analysts computed at average grade.

³ Based on proposed organizational chart and computed on average personnel costs derived from above listing.

The following are projected annual costs, other than personnel costs, for the proposed FOIPA branch. The table shows current annual costs (based on FY 1976 figures), additional costs required by the proposed branch structure and total projected annual costs.

FOI/PA PROJECTION COSTS OTHER THAN PERSONNEL

	Current	Additional	Projected
Supplies, printing, postage, miscellaneous.....	\$44,933	\$61,350	\$106,283
Space (GSA standard level users charge).....	106,671	141,070	241,741
Telephone, electric installation, and so forth.....	21,024	32,376	53,400
Telephone, electric installation, and so forth (in area not previously used).....	21,024	47,336	68,360
Furniture and equipment.....	(¹)	126,001	126,001
Transfer costs.....		102,581	102,581
Total other costs.....			644,966

¹ Not available for FOI/PA section.

² Not included in total.

The following is a supporting schedule showing computation of the total projected annual supplies and materials cost for the proposed FOIPA branch. The basis for computation is FY76 total expenditures. This is divided by total current employees to derive a per employee average cost. This average cost is multiplied times the projected number of employees to arrive at total projected cost.

FOI/PA projection—Supplies, etc.

Fiscal year 1976 for supplies, materials, etc.....	\$41,933
(Current number of employees, 182 (per employee).....)	30
Postage (41,933 plus 3,000).....	44,933
Projected annual cost (\$230 times projected number of employees, 391).....	89,930
Postage, per month, based on envelopes ordered (\$250 over 182 employees equals \$1.37 times 391 employees).....	536
Projected postage for 12 mo (\$536 times 12 mos.).....	6,432

Supplies for reproduction machine (IBM), paper (200,000 copies per month based on December-March 1976 average) times 12 mo:

Copies per year.....	(2,400,000)
Copies per roll.....	(775)
Cost of paper (3,097 rolls, at \$2.44).....	7,557
Cost of ink (Toner): Copies per carton \$2,416,000 (150 cartons, at \$15.70).....	2,355
Total cost of supplies for reproduction.....	9,921
Total supplies and materials cost.....	106,283

The following is a supporting schedule showing computation of total projected cost of space for the proposed FOIPA branch. Total cost was computed by multiplying the square footage of space allowed each grade level position in the proposed branch, times the GSA Standard Level Users Charge.

FOI/PA SPACE REQUIREMENT PROJECTION

GS	Number of positions	Square feet ¹	Total SLUC ² (dollars per sq. ft.)	Total	
17.....	1	300	300	7.38	\$2,214
16.....	2	300	600	7.38	4,428
15.....	12	225	2,700	7.38	19,926
14.....	39	150	5,850	7.38	43,173
13.....		150		7.38	
12.....		150		7.38	
11.....		75		7.38	
10.....		75		7.38	
9.....	102	75	7,650	7.38	56,467
8.....		75		7.38	
7.....	101	75	7,575	7.38	56,207
6.....	6	60	360	7.38	2,657
5.....	51	60	3,060	7.38	22,583
4.....	76	60	4,560	7.38	33,653
3.....	1	60	60	7.38	443
2.....		60		7.38	
Total.....	391		32,715		241,741

¹ Based on space that should be allotted to each grade per code of Federal regulations.

² Based on current GSA charge per square foot for general office space.

The following is a supporting schedule showing computation of total projected telephone, electrical outlet and construction costs for the proposed FOIPA branch. Total cost was derived by multiplying the additional positions required in the proposed branch structure times telephone company and GSA standard charges.

FOI/PA projection—telephone, electric and construction costs

187 additional positions (32 times \$270) ¹ cost/installation.....	\$8,640
6 (per installation) ¹ (32 times \$54 ¹ /month times 12).....	20,736
Telephone cost initial year.....	20,376
GSA cost to drill telephone holes \$40 times 187.....	7,480
GSA cost to drill electric holes \$40 times 187.....	7,480
Additional installation costs in area not previously used.....	14,060
Total telephone and electric costs.....	44,336
Sound proof partitions for steno pool.....	3,000
Total cost.....	47,336

¹ Per Dave Haller (Division 7) there are 3 lines allowed for every 6 people; \$250 installation charge for each 6 people (phone on each desk); \$54 monthly charge for each 6 people.

The following shows projected additional furniture and equipment costs for the proposed FOIPA branch. The total cost was computed by adding the cost of equipping each additional grade level position in the proposed branch and multiplying that result times the number of new positions. The type of equipment costed is the type presently being purchased for the JEH building.

FOI/PA PROJECTION (FURNITURE AND EQUIPMENT)

(Additional positions)	1-Branch chief	1-Section chief	5-Unit chiefs	12-Agents	7-Secretaries	13-Stenographers	91-Analysts	1-Typist	56-Clerks	Total
Desk	230	230	214	186	133	133	123	133	123	
	1	1	5	12	7	13	91	1	56	
Chair	230	230	1,070	2,232	931	1,729	11,193	133	6,888	
	105	105	105	77	54	54	77	54	54	
	1	1	5	12	7	13	91	1	56	
	105	105	105	924	378	702	7,007	54	3,024	
Credenza	135	135	130							
	1	1	5							
	135	135	650							
Table	160	160	160	160			160			
	1	1	5	12			9			
	160	160	800	1,920			1,440			
Bookcase	85	85	85	85		85	85			
	1	1	5	12		1	9			
	85	85	425	1,020		85	765			
Telephone stand	100	100								
	1	1								
	100	100								
File Cabinet	119	119	119	119	119	119	119			
	1	1	5	36	2	4	18			
	119	119	595	4,284	238	476	2,124			
Wardrobe	112	112	112	112		112	112		112	
	1	1	5	12		2	15		9	
	112	112	560	1,344		224	1,680		1,008	

Typewriter.....								1	545		
								545			
Mag-Card.....					2,328	2,328					
					7	13					
					16,296	30,264					
Xerox or IBM copier									10,188		
									2		
									20,376 ^a		
Total.....	1,046	1,046	4,625	11,724	17,843	33,480	24,209	732	10,920	20,376 ^a	126,001

¹ All costs based on GSA supply catalog.

² Annual cost based on monthly rental of \$194.

³ Annual rental for 1 machine \$849.

The following shows the computation of the total cost to transfer 19 additional agents from the field to FBIHQ in order to staff the proposed FOIPA branch. The number of agents to be transferred in are multiplied by the average agent transfer cost (based on fiscal year 1976 amounts) to arrive at total transfer costs.

FOI/PA projection transfer costs

Agents to be transferred to FBIHQ to staff proposed branch (19 at \$5,390¹) ----- \$102,581

¹ Fiscal year 1976 average transfer costs.

FOI/PA projection transfer costs

The following shows the computation of total projected costs for the proposed FOIPA backlog special. The four alternate costs derived by using two different grade level Agents in two different plans (2 month tours or 3 month tours), consist of four elements; (1) transportation costs (round trips), (2) per diem cost of maintaining an Agent in the Washington, D.C., area, (3) Agent salaries and benefits, and (4) reproduction machine costs. Each element of cost can be found on a supporting schedule.

FOI/PA backlog, 200 agents at 250 pages per day— 6-10 hours days for 6 months

Plan I—Two Agent Groups—3 months each:

Transportation—400 Agents at \$206.00-----	\$82,400.00
Monthly average agent cost for 200 agents at \$1,260.00 times 6 months-----	1,512,000.00
Total personnel costs—GS-12 (salaries and benefits)-----	3,176,400.00
Total reproduction costs-----	140,964.00

Total costs using GS-12 agents----- 4,911,764.00

Total personnel costs—GS-13-----	3,544,800.00
Total other costs (above)-----	1,735,364.00

Total costs using GS-13 agents----- 5,280,164.00

Plan 2—Three Agent Groups—2 months each

Transportation—600 agents at \$206.00-----	123,600.00
Total all other costs (above)—GS-12 agents-----	4,829,364.00

Total costs using GS-12 agents----- 4,952,964.00

Total personnel costs—GS-13-----	3,544,800.00
Total other costs (above)-----	1,776,564.00

Total costs using GS-13 agents----- 5,321,364.00

The following shows computation of the average cost of bringing an agent to and from Washington, D.C., to work on the special plus the average monthly cost or maintaining him in the Washington, D.C., area. The amounts used are based on standard rates derived by the training division.

FOI/PA BACKLOG COMPUTATION OF AVERAGE COST PER AGENT FOR "SPECIAL"

	Amount	Monthly cost	"1-time charge"
Transportation costs: ¹			
Air fare (round trip)-----	\$146		
Taxi (residence to airport)-----	20		
Per diem (based on 2, day to and from)-----	40		
Total, transportation costs-----			\$206
Per diem: District of Columbia metropolitan area per diem = \$42×30 days-----		\$1,260	

¹ Average figures computed by training division for transportation to Washington, D.C. (National Airport). Used in fiscal year 1978 budget submission calculations.

The following shows the computation of personnel costs (salaries and benefits) for two different grade levels of agents assigned to the FOIPA backlog special for six months. It shows total costs for six different work week schedules. The monthly rate per agent is derived from a supporting schedule.

FOI/PA BACKLOG: COMPUTATION OF AVERAGE COST PER AGENT FOR "SPECIAL"—PERSONNEL COSTS

Based on—	Monthly rate per agent	Agents	Months	Total cost
5 days at 8 hr per day:				
GS-12	\$1, 836	200	6	\$2, 203, 200
GS-13	2, 143	200	6	2, 571, 600
5 days at 8 hr per day plus 2 hr per day A.U.O.:				
GS-12	2, 176	200	6	2, 611, 200
GS-13	2, 483	200	6	2, 979, 600
6 days at 8 hr per day:				
GS-12	2, 212	200	6	2, 654, 400
GS-13	2, 519	200	6	3, 022, 800
6 days at 10 hr per day:				
GS-12	2, 401	200	6	2, 881, 200
GS-13	2, 708	200	6	3, 249, 600
5 days at 8 hr per day plus 2 hr per day A.U.O. plus 1 day at 8 hr regularly scheduled O.T.:				
GS-12	2, 552	200	6	3, 062, 400
GS-13	2, 859	200	6	3, 430, 800
5 days at 8 hr per day plus 2 hr per day A.U.O. plus 1 day at 10 hr regularly scheduled O.T.:				
GS-12	2, 647	200	6	3, 176, 400
GS-13	2, 954	200	6	3, 544, 800

Note: To compute total cost (col. 4) multiply col. (1) by col. (2) by col. (3).

The following shows the computation of monthly personnel costs per Agent assigned to the FOIPA backlog special. A rate is shown for two different grade levels for six different work week schedules. The total costs per Agent are carried forward to the total personnel costs schedule.

FOI/PA backlog computation of agent monthly personnel cost

Basic salary:

GS-12 (2d step)—\$20,032 per annum divided by 12 mo (per month)	\$1, 669
GS-13 (2d step)—\$23,670 per annum divided by 12 mo (per month)	1, 948
Personnel benefits GS-12: \$167 plus \$1,669 monthly salary (per month)	1, 836
Personnel benefits GS-13: \$195 plus \$1,948 monthly salary (per month)	2, 143
Base salary plus A.U.O. : A.U.O.—\$3,702 per annum :	
GS-12: 12 mo at \$309 plus 10 percent personnel benefits, \$1,898	2, 176
GS-13 (plus \$2,143)	2, 483
Base salary plus overtime (time and 1/2, 6 days per week) :	
\$10.70 per hr. ¹ (maximum overtime rate) times 32 hr (per month) ..	342
GS-12 (plus 10 percent personnel benefits, \$1,004)	2, 212
GS-13 (plus \$2,143)	2, 519
6 days at 10 hr per day :	
GS-12 (\$10.70 per hr times 48 hours overtime per month equals \$514 per month plus 10 percent personnel benefits, \$1,938)	2, 401
GS-13 (plus \$2,143)	2, 708
5 days, at 10 hr and 1 day, at 8 hr :	
GS-12: Base salary plus A.U.O, \$2,176 plus 32 hours overtime per month, \$376	2, 552
GS-13: \$2,483 plus \$376	2, 859
5 days, at 10 hr and 10 day, at 10 hr :	
GS-12: Base salary plus A.U.O, \$2,176; \$10.70 per hour times 40 hr, \$428; over time per month equals 10 percent personnel benefits, \$43 ..	2, 647
GS-13: \$2,483 plus \$428 and \$43	2, 954

¹ Maximum rate computed on GS-10.

The following shows the computation of total reproduction costs related to the FOIPA backlog. The computation is based on 10,000,000 copies (rounded) in the backlog to be reproduced times the standard charges for paper, toner and machine usage. The table shows a monthly cost figure for the six month special as well as a total figure for the entire six months.

FOI/PA backlog—computation of reproduction costs

IBM copier (monthly rent)-----	\$849
Paper:	
18,000,000 ¹ copies to reproduce in backlog=(6 months)-----	
3,000,000 copies per month=3,871 rolls×\$2.44 per roll=-----	9,445
Toner: 3,000,000 copies /month × .0044 per copy=-----	13,200
Total reproduction costs per month—(6 months)-----	23,494
or	
IBM copier for 6 months-----	5,094
Total paper costs-----	56,670
Total toner costs-----	79,200
Total-----	140,964

¹ Consists of 10,000,000 work copies plus 8,000,000 estimated release copies.

FOIPA BRANCH REORGANIZATION AND BACKLOG ELIMINATION COSTS—TOTALS

The following shows total additional funds needed, over and above the annual appropriation, to fund the proposed FOIPA branch in order to maintain work in current status and the cost to handle a backlog special to bring the work load up to date. The backlog special amounts are shown for each of the alternative plans of grade level utilization (use of GS-12's and GS-13's) and length of tours of duty. Salaries and benefits are subtracted from total costs to arrive at actual additional funds needed.

FOI/PA projection additional funds needed

Total projected annual cost for reorganization of FOI/PA section (301 employee work-years)-----	\$6,702,443
Total funds appropriated—fiscal year 1977 (202 employee work- years)-----	3,410,000
Additional funds needed (189 employee work-years)-----	3,292,443

TOTAL ADDITIONAL FUNDS NEEDED FOR BACKLOG SPECIAL

	Projected	Salaries	Additional costs
Plan 1.....	\$4,911,764	\$2,611,200	\$2,300,564
Plan 2.....	4,952,964	2,611,200	2,341,764
Plan 3.....	5,280,164	2,979,600	2,300,564
Plan 4.....	5,321,364	2,979,600	2,341,764
Plan 5.....	5,095,964	2,795,400	2,300,564
Plan 6.....	5,137,164	2,795,400	2,341,764

The following shows the total projected annual cost for the proposed FOIPA branch and the total projected cost of the FOIPA backlog special. Backlog special amounts are shown for the alternative plans of Agent grade level utilization and length of tours of duty. All figures are based on a six month duration, using 200 Agents, 10 hours per day, 6 days per week. All figures are supported by additional schedules.

