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Excellent memo -
Thanks

OGC 79-04478
14 May 1979

MEMORANDUM FOR: Director of Central Intelligence

VIA : Deputy Director of Central Intelligence

25X1 THROUGH : [redacted]
Acting General Counsel

25X1 FROM : [redacted]
Assistant General Counsel

SUBJECT : Charter Legislation--Proposed Administration Position Concerning Collection of Positive Foreign Intelligence from U.S. Persons

1. Action Requested: It is requested you review and consider this memorandum, which Tony Lapham agreed to provide you, prior to determining whether to present your views on the proposed charter authority to collect foreign intelligence from U.S. persons to the SCC at its 15 May meeting on intelligence charter legislation.

2. Background: You have expressed personal concern and discomfort on several occasions as to the advisability of and justification for the position approved by both the SCC and the President regarding charter legislation authority to collect foreign intelligence from U.S. persons. You and Tony Lapham discussed this concern during your luncheon meeting with him on 8 May, his last day at the Agency, and he promised to furnish you with a paper repeating and elaborating upon the matters addressed during that conversation. This paper attempts to explain in summary fashion what the Administration position is, how it came to be adopted, what may and has been said for and against it, and what course you should consider following at the 15 May SCC meeting if you continue to have strong concerns in this regard.

I. The Administration Position

3. Under the proposal approved by both the SCC and the President and furnished to the SSCI, intrusive collection

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techniques (i.e., electronic surveillance and physical search) would be available to collect foreign intelligence from U.S. persons outside the U.S. based essentially upon a determination that the information sought has special value to the U.S. from a national security standpoint. A court order from the Special Court created under the Foreign Intelligence Surveillance Act would be required in each case and would be based on a judicial finding that, in summary:

a. A senior official has certified the foreign intelligence sought is of a type determined by the NSC to be essential to the conduct of U.S. foreign relations or protection of U.S. national security, and such information is likely to be obtained through the use of the technique as proposed.

b. There is probable cause to believe the target is in possession of such information.

c. Less intrusive techniques are inadequate.

d. Appropriate minimization procedures will be applied to the information obtained.

Based on these findings, the court could authorize electronic surveillance of a U.S. person abroad for up to 90 days (with extension available on the same basis), or one physical search directed against U.S. persons or their property (including mail) abroad. There is provision for an Attorney General certification to be substituted for the element of the court finding described in subsection b. above, where disclosure of the information necessary to support that element would confirm the existence of a cooperative or liaison relationship with any foreign government or component.

4. Obtaining foreign intelligence from U.S. persons by means of "placing employees" in any organization in the U.S., or substantially composed of U.S. persons outside the U.S., without disclosure of intelligence affiliation would require approval of the Attorney General based on a finding that:

a. A senior official has certified the foreign intelligence sought is of a type determined by the NSC to be essential to the conduct of U.S. foreign relations or protection of U.S. national security.

b. There is probable cause to believe such information is likely to be obtained through the proposed activity.

c. Less intrusive techniques are inadequate.

d. Appropriate minimization procedures will be applied to the information obtained.

e. The activity will not exceed 90 days (with extensions available on the same basis).

f. The activity is not initiated to interfere with the exercise of legal and constitutional rights.

In the U.S., this type of activity could only be conducted by the FBI, or by the military as to military personnel.

5. Collecting foreign intelligence information from U.S. persons through use of mail covers, physical surveillance, and clandestine human sources outside the context of U.S. organizations would require approval of a designated agency official based on a finding that:

a. The foreign intelligence sought is of a type determined by the NSC to be important to the conduct of U.S. foreign relations or protection of U.S. national security.

b. Less intrusive techniques are inadequate.

In the U.S., these types of activities could only be conducted by the FBI, or by the military as to military personnel.

6. The collection of nonpublic foreign intelligence from unconsenting U.S. persons by any other means would be regulated by procedures approved by the Attorney General.

