OGC 79-02171
6 March 1979

MEMORANDUM FOR : Director of Central Intelligence
Deputy Director of Central Intelligence
Deputy Director for Operations
Deputy Director for Science & Technology
Deputy Director for Administration
Legislative Counsel
Director, National Foreign Assessment Center
Deputy to the DCI for Collection Tasking

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Draft Special Activities Issue Paper for Special Coordination Committee Consideration in Connection with Proposed Charter Legislation

1. Action Requested: It is recommended that you review the attached materials in anticipation of further SCC action. 25X1 [redacted]

2. Background: By his memorandum of 16 February, David Aaron assigned responsibility to various agencies for the preparation of issue papers concerning several of the remaining charter legislation topics requiring discussion by the SCC and determination of Administration positions. The topics and the responsible agencies were Counterintelligence (Justice/ FBI), Special Activities (CIA), Personnel and Physical Security Investigations (CIA), and Recruitment of U.S. Persons, Including Source Investigations (Justice). [redacted] 25X1

3. Attached is a copy of the draft of the Special Activities issue paper we prepared in coordination with appropriate components of the DDO and furnished to the NSC last week for further distribution and comment. Justice and the FBI are still developing the counterintelligence paper. As you will note from the covering memorandum to David Aaron, we have asked for an explanation of the term "physical and personnel security investigations" before determining whether this Agency is best suited to discuss that topic, and have suggested that this Agency, not Justice, should draft the paper concerning recruitment and potential source investigations. 25X1 [redacted] 25X1

OGC Has Reviewed DOJ Review Completed.

[redacted]

4. As the development and exchange of these topical issue papers continue, we shall be in contact with appropriate Agency components to solicit views as to the papers themselves, and assistance in preparing Agency positions with regard to the issues to be deliberated at meetings of the SCC.

5. Recommendation: It is recommended you review the attached draft issue paper concerning special activities.

25X1

[redacted]
Anthony A. Lapham

Attachment

79-0801

NSC-1030

ncd 21 Feb.

THE WHITE HOUSE

WASHINGTON

CONFIDENTIAL February 16, 1979

MEMORANDUM FOR: THE VICE PRESIDENT
THE SECRETRAY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
THE DIRECTOR, OFFICE MANAGEMENT AND BUDGET
CHAIRMAN, JOINT CHIEFS OF STAFF
DIRECTOR OF CENTRAL INTELLIGENCE

SUBJECT: Intelligence Charters [redacted] 25X1

Now that the SCC has completed consideration of positive foreign intelligence collection involving U.S. persons, it will begin consideration of the remaining restrictions issues. In preparation for these deliberations, outlines of proposed charter provisions for SCC consideration should be prepared as follows: [redacted] 25X1

1. Counterintelligence by Justice/FBI

2. Covert Action by CIA

3. Personnel and physical security investigations by CIA

4. Recruitment of U.S. persons, including source investigations by Justice [redacted] 25X1 25X1

The outlines should follow the general model of the one prepared by Justice on positive foreign intelligence and should be submitted to the NSC no later than February 26. [redacted]

Zbigniew Brzezinski

CONFIDENTIAL
Review on February 15, 1983

Central Intelligence Agency

Washington, D.C. 20505

OGC 79-02114
2 March 1979

MEMORANDUM FOR : David Aaron
Deputy Assistant to the President
for National Security Affairs

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Intelligence Charters - Draft Issue Paper Concerning Special Activities, and Foreign Intelligence Collection and Counterintelligence Activities

Enclosed, in response to your memorandum of 16 February, is a draft paper for SCC consideration that addresses the central issues, as we see them, concerning the review and approval of special activities. Because the Senate draft legislation raises many of the same issues with regard to approval and review of foreign intelligence collection and counterintelligence activities, there has been included the basic question of whether similar controls should be applied in those areas. If that question is answered in the affirmative, the same range of issues raised with regard to special activities will likewise have to be confronted with regard to collection and counterintelligence activities. It is recommended this paper be distributed to various departments and agencies involved in this process to determine whether it fairly presents the issues that should be addressed, and that an SCC meeting be scheduled shortly thereafter to seek resolution.

Your memorandum also assigned responsibility to the Department of Justice for preparing a similar paper regarding "Recruitment of U.S. persons, including source investigations ...," and to CIA regarding "Personnel and physical security investigations ...." As to the former topic, both we and Justice believe that this Agency is best suited to prepare at least the basic draft of such a paper, and we shall begin to do so with your approval. As to the latter topic, there is some uncertainty as to what subject area is to be covered and thus which agency should be responsible for preparing the issue paper. Further clarification would be helpful in this regard.

In another regard, your memorandum implies that only the four areas it identifies continue to present issues that will require resolution by the SCC. Unless it will be the Administration position that these areas, plus collection of foreign intelligence that concerns U.S. persons and assassinations and human experimentation, should be the only areas within the coverage of the charter, there appear to be other issues requiring SCC attention, as for example issues respecting retention and dissemination, relations with persons engaged in particular professions and activities (clergy, newsmen, exchange programs, etc.), organizational cover, and distribution of information abroad. Clarification on this point also would be useful.

25X1

Anthony A. Lapham

Enclosure

25X1 cc: NSC Coordinator/
25X1 OLC/
C/PC
OGC/
OGC/

SPECIAL ACTIVITIES
INTELLIGENCE CHARTER ISSUES PAPER
FOR THE SPECIAL COORDINATION COMMITTEE

I. Background: This paper presents the range of basic issues that require resolution in order to develop an Administration position concerning appropriate intelligence charter legislation authorities and controls for the approval and conduct of special activities in support of the foreign policy objectives of the United States. It is based upon a presumption that some form of existing conditions for the conduct of special activities - SCC review, Presidential approval, reporting to Congress - will continue to be acceptable in a statutory context. If any part of this presumption is questioned the nature of the issues framed in this paper will be changed. Because of the similarity of the issues involved, the question of the appropriate review and approval process to be required for foreign intelligence collection operations and counterintelligence activities has been included in this paper.