FOI/PA projection

Total projected annual cost for reorganization of F.O.I. P.A. section...	\$6,702,443
Total projected cost for backlog special (6 months—200 agents):	
GS-12 agents—two groups-----	4,911,764
GS-12 agents—three groups-----	4,952,964
GS-13 agents—two groups-----	5,280,164
GS-13 agents—three groups-----	5,321,364
GS-12 and 13 agents (average)—two groups-----	5,095,964
GS-12 and 13 agents (average)—three groups-----	5,137,164

"SEE" REFERENCE POLICY BACKGROUND DOCUMENTS

NOVEMBER 3, 1975.

Memorandum to: The Deputy Attorney General.

From: Director, FBI.

Subject: Interface Between the privacy and freedom of informations acts as regards "See" references an obstacle to compliance.

Reference is made to recent informal discussions by the FBI with Mr. Quinlan J. Shea, Jr., Chief, Freedom of Information Appeals Unit, Department of Justice, concerning the interface between the two information acts and its effect upon the handling of "see" references.¹

Manpower allocation to the processing of "see" references is a major obstacle to timely, cost effective responses to information act requests.²

File review time to determine which documents are identifiable with a requester necessitates an extensive preliminary review to eliminate main file references and "see" references under the same or similar name of a requester, but which are not identical.³ Fifty years of compiling documents and building indices have left the FBI with approximately 58 million index cards. Estimates indicate these indices consist of approximately 19.3 million main file indices cards and 38.7 million incidental "see" reference cards which correlate to a total of 6,628,000 cases investigated during the history of the FBI.⁴

Careful and extensive indexing, which is essential to successful criminal and security investigations, has become a severe impediment to the expeditious handling of information act requests. To insure that no witness, bystander, associate, suspect, pseudonym, relative, or phonetically spelled counterpart of any of the above is overlooked, each is indexed if deemed relevant by the supervising Agent. Victims are also indexed; but as they are carried in the title of a case a main file index card would exist for them. Multiple subject cases and the listing of victims in the case caption account for the reason that approximately three times as many main file index cards exist as the total number of cases investigated. Therefore, an indexing system of considerable value to an investigative agency exists which presents a unique problem with regard to information act requests.

A significant portion of the time devoted to processing information act requests involves processing "see" references from documents which pertain to the subject(s) and occasionally the victim(s) of investigations otherwise unrelated to the requester. The United States Civil Service Commission takes the position that such a document pertains to the subject of the investigation and not the person who is interviewed, i.e., the reference.⁵

The FBI in handling requests under the proposed guidelines pertaining to the interface of the Privacy Act and the FOIA recommends consideration of the following proposal:

All indices searches pursuant to an information act request should be restricted to "on the nose" searches. Such a process would eliminate the examination of breakdowns or buildups of a name, the search being limited instead to the

¹ The term "see" reference under FBI search procedures means that an individual other than the subject of the investigation is mentioned in the documents comprising the investigation. Conversely the subject of any case will be listed in an indices search as having a main file (case investigation).

² A random sampling of 206 nonproject FOIPA cases, October 7, 1975, revealed a total of 424 main files and 10,055 "see" references. All main files and "see" references were reviewed and confirmed as identical with the requesters. At a minimum all 424 main file volumes (assuming only one volume to each main file) and conservatively speaking at least 5,000 volumes containing references must be individually located, retrieved, disassembled, Xeroxed, reassembled, and refilled to process these 206 cases.

³ And these figures do not include the examination of all main files and "see" references that were possibly identical with the requesters. Initially the search for possibly identical files or references might have involved 20,000 separate volumes. This job is handled by file review.

⁴ Information obtained from surveys made by the Records Management Unit, Files and Communications Division, FBI. Over one million of these files were destroyed by Archival authority. 1.7 million exist on microfilm and 8.8 million are "hard copy" case files. Figures tabulated July 22, 1975.

⁵ Information obtained from Mr. Clark Trapp, Director, Freedom of Information Act, United States Civil Service Commission, October 3, 1975. Admittedly the FBI use of the term "see" reference encompasses more individuals, nevertheless, the principle is the same. Where the requester is both the subject of the investigation (or victim) and the person being interviewed, the document will be located in a main FBI file pertaining to the requester, not a "see" reference.

individual's complete name, commonly abbreviated name and business signature. In conjunction with this limited search,⁶ the FBI proposes to process only main files identified as a result of an indices search of requester's name. "See" references would not be listed⁷ except for any "see" references to general files.⁸ If requester further, or specifically, identifies records associated with a particular organization or incident contained in an investigation otherwise unrelated to requester, every effort would be made to locate and process such a record.

The above procedure is designed to bring the FBI into conformance with the rest of the Department of Justice per Title 28, Code of Federal Regulations, Section 16.3 (b), (c), (d) (1) and (2) (as amended March 1, 1975). These regulations permit the Department to request identification of the particular pending litigation, case title or other relevant information that will permit identification of the records by a "process that is not unreasonably burdensome or disruptive of Department operations." Indeed that FBI has requested no specificity or additional information to reduce the scope of "see" reference reviews; relying instead upon our own resources, this Agency has engaged in extensive research efforts to locate, retrieve and process any document that may relate to the requester's inquiry. Rather than information retrieval under established procedure, the effort to locate, identify or eliminate potentially relevant material has become investigatory.

Additionally this proposal is consistent with the philosophy expressed in the proposed regulation 16.57, which stipulates that all requests by an individual for information pertaining to himself be treated procedurally as Privacy Act requests with disclosure of otherwise exempt files being made at the discretion of the Attorney General. Such discretion should encompass the establishment of procedures that would permit prompt, substantial compliance with the mandate of Congress. Continued use of an indices search and file review procedure designed to facilitate the FBI's primary investigative function imposes a burden and subsequent delay in responding to requesters which has reached disruptive proportions within the FBI. A request by persons for any document containing their name as opposed to a case investigation captioned in their name, i.e., a main file reference, constitutes a categorical request under existing procedures.

As the FBI now has a backlog of 5,137 information act requests of which only 1,084 are presently being processed, the problem of noncompliance under the statutes is grave. Additionally the FBI continues to receive between seventy-five and one hundred ten new information act requests each day.

Existing procedures utilized by the FBI in an attempt to fulfill the statutory mandates are outside the bounds of a common sense approach to compliance. Administrative changes are necessary. Elimination of, or a significant reduction in the processing of "see" references, would substantially improve Department of Justice compliance with the information act statutes and significantly reduce the disruptive effect of taxing out of file and processing thousands of volumes containing "see" references.

The proposal outlined in this memorandum is considered a feasible and proper plan to reduce a growing backlog of requests. It is urged that the Deputy Attorney General act with celerity in consideration of this proposal which is strongly recommended by the FBI.

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

Re Interface between the Privacy and Freedom of Information Acts as Regards "See" References, an Obstacle to Compliance.

⁶ As opposed to an examination of all breakdowns and buildups of a name for criminal and security investigations, e.g., name: Robert Edward Lee with an indices search under not only full name, but also Robert E. Lee, Robert Lee, R. E. Lee, R. Edward Lee, E. Lee, and R. Lee, being conducted.

⁷ It is to be noted that FOIA experience demonstrates that "see" references are frequently reported in substance in any main file of which the requester is the subject.

⁸ General files are those which do not relate to a single, contained investigation, including instead documents grouped by category. Each document relates to a separate activity which is generally noninvestigatory. Examples are correspondence files, purchase contract files, uninvestigated allegations, liaison and miscellaneous matters. Records Management Unit, FBI, has identified these classifications as () files in all classifications, and the 62, 63, 66, and 94 classifications in the Field Offices and Headquarters as well as the 80 classification only at Field Offices.

ACTION MEMORANDUM

Background

Attached [Tab A] is a memorandum from Director Kelley which sets forth in detail the Bureau's current procedures involving searches for records pursuant to Freedom of Information and Privacy Act requests. Director Kelley seeks your approval of certain modifications in those procedures. These involve going to a system of "on-the-nose" searches, based on the information furnished by a requester, and the elimination of "see" reference checks.

Departmental Positions

I agree with the procedural changes which Director Kelley desires to implement and propose that you approve them for future operations. In forming my own opinions, I have relied substantially on representations, within and without the attached memorandum, that the Bureau recognizes that approval to make these changes can operate only to create "general rules" and that there will be cases in which more refined search procedures will be required as a matter of logic and fairness. I have coordinated my position with DAAG Lawton and Mr. Saloschin of the Office of Legal Counsel and [very informally] with Ms. Ruth Matthews of the staff of the oversight subcommittee chaired by Representative Abzug. All agree that the minimal impact on individual requesters which will result from these changes is more than offset by the significant favorable impact we anticipate in terms of reducing processing time within the Bureau.

Discussion

"On-the-nose" Searches.—The current practice within the Bureau is to undertake essentially the same sort of sophisticated files check in F.O.I.A. and P.A. cases as it would run in any other case. This involves, inter alia, building up and breaking down the requester's name into many different combinations of names and initials. In the F.O.I.A. and P.A. area, this involves considerable effort, which is rarely, if ever, rewarded in terms of records positively identifiable with the requester.

As a general proposition, Director Kelley intends to limit searches to the name used [for names provided] by the requester. Determination as to whether files so located are or are not identifiable with the particular requester will ordinarily be made by use of the information furnished by the requester. The Bureau fully realizes and accepts that there will be specific requests concerning which logic and/or fairness will require a more comprehensive search; it also accepts the fact that it may end up running several checks in a case, to the extent that requesters write back with further identifying information.

I propose that you approve the request of Director Kelley to go to a system ordinarily conducting only "on-the-nose" searches.

"See" Reference Checks.—This is by far the more important proposed change in terms of facilitating the Bureau's ongoing efforts to cut into its pending backlog of requests and reduce substantially the length of time the processing of the average request will take. "See" references are very peripheral in nature. In terms of the importance of the information they contain about the individual so referenced. As you well know, if the Bureau has any significant information about an individual or is seriously interested in him, he will have his own file. Director Kelley proposes to limit searches to main files identified with the requester, plus cross-referenced general files [documents grouped by category, e.g., correspondence, purchase contract, uninvestigated allegations, Halson, miscellaneous, etc.] and any file relating to organizations and/or incidents which are indicated by the requester, although otherwise superficially unrelated to him [i.e., he is not indexed as a subject or victim]. Under this procedure, it is difficult to see how any information of any significance about a requester will not be located.

I recognize that the statutes of concern talk about "records," rather than "significant information." I concede that adoption of the procedure proposed by Director Kelley represents a deliberate narrowing of our searches on these requests in a way that could "deprive" an individual of an adjudication as to the records that would be located through the "see" references. Nonetheless, I believe that most requesters are primarily [if not, in fact, solely] concerned with what we have "on" them. Given the present situation faced by the Bureau—where the pending backlog continues to rise each month—some solutions must be found. Although I often disagree with the F.B.I. as to what the vital interests of the

Department and Bureau are, all of us agree that the review procedures must be sufficient to protect those interests. Similarly, it is not reasonable, in my opinion, to require the Bureau to increase its already generous allocation of personnel resources to the F.O.I.A./P.A. area. The proposal of Director Kelley conforms to the current practice within the Civil Service Commission and the C.I.A. as well as D.E.A. and the other components of this Department.

Recommendation

I recommend that you approve the proposal of Director Kelley, with appropriate caveats. A memorandum to effect this result is submitted herewith.

QUINLAN J. SHEA, Jr.,
Chief, Freedom of Information and Privacy Unit.

DECEMBER 1, 1975.

Memorandum to: Clarence M. Kelley, Director, Federal Bureau of Investigation.
 From: Harold R. Tyler, Jr., Deputy Attorney General.
 Subject: Interface between the Privacy and Freedom of Information Acts as Regards "See" References an Obstacle to Compliance.

Reference is made to your memorandum of November 3, 1975, subject as above. Given the magnitude of the Bureau's pending caseload in the Freedom of Information Act-Privacy Act area, I concur generally in your proposal to modify your existing search procedures. Reliance, in most cases, on the use of "on-the-nose" searches and the cessation of "see" reference searches as a general rule may operate, technically, to deny some individual requesters the adjudication as to every record pertaining to them to which they are arguably entitled under these Acts. Nevertheless, it is clear to me that this effect of your proposal should be very minor and that it will be more than offset by the fact that the processing of pending and future requests will be greatly expedited.

Accordingly, your request in these regards is approved on the basis that it will significantly advance our mutual efforts to comply, to the greatest feasible extent, with both the letter and spirit of these two Acts.

[Whereupon, at 11:50 a.m., the subcommittee adjourned subject to call of the Chair.]

FBI OVERSIGHT

Preliminary GAO Report on FBI Accomplishments and Statistics

WEDNESDAY, SEPTEMBER 29, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 1:45 p.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Seiberling, Drinan, Dodd, Butler, and Kindness.

Also present: Alan A. Parker, counsel; Catherine LeRoy and Thomas P. Breen, assistant counsel; and Roscoe B. Starek III, associate counsel.

Mr. EDWARDS. The subcommittee will come to order. We apologize for the delay. The electronic voting machine broke down. We had to go back to the Middle Ages in voting. It takes 45 minutes.

First, I wish to express the subcommittee's appreciation to the General Accounting Office for accommodating our abrupt change in scheduling due to a meeting of the full Committee on the Judiciary this morning.

I wish also to express our appreciation for your cooperation and willingness to appear and present your progress to date before your review has been completed. Oversight, in all its facets, over the Federal Bureau of Investigation has been the objective of this subcommittee since June of 1974 when that assignment was first undertaken.

An important asset of ours in this endeavor has been the resources and cooperation of the General Accounting Office.

It was on June 3 of 1974 that we first asked for the assistance of the GAO to provide for us on a continuing basis information on the efficiency, economy, and effectiveness of the FBI's operations. Our initial concern was the Bureau's domestic intelligence operations.

You responded with a preliminary report in September of 1975, and your complete review on the FBI's domestic intelligence operations was received on February 24, 1976. It still remains as the basic source document for information on current Bureau practices in that area.

We have asked that you follow up that review with a new study, reporting to this subcommittee your findings after the implementation of the Attorney General's guidelines and the recent reorganization by Director Kelley, with respect to domestic intelligence matters, so that we may know the true effects of these recent changes on this troublesome area.