II. Development of the Administration Position

7. As you know, last November the Charter Legislation Working Group, chaired by Tony Lapham, submitted to the SCC a detailed Issues Paper and a set of draft statutory provisions that represented one of the alternative approaches to revising the restrictions portion (Title II) of the charter legislation (S. 2525). The main standard around which the Working Group had constructed authority to collect foreign intelligence from U.S. persons in its draft required a showing that "facts and circumstances indicate that the United States person is an agent of a foreign power" and that the information sought is "significant" foreign intelligence. Similarly, the use of electronic surveillance to gather foreign intelligence from a U.S. person abroad, while permitted to be authorized by the Attorney General or the Special Court, depending upon the circumstances, would have required a finding of, among other things, probable cause to believe

the target is an "agent of a foreign power." Other types of collection would have been governed by procedures approved by the Attorney General.

8. The Working Group had adopted the "agent of a foreign power" standard as an alternative to the S.2525 requirement that collection of foreign intelligence from or concerning a U.S. person be permitted only where there could be shown to be some relation to a violation of U.S. criminal law because (a) such a criminal standard bears no rational relationship to the justification or purpose for collection of foreign intelligence, (b) the "agent of a power standard" is the basis for use of intrusive techniques under E.O 12036 and existing procedures, and (c) that standard seemed a reasonable one that could be made more or less expansive by enlarging or contracting the definition of "agent of a foreign power" so as to include greater or fewer categories of U.S. persons.

9. As you also know, the SCC, at the urging of the Vice President and the Attorney General, determined not to adopt or address the Working Group's product at that time (November 1978). While there may have been many reasons for this development, one apparent cause of the Vice President's dissatisfaction was the belief that the papers were skewed toward allowing greater flexibility to the intelligence entities at the expense of individual liberties. In any event it was determined the task of developing an Administration position should fall to a sub-SCC group chaired by David Aaron.

10. At a 9 January meeting of this group, David Aaron pointed out that the principal impediment to progress in the restrictions portions of the charter was the issue of whether and to what extent collection should be authorized as to foreign intelligence that also relates to the activities of U.S. persons. An SCC meeting was held on 24 January to address this issue based upon an Issues Paper prepared by DOJ with input from CIA and NSA. The 22 January 1979 OGC memorandum provided you and the DDCI in preparation for that meeting stated, in the context of a discussion of available options relating to clandestine collection:

> The intrusive techniques must be distinguished here since it is illusory to believe that existing standards governing their use may be relaxed to any significant degree.... The prevailing wisdom concerning the extent to which existing law and precedent permits these techniques to be used abroad for the collection of foreign intelligence where an American is involved indicates they will

> be available, except for emergency situations, only where the American may be established to be an "agent of a foreign power." However that term may ultimately be defined in any proposed charter legislation, it inherently and logically would seem to require some form of association with a foreign entity and would not include persons who are merely in possession of information or engaged in activities of interest, however significant, to the U.S. Government. Thus, what is truly at stake here is whether, and to what extent, under what sort of procedural limitations, the other, "less intrusive" covert techniques may be used to collect foreign intelligence which concerns Americans. (S)

That memorandum ultimately recommended the Agency position at the SCC meeting favor a system of:

> heightened approval standards and procedures which would be tailored to particular circumstances and techniques. For example, electronic surveillance would continue to be available only in limited instances and subject to high level approvals.

11. The SCC Issues Paper pointed out that there were responsible advocates of the proposition that the Government should "never collect foreign intelligence from law-abiding Americans without their informed, voluntary consent." That Paper also stated, in essentially the only direct reference to electronic surveillance:

> It should be remembered in considering the appropriate authorities and limitations which should be imposed upon the acquisition of intelligence information about U.S. persons by CIA through covert means that, in all but serious national emergency situations, the most intrusive collection techniques such as electronic surveillance and physical searches are not likely to be available under existing law unless it may be established that the American involved is an "agent of a foreign power." Unless we seek statutory authority to go further, the issue of whether to lessen, retain, or heighten existing limitations and procedural requirements for the purposes of intelligence charter legislation relates largely only to techniques not considered to be intrusive, i.e., physical surveillance, pretext interviews, and the use of information assets or "informants." (Emphasis added.)