The issues relate to whether:

a. Repeal of the Hughes-Ryan Amendment should be sought.

b. All special activities should be treated in a similar manner.

c. There should be a higher or lower standard for Presidential approval of special activities.

d. Presidential approvals should be required to be in writing.

e. There should be a requirement for timely, prior, or other reporting to Congress.

f. There should be a required annual review and reaffirmation of ongoing special activities.

g. Membership and attendance requirements for the NSC committees reviewing special activities should be specified.

h. A review and approval process similar to that applied to special activities should be required also for selected foreign intelligence collection operations and counterintelligence activities.

i. There should be specific prohibitions of assassination and particular types of special activities.

II. Current Practice: The Foreign Assistance Act of 1961, as amended in 1974 by the Hughes-Ryan Amendment (22 U.S.C. 2422), provides that no funds may be expended by or on behalf of CIA for any special activity (euphemistically described in the statute as "operations in foreign countries, other than activities intended solely for obtaining necessary intelligence") except pursuant to a finding by the President that it is "important to the national security" and unless reported "in a timely fashion" to the "appropriate committees" (now seven, earlier eight) of the Congress.

The Hughes-Ryan Amendment has been construed to require specific Presidential findings with respect to special activities that are of major scope or involve particular foreign countries, but to permit general findings with respect to special activities that are of a more routine nature and are conducted on a world-wide basis. These specific and general findings are subject to consideration by the SCC, which forwards them, along with its recommendations, to the President in accordance with Executive Order 12036. Under current practice, approved findings are signed by the President and notice is then given, prior to implementation of the activities, to the Senate Foreign Relations, Appropriations, Armed Services, and Intelligence committees, and to the House Foreign Affairs, Appropriations, and Intelligence committees. The House Armed Services Committee determined in late 1978 it no longer desired to be notified of these findings. If requested, the committees may be briefed in further detail on the activity.

Executive Order 12036 specifies the membership of the SCC for this purpose and requires attendance by the designated members except in unusual circumstances. The order also requires an annual SCC review of all ongoing special activities and a report to the SCC.

The order similarly assigns responsibilities to the SCC for review of proposals for sensitive foreign intelligence collection operations reported to the SCC chairman by the DCI and determined by the chairman, under Presidential standards, to require SCC review and approval. The SCC membership and attendance in this regard, and a requirement for annual review of ongoing operations, also are specified in the order. The SCC, under similar membership and attendance requirements, is responsible for approving counterintelligence activities, again under standards established by the President, but no annual review of these activities is required. Standards to implement these provisions of the order have yet to be adopted.

III. Issue - Repeal of the Hughes-Ryan Amendment:

Because it is likely the other requirements of the Hughes-Ryan Amendment would be more or less duplicated in any charter, repeal of this statute would be intended primarily to reduce to the two intelligence committees the number of committees notified of such findings. This step would implement one of the recommendations of the Church Committee and would lessen the burdens and security problems associated with the current reporting requirement.

The SSCI draft charter legislation circulated for executive branch comment contained a provision repealing the Hughes-Ryan Amendment as late as January 1978. This provision was deleted, however, when the bill was introduced as S.2525 in February. The deletion of this repealer is symptomatic of a congressional reluctance to resolve the competing jurisdictional claims of the various committees receiving these reports, and Administration insistence on this point may force the issue.

The other committees may insist on retaining their rights to receive these reports, however, or it may be that the SSCI and HPSCI will demand a quid pro quo, for example, a higher approval standard or a prior reporting requirement, for pressing for repeal of Hughes-Ryan.

IV. Issue - Differentiation Among Special Activities:

Currently, a general Presidential finding is deemed to encompass all actions of a "routine" nature within the category of activities approved by the finding. If actions of a "nonroutine" nature are contemplated or become necessary, a separate process of Presidential finding and congressional reporting is required.

All activities not "intended solely for obtaining intelligence," no matter how mundane and noncontroversial, now must be subjected to the same rigorous approval and reporting process. The Senate proposals to date have retained a requirement for similar approvals of all special activities. It may be possible and desirable, however, to seek to establish the routine/nonroutine distinction in the law and require that only nonroutine actions need be subject to SCC review, Presidential approval based upon a specific standard, and reporting to the Congress. Routine actions could be required to be approved only at the interdepartmental level, as was the case to a large extent from 1974 until 1977, or even, if necessary at the SCC level. The statute might require guidelines, approved by the President, to govern the determinations as to what is routine and what is nonroutine and thus requires higher approvals and reporting.

Such a dual approval system would alleviate much of the burden, delay, and undue complexity which may inhibit the performance of such "routine" special activities.

Of course, such a proposal may be seen as a device to avoid proper review, approval, and accountability and to return to more free-wheeling practices. These fears may be alleviated by requiring the Presidentially-approved guidelines be provided to the SSCI and HPSCI and emphasizing control through effective oversight.

IV. Issue - Approval Standard:

The Hughes-Ryan Amendment currently requires that special activities be approved by the President on the basis of a finding that such actions are "important to the national security."