As we near the end of the 94th Congress, let me take a few minutes to outline our progress and activities with respect to the FBI. This subcommittee, since June of 1974, has publicly looked at the COINTELPRO's, outlining for the first time the structure and extent of FBI counterintelligence programs; held hearings with Attorney General Levi which covered the FBI information gathering practices with respect to Members of Congress and citizens of the United States; covered the special official and confidential files of J. Edgar Hoover and the destruction of same; covered how the resources of the FBI were misused by the executive branch.

We also initiated and discussed with Attorney General Levi the drafting of guidelines to speak to the appropriate investigatory areas and the scope of the Bureau's investigatory practices and completed public hearings on the Oswald-Ruby-Walter-Warren Commission-FBI connecting interests.

As previously mentioned, the subcommittee requested and received a report from the GAO on FBI domestic intelligence operations: Their Purpose and Scope; Issues That Need To Be Resolved. This report represents the most comprehensive and indepth look at the FBI's current domestic intelligence operations. It was and is the single most important resource document in this area. The followup study now in progress will indicate whether or not the changes instituted are of form or substance.

The subcommittee recently concluded a look at the problems occurring in the FBI's ability to comply with the statutory provisions of the Freedom of Information and Privacy Acts. The subcommittee demanded and recently received a proposal from the FBI to effectively administer in a timely fashion Freedom of Information and Privacy Act requests.

That proposal requires a transfer of manpower and funds, and we will be monitoring very closely the implementation of that proposal. I might add that is another area where the GAO is performing an audit, and we look forward to the results and your recommendations in that area.

More important, however, are the present projects which are ongoing at the staff level and on which we will hold hearings in this coming year.

Oversight, to be effective, needs to be constant and relentless. From time to time it will surface with a splash of publicity and that is necessary and helpful, as is the public scrutiny every agency should undergo; but 95 percent of effective oversight is constant probing and questioning on a daily basis by trained and knowledgeable staff persons.

The FBI is a vast bureaucracy of approximately 20,000 total employees and 12 divisions. Thorough-going oversight requires that every nook and cranny be looked into at regular and irregular intervals; not just the sensational must be probed, but the operations in their entirety must be scrutinized. Questions regarding the establishment of policy and its implementation must be constantly asked.

The subcommittee is presently asking those questions and delving into the area of informants. This will encompass the history and use of informants by the FBI, the law surrounding their use, a survey of instructions given by the FBI to informants, a survey of the methods used in handling them, the differences in their utilization between

criminal and intelligence matters, an analysis of their use compared to other techniques, an attempt to profile informants used, and to categorize the abuses caused by informants or the use of informants.

The subcommittee shall also examine the relationships between U.S. attorneys and the FBI—the control system for agents assisting U.S. attorneys and who sets the investigative priorities. I might add that the report to be received this afternoon points up the importance of this examination.

We will also continue our check on the current status of the FBI's electronic fingerprint identification systems, and check on continued use and effectiveness of NCIC.

The subcommittee is examining the employment/personnel management policies of the Bureau, looking at their present policy in recruitment of agent personnel; determining the educational and background needs of the FBI and how those needs are being filled; establishing the pattern of education and experience of agents hired in the last 10 years; examining their EEO efforts at all levels of employment; looking at their disciplinary policy, their grievance and appellate procedures and determining the policies and practices of assignments.

Additionally, we are examining the educational activities of the Bureau, the operation of their training academy at Quantico and the police academy, and checking the facilities, the curriculum, and the instructors.

This list is not meant to be all inclusive, but to provide the general outline of the areas we will be looking at first.

All of this takes time. All of this will result in public hearings and public disclosures of our findings. It is our goal, both in the short and long range, to assure the American people that they are getting full value from each dollar expended by the Bureau. Just as important we must assure ourselves that all FBI activities are solidly based on constitutional authority. These two concepts are inseparable in my view.

Let me turn now to the subject of today's hearings. For some time the FBI has been publishing an annual report. The introduction to each report always refers to the achievements recorded, the accomplishments the report outlines.

These reports and statistics have been widely used, even by Congress, to chronicle the accomplishments of the Bureau, to measure its effectiveness, and in some cases as a base on which to appropriate funds for its operations. Therefore, the subcommittee asked the GAO to look into these figures to determine their validity and their relevance.

Are they accurate yardsticks of how well the Bureau performs its assigned tasks and legitimate functions? Are they relevant to telling the story of how efficiently the Bureau performs? Is there a better measure?

Shortly the House and Senate will approve an LEAA authorization bill which will provide that all future appropriations for the Department of Justice must first be authorized by the Judiciary Committee. We proposed that suggestion and have worked hard for its passage. Our work here this afternoon will be helpful in looking forward to that authorization responsibility.

We have with us today Victor Lowe, Director of the General Government Division of the General Accounting Office. Mr. Lowe is ac-

accompanied by Daniel Stanton, Associate Director of the General Government Division, and by Daniel Harris, Supervisory Auditor of the General Government Division.

I ask you to rise and raise your right hand.

[Witnesses duly sworn.]

Mr. DRINAN. Mr. Chairman, I have a routine motion for media coverage. I move that the committee permit coverage of this hearing in whole or in part by television, radio, still photography or by any such methods pursuant to committee rule V.

Mr. EDWARDS. Without objection, so ordered.

If there are no statements by the members, you may proceed.

TESTIMONY OF VICTOR LOWE, DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY DANIEL STANTON, ASSOCIATE DIRECTOR, GENERAL GOVERNMENT DIVISION; DANIEL HARRIS, SUPERVISORY AUDITOR, GENERAL GOVERNMENT DIVISION; AND ROBERT POWELL, SUPERVISORY AUDITOR, SAN FRANCISCO REGION

Mr. LOWE. Mr. Chairman, I understand there are some time constraints so if it is suitable to the Chair, I would proceed to read through page 10 of my statement and then read the last two pages.

Mr. EDWARDS. Without objection, the full statement will be made a part of the record.

You may proceed.

[The prepared statement of Victor L. Lowe follows:]

STATEMENT OF VICTOR L. LOWE, DIRECTOR, GENERAL GOVERNMENT DIVISION

Mr. Chairman and Members of the Subcommittee: Our testimony today deals with the methods by which the FBI develops, reports, and uses accomplishment statistics on its criminal investigative activities. The Chairman of this Subcommittee has expressed a continuing interest in this review and particularly in the validity of the accomplishment statistics claimed annually by the FBI. Although the review is not yet complete, we can report on our progress to date and provide information that may be helpful in carrying out your oversight responsibilities.

The initial purpose of our review was to determine the validity of the FBI's accomplishment statistics resulting from its investigative efforts. Early in the review, however, we also began to focus on the more important issue of how useful and representative the FBI's accomplishment statistics are as indicators of the effectiveness of its criminal investigative efforts.

Our work is being conducted at FBI Headquarters and six FBI field offices—Boston, Chicago, Los Angeles, Milwaukee, Sacramento, and San Francisco. From these six offices we selected 1,199 criminal cases for review as shown in Appendix I. Our observations today are based on 683 or 57 percent of these cases.

Before I begin with the subject of today's testimony, I would like to briefly discuss the FBI's cooperation with our audits. In our previous two appearances before this Subcommittee regarding our review of the FBI's domestic intelligence operations, we pointed out several problems we had in conducting the review and in obtaining access to FBI records, particularly investigative files. Since that time, as you know, the FBI has agreed to cooperate with GAO audits and to provide us more complete information on its activities. However, it still does not include access to investigative files or to original file documents.

As you know, we are conducting several reviews of various FBI activities, including the one which we are testifying on today. To date, FBI officials have been very responsive to our requests for information on all ongoing reviews. Their cooperation has been particularly good on this review. The FBI has shown real

interest and has been taking action to improve its methods for managing resources and measuring investigative results. Following a briefing on the tentative results of our review, the FBI Director asked our assistance in developing better management information and directed his associates to provide us with any information we needed in this regard.

I would now like to discuss our observations with respect to our review of the FBI's investigative results and accomplishments.

The FBI has traditionally maintained and reported five categories of accomplishment statistics—Convictions, Fines, Savings, Recoveries, and Fugitive Locations—as the prime measurement of the effectiveness of its criminal investigative efforts. We found only a small number of errors in the accomplishment statistics. However, the statistics are subject to misinterpretation because of the way they are presented. More important, they are limited as a management tool in that they do not adequately portray the impact and effectiveness of the FBI's total investigative effort.

The FBI's accomplishment statistics relate to only a small percentage of the total criminal investigations it conducts. Our work to date indicates that most investigations do not produce one of the traditional above-noted accomplishments. Most cases are terminated either administratively within the FBI due to lack of a Federal crime or failure to identify a suspect, or by a U.S. attorney's declination to prosecute.

Cases investigated by the FBI, whether they produce accomplishment statistics or not, range from serious and complex instances of fraud and embezzlement, kidnapping, and armed bank robbery to what the FBI has termed "areas of marginal importance."

The fact that many cases do not produce a measurable accomplishment may be somewhat attributable to the reactive nature of the law enforcement business and the FBI's view that it must investigate all situations where it has sole or partial enforcement responsibility.

The FBI said that unless directed otherwise by the Department of Justice or local U.S. attorneys, it must investigate all apparently valid complaints of alleged violations of Federal law within its jurisdiction, and present each case for prosecutive opinion if the necessary elements are developed. Therefore, the FBI is expending resources on cases where it finds there was no crime or where the U.S. attorneys decide the violation was not substantive enough to justify the effort and expense of court proceedings.

Little agent time is expended on these cases individually. Since most cases terminate without being authorized for prosecution, however, these cases in total consume a large amount of FBI resources, the impact of which—except for any possible deterrent effect—may be limited.

The FBI has allocated its investigative resources primarily on the basis of caseload; that is, the average number of cases handled by a special agent. Generally, little attention was given by headquarters to the quality, nature, or scope of cases. Management information was limited and primarily caseload related. No information was kept to relate resources expended to the types of cases on which they were expended and the results achieved.

A year ago, the FBI initiated a different approach to investigations aimed at improving the management of its resources and cases. Field offices were instructed to "strive for early resolution" of investigative matters of "marginal importance" and "concentrate investigative effort on the major criminal problems" in their area. It was also suggested discussions be held with the U.S. attorneys regarding areas for concentration of investigative efforts.

The new concept should channel investigative resources into areas of greatest need to achieve maximum impact on crime. However, without better and more comprehensive information on the results of investigations and the corresponding effort expended, the FBI cannot adequately evaluate the effectiveness of the new concept or assure that resources are allocated to achieve the maximum impact on major criminal problems.

The FBI agreed it needs better and more comprehensive management information. Actions, which we will discuss later, have been taken by the FBI over the past 2 or 3 years to develop such information. Also, in August 1976, the FBI Director appointed a task force to review their management information needs and asked our assistance in developing better ways to report investigative results.

MANAGEMENT OF INVESTIGATIVE RESOURCES

The FBI is responsible for investigating a large number of criminal violations and civil matters. Even though the FBI—like any other law enforcement agency—is required by law to investigate all violations within its jurisdiction, from a practical standpoint its resources are limited. It must therefore establish priorities and focus its efforts where it can have the most impact on the crime problem. Thus, the way the FBI organizes its criminal investigative activities and the information it uses to manage and control its resources are important to achieving maximum efficiency.

Management of FBI resources has been based on limited information such as personal observations and opinions, and reports that do not provide comprehensive information on all aspects of investigative efforts.

FBI headquarters decisions regarding priorities, staffing allocations, and conclusions regarding program success have been based on caseload information from administrative reports, accomplishment reports, periodic manpower surveys, and annual inspections. Field office decisions have been based on caseload, and on the squad supervisors' and field office managers' personal knowledge of performance and resource needs in specific areas and the capabilities of personnel working those areas.

Accomplishment reports, compiled monthly by headquarters, show fines, savings, recoveries, convictions, and fugitive locations claimed by field offices. These reports are available to the field offices, but their usefulness is questionable because they lack information on the resources expended.

Administrative reports, also compiled monthly from similar field office reports, contain data on the number of cases received, closed, and pending, the number of agents assigned, and average caseload.

In lieu of routine information on manpower usage, which—as will be discussed later—will soon become available, manpower surveys were periodically made of selected 2-week periods in various field offices. Although these surveys became increasingly refined since they were initiated in 1973, they still only approximated the percentage of total agent effort expended in each investigative and administrative classification. In addition, with certain exceptions, the surveys did not go beyond these classifications to categories or types of cases.

Average caseload has been the primary basis for allocating resources, with some reliance placed on the Inspection Division's assessment during annual field office inspections of caseload and the adequacy of staffing levels. However, this system gave equal weight to all cases without considering their quality or significance, and it generally implied that enough resources were available to cover all cases. Also, under this system a tendency developed at the field office level to maintain high caseloads by opening and retaining relatively inconsequential cases to justify staffing levels.

In late 1974, recognizing the problems with the "caseload management" approach, the FBI initiated a "use of personnel" study to determine whether the field offices "could produce a more meaningful and significant investigative product if they were unencumbered by the caseload system with its direct correlation to manpower allocation" and whether "office efficiency, productivity, and morale would be positively affected by a managerial approach which emphasized 'Quality over Quantity.'"

After a trial period in four field offices, the FBI initiated in September 1975 the so-called "Quality over Quantity" concept in all its field offices. Instructions were issued to the field offices to (1) conclude as expeditiously as possible cases of "marginal importance," (2) establish investigative priorities in conjunction with the local U.S. attorneys, and (3) concentrate on quality cases and on major criminal and security problems within their respective territories.

In our opinion, the FBI's acceptance of the "Quality over Quantity" approach to conducting investigations and managing its investigative resources is a major step forward. However, certain problems must be resolved before the concept can become effective, including defining and establishing criteria for determining "quality" cases and cases of "marginal importance." Also, since caseload has been the primary method used to allocate manpower, the successful implementation of the concept could be hindered by any lingering suspicions in the FBI that a drop in caseload could result in closing smaller offices, transfer of agents from offices having small caseloads, and manpower reductions in general.

For the "Quality over Quantity" concept to be viable, the FBI in conjunction with the U.S. attorneys must make determinations of which cases or types of cases should be investigated, and to what extent resources should be committed to a given case. Criteria should be developed to help determine whether the FBI should become involved in a case and what priority the case should be given.

Information presently available to the FBI does not provide a complete picture of its criminal investigative efforts and, thus, is not a firm basis for measuring the effectiveness of past operations, determining where resources were used, allocating resources, or planning future operations.

After about 2 years of design and development, the FBI recently implemented an automated system to replace its periodic manpower survey that will routinely account for agent time expended by general investigative classifications and sub-classifications. Sub-classifications of the existing classifications and other changes are also being considered for the existing administrative or caseload report to improve its usefulness.

