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22 January 1979
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MEMORANDUM FOR : Director of Central Intelligence

THROUGH : Deputy Director of Central Intelligence

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Issues for Discussion at the 24 January Meeting of the National Security Council's Special Coordination Committee (SCC) Concerning Intelligence Charter Legislation

1. Action Requested: It is requested that you review this memorandum and the attached issues paper which has been prepared jointly by Justice, CIA and Defense in connection with the SCC meeting now scheduled for Wednesday, 24 January. The purpose of that meeting is to discuss and determine, to the extent possible at this stage, the general nature of the position the Administration should take with regard to statutory authorities and limitations pertaining to collection of information that may constitute foreign intelligence but that also concerns Americans in one way or another. In addition to the issues paper, attached for your information are copies of a recently prepared overview of existing practice and authority in this area and the most recent position paper produced by the staff of the Senate Select Committee on Intelligence (SSCI) which discusses this area on pages 5-7. [Redacted]

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2. Background: As you know, the development of Administration positions as to the proposed charter legislation has become the responsibility of a group chaired by David Aaron. At the most recent meeting of that group, on 9 January, it was determined, largely at David Aaron's urging, that the principal impediment to real progress in the resolution of the issues relating to Title II of S.2525 is the question of the extent, if any, to which the intelligence agencies should be allowed to collect foreign intelligence information that also relates to the activities of Americans. In order to obtain high-level guidance as to the preferred Administration position in this regard, the attached issues paper has been prepared for SCC consideration at its 24 January meeting. [Redacted]

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3. Scope of the Question Presented: As the attached paper points out, the issues presented relate only to the collection of foreign intelligence that [Redacted]

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Collection of counterintelligence information, or information relating to potential sources, or to security matters, has been put aside for the moment since there appears to be no basic philosophical dispute among those involved in the charter process at this time but that such information should and may be collected whether or not it concerns Americans. Issues regarding the appropriate circumstances, techniques, and limitations of such collection will be dealt with at a later date. [REDACTED]

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4. Thus, the focus here is on the collection of foreign intelligence viewed in theoretical isolation from all other collection activities. The term "foreign intelligence" should be understood to apply broadly in the context of this discussion to not only information concerning the capabilities, intentions, and activities of foreign persons or entities which is in the possession of an American, but also to information concerning activities of Americans that may influence developments abroad or that may be useful in determining the most appropriate policy to be pursued by the U.S. in a particular area abroad. In addition, the discussion is drawn in larger terms to involve both collection of such information from Americans whether or not it directly "concerns" them, and collection of such information concerning Americans whether or not it is acquired directly "from" them. Further, it must be remembered that "Americans" as here defined includes not only natural-born U.S. citizens, but also entities incorporated in the U.S., naturalized citizens, dual nationals, persons with permanent resident alien status, and organizations substantially composed of individuals in any of these categories. Finally, to simplify the issues as much as possible, and to accommodate differing views within the Aaron group as to this point, no distinction has been made between collection activities that occur in the U.S. and those that occur abroad although it seems to me such a distinction may be perfectly reasonable in various circumstances and as to use of certain techniques. [REDACTED]

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5. There is sharp divergence of views between and among the Administration and Senate representatives involved in the consideration of the proposed charters as to the fundamental question of whether collection of positive foreign intelligence consisting in part of information which concerns Americans should be authorized at all and, if so, in what circumstances and by what methods, and under what procedures. [REDACTED]

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6. Issues: For the purposes of discussion, the issues and options have been organized somewhat artificially under four basic forms of collection: (a) voluntary or consensual provision of information; (b) interviews with third parties who are aware they are providing the U.S. Government with information which concerns Americans and which has been disclosed to them by American friends, relatives, or acquaintances; (c) incidental acquisition of information which concerns Americans in the course of intelligence activities directed at foreign targets; and (d) the use of covert methods with the intent and for the purpose of acquiring information which concerns Americans. []

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a. Voluntary, Consensual Provision of Information: There appears to be no dispute but that the government should be entitled to accept and utilize information that concerns Americans but that is provided voluntarily by, or with the consent of, the Americans who are involved. This agreement tends to blur around the edges and overlap with third party or covert collection considerations, however, in some circumstances, as, for example, where the providers are acting voluntarily in furnishing information as to their own activities but other Americans are intrinsically involved, or where corporate employees are voluntarily providing information concerning their official activities but with which corporate interests are essentially intertwined. Despite this sort of definitional problem, continuing authority to accept information offered on this basis should not arouse any dissent or require much discussion. []

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b. Third Party Interviews: This area involves only circumstances where persons ("third parties") are aware they are in contact with an official of the government and provide information previously disclosed to them by an American who may not be aware it is being passed on to the government. This type of collection would not include situations where third parties are requested or "tasked" to obtain the initial, or additional, information as that would alter the character of this activity and require it to be treated as a form of covert collection. The need for third party collection could arise either where the American involved has been approached and has refused to provide the desired information to the government, or where the American has not been approached at all because of security or other reasons as, for example, where the government is not previously aware of the fact that the American concerned is in possession of useful information. []

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As is indicated in the portion of the attached issues paper concerned with third party interviews, this type of collection would include not only instances where CIA case officers might solicit or receive information concerning Americans which is already known to foreign or American information assets, but also a large portion of the activities [redacted]

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[redacted] As is also indicated in the issues paper, this form of collection appears to be used frequently and may produce very significant information. [redacted]