S.2525 would have required a four part Presidential finding for approval of special activities - (1) "essential" to U.S. national defense or foreign policy, (2) benefits outweigh risks of disclosure, (3) overt and less sensitive alternatives would not likely achieve the objectives, (4) circumstances require use of extraordinary means. In its most recent submissions, however, the SSCI has proposed a standard for special activities attributed to Secretary Vance in testimony to the Church Committee on 5 December 1975 - (1) overt measures will not suffice (but not all overt measures must be attempted before resorting to special activities), (2) consistency with declared American policies, (3) vital or essential to the national interest (judged, perhaps, in the context of larger, long-term policy rather than in terms of each particular project). In actuality, Secretary Vance's prepared statement on that date stated only that such activities should be "very rare" and engaged in only when they are "absolutely essential" to the national security and that there should be specific approval and reporting procedures. Further, in the question and answer period that followed Mr. Vance agreed with Senator Hart that one of the criteria for approvals could be whether it is believed "a majority of the American people would favor that operation if they were given all the facts." See, Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Intelligence Activities, S. Res. 21, Covert Action, 94th Cong., 1st Sess., Vol. 7 at 54, 88 (Dec. 4, 5, 1975).

ILLEGIB

The use of a high standard is, of course, intended to deter excessive or unnecessary resort to special activities. The "important" standard used in the Hughes-Ryan Amendment has served this purpose to some extent although the national and international moods have also been factors in a lessened U.S. use of such activities. The basic choices in this regard are to retain the current "important" standard, to accept a higher standard such as "essential" or "vital" that would make it more difficult to approve these activities, to propose a lower standard such as "necessary," or to advocate the position there should be no standard in statute. If it is agreed that some basic standard is acceptable, it must be determined what, if any, additional conditions - such as inadequacy of overt means, consistency with announced U.S. foreign policy or public opinion, benefits outweighing risks -should be part of the decision to undertake any such activity.

V. Issue - Written Findings:

The Hughes-Ryan Amendment requires a Presidential finding but does not specify any particular form for such findings. Since 1974 when the Amendment became law, however, all Presidential findings relating to special activities have been in writing. The Senate bill would have required written Presidential findings for each approved special activity.

As a general principle, a requirement for written findings may be opposed on the ground that it is unnecessary and Congress should not be allowed to specify the form of any Presidential decision. However, the requirement for a written finding is premised on a desire for specific accountability and to avoid a return to "plausible denial" for these activities. Written findings also best ensure clear guidance and authority for those responsible for implementing the findings.

VI. Issue - Notice to Congress:

Hughes-Ryan requires notice to Congress "in a timely fashion" of special activities that have been approved by the President. Currently, while that phrase has not been construed to require reporting "prior" to implementation, there are understandings with each of the seven committees now notified that they will be advised in general terms immediately after a finding and before initiation of the activity. The Senate bill would have required prior notice of the facts and circumstances of any approved special activity, except in extraordinary circumstances where notice within 48 hours after implementation would be allowed. The Senate bill also included a disclaimer to the effect that this notice requirement did not imply a need for congressional approval.

Despite the disclaimer, mandated prior notice may facilitate the development of an undesirable degree of congressional control of and interference with these activities. Providing prior notice to date, however, has not had such adverse consequences. A prior reporting requirement may be the requisite "trade-off" for SSCI and HPSCI support of repeal of the Hughes-Ryan Amendment and reducing the reporting obligation to only those two committees, a much more important element in the process.

VII. Issue - Annual Reviews:

Currently, under Executive Order 12036, the SCC is responsible for performing an annual review of ongoing special activities and preparing a report for the National Security Council. The Senate bill would have required, at least annually, an NSC review and a reaffirmation by the President of the original finding underlying each ongoing special activity in order for it to continue.

Again it may be concluded that such a requirement is not an appropriate detail for enshrinement in statute. However, its purpose is, of course, to force periodic reassessment and termination of activities which may continue of their own momentum and yet have outlived their usefulness.

VIII. Issue - SCC Membership and Attendance:

Executive Order 12036 prescribes the membership of the SCC for purposes of considering proposed special activities and making recommendations to the President, and provides that the members must attend except in unusual circumstances when they are unavailable and their designated representatives may attend in their stead. The Senate bill would essentially have duplicated these provisions.

The obvious purpose of these requirements is to ensure, insofar as this is possible, serious, high level consideration of proposed special activities, as well as the heightened control and accountability that may be presumed to result from mandatory attendance by specified officials. These detailed specifications of executive branch affairs may be objectionable, however, on the basis of undue congressional intrusion, loss of future flexibility, and unwarranted assumptions of executive irresponsibility.

An alternative to prescribed membership and attendance requirements or no such requirements, may be acceptance of a statutory requirement that the President provide for these matters in an executive order.

IX. Issue - Similar Standards for Approval of Selected Foreign Intelligence and Counterintelligence Activities:

The entire range of issues raised with regard to review, approval, and reporting of special activities, may be raised also in connection with certain types of foreign intelligence collection operations and counterintelligence activities deemed to be of greater concern and potential risk than other such activities.

Currently, Executive Order 12036 requires, under standards established by the President, "sensitive" foreign intelligence collection activities be referred to the chairman of the SCC by the DCI for "appropriate" review and approval, and that the SCC annually review ongoing activities of this nature and report to the NSC. Similarly, although no annual SCC review is required, the order provides an SCC responsibility to review counterintelligence activities requiring SCC approval under standards established by the President. No standards have as yet been adopted to govern either approval process.

The Senate bill would have required Presidential criteria for identifying important, sensitive foreign intelligence collection operations and counterintelligence activities requiring either NSC or Presidential review and approval. These reviews would include consideration of stated factors, meetings with prescribed attendance, written findings by the President as to foreign intelligence collection activities (including that the information sought is "essential"), prior notice to the SSCI and HPSCI, and annual NSC or Presidential reviews and reaffirmations.