There then followed a description of the general usefulness in the past of clandestine collection techniques where U.S. persons have been involved, and a discussion of current NSA practices and limitations (relating to, but not mentioning, the "agent of a foreign power" standard). The options presented in the Issues Paper were limited to, (1) barring any clandestine collection of foreign intelligence from U.S. persons, (2) allowing such collection only in highly estraordinary circumstances and under stringent procedural requirements, and (3) allowing such collection limited by procedures and standards, such as requiring a showing of "agent of a foreign power," some "relationship" with a foreign power, a violation of criminal law, etc.

12. Thus, preceding the 24 January SCC meeting, it had been presumed that there was not likely to be any dramatic retreat from existing standards for targetting U.S. persons, at least as to the intrusive techniques. Indeed, NSA was concerned that current standards for use of intrusive techniques (i.e., "agent of a foreign power") might even be tightened. While there was language in the Issues Paper that hinted at adopting standards different from those now governing collection as to U.S. persons, this seemed to be intended to allow for such a change primarily as to the less intrusive techniques. These assumptions were supported by the November SCC debacle involving the Working Group papers.

13. The precise course of events at the 24 January SCC meeting remains unclear. The DDCI attended and was prepared to defend current practice against any effort to tighten existing strictures. Shortly after the meeting began, David Aaron cleared the room of all but principals. The decisions that emerged, although it is unclear how they were reached or by whom they were proposed, were that, (1) there should be no "criminal" or "agent of a foreign power" standard for use of intrusive techniques against U.S. persons abroad, but rather a court order should be required based on the quality of information sought, and (2) use of other techniques would require entity head findings based on the quality of intelligence sought. Apparently, the Vice President himself acknowledged that U.S. persons abroad may lose some of their protection from governmental action. Subsequently there were hints in news reports that the Attorney General had claimed responsibility for these proposals. Justice was commissioned to draft provisions to implement the SCC decisions. (S)

14. Justice required further guidance, however, and a second SCC meeting was held on 13 February. It was in the DOJ paper prepared for discussion at that meeting that the notion of "~~essential foreign~~ intelligence" was introduced as

a standard for judicial authorization of use of intrusive techniques. At the SCC meeting it was determined this standard was acceptable as to those techniques and would be required also with regard to requiring Attorney General approval of "placing agents" in U.S. organizations for these purposes, and that an "important" standard was agreeable as to use of other collection techniques. (C)

15. The Working Group was revived to draft statutory provisions in conformity with those decisions. This was completed by 7 March, and the proposal was circulated for comment to SCC members on 14 March. Your 21 March memorandum for David Aaron addressed several lesser points and concluded by stating:

> I also believe it would be a mistake to adopt a piecemeal approach and present to the President and then the SSCI the various sets of proposed statutory provisions concerning each issue area treated by the SCC as they are developed and finalized, rather than combining them in a unified statutory proposal. The piecemeal approach could make it much more difficult to gauge the total effect of the restrictions package or to modify positions on various issues that may require change as a result of subsequent deliberations in other areas.

Nonetheless, the Administration's foreign intelligence proposal was sent to and approved by the President and furnished to the SSCI on or about 20 April. In the course of approving these provisions, the President rejected suggestions that the judicial warrant requirement should be extended to "placing agents" in U.S. organizations and that U.S. "political organizations" should be insulated completely from this type of activity.