Although these changes are improvements, they do not go far enough because of the wide range in complexity and degree of importance of individual cases. The FBI does not develop statistical information on the results of cases. Generally, there is no information that relates the time and expense of investigations to their seriousness or complexity, or their final disposition. Such information is necessary if the FBI is going to adequately evaluate the effectiveness of its operations.

Since accomplishment statistics were claimed in only about 25 percent of the criminal cases closed in the offices we reviewed, the limited accomplishment information applies to a small part of overall operations. Most cases investigated are terminated either administratively under authority of the Special Agent in Charge (SAC), or by a U.S. attorney's declination to prosecute. In the six offices for the period April-July, only 530 or about 9 percent of 6,209 cases concluded were accepted for prosecution. About 50 percent were closed administratively by SAC authority and about 41 percent were declined for prosecution.

The fact that so many cases were not authorized for prosecution may not be bad. The problem, however, is that the FBI currently has no information on the disposition of cases so it can identify the number of, and amount of effort expended on, cases declined for prosecution, closed by SAC authority, or accepted for prosecution.

The FBI should have more comprehensive management information to effectively manage its investigative operations. Better information is needed to effectively select priority areas for concentrated efforts and allocate resources between field offices and squads. In addition to providing for better internal program management, such information could help the FBI identify areas in which action by the Congress and the Department of Justice is necessary to effect improvement. Such actions could include revising laws, and issuing prosecutorial guidelines setting forth investigative areas that will not normally be prosecuted or that should be routinely referred to other Federal, State, or local authorities having concurrent jurisdiction.

RECORDING AND REPORTING ACCOMPLISHMENT STATISTICS

Each year, primarily in its annual report and budget justification, the FBI reports the results of its investigative activities in the form of five types of accomplishments—convictions, fines, savings, recoveries, and fugitive locations. This is the primary basis which the Department of Justice, Office of Management and Budget, the Congress, the public, and the FBI itself have for judging and evaluating the FBI's performance and effectiveness.

Although generally the FBI's accomplishment statistics were accurate based on the FBI's criteria for determining accomplishments, we believe that they could be subject to misinterpretation because of the nature of their presentation and lack of detail. Many of the accomplishments represent joint efforts between the FBI and other law enforcement agencies, and contain estimated potential rather than actual dollar amounts.

The criteria FBI headquarters provides to field offices for recording accomplishments is limited. However, the basic rule followed by the FBI is that if it had any involvement whatsoever in a case, it claims credit for the resulting accomplishment. The main control is headquarters review and final approval of accomplishments, which are generally submitted by field office personnel as part of a periodic or final investigative report.

Of the 473 cases examined to date, we questioned 156, or about 33 percent, on the basis that they could be subject to misinterpretation unless further detail or explanation is provided. A small number appeared to be in error. Appendix II shows the number of cases examined and questioned by category of accomplishment.

We questioned accomplishments claimed in the cases reviewed on the basis of the following criteria :

The accomplishment claimed was either inaccurate or a duplication.

The accomplishment claimed was in a case where there was little apparent FBI involvement.

The role of the FBI in achieving the accomplishment was clearly supportive, or another agency played an important role in the accomplishment that is not recognized.

The amount claimed was based upon an estimate of potential loss that could have occurred had a scheme been successful or had a suit against the Federal Government been successful.

We will now discuss our findings with respect to each of the five accomplishment categories.

Convictions

The FBI expresses the convictions it claims as accomplishments in terms of the number of persons convicted and the sentences imposed. The format for presenting convictions treats all convictions the same and does not allow for distinction as to their relative importance in terms of impact on crime. For example, a conviction of an influential organized crime figure is given the same weight as a conviction of a bookmaker.

Also, multiple convictions of the same person could be misinterpreted since the reader may assume each conviction applies to a different person. It is FBI policy to claim a conviction on each indictment even though it may be on the same person.

Further, the FBI reporting does not recognize the contributions of State, local, and other Federal agencies in securing the convictions. On the other hand, it does not recognize the contributions of the FBI in some cases tried by the States where the FBI may have spent considerable resources.

Of the 108 cases reviewed in which convictions were claimed, we questioned 10, or about 9 percent, on the basis that they could be misinterpreted. For example :

In a case exemplifying multiple convictions of one person, a suspect wrote 10 worthless checks totaling \$887 at two military installations. The FBI investigated the case and presented it to the U.S. attorney. The suspect was convicted of each of 10 complaints and the FBI reported 10 convictions.

In a case exemplifying the unrecognized involvement of another agency, two juveniles fatally wounded a third individual and left him on military property. Military investigators obtained a description of the juveniles and notified the highway patrol, which apprehended the suspects. They turned the suspects over to the military which then turned them over the FBI. The FBI arrested the suspects who were later prosecuted as adults and convicted. The FBI reported two convictions and two life-term sentences.

Fines

The FBI reports fines as accomplishments, whether they are actual or suspended. In 16 cases, or about 21 percent, of the 76 cases reviewed, the fines claimed were suspended in whole or part and thus would not have been collected by the Federal Government. Although a fine imposed, even if suspended, is an accomplishment, it is misleading for the FBI to report this as if it were an amount actually collected by the Federal Government. For example :

In a case involving the conviction of a bank employee for embezzling funds using fraudulent withdrawal slips. The subject made complete restitution and was sentenced to 6 months probation and a \$550 fine which was suspended. The FBI claimed the \$550 fine as an accomplishment.

Savings

The amount of savings the FBI claims includes the actual or estimated value of money or property that could have been lost because of criminal acts, or could have been paid in civil suits brought against the Government. Most savings are claimed because of dismissals or reductions in the amount asked in civil suits brought under the Federal Tort Claims Act. When requested, the FBI assists U.S. attorneys who represent the Government in such cases.

The FBI claims as a savings the total amount asked for in suits that are

dismissed and the difference between the total amount asked for and the amount awarded in other cases. This practice is questionable because it cannot be assumed that the Government would have lost the cases and paid the entire amount had the FBI not assisted the U.S. attorney. One U.S. attorney pointed out that the amount asked for often bears no relation to the reasonableness of the claim.

We questioned all 50 cases reviewed involving savings claimed on the basis that the amounts were highly judgmental and subject to misinterpretation and require extensive clarification. For example:

In a civil suit, the plaintiffs asked \$1 million claiming the Government had clouded the title to some land. The U.S. attorney requested that the FBI check the two plaintiffs' backgrounds. However, before the background checks were provided to the U.S. attorney, the claim was dismissed on its merits by the court. The FBI claimed a \$1 million savings in the case.

Another case involved a \$1.5 million medical malpractice suit brought against the Federal Government charging that the victim's death resulted from a military doctor's negligence. The FBI assisted the U.S. attorney defending the case by investigating the doctor's background and circumstances surrounding the victim's death, and determined the doctor was possibly negligent. The suit was settled for \$7,000 and the FBI claimed a \$1,493,000 savings.

In a case involving a criminal act, five persons attempted to sell counterfeit money orders. A Drug Enforcement Administration (DEA) informant learned of the scheme and notified DEA which in turn notified the FBI. DEA recovered money orders with a potential face value of \$231,400, while the FBI recovered an additional \$314,800. DEA's recovered money orders were turned over to the FBI which claimed the entire \$546,200 as a savings. Since none of the money orders were successfully passed, this represented only potential savings.

Recoveries

The recoveries category includes stolen, duplicated or created property, money, and other financial documents, which are confiscated in the course of investigating a crime. The FBI's procedure for reporting recoveries indicates that the FBI was solely responsible for recovering the items even though the recoveries were made either by other law enforcement agencies or in a coordinated effort between the FBI and another agency.

The recovery category includes the confiscation of pirated movie films and recording tapes, whose value is routinely estimated based on the projected potential losses that may have occurred if the pirated items were distributed for monetary gain whether or not they were distributed.

Of the 110 sample cases involving recovery claims, we questioned 41, or about 37 percent, primarily because the recoveries were made by other law enforcement agencies or involved arbitrary figures related to a potential act. For example:

In one case, the FBI claimed a recovery although no Federal violation occurred and they did not work on the case. A piece of equipment valued at \$6,400 was turned in to a local police department the same day it had been reported to them as being stolen. The local police department notified the FBI thinking the theft might constitute a Federal violation. Although no Federal violation had occurred, and no suspect was apprehended, the FBI claimed a \$6,400 recovery.

In a case involving an estimated recovery based on a potential act, the FBI recovered copies of copyrighted movie film from a collector. The collector had made no money from showing the copies and there was no indication that he planned to use the films for financial gain. However, the FBI claimed a recovery of \$329,627, ascertained by applying a certain percent to the original films' gross receipts to date. This method was worked out with the film industry.

With regard to pirated films in general, FBI officials stated that sometimes the subject of an investigation will claim he is only a collector but later will sell the film.

Fugitives located

FBI claims of fugitives located include subjects wanted on Federal charges caught either by the FBI or other law enforcement agencies. Most fugitives located were deserters from the military services. Other major categories were persons wanted for unlawful flight to avoid local prosecution, escaped Federal prisoners, and parole and probation violators. The FBI's presentation of fugitive location statistics does not reflect the fact that many fugitives are apprehended by State or local law enforcement agencies with the assistance of the

FBI, or that the FBI's contribution may have consisted solely of having originally entered the suspect's name into the National Crime Information Center (NCIC) as a wanted person at the time he became a fugitive.

We questioned 39, or about 30 percent, of the 129 cases reviewed involving fugitive location claims because some other law enforcement agency was responsible for the apprehension. For example:

In one case, a deserter was arrested by a sheriff's office on local charges. The sheriff checked NCIC, discovered the suspect was a fugitive, and notified the FBI. The FBI confirmed where the suspect was wanted on the deserter charge and claimed the case as a fugitive accomplishment.

Obviously NCIC is a major aid to the FBI and other Federal and State agencies. But, it is misleading to claim accomplishments resulting through checks of NCIC by others on the same basis as apprehensions made by the FBI.

FBI officials agreed that their accomplishment statistics as currently presented could be subject to misinterpretation and are limited as a measure of their investigative effectiveness. They expressed a commitment to develop new ways to measure and report investigative results and accomplishments.

RECORDING AND REPORTING THE RESULTS OF INVESTIGATIVE ACTIVITIES

As we said before, the accomplishment statistics the FBI claims relate to only a small portion of their total investigations. Also, the statistics seldom reflect the final result or disposition of an investigation. For example, a case where a monetary recovery or a savings was claimed may never have been prosecuted, let alone involve a conviction.

From an investigative results standpoint, a case, when followed to its logical conclusion, can be terminated administratively within the FBI or be referred to the local U.S. attorney for a prosecutive determination. The U.S. attorney can decline to prosecute which would result in its termination; or he can authorize prosecution which, if successful, can lead to a conviction and possibly a fine.

We concluded that to get a complete picture of FBI investigative efforts, we needed information on the disposition and the resources expended on all types of cases. Neither the FBI nor the U.S. attorneys maintain such information on a routine basis.

At our request, the six FBI field offices in our review recorded the disposition of criminal cases on which they concluded investigative work during the period April through July 1976. As shown in the table in Appendix I, of 6,209 cases recorded, about 91 percent were either closed administratively by the SAC or declined for prosecution by the U.S. attorneys. Only 9 percent were authorized for prosecution.

For 497 cases randomly selected from the three categories, we determined the nature of the investigation, the disposition, and the estimated agent time expended. We will now discuss the results of our review of 210 of the 497 sample cases.

Administrative closures

The FBI closes investigations administratively when all reasonable investigative effort has failed to develop either a suspect or a Federal violation. Administrative closures are made at the squad supervisor's discretion on the delegated authority of the SAC.

Of the 83 administrative closures reviewed, 32 involved no crime, 8 no Federal crime, 25 no suspect, 3 insufficient evidence, and 15 were closed for a number of other reasons. Based on estimates from special agents, we determined the 83 cases were open an average of 130 calendar days and involved an average of three agent work days. The cases covered a variety of violations. Areas most commonly investigated were theft of Government property and interstate transportation of stolen property including motor vehicles. For example:

The FBI opened an investigation when an oil company owner reported that an audit of his company disclosed a \$20,000 theft of tires, batteries, etc. It was presumed that the theft involved interstate transportation of stolen property for which the FBI has jurisdiction. The case was closed after the FBI found there had not been a complete audit in over 5 years; and because of sloppy bookkeeping practices, it could not be established that a loss had in fact occurred. The case agent estimated that 46 hours were spent on this case.

A case was opened when the FBI learned a suspect might be in possession of \$200,000 in stolen jewelry. The FBI interviewed the suspect's friends and

acquaintances. Local authorities searched the suspect's residence but did not find any jewelry. The case was closed because no Federal violation was established. The FBI estimated it expended 20 hours on the case.

Another case involved the alleged theft at a national park of a bicycle valued at \$100. Three field offices were involved in trying to locate the owner and obtain an identification number for the bicycle. When finally located, the owner could not supply the bicycle's identification number. The case was then closed because there was no suspect and the stolen property could not be identified if recovered. The case was open 210 days and involved the estimated expenditure of two days by the originating office and an unknown number of days by two assist offices.

U.S. attorney declinations

Of the 92 cases we reviewed that the U.S. attorney declined to prosecute, 27 were declined because the cases lacked prosecutorial merit, 11 because there was no criminal intent, 1 because of insufficient evidence, 3 because the cases came under a blanket declination, and 23 because of other reasons. Another 27 cases were declined for Federal prosecution but referred to appropriate State or local authorities for prosecution.

Based on FBI estimates, the cases were open an average of 135 calendar days and involved an average of at least 4½ agent work days.

The cases covered a variety of Federal violations, some of which involve concurrent jurisdiction. As in the case of administrative closures, two of the most common violations were theft of Government property and interstate transportation of stolen motor vehicles. Other common violations declined for prosecution were bank fraud and embezzlement and crime on Indian and Government reservations. For example:

The FBI opened an investigation after a bank robbery was committed. The thief fled with \$339 but was identified by the local police through photographs. The suspect later surrendered to police in another city. The U.S. attorney declined prosecution in favor of prosecution by local authorities. The case was open 80 days and an estimated 44 agent hours were expended.

In another case a suspect was apprehended by a security officer at a military base exchange after allegedly changing the price tag on an item from \$2.50 to \$1.75. The FBI entered the case because the suspect was a civilian. The U.S. attorney declined prosecution because, in his opinion, the case lacked prosecutive merit. The FBI estimated that it expended about 1 day investigating the case.