Applying the same, or even more, elaborate procedures to these activities as are now applied to special activities does not seem warranted on public policy, substantive, or pragmatic grounds. The purpose is, of course, to ensure the same degree of high-level control, accountability, and careful consideration as is applied to special activities. An acceptable middle ground between no statutory controls and elaborate controls may be found in adoption of the executive order approach which retains Presidential flexibility to determine which foreign intelligence or counterintelligence activities, if any, require SCC, NSC, or Presidential review and approval, and what form that review and approval should assume.

X. Issue - Prohibition of Assassination and Particular Types of Special Activities:

a. Assassination. The Senate bill would have amended the U.S. criminal code to provide a maximum of life imprisonment for any person in the U.S. or any U.S. Government employee abroad who conspired or attempted to assassinate any foreign official abroad. Executive Order 12036 bars assassination activities on the part of U.S. Government employees but provides no penalties.

Since, historically, it has been U.S. intelligence employees that have been involved in such assassination-related activities as have occurred, it may be argued that such a bar is appropriate in the intelligence charter legislation. On the other hand, it may be opposed as part of that legislation on the ground that, even though not limited to intelligence employees, including such a bar and criminal penalties in the charter unnecessarily memorializes the past and stigmatizes the intelligence community. Further, the review, approval, and oversight mechanisms created by the bill will be sufficient to prevent such activities.

Several alternatives would be to (1) include a detailed criminal provision in the charter as an amendment to the criminal code, (2) oppose such a provision in the charter but support it as a separate initiative to amend the criminal code, (3) support a simple bar as in the executive order with no criminal penalty, leaving such a penalty to a separate initiative, (4) oppose any bar.

b. Certain Special Activities. The Senate bill would have barred explicitly initiating any special activity intended or likely, to result in (1) support of international terrorism, (2) mass destruction of property, (3) creation of food or water shortages, floods or epidemics, (4) use of chemical biological, or other weapons banned by treaty, (5) violent overthrow of democratic governments, (6) torture, or (7) support of any violation of human rights by foreign police, security, or intelligence services.

This type of prohibition is supported by the argument that certain types of activities are inherently abhorrent, unacceptable, and unnecessary as a means to accomplish U.S. foreign policy objectives and should be foresworn by law. Opposition to such a provision is based on the implication that what is not specified is allowable and the definitional problems raised (e.g., nonviolent overthrow of democratic governments would be favored and it is not always clear what is a "democratic government"), and the sufficiency of the elaborate executive-legislative oversight mechanism created by the charter.

OGC 79-02290
8 March 1979

MEMORANDUM FOR : Director of Central Intelligence
Deputy Director of Central Intelligence
Deputy Director for Operations
Deputy Director for Science & Technology
Deputy Director for Administration
Legislative Counsel
Director, National Foreign Assessment Center
Deputy to the DCI for Collection Tasking

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Modifications of SCC Issue Paper Concerning Special Activities

1. Action Requested: It is requested that the attached pages be inserted, as explained below, into the draft SCC Issue Paper concerning special activities that you received from me under cover of a memorandum dated 6 March 1979 (OGC 79-02171).

2. Background: The attached pages represent a substitute page 1 and a new page 8 to be added to the SCC Issue Paper. The effect is to add and describe a new issue identified as "i." on the first page, i.e., whether the charter legislation should contain specific prohibitions on assassinations and certain types of special activities. These modifications have been made at the request of the National Security Council Staff in the interests of completeness, despite our understanding that the SCC Task Force chaired by David Aaron had decided at its initial meeting in December 1978 in favor of a simple bar on assassination and against any prohibition on particular types of special activities.

3. Recommendation: The attached page 1 should be substituted for the existing page 1, and the attached page 8 should be added as the last page, of the SCC Issue Paper on special activities.

done
15 Mar

STAT

Anthony A. Lapham

Attachments

CONFIDENTIAL

OGC 79-02729

22 March 1979

MEMORANDUM FOR : Director of Central Intelligence

VIA : Deputy Director of Central Intelligence

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Special Coordination Committee Meeting Scheduled for 26 March Concerning Charter Legislation Treatment of Special Activities

1. Action Requested: It is requested you review and consider this memorandum and the views of other Agency components that may wish to comment, and adopt the recommended positions when the SCC meets to arrive at an Administration position as to charter provisions dealing with special activities. (See Tab A.)

2. Background: By my memoranda to you of 6 and 8 March 1979 (attached as Tab B), I provided you with materials relating to an SCC issue paper concerning special activities and suggested they be reviewed in anticipation of further SCC action. The issues described in that paper (part of Tab A) will be the subject of SCC deliberation on 26 March. This memorandum explains the issues to be discussed and makes recommendations concerning the positions to be advocated. The issues and recommendations, all in the context of special activities, are:

a. Repeal of the Hughes-Ryan Amendment - support repeal and reporting to only the two intelligence committees.

b. Scope of Presidential requirement - support limited scope that would allow lesser approvals for "routine" special activities.

c. Standards for Presidential approval - support continued use of a standard of "important" to national security with no additional conditions.

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d. Written Presidential approval - support written approval.

e. Reporting to Congress - support continued use of a "timely" reporting requirement.

f. Annual review and reapproval - support an annual SCC review.

g. Membership and attendance at SCC reviews - oppose membership and attendance requirements.

h. Treatment of sensitive collection and counter-intelligence activities - support continued authority in the President to determine which of these activities should be reviewed and in what manner.

i. Specific bars on assassination and certain other types of special activities - support a bar on assassination but oppose bars on particular types of special activities.

3. Adoption of these recommendations would result in essentially the following approval process for these activities. The initiation of any special activity of a significant nature would require a written finding by the President, based upon SCC review and recommendation, that the proposed special activity is "important to the national security." Approved special activities would be required to be reported to the two intelligence committees "in a timely manner." More routine special activities could be approved by the DCI, or the SCC, in accordance with standards and guidelines established by the President. The membership and attendance requirements for SCC meetings to review and make recommendations as to, or to approve special activities, as well as the overall requirements for SCC review and approval of foreign intelligence collection and counterintelligence activities, and the performance of required annual SCC reviews of these various types of activities, would also be matters for resolution by standards and guidelines established by the President. These guidelines would be available to the two intelligence committees. No special activity could be initiated that involved any assassination attempt, but no other specific types of special activities would be barred by statute.