III. Pros and Cons

16. As you know, the Administration position already has been the subject of criticism from civil libertarian groups and has resulted in several news accounts describing it and its perceived dangers. A sampling of these reports is attached for your information. It is true the authority that would be created by the SCC decisions would be far broader than current authority for the use of intrusive techniques directed against U.S. persons abroad, and would be significantly greater than, and stand in marked contrast to, the authority provided under the Foreign Intelligence Surveillance Act for use of these techniques against U.S. persons in the U.S. Similarly, the use of physical surveillance,

mail covers, and covert human sources to collect information concerning U.S. persons would depend on the quality of the information sought rather than, as is largely the case under E.O. 12036, on the conduct of the U.S. person involved (e.g., acting on behalf of a foreign power, endangering sources or methods).

17. It is also true that, because these authorities are so different from those on which current or past practices have been grounded, it may ill be difficult to demonstrate a convincing or compelling need for statutory provisions that would for the first time expose U.S. persons to intelligence collection activities solely on the ground that they possess foreign intelligence information desired by the government. Despite our protracted efforts over the past several months, we have been unable to substantiate, by reference to more than a very limited number of actual circumstances, the claim that the Agency has been deprived of valuable foreign intelligence information because of the absence of such broad authority. As a result, any effort to justify this proposal is likely to rely heavily on hypothetical cases, both past and future, where the government might benefit from an entity to collect information more readily from U.S. persons. By contrast, the perceived threats to privacy interests of U.S. persons may be made to appear obvious and tangible by those who will oppose broader authority, with historical precedent provided by activities such as the CHAOS and COINTELPRO programs.

18. On the other hand, the Administration proposal is not without redeeming value. It preserves and promotes the necessary distinction between the intelligence activities and the law enforcement activities of the U.S. Government, a distinction that has become increasingly blurred in the minds of segments of the public, the press, and the drafters of S. 2525. The proposal, for the first time, would require a judicial warrant for the use of intrusive techniques abroad, neither an insignificant concession by the intelligence entities nor a safeguard that can be easily brushed aside by those who may oppose the proposal. The proposal also will regularize the collection process and accountability for decisions to utilize these authorities. The NSC would be responsible for its findings of essentiality - a high standard in a literal sense - and various officials down the line will be responsible for their actions, again not an insignificant feature since the charter may include specific civil and criminal remedies, depending upon the SCC's decisions on 15 May, for certain types of violations. Attorney General approval and findings would be required for "infiltrating" U.S. organizations to collect foreign intelligence, use of other somewhat-intrusive techniques would require specific

approval based on specific findings of the importance of the information, and both types of activity would be limited to the FBI in the U.S. - all additional "firsts" of some significance. Other collection techniques would continue to be regulated by procedures approved by the Attorney General.

19. Furthermore, it cannot be argued in opposition to this proposal that there will not be situations in the future where vital, perhaps even critical, information would be unavailable to the U.S. unless such authority is provided in the statute. It may not be stretching the point to say that flexibility, the ability to adapt activities to existing circumstances, is the most essential element of the collection business. In the areas of nuclear technology, energy and oil, and international economic activities, for example, there may develop instances where U.S. persons are in possession of information they choose not to share with the government that may truly be deemed "essential" to U.S. national security. While there is always the possibility that this authority could be misused to suit a disorted view of U.S. national security interests, it must be presumed that high level officials will act responsibly, especially when held accountable, or any statutory scheme that may be devised will be unworkable. As to the most sensitive types of activities, the involvement of an impartial judicial authority will serve to prevent gross distortion.

IV. Your Course of Action

20. This proposal is likely to remain controversial and difficult to explain. It can be expected that criticism will heighten as the public debate proceeds. It is our understanding that Senators Huddleston, Bayh, and Mathias met with and informed the Vice President recently that the Administration position on this issue is unacceptable to them. Although it is our further understanding that the Vice President registered his support for the proposal at that meeting, and that the Attorney General may be designated as chief spokesman on these issues, it is certain that your views will be solicited and that the Administration will expect you to shoulder a major responsibility for defending its charter position.