The FBI opened another case after a review of its records showed that two suspects with previous criminal records had been arrested by local police for possessing a stolen car. The FBI estimated it expended about 10 hours requesting and reviewing the suspects' criminal records; interviewing the arresting officer; determining the disposition of local charges; requesting other field offices to interview the car owner and verify the theft; and, finally, presenting the case to the U.S. attorney for a prosecutorial decision. The U.S. attorney then declined the case in favor of local prosecution.

Cases authorized for prosecution

The U.S. attorney authorizes and initiates prosecutive proceedings when, in his opinion, the case has prosecutive merit, a provable Federal violation has occurred, and there appears to be sufficient evidence to prove the suspect willfully committed the violation. Some other factors in the decision to prosecute are whether the case should be tried by local authorities in cases of concurrent jurisdiction, and whether the subject is a repeat offender.

Bank robberies were the violations most frequently authorized for prosecution among the 35 cases we reviewed. The other most frequently authorized violations were generally the same as the ones that were frequently closed administratively or by prosecutive declination. However, the nature of the violations in the authorized cases was generally more serious or involved repeat offenders.

The complexity of the authorized cases also appeared to be greater than those from the other two categories. In this regard, the 35 sample cases were open an estimated average of 315 calendar days and involved an estimated average of 107 agent work days. The following cases are examples.

The suspect of one case allegedly provided a bank false information to obtain loans totaling almost \$1 million. When the loan defaulted, the bank found the business collateral offered was nonexistent. The FBI entered the case upon a complaint from the victim bank.

In another case, two suspects wanted by the FBI for over 20 other bank robberies, were caught by local authorities while attempting to rob another bank

with a third suspect. Prosecution of all three suspects, two of whom had stolen about \$25,000 in total, was authorized and they were convicted.

SUMMATION

The estimated time spent on cases terminated by administrative closures or U.S. attorney declinations is substantially lower than on cases authorized for prosecution. However, when taken together, the large number of cases not prosecuted represents a considerable investment of FBI resources.

Unless there is concurrent jurisdiction with respect to a particular violation or specific guidelines from the U.S. attorney as to what generally will not be prosecuted, the FBI may have no choice but to investigate every complaint within its jurisdiction that it can reasonably handle. However, 48 percent of the administrative closure cases we sampled were closed because either no crime or no Federal violation was involved. Furthermore, 59 percent of the cases we sampled that were declined by the U.S. attorney were declined because they lacked prosecutorial merit due to the nature and degree of seriousness of the offense, or referred to State or local authorities having concurrent jurisdiction for their consideration to prosecute. Based on these results, it seems the FBI might be able to reduce its efforts on the large number of cases not being prosecuted and focus its efforts on greater priorities by assuming a more supplemental role in areas of concurrent jurisdiction and obtaining more guidance from U.S. attorneys on the types of cases normally not prosecuted.

To identify priority and marginal areas, the FBI needs a system to provide information on a regular basis regarding how available time is being used and with what results. Once problem areas have been identified and necessary agreements reached, the information can be used to monitor the effectiveness of FBI field offices in reducing efforts in marginal areas and increasing investigative results in priority areas.

The major factor cited by FBI officials as inhibiting the FBI from limiting the expenditure of resources in areas of "marginal importance" is that it is bound by law to investigate every reported alleged violation of Federal law even though there may be dual jurisdiction with State and local agencies. Several of the U.S. attorneys we contacted said that, in instances of dual jurisdiction, applicable State and local legal sanctions should be applied in preference to Federal sanctions which prohibit essentially the same act. FBI officials indicated their efforts could be reduced in some areas if U.S. attorneys would issue specific prosecutorial guidelines or blanket declinations. The U.S. attorneys expressed differing views on the benefits and limitations of guidelines.

We believe the basic issue is to insure that the FBI's resources are focused to have maximum impact on major crime problems. The Department of Justice and the FBI need to explore ways of reducing FBI efforts in marginal areas and re-directing them toward priority areas.

This concludes my prepared statement. We hope this information and the information in our final report will assist the Subcommittee in its oversight of FBI activities. We would be pleased to respond to any questions.

APPENDIX I

NUMBER OF CASES SAMPLED BY CATEGORY IN REVIEW OF INVESTIGATIVE RESULTS AND ACCOMPLISHMENTS

Category	Cases in universe	Cases sampled	Cases reviewed as of Aug. 13, 1976
Accomplishment cases (July 1975 to April 1976):			
Convictions	2,045	170	188
Fugitive locations	3,808	180	129
Fines	480	131	76
Savings	61	61	50
Recoveries	1,041	160	110
Total	7,435	702	473
Other results cases (April to July 1976):			
Administrative closures	3,088	179	83
U.S. Attorney declination	2,583	180	92
U.S. Attorney authorizations for prosecution	530	138	15
Total	6,201	497	210
Total accomplishment and other results cases	13,644	1,199	683

APPENDIX II

FBI CRIMINAL INVESTIGATIONS SAMPLED BY GAO IN WHICH ACCOMPLISHMENTS WERE CLAIMED DURING THE PERIOD JULY 1975 TO APRIL 1976

Category	Cases reviewed as of Aug. 13, 1976	Cases questioned
Convictions	108	10
Fugitive locations	129	39
Fines	76	18
Savings	50	50
Recoveries	110	41
Total	473	156

Mr. Lowe. Mr. Chairman and members of the subcommittee, our testimony today deals with the methods by which the FBI develops, reports, and uses accomplishment statistics on its criminal investigative activities. The chairman of this subcommittee has expressed a continuing interest in this review and particularly in the validity of the accomplishment statistics claimed annually by the FBI. Although the review is not yet complete, we can report on our progress to date and provide information that may be helpful in carrying out your oversight responsibilities.

The initial purpose of our review was to determine the validity of the FBI's accomplishment statistics resulting from its investigative efforts. Early in the review, however, we also began to focus on the more important issue of how useful and representative the FBI's accomplishment statistics are as indicators of the effectiveness of its criminal investigative efforts.

Our work is being conducted at FBI Headquarters and six FBI field offices—Boston, Chicago, Los Angeles, Milwaukee, Sacramento, and San Francisco. From these six offices we selected 1,199 criminal cases for review as shown in appendix 1. Our observations today are based on 683 or 57 percent of these cases.

Before I begin with the subject of today's testimony I would like to briefly discuss the FBI's cooperation with our audits. In our previous two appearances before this subcommittee regarding our review of the FBI's domestic intelligence operations, we pointed out several problems we had in conducting the review and in obtaining access to FBI records, particularly investigative files.

Since that time as you know the FBI has agreed to cooperate with GAO audits and to provide us more complete information on its activities. However, it still does not include access to investigative files or to original file documents.

As you know, we are conducting several reviews of various FBI activities, including the one which we are testifying on today. To date FBI officials have been very responsive to our requests for information on all ongoing reviews. Their cooperation has been particularly good on this review. The FBI has shown real interest and has been taking action to improve its methods for managing resources and measuring investigative results. Following a briefing on the tentative results of our review, the FBI Director asked our assistance in developing better management information and directed his associates to provide us with any information we needed in this regard.

I would now like to discuss our observations with respect to our review of the FBI's investigative results and accomplishments.

The FBI has traditionally maintained and reported five categories of accomplishment statistics—convictions, fines, savings, recoveries, and fugitive locations—as the prime measurement of the effectiveness of its criminal investigative efforts.

We found only a small number of errors in the accomplishment statistics. However, the statistics are subject to misinterpretation because of the way they are presented. More important, they are limited as a management tool in that they do not adequately portray the impact and effectiveness of the FBI's total investigative effort.

The FBI's accomplishment statistics relate to only a small percentage of the total criminal investigations it conducts. Our work to date indicates that most investigations do not produce one of the traditional above-noted accomplishments. Most cases are terminated either administratively within the FBI due to lack of a Federal crime or failure to identify a suspect, or by a U.S. attorney's declination to prosecute.

Cases investigated by the FBI, whether they produce accomplishment statistics or not, range from serious and complex instances of fraud and embezzlement, kidnapping, and armed bank robbery to what the FBI has termed "areas of marginal importance."

The fact that many cases do not produce a measurable accomplishment may be somewhat attributable to the reactive nature of the law enforcement business and the FBI's view that it must investigate situations where it has sole or partial enforcement responsibility.

The FBI said that unless directed otherwise by the Department of Justice or local U.S. attorneys, it must investigate all apparently valid complaints of alleged violations of Federal law within its jurisdiction, and present each case for prosecutive opinion if the necessary elements are developed.

Therefore, the FBI is expending resources on cases where subsequently it finds there was no crime or the U.S. attorneys decide the violation was not substantive enough to justify the effort and expense of court proceedings.

Little agent time is expended on these cases individually. Since most cases terminate without being authorized for prosecution, however, these cases in total consume a large amount of FBI resources, the impact of which—except for any possible deterrent effect—may be limited.

The FBI has allocated its investigative resources primarily on the basis of caseload; that is, the average number of cases handled by a special agent. Generally little attention was given by headquarters to the quality, nature, or scope of cases. Management information was limited and primarily caseload related. No information was kept to relate resources expended to the types of cases on which they were expended and the results achieved.

A year ago the FBI initiated a different approach to investigations aimed at improving the management of its resources and cases. Field offices were instructed to "strive for early resolution" of investigative matters of "marginal importance" and "concentrate investigative effort on the major criminal . . . problems" in their area. It was also suggested discussions be held with the U.S. attorneys regarding areas for concentration of investigative efforts.

The new concept should channel investigative resources into areas of greatest need to achieve maximum impact on crime. However, without better and more comprehensive information on the results of investigations and the corresponding effort expended, the FBI cannot adequately evaluate the effectiveness of the new concept or assure that resources are allocated to achieve the maximum impact on major criminal problems.

The FBI agreed it needs better and more comprehensive management information. Actions, which we will discuss later, have been taken by the FBI over the past 2 or 3 years to develop such information. Also in August 1976 the FBI Director appointed a task force to review its management information needs and asked our assistance in developing better ways to report investigative results.

The FBI is responsible for investigating a large number of criminal violations and civil matters. Even though the FBI—like any other law enforcement agency—is required by law to investigate all violations within its jurisdiction, from a practical standpoint its resources are limited. It must therefore establish priorities and focus its efforts where it can have the most impact on the crime problem. Thus the way the FBI organizes its criminal investigative activities and the information it uses to manage and control its resources are important to achieving maximum efficiency.

Management of FBI resources has been based on limited information such as personal observations and opinions, and reports that do not provide comprehensive information on all aspects of investigative efforts.

FBI headquarters decisions regarding priorities, staffing allocations, and conclusions regarding program success have been based on caseload information from administrative reports, accomplishment reports, periodic manpower surveys, and annual inspections. Field office decisions have been based on caseload, and on the squad supervisors' and field office managers' personal knowledge of performance and resource needs in specific areas and the capabilities of personnel working those areas.

Accomplishment reports, compiled monthly by headquarters, show fines, savings, recoveries, convictions, and fugitive locations claimed by field offices. These reports are available to the field offices, but their usefulness is questionable because they lack information on the resources expended.

Administrative reports, also compiled monthly, from similar field office reports, contain data on the number of cases received, closed and pending, the number of agents assigned, and average caseload.

In lieu of information on manpower usage—which as will be discussed later—will soon become available, manpower surveys were periodically made of selected 2-week periods in various field offices. Although these surveys became increasingly refined since they were initiated in 1973, they still only approximated the percentage of total agent effort expended in each investigative and administrative classification. In addition, with certain exceptions, the surveys did not go beyond these classifications to categories or types of cases.

Average caseload has been the primary basis for allocating resources, with some reliance placed on the Inspection Division's assessment during annual field office inspections of caseload and the adequacy of

staffing levels. However, this system gave equal weight to all cases without considering their quality or significance, and it generally implied that enough resources were available to cover all cases. Also under this system a tendency developed at the field office level to maintain high caseloads by opening and retaining relatively inconsequential cases to justify staffing levels.

In late 1974 recognizing the problems with the caseload management approach, the FBI initiated a use of personnel study to determine whether the field offices—

... could produce a more meaningful and significant investigative product if they were unencumbered by the caseload system with its direct correlation to manpower allocation

and whether

office efficiency, productivity, and morale would be positively affected by a managerial approach which emphasized quality over quantity.

After a trial period in four field offices, the FBI initiated, in September 1975, the so-called quality over quantity concept in all its field offices. Instructions were issued to the field offices to:

1. conclude as expeditiously as possible cases of marginal importance;
2. establish investigative priorities in conjunction with the local U.S. attorneys, and
3. concentrate on quality cases and on major criminal and security problems within their respective territories.

In our opinion, the FBI's acceptance of the quality over quantity approach to conducting investigations and managing its investigative resolved before the concept can become effective, including defining and establishing criteria for determining quality cases and cases of marginal importance. Also, since caseload has been the primary method used to allocate manpower, the successful implementation of the concept could be hindered by any lingering suspicions in the FBI that a drop in caseload could result in closing smaller offices, transfer of agents from offices having small caseloads, and manpower reductions in general.

For the quality over quantity concept to be viable, the FBI in conjunction with the U.S. attorneys must make determinations of which cases or types of cases should be investigated, and to what extent resources should be committed to a given case. Criteria should be developed to help determine whether the FBI should become involved in a case and what priority the case should be given.

Information presently available to the FBI does not provide a complete picture of its criminal investigative efforts and, thus, is not a firm basis for measuring the effectiveness of past operations, determining where resources were used, allocating resources, or planning future operations.

After about 2 years of design and development, the FBI recently implemented an automated system to replace its periodic manpower survey that will routinely account for agent time expended by general investigative classifications and subclassifications. Subclassifications of the existing classifications and other changes are also being considered for the existing administrative or caseload report to improve its usefulness.

Although these changes are improvements, they do not go far

enough because of the wide range in complexity and degree of importance of individual cases. The FBI does not develop statistical information on the results of cases. Generally there is no information that relates the time and expense of investigations to their seriousness or complexity, or their final disposition. Such information is necessary if the FBI is going to adequately evaluate the effectiveness of its operations.

Since accomplishment statistics were claimed in only about 25 percent of the criminal cases closed in the offices we reviewed, the limited accomplishment information applies to a small part of overall operations. Most cases investigated are terminated either administratively under authority of the special agent in charge (SAC) or by a U.S. attorney's declination to prosecute. In the six offices for the period April-July 1976, only 530 or about 9 percent of 6,209 cases concluded were accepted for prosecution. About 50 percent were closed administratively by SAC authority and about 41 percent were declined for prosecution.

The fact that so many cases were not authorized for prosecution may not be bad. The problem, however, is that the FBI currently has no information on the disposition of cases so it can identify the number of, and amount of effort expended on, cases declined for prosecution, closed by SAC authority, or accepted for prosecution.