4. Repeal of Hughes-Ryan. As you know, the Hughes-Ryan Amendment requires reporting special activities to seven, formerly eight, committees of the Congress. Repealing that requirement and substituting a requirement for reports to the two intelligence committees would do much to restore a sense of security to the planning, approval and implementation of special activities. This proposal is

likely, of course, assuming in the first instance the intelligence committees are willing to support it, to involve a long and difficult struggle between the various committees with competing views of the scope of their jurisdiction. It may be unrealistic, in any event, to even attempt to exclude the two appropriations committees from this process. However, all the substantive arguments for security, efficiency, and even oversight in its pure sense, as well as one of the Church Committee recommendations, support such a proposal and the benefits to be gained justify the difficulty entailed. Recommendation: It is recommended you support repeal of the Hughes-Ryan Amendment and the substitution of a requirement to report special activities only to the two intelligence committees.

5. Scope of Presidential Review Requirement. Current law and practice do not differentiate between "routine" and "nonroutine" special activities - all special activities must be authorized by Presidential findings. There is no legal reason, however, although there could be serious drafting problems, why the law could not be written to require Presidential approval and congressional reporting of only special activities that are "nonroutine" in the sense that their implementation would entail a substantial commitment of resouces, funds, equipment, or personnel, or would be likely to result in some significant development abroad. Other, less ambitious, special activities that could be categorized as "routine" might be subject only to entity head or SCC approval. This is likely to be a subject of some controversy since such a two-tiered approval system will be viewed by some as another step backward in terms of controlling the intelligence entities. If necessary to meet these objections, Presidential guidelines could be required to be established to assist in identifying the different categories of special activities and the approval procedures to be followed for each type. Also if necessary to alleviate fears of eluding oversight of special activities, such guidelines could be required to be provided to the intelligence committees. Recommendation: It is recommended you support Presidential approval of only "nonroutine" forms of special activities coupled with entity head approval of "routine" special activities. If necessary, this position may be supplemented by adding SCC review of "routine" activities, Presidential guidelines to govern the drawing of these distinctions, and provision of these guidelines to the intelligence committees.

6. Standards for Presidential Approval. The Hughes-Ryan requirement that the President find that proposed special activities meet a standard of "important to the national security" has not proven in and of itself to be a

deterrent to special activities that can be reasonably justified in terms of furthering U.S. foreign policy goals abroad. However, the SSCI would, at least linguistically, raise this standard to "vital" or "essential," and add to it the further conditions that overt means of achieving the same goal be found insufficient and that special activities be consistent with declared U.S. policies. (See page 4 of the SSCI position paper attached as Tab C.) Even assuming that these requirements are diluted somewhat by the inclusion in legislative history of the SSCI's explanatory statements to the effect that not all overt means must be examined before resorting to special activities, and that particular special activities that may not meet the "vital" or "essential" standard may be justified in "light of larger, long-term policy frameworks," there is no question but that the net effect of this proposed standard would be a raising of the threshold for approval to a level that could be expected to inhibit the ability of the U.S. to pursue any but the most significant forms of special activity. The idea of justifying special activities that cannot be termed "essential" on the ground that they meet some perceived long-range goal instead, when the law requires meeting an "essential" standard, is ill-considered. This would be less of a problem, although a problem nonetheless, if it is determined that only "non-routine" special activities should be subject to Presidential approval and thus to this high standard. The alternatives of including no standard or a lower standard such as "necessary" in statute are likely to be politically untenable, and would generate a largely meaningless debate since the current "important" standard has not been a real burden. Recommendation: It is recommended you support maintenance of the current standard of "important to the national security."

7. As for the notion of adding further conditions, such as consideration of overt means and consistency with public U.S. policies, this would appear to serve only to encumber the process further. It is theoretically true that such limitations could reduce the number of instances in which special activities might be conducted where overt efforts would suffice. However, given the inherent limitations of special activities in terms of both security and resource commitments, as well as the elaborate approval gauntlet required to be run, these instances will likely be rare. A requirement of consistency with publicly declared U.S. policies would be more troublesome since candor is not always the essence of diplomacy and situations will almost certainly occur in which stated or implied U.S. policy differs somewhat from actual but undeclared U.S. policy respecting the same matter. Recommendation: It is recommended you oppose further conditions on the Presidential authority to approve special activities.

8. Written Presidential Approval. There is currently no specific requirement that the Presidential approval of special activities be written but written approvals have developed as the norm because of the practical need for some record as to just what it is that has been proposed and authorized. Even with a system of written approvals, however, it has not always been clear whether a particular element of an activity was authorized by a finding or required a separate finding. A system allowing oral approvals would result in even more difficult problems not only in terms of accountability and oversight, but also in implementation of the special activities themselves. Agency officials charged with carrying out these activities could be left with insufficient guidance as to the nature and scope of the authority upon which they will be forced to rely by the law. Recommendation: It is recommended you support a requirement for written findings by the President.