21. While you may be experiencing some justifiable anxiety at the prospect of defending the Administration proposal, you should consider carefully whether this is the most opportune time to make your feelings known, even within the Administration. The Administration position is the product of an arduous, time-consuming process, has been explicitly sanctioned by the President, and has already been

provided to the SSCI. Consequently, it would be very painful for the SCC to even consider retreating from that position until it becomes more evident that a compromise is necessary. Also, any move on your part to force reconsideration of the position on foreign intelligence collection may result in a collapse of the fragile Administration consensus that surrounds not just that position but all the Administration decisions reached thus far. The result may be damaging to our interests in other areas, such as special activities where the Administration position is clearly defensible. A further substantial delay in the Administration's efforts to develop a charter could result, and it would probably not be long before word reached the news media that you were the cause.

22. It should be kept in mind that the enactment of charter legislation is nowhere near imminent and that much negotiation and compromise is yet to occur. Since the legislative process is inevitably one of presenting a most favorable position and then falling back to more agreeable provisions, it would be unrealistic to expect to begin with a final proposal and it is to be expected that the current Administration position will be subject to further discussion and modification. What this means is that there are likely to be other, more propitious circumstances ahead in which an expression of your position may not only be more appropriate but also better received.

23. Further, it is not unreasonable to argue that you should do your utmost to defend the Administration proposal, so long as it is not outrageous (which this position is not), despite any personal reservations you may have. This is especially so here since a weak DCI or CIA showing in favor of greater flexibility in this area is likely to substantially weaken our ability, both within the Administration and before the Congress, and not only as to foreign intelligence collection but also as to the other Administration positions, to object to alternative proposals that may do real damage to U.S. intelligence capabilities. For example, we understand that one SSCI counterproposal under serious consideration may be to require a judicial warrant for any and all collection of foreign intelligence from individual U.S. persons, regardless of the technique to be used. In a functional sense, also because of your position as DCI, you bear primary responsibility for ensuring that a statutory charter provides sufficient authority to meet U.S. intelligence requirements, and the intelligence community entities will naturally expect you to articulate their desire for greater flexibility and to advocate their need for some loosening of current restrictions.

24. If, nonetheless, your concerns are of sufficient magnitude to eclipse these considerations and you believe you must take action now to prevent more serious damage later, you may wish to begin by ensuring the SCC members, and perhaps even the President, are aware of your feelings in order that they will not be surprised subsequently should you voice them. One vehicle for doing this would be to suggest at the end of the 15 May SCC meeting, if such a suggestion is not made by one of the other SCC members, that there be a "final" meeting of that group, as was proposed in your March letter to David Aaron, to assess what has been done, to ensure the Administration is fully committed to its proposals, and to discuss how the Administration intends to proceed from here. Practically speaking, it can be expected that your position may be used to your disadvantage no matter what you say if not carefully framed and you may find yourself being attacked for, at the same time, seeking too much authority or for not supporting sufficient authority. Any presentation you may feel compelled to make to the SCC, accordingly, should be carefully measured to avoid the appearance of indecision, weakness, or timidity, and to avoid an overreaction that could result in the entire charter structure being pulled down around you and the Agency. As noted above, such a result could be truly adverse in that your views and those of the Agency could be discounted on this and other issues in the future. Therefore, your objectives in making any statement along these lines to the SCC should be to ensure that (i) the Administration is serious about presenting and defending this proposal, (ii) these are commitments on all sides to share in that defense, (iii) there is some clear definition of the roles you and others are to be expected to play in this process, and (iv) the SCC members understand that, while the Administration position on foreign intelligence collection is far from an irresponsible effort to destroy individual liberty, the justification may not be overwhelming in the face of the case that is likely to be presented on the other side to demonstrate a threat to the privacy interests of Americans.

25. Looking ahead, and concerning an area that you will surely wish to discuss with Fred Hitz in greater detail when the appropriate time comes, is the problem of what course will be open to you if you feel the current Administration position, or a substitute position that may be developed later, is unpalatable and you cannot wholeheartedly support it should it survive to the point where public comment and testimony is required of you. This situation could arise if you choose now to say nothing and allow events to develop, or if you decide you must request a "final" SCC meeting and assessment but such an SCC review results in a decision to

proceed with this proposal, or if such a review or the legislative process result in a different approach that is still not satisfactory to you. To oppose the Administration position publicly could be calamitous, and half-hearted support may be easily perceived to be just that.