There is not apt to be great discussion or disagreement concerning continued authority for this form of collection. For your information, except for its most recent position paper which did not appear to be well-considered and would have required a Presidential waiver and Attorney General procedures for such collection, even the SSCI staff has been prepared to accept this type of activity and S 2525 would have authorized it specifically. [redacted]

Basically, "Option A" represents current practice and should be supported. As a general proposition, individuals who have disclosed personal information to third parties have essentially waived their privacy interests in that information, even where they have requested confidentiality and the collection of the information therefore does not intrude on such interests. Limiting this type of collection further by special procedures or by requiring a relation with a foreign power as is proposed in Option B could deprive the U.S. of information concerning economic and other activities of Americans which might have significant effects upon developments abroad. [redacted]

c. Incidental and Unintentional Collection: This form of collection, also not likely to be the subject of substantial debate or disagreement, involves situations where information that concerns Americans is acquired in the course of activities directed at foreign targets. Such collection occurs in connection with CIA human intelligence activities, where it is truly incidental, and NSA and CIA signals intelligence activities, where it is almost inevitable. [redacted]

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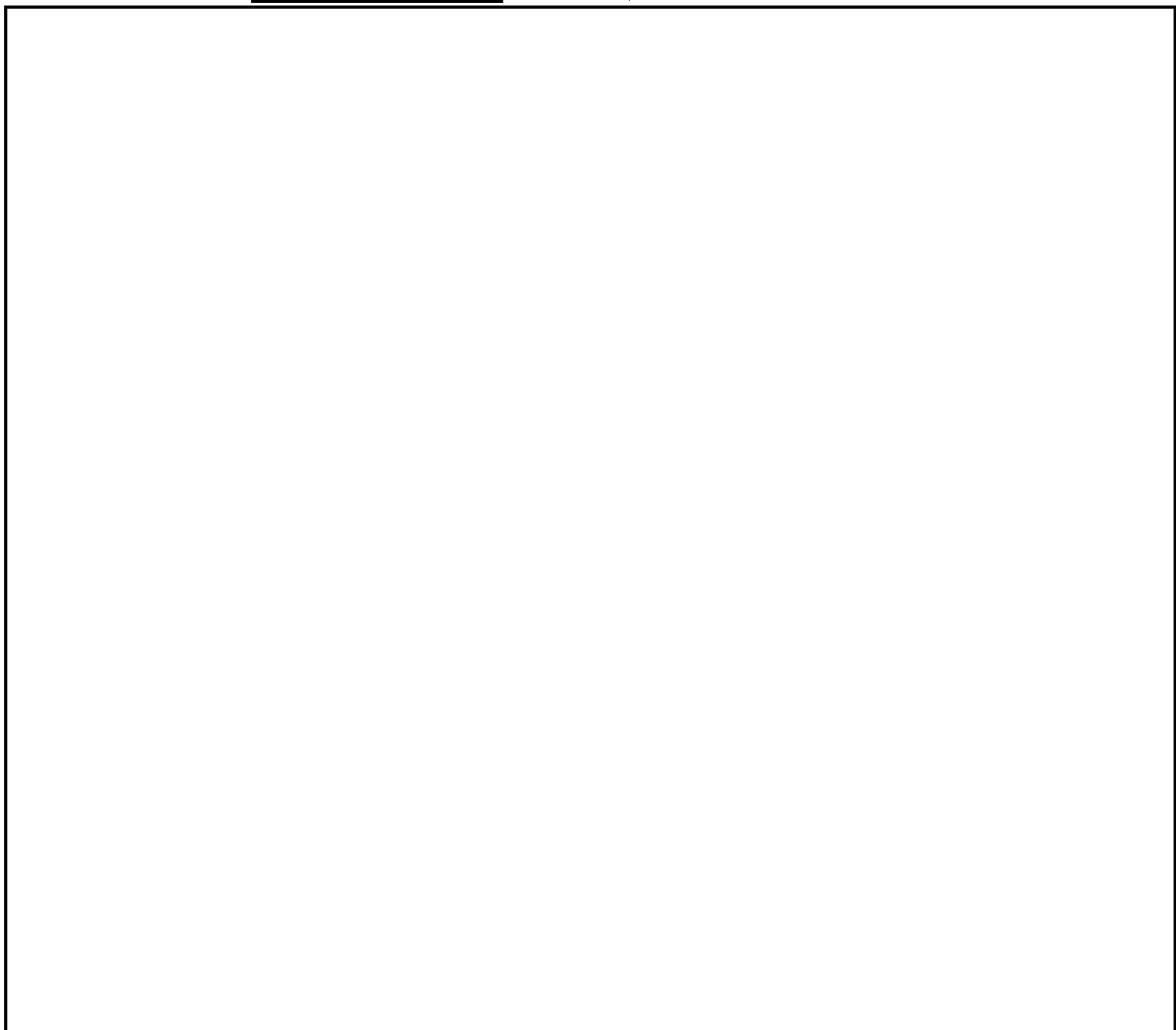
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Collection by CIA would occur, for instance, where a case officer who is required to maintain a cover status meets and engages in conversation with an American who has traveled or been active abroad and who relates significant details of that experience without being aware of the case officer's true affiliation. To a great degree the American, albeit uninformed, has waived any privacy interest in the information by disclosing it to the CIA officer or asset in much the same manner as is the case in the context of third party interviews. The opportunity for this type of collection develops somewhat frequently, but because of its fortuitous and open nature it cannot be depended upon to any great extent as a source of significant information.

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LEGISLATIVE CHARTERS

WEDNESDAY

24 JANUARY 1979

1400-1530

WHITE HOUSE SITUATION ROOM