9. Reporting to Congress. While current practice is to notify the "appropriate" congressional committees of a Presidential finding in general terms immediately after the finding is issued, and before the special activity authorized is actually initiated, the Hughes-Ryan Amendment requires only "timely" notice. The "timely" notice requirement is a comfortable one because it allows some discretion to be exercised by both parties and it does not imply any congressional approval role as to such activities. A statutory requirement for reporting of Presidential approvals to Congress "prior" to the initiation of the activity would be somewhat more threatening and, in both implied and real terms, would represent a greater potential for congressional control of these activities. These difficulties would be greatly reduced, however, although not entirely eliminated, if the reporting requirement is limited to the two intelligence committees. Acceptance of a "prior" reporting requirement may prove to be the ultimate price for this sort of an arrangement. Recommendation: It is recommended you advocate continuation of the current "timely" reporting requirement in conjunction with reducing the number of recipient committees by repealing Hughes-Ryan. If both goals cannot be reached, a "prior" reporting requirement would correspond to current practice and may be acceptable if limited to the two intelligence committees.

10. Annual Review and Reapproval. Current practice under Executive Order 12036 includes an annual SCC review and report to the NSC regarding special activities. This review has not proven harmful and, in light of the overall loosening effect that is likely to be ascribed to this special activities package, continuing such a requirement may serve to lessen slightly the fears of persons who emphasize continued oversight and accountability of special

activities. Thus, accepting an annual review may make it easier to avoid added standards for Presidential approvals such as consistency with declared U.S. policy since there would be at least an annual reassessment of ongoing programs. Recommendation: It is recommended you support the requirement for an annual SCC review of ongoing special activities.

11. Membership and Attendance Requirements. Both Executive Order 12036 and S.2525 include requirements that particular officials be present at NSC subcommittee meetings to review proposed special activities and formulate recommendations for the President, and that designated representatives may attend instead only in unusual circumstances. This is essentially a "good government" issue that centers on the question of how far the law should go in attempting to ensure that proposed special activities receive careful, high-level consideration by executive branch officials who later may be held accountable for their judgments. While such provisions are appropriate in an executive order, that these are management decisions better left to the President and they should not be dealt with in specific detail in a statute. Recommendation: It is recommended you oppose such requirements and advocate the position that the statute should only assign functions to the NSC or to a subcommittee of the NSC to be constituted by the President.

12. Treatment of Sensitive Collection and Counterintelligence Activities. The same type of approval standards and review procedures as would be applied under S. 2525 to special activities would also be applied under that proposal for sensitive foreign intelligence collection and counterintelligence activities - including written Presidential findings that "essential" foreign intelligence is sought, meetings of designated officials required to consider specific factors, prior notice to the two intelligence committees, and annual reviews and reapprovals. The requirements of Executive Order 12036, by way of contrast, are much less formal and permit greater discretion on the part of the President, the DCI, the SCC chairman, and the SCC members as to the manner in which they will fulfill their responsibilities in this regard. The order requires, under standards yet to be established by the President, that the DCI refer sensitive foreign intelligence collection activities to the SCC chairman who determines what review and approval is appropriate, that the SCC annually review and report to the NSC as to ongoing activities of this nature, and that the SCC review and approve certain counterintelligence activities. The application of the same type of specific, detailed procedural requirements to these intelligence activities as are applied to special activities makes very little practical or substantive sense. The possible risks and consequences, as well as the potential for exposure and embarrassment due to apparent

inconsistency with declared U.S. policy, are not likely to be as great and there is nowhere near the same historical imperative for high-level review of these activities. In addition, the imposition of these formalized procedural requirements would result in the same drawing-out of the process that has occurred with special activities and would heighten the risk of a premature disclosure. Recommendation: It is recommended you advocate continued Presidential authority to determine appropriate review and approval procedures for foreign intelligence collection and counter-intelligence activities. (Note: It is possible that questions will be raised at the SCC meeting relating to the status and nature of the procedures required by Executive Order 12036 for the approval of sensitive intelligence collection activities. For your information and background, the most recent exchanges of correspondence concerning those procedures are attached as Tab D. You will recall that we and the Justice Department have some differences on the content of these procedures, and that the State Department would go even further than Justice in opposing our draft procedures and has suggested the SCC may have to resolve the differences.)

13. Specific Bars on Assassination and Certain Other Types of Special Activity. The NSC staff requested this issue be added to round out the discussion of special activities despite our understanding that the Aaron group had decided at its initial meeting in favor of a simple statutory bar on assassination activities by U.S. employees (with the question of criminal penalties to be decided in some other forum) and against any bars on particular other types of special activities (such as the bar in S.2525 on supporting terrorism, mass destruction, food and water shortages, floods, epidemics, torture, human rights violations, and use of chemical or germ warfare). The bar on assassination is politically and substantively unobjectionable. The bars on specific types of activities are unnecessary, demeaning, and definitionally impossible. Recommendation: It is recommended you support a simple bar on assassination and oppose specific bars on other types of special activities.

14. Recommendation: It is recommended you adopt the positions recommended in this paper after consideration of the views of the DDO and other appropriate Agency components.

25X1

[redacted]

Anthony A. Lapham

Attachments

cc: DDO
DDS&T
DDA
D/NFAC
OLC
25X1 C/P[redacted]
NSC
OLC

CONFIDENTIAL

79-6753

1630

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

OGC-79-02612
19 Mar 79

March 16, 1979

MEMORANDUM FOR: THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET
CHAIRMAN, JOINT CHIEFS OF STAFF
THE DIRECTOR OF CENTRAL INTELLIGENCE
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

SUBJECT: SCC Meeting on Intelligence Charter Legislation

Attached is a paper prepared by CIA outlining the basic intelligence charter issues concerning covert actions. This paper will be the basis for discussion at the SCC meeting scheduled for March ~~23~~ 26 at 10:00.