26. Should such a situation develop, one approach that you may wish to consider would be to attempt to avoid addressing the position as "right" or "wrong" but to present only your best assessment of the intelligence gain or loss that could be expected to result. The supportive roles of other Administration officials should be clear by then and it should not be expected, if the Administration is serious about its proposals, that you will be responsible alone for defending its charter provisions on all fronts. You should not be required to answer, for example, the inevitable question of whether it is "good" or "bad" to seek to collect information from Americans who have "done nothing wrong." That question should be left to others to debate and your function as DCI should be to arrive at and present intelligence, not moral, legal, political, or philosophical judgments. Those areas are more properly the concerns of the Attorney General, the President and Vice President, and the members of the Congress themselves. Such a posture has its dangers of course and may quickly prove to be one that others will not allow you to maintain for long. It is an approach, also, that will be easily susceptible to misunderstanding and, as you know, treading a middle ground in a spirited public debate is not only difficult but is not likely to win you the gratitude of either side. It is presented here, admittedly prematurely, only for the purpose of rounding out this discussion of the problems you may face in dealing with this small aspect of charter legislation. Another alternative, in such a situation, would be to prepare and advocate provisions with which you can be comfortable on a personal basis, while also accommodating real intelligence needs. The difficulties of proposing alternatives to an Administration bill are obvious.

27. Recommendation: If you conclude, after considering the details of the Administration position concerning foreign intelligence collection as described in this paper, that it would be beneficial from an intelligence, tactical, and political point of view to proceed with it at this time, you should not oppose it now. If, on the other hand, you have very strong personal reservations concerning the wisdom of the Administration position that you believe override any such beneficial aspects and the risks of expressing yourself now, you should make those feelings known to the SCC on Tuesday. In any event, there is something to be said for suggesting to the SCC that there be a "final"

SCC meeting to assess what has been done, determine the course to be pursued from here on, and define your role in it more clearly.

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Attachments

BACKGROUND MATERIALS FOR 16 May 1979 1400-1530
SPECIAL COORDINATION COMMITTEE MEETING CONCERNING
INTELLIGENCE CHARTER ISSUES

PART I: USE OF PARTICULAR TYPES OF PERSON AND ORGANIZATIONS FOR INTELLIGENCE PURPOSES

1. OGC Memorandum and Recommendations

2. Tab A: SCC Issues Paper

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3. Tab B: (i) [redacted] provisions governing relations with
- U.S. News Media Organizations
- Clergy and Missionaries
- Academics

(ii) [redacted] governing operational use of certain categories of individuals, including 25X1
- Fulbright grantees (page 5)
- Employees of other federal agencies
- Media representatives (page 9)
- Academics (pages 12-13)
- U.S. persons abroad in general (page 12 and book cable attached to DOI)

(iii) Katzenbach Report and Presidential directive barring support of U.S. educational or private voluntary organizations

4. Tab C: Views of the Chief, DDO/Covert Action Staff and the Coordinator, NFAC/ Academic Relations

5. Tab D: OGC Background Papers

(i) Undisclosed Participation for Recruitment of Foreign Persons in the U.S.

(ii) Undisclosed Participation in U.S. Organizations Generally

6. DDO MATRIX of Issues and Current Regulations

PART II: REMEDIES

1. OGC Memorandum and Recommendations

2. Tab A. Issues paper

MEMORANDUM FOR:

15 May 1979

SCC on Legislation Charter

attended by DCI / DDCI

Date

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5/15/74

DDCI

Re: query from VP concerning spotting and assessing

The AG has been furnished by the DOJ staff, with a suggested response and status report to the VP with a recommendation that copies go to the Sec Def & DCI