The FBI should have more comprehensive management information to effectively manage its investigative operations. Better information is needed to effectively select priority areas for concentrated efforts and allocate resources between field offices and squads. In addition to providing for better internal program management, such information could help the FBI identify areas in which action by the Congress and the Department of Justice is necessary to effect improvement. Such actions could include revising laws, and issuing prosecutorial guidelines setting forth investigative areas that will not normally be prosecuted or that should be routinely referred to other Federal, State, or local authorities having concurrent jurisdiction.

As previously indicated, the estimated time spent on individual cases terminated by administrative closures or U.S. attorney declinations is substantially lower than on cases authorized for prosecution. However, when taken together, the large number of cases not prosecuted represents a considerable investment of FBI resources.

Unless there is concurrent jurisdiction with respect to a particular violation or specific guidelines from the U.S. attorney as to what generally will not be prosecuted, the FBI may have no choice but to investigate every complaint within its jurisdiction that it can reasonably handle.

However, 48 percent of the administrative closure cases we sampled were closed because either no crime or no Federal violation was involved. Furthermore, 59 percent of the cases we sampled that were declined by the U.S. attorney, were declined because they lacked prosecutorial merit due to the nature and degree of seriousness of the offense, or referred to State or local authorities having concurrent offense, or referred to State or local authorities having concurrent jurisdiction for their consideration to prosecute. Based on these results, it seems the FBI might be able to reduce its efforts on the large number of cases not being prosecuted and focus its efforts on greater priorities by assuming a more supplemental role in areas of concurrent juris-

diction and obtaining more guidance from U.S. attorneys on the types of cases normally not prosecuted.

To identify priority and marginal areas, the FBI needs a system to provide information on a regular basis regarding how available time is being used and with what results. Once problem areas have been identified and necessary agreements reached, the information can be used to monitor the effectiveness of FBI field offices in reducing efforts in marginal areas and increasing investigative results in priority areas.

The major factor cited by FBI officials as inhibiting the FBI from limiting the expenditure of resources in areas of "marginal importance" is that it is bound by law to investigate every reported alleged violation of Federal law even though there may be dual jurisdiction with State and local agencies.

Several of the U.S. attorneys we contacted said that, in instances of dual jurisdiction, applicable State and local legal sanctions should be applied in preference to Federal sanctions which prohibit essentially the same act. FBI officials indicated their efforts could be reduced in some areas if U.S. attorneys would issue specific prosecutorial guidelines or blanket declinations. The U.S. attorneys expressed differing views on the benefits and limitations of guidelines.

We believe the basic issue is to insure that the FBI's resources are focused to have maximum impact on major crime problems. The Department of Justice and the FBI need to explore ways of reducing FBI efforts in marginal areas and redirecting them toward priority areas.

This concludes my prepared statement. We hope this information and the information in our final report will assist the subcommittee in its oversight of FBI activities. We would be pleased to respond to any questions.

Mr. EDWARDS. Mr. Lowe, when the FBI went to the Appropriations Committee for their appropriations for fiscal year 1975, they asked and got \$449,546,000 to run the FBI for that fiscal year. But in their testimony to the House and the Senate Appropriations Committee, the FBI testified that in fines, savings, and recoveries, they had collected—or whatever it might be—or saved the American taxpayer \$498,030,000 and advised the Appropriations Committee that for every dollar spent on the FBI, \$1.10 came back to the taxpayer.

Now the sample cases you examined—and there were very few, and I have four of them here—in those cases you found \$3,330,000 that the FBI had claimed in fines, savings, and recoveries not to hold up, not to be valid savings to the American Government.

Is that correct?

Mr. LOWE. I have not added it up to see about the \$3 million, Mr. Chairman. But if you look at the appendix, that will respond to your question. If you look at Appendix II, we have a summary there of the number of cases that we reviewed and the number of cases questioned.

It depends on the particular category. Under convictions we questioned less than 10 percent. In the savings category, we questioned every one of the 50 that we ran across.

I think in nearly every case you can analyze, the FBI should have been able to claim some savings. Which figure you choose is really the source of disagreement, I suppose.

Mr. EDWARDS. Well, for fiscal year 1974 and to obtain the appropriations in fiscal year 1975, they claimed savings of \$498 million. Can you

extend your examination and guess at or estimate how much of the \$498 million that they claimed in fines and recovery, savings and recoveries, should not have been claimed?

Mr. LOWE. No, Mr. Chairman. We would have to go back and look at every one of those cases making up that total report. When we finish our ongoing job completely, we will be able to make a projection in the six field offices. In other words, we will be able to show how much each field office had in claimed savings and how much it actually saved. But that would not be a valid projection for the total FBI. It would give you some idea but it would not be statistically sound if you estimated on that basis.

Mr. EDWARDS. We can expect you to give us a reasonably statistically sound idea?

Mr. LOWE. At least for those offices that we cover; yes, sir.

Mr. EDWARDS. In these few cases that you cite in your testimony, I just added it up while you were talking and it is over \$3,330,000 that was claimed and not claimed validly.

Have you asked the FBI about this?

Mr. LOWE. No. We have not yet prepared our report and submitted it to the FBI for comment. We have discussed a couple of these specific cases with them and we are prepared to deal with those specific ones if you are interested.

Mr. EDWARDS. Do they know that these statistics don't bear examination?

Mr. LOWE. They do. As I indicated in the earlier part of my statement, sometime ago the Comptroller General, Mr. Stanton, Mr. Harris and I met with the Director of the FBI and a number of his top people and briefed them on what it looked like we were coming up with in our study.

The FBI was already involved in trying to improve its management, reporting system. The Director felt we were all going in the same direction and gave us complete cooperation. As a result of our preliminary discussions with them, in addition to the work they already had underway, they have taken into consideration some of our preliminary findings and have started to make changes in their reporting requirements.

Mr. EDWARDS. Have they specifically told you that they are not going to continue the present practice of going before the Appropriations Committee and making these rather large claims about hundreds of millions of dollars saved?

Mr. LOWE. No, sir, but I did not ask them that either.

Mr. EDWARDS. We will ask them. The gentleman from Virginia.

Mr. BUTLER. Thank you, Mr. Chairman.

I apologize for being late, Mr. Lowe. It seems the FBI may be able to reduce its efforts on a large number of the types of cases which are not being prosecuted. Of course, that is a desirable end result.

You will have recommendations as to specifically how they can go about doing this, is that correct?

Mr. LOWE. Yes, sir.

They have already started in this direction in some respects. As I recall, there are 94 U.S. attorneys. Obviously each of them has a different way of running his own shop. But upon Mr. Kelley's instructions, the FBI agents in charge have dealt with each one of the U.S.

attorneys in trying to reach an agreement with the U.S. attorney as to what type of case he will not prosecute under most circumstances.

In that way the FBI is able to devote little or no time to those kinds of cases unless they are outside of the normal as laid down by a particular U.S. attorney. In this specific instance, they will be able to save some manpower.

Instead of having to develop a case and take it to the U.S. attorney, they will have some guidance in advance which we think is desirable. We think it would also be desirable to have better overall guidance from the Department of Justice level.

I think to date it has been primarily left up to the individual U.S. attorneys. Perhaps the Justice Department ought to be able to give them some guidance also.

Mr. BUTLER. I guess that is my next question. What limitations would you place on the discretion of the local U.S. attorneys as to how they can make this policy decision?

Are they fairly well bound by Department of Justice policy in this regard?

Mr. LOWE. As far as I can determine, they are 94 individual entities, appointed by the President and responsible to God knows who. I think they are pretty much on their own.

Mr. BUTLER. Are you critical of that autonomy?

Mr. LOWE. Well, I am not an attorney but I would think that the individual U.S. attorney has to be able to exercise some discretion and commonsense in determining what cases he wants to prosecute. However, I do think that there is room for some overall guidance by the Department of Justice level as to what each attorney ought to do.

Mr. BUTLER. Well, I guess what I am disturbed about is the fact that the FBI under this direction will be abdicating its responsibility to make basic decisions as to where to proceed in investigations. Is that wise?

Mr. LOWE. I would not interpret it that way, Mr. Butler. I think that if the local SAC knows in advance that if he takes a particular type of case to the U.S. attorney and he will not prosecute it, that the local SAC then can say I will not devote any of my manpower to developing those types of cases. It seems to me that would be a saving of manpower rather than a waste of manpower.

In any event, the U.S. attorney is going to make a decision. The FBI feels that without guidance they have to investigate every one of them.

It seems to me that it avoids wasting time on cases he won't prosecute anyway.

Mr. BUTLER. Well, an investigation that does not result in a prosecution is not necessarily a wasted effort, is it?

Mr. LOWE. No, sir. Not necessarily.

Mr. BUTLER. Have you endeavored to pass judgment on the quality of the investigations?

Mr. LOWE. No, sir.

Mr. BUTLER. Thank you, Mr. Chairman.

Mr. EDWARDS. The gentleman from Ohio, Mr. Seiberling.

Mr. SEIBERLING. Thank you, Mr. Chairman. I think this is a very, very helpful statement. I listened to it with great interest. Let me just ask you a general question. Do you think that measuring law enforcement effectiveness solely by adding up convictions, fines, fugitives

located and so forth is really appropriate or are there other ways of measuring effectiveness that might even be more appropriate?

If so, have you any thoughts as to what they might be?

Mr. LOWE. That is a tough question. I think some types of statistics are desirable such as the number of convictions and that sort of thing. I think law enforcement with no convictions and no arrests and no fines reported might be just as good if that is the way you wanted to run it. Thank heaven the policeman on the beat or the FBI agent on the beat is awfully important whether or not any of these other activities take place.

What we were driving at here is with some additional information and refinements in the way it is presented, we think that the upper level of the FBI will have a much better idea or at least an improved idea of where it wants to put resources and manpower.

Mr. SEIBERLING. To the extent that law enforcement deters crime, whether it is by the FBI or local or state law enforcement authorities, it is like preventive medicine. I guess like preventive medicine it is rather difficult to measure the results.

But I just wondered if in the course of your further investigations you could be thinking about possible ways to measure that because it seems to me that perhaps that is at least as important as the measurable results that the FBI reports in its various reports to Congress and the public.

Mr. LOWE. In our own office, we have somewhat the same problem in describing what we do and how well we do it and how much we do.

Mr. SEIBERLING. I would say we have the same problem, too.

[Laughter.]

Mr. SEIBERLING. Well, in reading your report, it seems to me that the FBI has done what in private business they refer to as puffing and building up their case to continue to be in the favor of their customers, which is the public.

I think some sort of truth in advertising approach may even be needed here as it is in private industry. But I get the impression that fundamentally, with the possible exception of the figures as to savings, you feel that the FBI figures are reasonably accurate representations of what they purport to represent.

Mr. LOWE. Well, I don't know whether I would like to lump that all in one sentence or not. But I think Appendix II gives you some idea of what percentage of the five categories we question, at least.

In one case it is about 10 percent, another slightly more and one is 50 cases out of 50. The important thing is that the FBI has already recognized that they have a problem here and moved out in the last month or two trying to revise its whole system.

Even in those cases we have given as examples, there were some savings that the FBI could have claimed. The amount is the question. For example one of the points that we questioned was about a movie which had been pirated or was held by a collector.

They worked out a method with the movie industry which was very concerned about people stealing movies.

The one we gave as an example might sound like a little puffery. But we also have a case where they claimed no savings based on this same criteria. This movie—one issued in the last year or two—was a very profitable movie.

From the FBI's standpoint, it was unfortunate that they recovered a stolen copy before the movie had grossed any money because it bases its recovery on the gross of the movie. The movie had not yet been released. The FBI recovered a stolen copy but under the ground rules they couldn't claim any savings. If it had been 6 months later, there would have been a tremendous savings.

Mr. SEIBERLING. The example you gave where stolen equipment involved valued at \$6,400 was turned into the local police the same day it was reported stolen and they simply notified the FBI and there was no Federal violation and no arrest and the FBI claimed that as one of the things they had saved which strikes me as going a little far.

Is that in accordance with their guidelines?

Mr. LOWE. I don't think it would fit with their guidelines, no. Each report is looked at here in headquarters. We have been shown cases where they caught errors, turned them down, and told the field office about it.

Mr. SEIBERLING. Thank you.

Mr. EDWARDS. The gentleman from Ohio, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. LOWE, we appreciate your interim report here and realize that it is awkward for you to be reporting on an interim basis at this time when your work is not complete. But what is disclosed in your testimony today seems to me is encouraging overall.

You point out on page 5 of your testimony that over the past 2 or 3 years the FBI has been working to develop the needed information that is discussed there. On page 6 at the bottom of the page, it is noted that accomplishment reports are available to the field offices but there might be the need for improvement there.

On page 7, you note there has been a policy of having manpower surveys made periodically over a period of at least 3 years. I cannot help but be concerned with the same question that you touched on a little while ago, and the General Accounting Office has a somewhat paralegal problem in evaluating the ways that resources are used.

Do you have any guidelines within GAO that do have some sort of paralegal status?

Mr. LOWE. We do, Mr. Kindness. We go through the same exercise each year for our appropriations hearings and for our Comptroller General's annual report. I think our procedure is considerably tighter than the ones the FBI has been operating under up until now.

Essentially, it is the same problem. I think our guidelines have been refined fairly well over the years. As a matter of fact, I think we report some things as clearly dollar savings while other things are just improvements in the way business is done. Some things result in more expenditures.

I remember one case in our work at the Department of Agriculture where we did a review and issued a report on the pesticide regulation division. We pointed out that they needed to beef that operation up. The appropriation was substantially increased the next year. I think we could very well claim credit for improving a very necessary operation. But on the other side of the ledger, I guess you would have to say it cost the Government some additional money.

Mr. KINDNESS. That is almost bound to be true with any such improvement, I suppose. What concerns me a little bit is whether it is

worthwhile to go through all this evaluative process if the FBI is charged with law enforcement activities and once decisions are made as to where to place the emphasis in terms of categories of claims to be given the greatest amount of attention. Placing a value on this seems to be a very silly exercise probably prompted by the politics of this Congress, as a matter of fact, in terms of the appropriations process. But something attractive has to be said when the Appropriations Committee is hearing their particular case.

Do you feel that there is some value that should be attributed to this law enforcement effort that relates somehow to budgetary considerations or is this a ridiculous exercise?

Mr. LOWE. I think there probably is some validity to it but it is also a little silly in some ways, too. It is probably something that has been forced on them in some degree.

Mr. KINDNESS. Originating right here, I suppose. I don't expect you to answer that. Thank you, Mr. Chairman.