Christine Dodson
Staff Secretary

Attachment

SPECIAL ACTIVITIES
INTELLIGENCE CHARTER ISSUES PAPER
FOR THE SPECIAL COORDINATION COMMITTEE

I. Background: This paper presents the range of basic issues that require resolution in order to develop an Administration position concerning appropriate intelligence charter legislation authorities and controls for the approval and conduct of special activities in support of the foreign policy objectives of the United States. It is based upon a presumption that some form of existing conditions for the conduct of special activities - SCC review, Presidential approval, reporting to Congress - will continue to be acceptable in a statutory context. If any part of this presumption is questioned the nature of the issues framed in this paper will be changed. Because of the similarity of the issues involved, the question of the appropriate review and approval process to be required for foreign intelligence collection operations and counterintelligence activities has been included in this paper.

The issues relate to whether:

a. Repeal of the Hughes-Ryan Amendment should be sought.

b. All special activities should be treated in a similar manner.

c. There should be a higher or lower standard for Presidential approval of special activities.

d. Presidential approvals should be required to be in writing.

e. There should be a requirement for timely, prior, or other reporting to Congress.

f. There should be a required annual review and reaffirmation of ongoing special activities.

g. Membership and attendance requirements for the NSC committees reviewing special activities should be specified.

h. A review and approval process similar to that applied to special activities should be required also for selected foreign intelligence collection operations and counterintelligence activities.

i. There should be specific prohibitions of assassination and particular types of special activities.

II. Current Practice: The Foreign Assistance Act of 1961, as amended in 1974 by the Hughes-Ryan Amendment (22 U.S.C. 2422), provides that no funds may be expended by or on behalf of CIA for any special activity (euphemistically described in the statute as "operations in foreign countries, other than activities intended solely for obtaining necessary intelligence") except pursuant to a finding by the President that it is "important to the national security" and unless reported "in a timely fashion" to the "appropriate committees" (now seven, earlier eight) of the Congress.

The Hughes-Ryan Amendment has been construed to require specific Presidential findings with respect to special activities that are of major scope or involve particular foreign countries, but to permit general findings with respect to special activities that are of a more routine nature and are conducted on a world-wide basis. These specific and general findings are subject to consideration by the SCC, which forwards them, along with its recommendations, to the President in accordance with Executive Order 12036. Under current practice, approved findings are signed by the President and notice is then given, prior to implementation of the activities, to the Senate Foreign Relations, Appropriations, Armed Services, and Intelligence committees, and to the House Foreign Affairs, Appropriations, and Intelligence committees. The House Armed Services Committee determined in late 1978 it no longer desired to be notified of these findings. If requested, the committees may be briefed in further detail on the activity.

Executive Order 12036 specifies the membership of the SCC for this purpose and requires attendance by the designated members except in unusual circumstances. The order also requires an annual SCC review of all ongoing special activities and a report to the SCC.

The order similarly assigns responsibilities to the SCC for review of proposals for sensitive foreign intelligence collection operations reported to the SCC chairman by the DCI and determined by the chairman, under Presidential standards, to require SCC review and approval. The SCC membership and attendance in this regard, and a requirement for annual review of ongoing operations, also are specified in the order. The SCC, under similar membership and attendance requirements, is responsible for approving counterintelligence activities, again under standards established by the President, but no annual review of these activities is required. Standards to implement these provisions of the order have yet to be adopted.

III. Issue - Repeal of the Hughes-Ryan Amendment

Because it is likely the other requirements of the Hughes-Ryan Amendment would be more or less duplicated in any charter, repeal of this statute would be intended primarily to reduce to the two intelligence committees the number of committees notified of such findings. This step would implement one of the recommendations of the Church Committee and would lessen the burdens and security problems associated with the current reporting requirement.

The SSCI draft charter legislation circulated for executive branch comment contained a provision repealing the Hughes-Ryan Amendment as late as January 1978. This provision was deleted; however, when the bill was introduced as S.2525 in February. The deletion of this repealer is symptomatic of a congressional reluctance to resolve the competing jurisdictional claims of the various committees receiving these reports, and Administration insistence on this point may force the issue.

The other committees may insist on retaining their rights to receive these reports, however, or it may be that the SSCI and HPSCI will demand a quid pro quo, for example, a higher approval standard or a prior reporting requirement, for pressing for repeal of Hughes-Ryan.

IV. Issue - Differentiation Among Special Activities:

Currently, a general Presidential finding is deemed to encompass all actions of a "routine" nature within the category of activities approved by the finding. If actions of a "nonroutine" nature are contemplated or become necessary, a separate process of Presidential finding and congressional reporting is required.

All activities not "intended solely for obtaining intelligence," no matter how mundane and noncontroversial, now must be subjected to the same rigorous approval and reporting process. The Senate proposals to date have retained a requirement for similar approvals of all special activities. It may be possible and desirable, however, to seek to establish the routine/nonroutine distinction in the law and require that only nonroutine actions need be subject to SCC review, Presidential approval based upon a specific standard, and reporting to the Congress. Routine actions could be required to be approved only at the interdepartmental level, as was the case to a large extent from 1974 until 1977, or even, if necessary at the SCC level. The statute might require guidelines, approved by the President, to govern the determinations as to what is routine and what is nonroutine and thus requires higher approvals and reporting.

Such a dual approval system would alleviate much of the burden, delay, and undue complexity which may inhibit the performance of such "routine" special activities.

Of course, such a proposal may be seen as a device to avoid proper review, approval, and accountability and to return to more free-wheeling practices. These fears may be alleviated by requiring the Presidentially-approved guidelines be provided to the SSCI and HPSCI and emphasizing control through effective oversight.

IV. Issue - Approval Standard:

The Hughes-Ryan Amendment currently requires that special activities be approved by the President on the basis of a finding that such actions are "important to the national security."