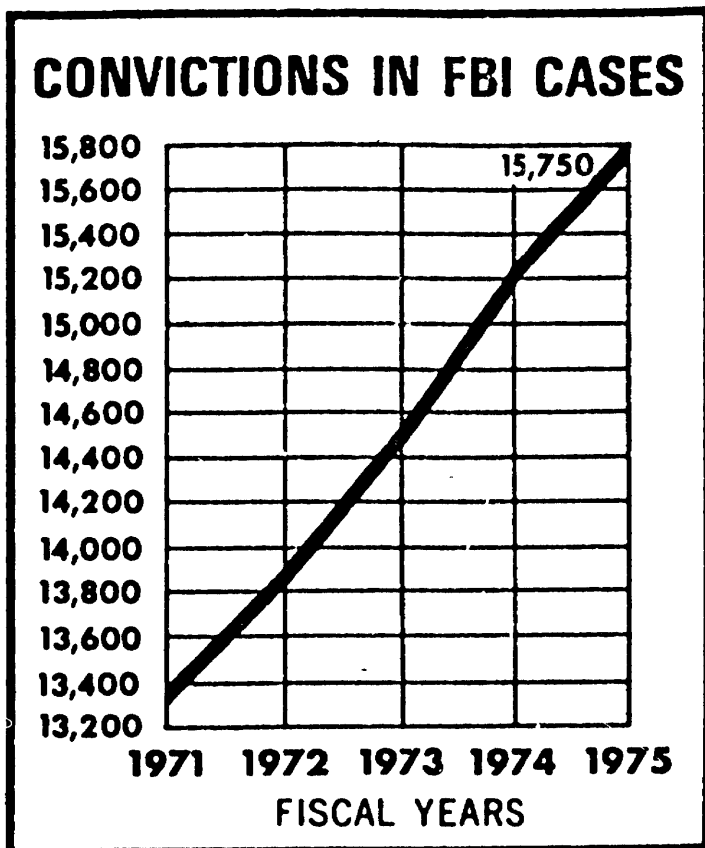
Mr. EDWARDS. Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

Thank you, gentlemen. What am I to think when Clarence Kelley in his most recent report said convictions soared in 1975 to all time highs and he has the inevitable chart where convictions are going up and up?

I am referring to convictions in FBI cases. They go up from 13,400 in 1971 to almost 15,800 in 1975. Do these have any meaning after what you have told us?

[The chart referred to follows:]



Mr. LOWE. I think so, Mr. Drinan, particularly if they were prepared on the same basis from year to year, even if the bases might have some error factored in. I think the comparison would be relatively valid.

Mr. DRINAN. Except that you say that they claim credit for anything that the other people have done. The basic rule followed by the FBI is that if it has had any involvement whatsoever in a case, it claims credit for the resulting accomplishment. Furthermore, you have told us that the FBI reporting does not recognize the contribution of any State or local or even any other Federal agency. Thus it may reflect multiple convictions.

So I ask you again what does this mean?

Mr. LOWE. Well, I think the FBI only claims a conviction in the case of a Federal crime. In the case of crimes that they touch or are involved in at the State level, I don't think they claim convictions in those cases.

Mr. DRINAN. That seems contrary to what you have been telling us. What is the practice with other law enforcement agencies?

Mr. LOWE. I don't know.

Mr. DRINAN. Do you have any ballpark figure as to what the FBI might have saved us? As the Chairman, Mr. Edwards has pointed out, it claims in the Appropriations Committee to have made money for the Federal Government.

There was \$1.11 returned for every dollar. Can you draw any conclusions as to what the Bureau has gained for the American people by way of savings?

Mr. LOWE. Not overall, Mr. Drinan. As I mentioned before, though, when we do finish with the six particular field offices we will have a good drift on those things based on our sample.

But not overall. We can give you an indication. I can see where they are faced with a difficulty where the judge imposes a fine and then abates the fine or suspends it. I guess you could say that would be saving for the FBI and a loss by the judge.

Mr. DRINAN. When did this misleading practice begin? From time immemorial?

Mr. LOWE. It seems to be historical, yes.

Mr. DRINAN. Have convictions gone up every single year? Have they ever gone down?

Mr. LOWE. Not according to that chart, no, sir.

Mr. DRINAN. You are answering my question as to the validity. That is the purpose of your study; I quote: "The study is to determine the validity of these claimed FBI accomplishment statistics."

It is indicated on page 5 that a task force was authorized or appointed in August 1976. Was any thought given to an outside agency, such as Arthur D. Little, or is this an in-house task force and if so, who is on it?

Mr. LOWE. This is strictly an in-house task force. The FBI has several efforts underway to improve some of their management reports. After we brief the FBI Director and some of his top people on what the outlook was for our study, he took action to have his people work with us and improve their reporting practices.

Mr. DRINAN. Who is on this task force and will they work with this subcommittee?

Mr. LOWE. Mr. Harris?

Mr. HARRIS. It is informally structured, sir.

Mr. DRINAN. Do they have names? Are there 6 or 60? Who are they?

Mr. HARRIS. These are special agent supervisors at FBI headquarters.

Mr. DRINAN. The people who have been involved in all of this are sitting in judgment on themselves?

Mr. HARRIS. No, sir. I don't think so. These are different people from different situations—people from the FBI's Office of Planning and Evaluation, people from the Administrative Services Division, and the Finance and Personnel Division—that are working on various aspects of the FBI's statistical needs.

Mr. DRINAN. I wondered if they get overtime for this? In 1975 the overtime pay that the FBI gave was the equivalent of 2,117 full-time agents. They admitted in the appropriations hearings that they gave \$46.8 million in overtime. So I am wondering whether or not this informal group is getting overtime for their new duties.

Mr. HARRIS. Sir, I can't answer that question.

Mr. DRINAN. My time is up. Thank you.

Mr. EDWARDS. The gentleman from Connecticut, Mr. Dodd?

Mr. DODD. Thank you, Mr. Chairman.

Did you in your studies at all show any relationship at all between the levels of caseload that were sent from the field offices to the headquarters and any relationship between that and promotions and meritorious citations?

Was there any indication of an incentive for people to build up statistics in order to promote themselves?

Mr. LOWE. No, not along that line. I think it was an understood incentive to maintain the caseload so the staffing of the office would not be reduced.

Mr. DODD. But as far as any incentives or promotions if one maintained a high level of caseloads, there was no indication of that at all?

Mr. LOWE. Not that we know of.

Mr. DODD. On page 9 you talked about the cost relationship, expense, time. Would you be more specific as to what you think ought to be done in order to determine the cost, expense, and time of cases?

Mr. LOWE. If I can stay with one example that we used, if the FBI develops information showing the manpower and the cost going into specific types of cases not prosecuted generally by U.S. attorneys, that would be a valuable piece of information that headquarters ought to know so they can devote less effort and less manpower and less dollars to that type of effort.

It is a little hard to get specific right at the moment. We are right in the middle of working on that problem with them trying to develop some types—

Mr. DODD. What I am getting at is there might be a direct relationship between the dollars spent either in salaries or equipment and so forth by the FBI on a successfully prosecuted case.

But in addition to the expenses that relate to that particular case, there might be other expenses that one would want to take into consideration. In addition to the direct amount of time spent or the expense, what are the cost benefits that could be gleaned from the successful prosecution of a case?

I wondered if you could be more specific in that area?

Mr. EDWARDS. If the gentleman from Connecticut would not mind, we should go vote now and come back. By that time I am sure Mr. Lowe will have the answer to that question.

Then I will recognize the gentleman from Connecticut upon our return. We will recess until the vote is over.

[Voting recess.]

Mr. EDWARDS. The subcommittee will come to order. We will proceed in the interests of time.

Mr. LOWE. Mr. Chairman, when you left to take a vote, Mr. Dodd had left a question with us and even though we had a lot of time to think about it, I am not sure we have a very good answer.

Mr. EDWARDS. We will hold it until Mr. Dodd gets back. Mr. Lowe, you questioned all 50 cases reviewed involving savings claimed on the basis that the amounts were highly judgmental and subject to misinterpretation. Now, for example, I would like you to tell the committee about the civil suit on page 15 where the FBI claimed a million dollars saved to the taxpayers.

Mr. LOWE. In that particular example, the plaintiffs had sued the Government for \$1 million claiming that the Government had clouded the title to some land. The U.S. attorney asked the FBI to check the two plaintiffs' background and before the background checks were provided the U.S. attorney the claim was disallowed on its merits by the court. The FBI claimed a \$1 million savings in that case.

There is another case of a \$1.5 million malpractice suit brought against the Government charging that the victim's death resulted from the military doctor's negligence. There was an investigation of the background of the doctor and it was determined that the doctor was possibly negligent. The FBI claimed the \$1.493 million as a saving.

Those numbers don't look reasonable, but perhaps some number ought to be used. Obviously, in those cases, we questioned the validity of those figures.

Mr. EDWARDS. In those two cases they claimed they saved the taxpayers \$2½ million. And yet the total actually that they can prove would be \$7,000?

Mr. LOWE. Possibly. We don't know how much in the first one. I think basically what we are questioning is the method of presentation. I think in each one of these cases, the FBI had something to do with the case. Some cases are more important than others.

But it is just the method of presentation. As I indicated before, I think we go through somewhat the same process and we have cases where we try not to assign a dollar value. It is very difficult sometimes. I think that is the trap that they have fallen into, trying to assign a dollar value to some cases where it is really impossible to do so.

Mr. EDWARDS. Well, you tested 110 cases involving recovery claims, for example, stolen property, I presume, or stolen jewels. Would that be a typical case? An automobile?

Mr. LOWE. An automobile would be a case, yes.

Mr. EDWARDS. You questioned 37 percent primarily because somebody else recovered the stolen property, not the FBI, but the FBI claimed credit for it; is that correct?

Mr. LOWE. That happened in some cases. In one case they had recovered a copy of a copyrighted film and they claimed savings based on a formula worked out with the industry. There was one, however,

that they recovered that was a fantastic grossing film and they claimed no recovery.

Mr. EDWARDS. Let's move to another subject where they claimed that they located a number of fugitives and that is a statistic that they provide every year. You tested 129 cases where the FBI said that a fugitive had been apprehended or located, presumably by the FBI, according to their statistics.

But you found out that 30 percent of these cases involved some other law enforcement agency apprehending or locating the criminal. Is that correct?

Mr. LOWE. That is right; yes, sir.

Mr. EDWARDS. Why would they claim 30 percent of those as an FBI accomplishment?

Mr. LOWE. Only because they had some involvement, particularly through this National Crime Information Center. I don't think that makes it valid but they did have some involvement and perhaps he might not have been located except for that Crime Information Center.

But I think this whole thing has been recognized by them and they are working to straighten it out.

Mr. EDWARDS. My last question before I yield to the gentleman from Massachusetts would be this: Of 6,209 criminal cases where the FBI included investigative work April through July, 1976, 91 percent of these cases were closed out either administratively by the special agent in charge or about half of them the U.S. attorney declined prosecution.

Is that an appropriate percentage that out of every hundred cases, 9 percent go to prosecution?

Mr. LOWE. I would have to answer it this way. Nine percent going to prosecution was probably appropriate or that is what the U.S. attorney decided. I have no basis for arguing with them. I think that is the whole point of us and the FBI working together trying to improve their administrative reporting.

I think when you get to particularly the figure of 2,600 cases where the U.S. attorney declined to prosecute, with additional guidance from the U.S. attorney, they ought to be able to short circuit those cases to determine whether or not they meet the criteria laid down by the U.S. attorney for prosecution.

They ought to be able to stop some of them shorter than they do now. During the course of our study, as I mentioned before, our staff did talk with a number of U.S. attorneys while they don't all agree—some of them think that it is really not proper to have a blanket declination saying that if you get a certain type of case we will not prosecute it—most of them agree that that is a useful tool because not only does it waste the FBI's time but it is a waste of the U.S. attorney's time.

As far as we can see, the U.S. attorneys are short-handed, the courts are short-handed. That is one reason for declining some of these cases which otherwise would be valid but perhaps not a major case.

The type of prosecution guidelines that we are talking about, for example, is that in several jurisdictions the U.S. attorney has said if you have a bank embezzlement case—this is one of the big categories of the FBI—under a certain dollar amount and there has been no prior problem with this particular person and this particular person is not a supervisor or an officer of the bank, we will not prosecute.

That gives the FBI some guidance. When they run into a case like that, they get the facts and move on. Interstate transportation of stolen

securities. A number of prosecuting attorneys have said if you find a case that involves X amount or below, no prior convictions, no complicating circumstances, we won't prosecute. Don't waste your time.

It is that type of thing that needs to be developed a lot further in order to save the FBI some of its resources.

Mr. EDWARDS. Thank you.

Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

On page 4 "The FBI said unless directed otherwise by the Department of Justice or local U.S. attorneys, it must investigate all valid complaints of alleged violations."

Has anything developed so that they do check on a regular basis with the Department of Justice or with the U.S. attorney?

It seems the FBI is drifting without guidelines and without knowing exactly what their priorities are. Is there any sentiment that they should? Does the policy announced a year ago, also mentioned on page 4, reach that?

The FBI initiated a different approach to investigations. Is that along the lines I have said? Have any results come about in the last year?

Mr. LOWE. That is along the lines you indicated and quite a few results have come about. In the four FBI offices where they had the preliminary trial with this type of quality versus quantity type thing, as I recall the caseload—the reported caseload—was reduced by 22 percent.

If nothing else happened it reduced a lot of paperwork. Obviously it freed up some resources for more major crimes.

Mr. DRINAN. Except that they are still dictating their own guidelines. According to this policy adopted a year ago, as I read it, FBI agents don't check with the Department of Justice or the U.S. attorneys. They simply make their own judgment as to what is marginal and what is very important.

Mr. LOWE. Except that situation has improved substantially in the last year or so.

Mr. DRINAN. Do you have any facts to indicate that?

Mr. LOWE. Not necessarily in this study, but we are also doing a review at the request of this subcommittee of the operations of the U.S. attorneys offices. Between these two reviews, we have found that in the recent past the FBI, under the instructions of the Director, has gone to the U.S. attorneys at the various locations throughout the country and tried to work out some instructions in advance from the U.S. attorney as to what type of cases not to waste their time on.

I think that more of this can be done. I particularly think—we have not developed this fully yet—that a lot more can be done to issue guidelines at the Department of Justice level, giving due recognition to the differences in various jurisdictions. One crime in Texas might be considered pretty bad while the same crime in New York City might not be considered too bad.

Mr. DRINAN. Do you detect any differences in statistics from the six regional offices that you investigated? Are there any variations which would be important?

Mr. HARRIS. We have not had time to make comparisons between different field offices.

Mr. DRINAN. Let me ask this going back to the change of priorities. It has been announced recently that the whole counter-intelligence program or at least most of it has collapsed. It appears that the several thousand cases including surveillance of alleged extremists and subversives has been reduced to a few hundred.

What is going to happen to all FBI personnel formerly assigned to the work of chasing extremists and subversives?

Mr. LOWE. I don't know, Father Drinan. I do know the committee has asked us to do a follow-up review on our domestic intelligence work. I assume there is enough work to go around for the FBI but I think this indicates the importance of developing the right kind of management report so they will know how their manpower is being used.

Mr. DRINAN. That ties into what I wanted to ask before time runs out. We have this beautiful graph showing that the FBI is becoming more and more efficient, and the number of convictions goes up. Have you uncovered any evidence that the number of unsolved crimes is going up, going down, or remaining the same?

Mr. LOWE. I have not.

Mr. DRINAN. That would be very relevant. I hope you will search for such evidence.

Mr. LOWE. That would be the number of open cases.

Mr. DRINAN. You stated you found a small number of errors in the accomplishment statistics. Yet you told us at another point that the FBI claims everything that apparently would look good in the statistics. If they had any involvement whatsoever in an investigation which resulted in a conviction, they claim it.

How therefore can you say there was only a small number of errors?

Mr. LOWE. I think we were referring here to mathematical errors rather than the way the material is presented. In each one of these cases where we in effect disagree with the FBI, it is primarily a matter of presentation. If each one of those cases were presented individually with the whole story, I don't think anybody would have any problem with them. Obviously, when you try to produce them in a summarized fashion, you have to have a lot more detail than the FBI has at present.

That is basically what we are talking about. I think as far as mathematical errors, or errors in putting it together, or just plain errors in duplication, there are very few.

Mr. DRINAN. You have already pointed out many errors where they claimed savings of millions of dollars and those millions of dollars never came into the Treasury. Those are substantial amounts, and if your testimony is any norm, there must be many more.

You are very nice to the FBI. You say this is subject to misinterpretation but it seems to me that that is just wrong to put down alleged fines or alleged recoveries that are not there. Let me quote to you from page 15 of your testimony.

"The suit was settled for \$7,000 and the FBI claimed a savings of \$1,493,000." Isn't that an error?

Mr. LOWE. I think it is not properly stated. I don't know whether I would call that an error or not.

The FBI did have some involvement. Whether or not the suit was settled for less because of that involvement, I do not know. Certainly they can claim some credit for doing work with the U.S. attorney on that suit.

Mr. DRINAN. On page 18, "FBI officials agree that their accomplishment statistics as currently presented could be subject to misinterpretation."

Which FBI officials, Clarence Kelley?

Mr. LOWE. Yes, sir. We discussed this with him back in August. He was at that time concerned with what we had found. He was also concerned that his people were working on it and he asked us to get together with his people and see if we could give him some help in straightening this thing out.

That is what we are doing now.

Mr. DRINAN. When do they publish their latest annual triumph over evil?

Mr. LOWE. It has not been published yet.

Mr. HARRIS. It will probably be coming out sometime in the late fall.

Mr. DRINAN. Maybe before the election?

Mr. HARRIS. I don't know.

Mr. DRINAN. Can we hope for some revision or modification here?

Mr. HARRIS. No, sir.

Mr. DRINAN. Why not?

Mr. HARRIS. We talked to them about this. At this time, it would be too costly to make any revisions in the fiscal year 1976 data, from which our sample was drawn. The revisions will apply to any subsequent data.

Mr. DRINAN. They have made these revisions for fiscal 1976?

Mr. HARRIS. I think the fiscal 1976 statistics have gone to the publisher.

Mr. DRINAN. Perhaps we should suggest that, since their accomplishment statistics as currently presented could be subject to misinterpretation and are misleading, the FBI should not publish them. There is no divine law that says they have to be published in the fall.

Do you think the committee should suggest to Mr. Kelley that he should postpone the date of publication?

Mr. LOWE. The subcommittee will have to decide that. I think that having an idea of what kinds of problems the statistics have would be helpful at least to you.

Mr. DRINAN. But the copy has already gone to the printer so there is nothing that can hold it up. They are printing how many thousands of copies?

My time has expired. Thank you.

Mr. EDWARDS. Mr. Parker?

Mr. PARKER. Mr. Lowe, I want to discuss the issue of access to files and file documents at the FBI. As I understand it you at the GAO are presently operating under an agreement with the FBI regarding your audit. While that agreement does not permit total access to investigative files and documents, it does provide for you to be provided with a synopsis and a selected access for verification purposes if necessary.

Are you indicating in your statement to us that the agreement by the FBI is not being followed or adhered to or are you simply indicating that total and complete access to investigative files is still not available?

Mr. LOWE. What we are saying here is that they are living up to their agreement. As a matter of fact, we have made a lot of progress with them. In this particular job, the FBI Director personally instructed everyone present to give us anything we asked for.

We still do not have access to investigative files. We maintain in the agreement with the FBI that we have the right to access. They maintain we don't. But we move ahead with our work on the basis of this agreement. They have agreed to furnish us certain information with names excised and that sort of thing, out of those files when we are working on projects that involve the investigative files per se.

Mr. PARKER. Does it in any way impair the validity of the findings you have presented to us?

Mr. LOWE. No, sir; not on this study.

Mr. PARKER. Do you foresee that that lack of total access will cause you any further problems on projects underway now? For example, will it hinder your followup study on the effectiveness of the domestic intelligence guidelines?

Mr. LOWE. There could be some hindrance in that particular review but right now we don't anticipate any. I think we will be able to work it out so we can follow up and see how effective the actions are that they and the Attorney General have taken. I think our followup will be a valid study and we will get the information that we really need.

Mr. PARKER. I have one other question in terms of your example on page 15 in that civil suit where the plaintiffs asked \$1 million from the Government. Was the Government the defendant in that suit?

Mr. LOWE. Yes.

Mr. PARKER. The U.S. attorney was there for representing the defendant.

Mr. LOWE. Yes.

Mr. PARKER. Is it a regular practice for the background of plaintiffs to be checked out in these matters?

Mr. LOWE. I don't know whether that is a regular practice or not.

Mr. PARKER. Another matter which the chairman has previously discussed is this business of the workload of 100 cases which 50, apparently, according to your statistics, are closed at the administrative level and within the Bureau.

Of the remaining 50, 41 of those would be declined for prosecution. That raises some very serious questions. Either there are not enough U.S. attorneys to prosecute those cases or the cases may not have been prosecutable, in the first instance when they are brought to the U.S. attorney in his judgment.

Would you provide to the subcommittee in your report on the relationship between the U.S. attorneys and the FBI some more definite information so we can make some judgments in this area as to where the problem is, whether it is on the investigative side of it or on the U.S. attorney's side of it?

Mr. LOWE. Yes. Well, Mr. Parker, my off the top of my head reaction to that question without getting too specific is that most of the U.S. attorneys that our people talked to were very high in their praise of the FBI's investigations.

Generally speaking I would say the cases were declined for prosecution for other reasons—the type of criminal, the severity of the crime and workload in the U.S. attorney's office and the courts.

Mr. PARKER. If there was a closer working relationship they would know beforehand what to bring to the U.S. attorney's office?

Mr. LOWE. Yes.

Mr. PARKER. If I understood you correctly earlier today, you indicated that for all of the figures that are compiled, the statistics come

out of the field offices, go to headquarters and are all looked at by someone at headquarters before being incorporated in the report?

Mr. LOWE. In the accomplishment reports, yes.

Mr. PARKER. So these examples that you have given us where a person pleads guilty to 10 counts of check fraud and the FBI counts it as 10 convictions, those are all looked at at headquarters?

Mr. LOWE. In that particular case, I think there was some oversight because I do believe that the FBI's policy would be to count that as one conviction. Normally, if I understand the situation correctly, if there are two separate indictments—two separate crimes and two convictions—that is counted as two convictions.

However if it is a number of counts on one indictment, it is only counted as one conviction. I think that is their normal policy.

Mr. PARKER. Are all those criteria set down in writing?

Mr. LOWE. No. The criteria are fairly general. There are some cases where the guidelines are quite specific.

Mr. PARKER. And have those been appraised by the GAO?

Mr. LOWE. Yes.

Mr. PARKER. Will you include those in your final report?

Mr. LOWE. We will if you would like to have them.

Mr. PARKER. We would like to have them.

My time has expired.

Mr. EDWARDS. Mr. Starek?

Mr. STAREK. Thank you, Mr. Chairman.

If in fact the FBI is charged now by law to investigate all alleged violations of Federal law, how could more liaison or better cooperation with the various U.S. attorneys lighten the workload by the Bureau with respect to investigation of cases?

Mr. LOWE. I think it could substantially shorten the amount of manpower and the amount of paperwork going into each individual case, particularly in those cases where they know that the U.S. attorney will not prosecute under certain circumstances.

Once they ascertain that those circumstances exist, then as far as they are concerned, the case is over. I think that would be a saving in resources. In addition, I think that the FBI is probably correct in saying that it has investigate every alleged crime unless they are given instructions by the attorney general because it is his instructions they are operating under.

I think the Department of Justice could do more to delineate the types of cases that they should spend less time on.

Mr. STAREK. Thank you. With respect to these questionable savings cases which you list in appendix 2, 50 out of 50 as I read the chart, were these cases questioned because there was a minimal involvement on the part of the Bureau in the actual work on the case or was it because of what Mr. Seiberling referred to as puffing?

Mr. LOWE. I think that there is some of each. I would like to mention one other example we have here.

This one probably involved a minimum amount of time but it was otherwise absolutely valid. This is a case of a recovery. In this case, thieves contacted an FBI undercover agent to try to sell a truckload of stolen whisky. The suspects were arrested when they entered the truck.

The FBI claimed a \$50,500 accomplishment. That is a valid one. It probably took a very short period of time as far as man-days went. But

it would not be based just on the amount of time but maybe a combination of those factors.

It is sort of a judgment thing on each case. I think that is the way they have been operating.

Mr. STAREK. It seems that maybe the problem here is the use of the term "savings," monetary savings. Are you going to suggest to the FBI how they can better categorize the facts which are really recorded as statistics and labeled savings.

I am not sure what kind of category could be used.

Mr. LOWE. I am not sure I know at this stage either, but we are working on that very thing with them. We hope to work out some way of better presenting and better gathering their statistical data.

Mr. EDWARDS. I would specifically like to know under savings for 1975, the \$128 million saved the taxpayers in the area of the Federal Tort Claims Act and \$86 million in savings on interstate transportation of stolen property and \$90 million on recoveries of interstate transportation of stolen property. That is a lot of money.

I would like to know how often the local police found an abandoned car and the FBI was not involved? These statistics have to be accurate.

Let me direct your attention to this, the FBI Annual Report put out for fiscal year 1975. There are the criminal investigations, convictions in FBI cases. It shows straight up improvement, from 1971, 13,200 convictions to 1975, 15,750 convictions. Actually in 1965, they claimed, there were 13,011 convictions. So the improvement in 10 years has been from 13,011 convictions to 15,750 convictions. Do you think that is a chart that in your capacity as auditors is appropriate?

Mr. LOWE. I really have not examined that thing very closely. But assuming that the figures they are using are valid or at least that they are comparable to each other, the chart should be reasonably valid.

In other words, if they were using the same criteria back in 1971 that they are using now, even though there may be some complications about the numbers, they should be comparable to each other.

Mr. EDWARDS. Now in fines, you reviewed 76 cases where the FBI reported fines as accomplishments. However, you found out in 16 cases, about 21 percent of the 76 cases reviewed that the fines claimed were suspended in whole or in part and could not be collected by the Federal Government.

Was that money appropriately shown in the statistics as collected by the Federal Government?

Mr. LOWE. Is that the word they used? Can I go one step further with one of those examples? Let's assume that the judge imposed a \$1,000 fine and did not suspend it. Then I think all of us would agree that that was proper, probably a valid FBI figure.

Whether or not the Government collects it has nothing to do with the judge's fine. We found in studies years ago, that the biggest portion of those fines are not collected, even when they are imposed. I don't know quite where you draw the line.

It does present a problem.

Mr. EDWARDS. You as auditors would think that the audit ought to be on a cash basis?

Mr. LOWE. It could show fines imposed and fines suspended.

Mr. STANTON. The point you made is the basis on which we question these.

Mr. LOWE. It could show both figures and it would be a full disclosure so anybody reading it would understand what it was.

Mr. EDWARDS. Don't you agree that reporting on a cash basis would be much more appropriate, actual money paid in to the government?

Mr. LOWE. The FBI would have trouble determining that. The U.S. attorney is the one that keeps the books and does the collecting. The FBI has to get out of the business at that stage of the game.

But the U.S. attorney is responsible for that. I would say in this case that the FBI could show the fines imposed by the judge, the amounts suspended and that is as far as they could go without turning themselves into a bookkeeping organization.

Mr. EDWARDS. I have no further questions. I thank you for the preliminary report, and I am looking forward to your complete report. I am deeply disturbed by the statistics which you have provided today, number of cases reviewed, 473. Number of cases questioned, 156. Of the 50 cases reviewed for savings, 50 questioned. Of the 76 fines cases, 16 questioned.

Those are really unsatisfactory statistics. Our job is to help the FBI become a more crackerjack criminal investigations organization and that is what you are helping us do.

I thank you very much.

Mr. Drinan?

Mr. DRINAN. I want to thank these gentlemen, too. You make the point on page 10 that the FBI should collaborate with Congress and the Department of Justice so that we could determine whether some laws need revising or whether the U.S. attorney should set forth guidelines, or whether the Department of Justice could utilize manpower better.

It seems to me that Mr. Kelley, or whoever sent the printer this advance copy of the annual report, should have simply sent it to the oversight committee.

Mr. Chairman, I would like to suggest that the committee ask Mr. Kelley for that report so that when it comes out we will be able to say this is misleading or that they will improve. Hopefully they will.

Mr. Chairman, we won't be here next week so we cannot have another oversight examination. But I think we ought to know, if there is improvement in the report and, if there isn't, we would have no knowledge of what they are presenting to the American people today as their accomplishments.

Mr. EDWARDS. The subcommittee will meet tomorrow morning at 10 a.m., in room 2141 of this building. The Secretary of HUD, Carla Hills, will be the witness on discrimination in housing.

Again, Mr. Lowe and gentlemen, we thank you very much.

Mr. LOWE. Thank you, Mr. Chairman.

Mr. EDWARDS. We stand adjourned.

[Whereupon at 3:35 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, September 30, 1976.]