S.2525 would have required a four part Presidential finding for approval of special activities - (1) "essential" to U.S. national defense or foreign policy, (2) benefits outweigh risks of disclosure, (3) overt and less sensitive alternatives would not likely achieve the objectives, (4) circumstances require use of extraordinary means. In its most recent submissions, however, the SSCI has proposed a standard for special activities attributed to Secretary Vance in testimony to the Church Committee on 5 December 1975 - (1) overt measures will not suffice (but not all overt measures must be attempted before resorting to special activities), (2) consistency with declared American policies, (3) vital or essential to the national interest (judged, perhaps, in the context of larger, long-term policy rather than in terms of each particular project). In actuality, Secretary Vance's prepared statement on that date stated only that such activities should be "very rare" and engaged in only when they are "absolutely essential" to the national security and that there should be specific approval and reporting procedures. Further, in the question and answer period that followed Mr. Vance agreed with Senator Hart that one of the criteria for approvals could be whether it is believed "a majority of the American people would favor that operation if they were given all the facts." See, Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Intelligence Activities, S. Res. 21, Covert Action, 94th Cong., 1st Sess., Vol. 7 at 54, 88 (Dec. 4, 5, 1975).

The use of a hi[redacted] standard is, of course, intended to deter excessive or unnecessary resort to special activities. The "important" standard used in the Hughes-Ryan Amendment has served this purpose to some extent although the national and international moods have also been factors in a lessened U.S. use of such activities. The basic choices in this regard are to retain the current "important" standard, to accept a higher standard such as "essential" or "vital" that would make it more difficult to approve these activities, to propose a lower standard such as "necessary," or to advocate the position there should be no standard in statute. If it is agreed that some basic standard is acceptable, it must be determined what, if any, additional conditions - such as inadequacy of overt means, consistency with announced U.S. foreign policy or public opinion, benefits outweighing risks - should be part of the decision to undertake any such activity.

V. Issue - Written Findings:

The Hughes-Ryan Amendment requires a Presidential finding but does not specify any particular form for such findings. Since 1974 when the Amendment became law, however, all Presidential findings relating to special activities have been in writing. The Senate bill would have required written Presidential findings for each approved special activity.

As a general principle, a requirement for written findings may be opposed on the ground that it is unnecessary and Congress should not be allowed to specify the form of any Presidential decision. However, the requirement for a written finding is premised on a desire for specific accountability and to avoid a return to "plausible denial" for these activities. Written findings also best ensure clear guidance and authority for those responsible for implementing the findings.

VI. Issue - Notice to Congress:

Hughes-Ryan requires notice to Congress "in a timely fashion" of special activities that have been approved by the President. Currently, while that phrase has not been construed to require reporting "prior" to implementation, there are understandings with each of the seven committees now notified that they will be advised in general terms immediately after a finding and before initiation of the activity. The Senate bill would have required prior notice of the facts and circumstances of any approved special activity, except in extraordinary circumstances where notice within 48 hours after implementation would be allowed. The Senate bill also included a disclaimer to the effect that this notice requirement did not imply a need for congressional approval.

Despite the disclaimer, mandated prior notice may facilitate the development of an undesirable degree of congressional control of and interference with these activities. Providing prior notice to date, however, has not had such adverse consequences. A prior reporting requirement may be the requisite "trade-off" for SSCI and HPSCI support of repeal of the Hughes-Ryan Amendment and reducing the reporting obligation to only those two committees, a much more important element in the process.

VII. Issue - Annual Reviews:

Currently, under Executive Order 12036, the SCC is responsible for performing an annual review of ongoing special activities and preparing a report for the National Security Council. The Senate bill would have required, at least annually, an NSC review and a reaffirmation by the President of the original finding underlying each ongoing special activity in order for it to continue.

Again it may be concluded that such a requirement is not an appropriate detail for enshrinement in statute. However, its purpose is, of course, to force periodic reassessment and termination of activities which may continue of their own momentum and yet have outlived their usefulness.

VIII. Issue - SCC Membership and Attendance:

Executive Order 12036 prescribes the membership of the SCC for purposes of considering proposed special activities and making recommendations to the President, and provides that the members must attend except in unusual circumstances when they are unavailable and their designated representatives may attend in their stead. The Senate bill would essentially have duplicated these provisions.

The obvious purpose of these requirements is to ensure, insofar as this is possible, serious, high level consideration of proposed special activities, as well as the heightened control and accountability that may be presumed to result from mandatory attendance by specified officials. These detailed specifications of executive branch affairs may be objectionable, however, on the basis of undue congressional intrusion, loss of future flexibility, and unwarranted assumptions of executive irresponsibility.

An alternative to prescribed membership and attendance requirements or no such requirements, may be acceptance of a statutory requirement that the President provide for these matters in an executive order.

IX. Issue - Similar Standards for Approval of Selected Foreign Intelligence and Counterintelligence Activities:

The entire range of issues raised with regard to review, approval, and reporting of special activities, may be raised also in connection with certain types of foreign intelligence collection operations and counterintelligence activities deemed to be of greater concern and potential risk than other such activities.

Currently, Executive Order 12036 requires, under standards established by the President, "sensitive" foreign intelligence collection activities be referred to the chairman of the SCC by the DCI for "appropriate" review and approval, and that the SCC annually review ongoing activities of this nature and report to the NSC. Similarly, although no annual SCC review is required, the order provides an SCC responsibility to review counterintelligence activities requiring SCC approval under standards established by the President. No standards have as yet been adopted to govern either approval process.

The Senate bill would have required Presidential criteria for identifying important, sensitive foreign intelligence collection operations and counterintelligence activities requiring either NSC or Presidential review and approval. These reviews would include consideration of stated factors, meetings with prescribed attendance, written findings by the President as to foreign intelligence collection activities (including that the information sought is "essential"), prior notice to the SSCI and HPSCI, and annual NSC or Presidential reviews and reaffirmations.

Applying the same, or even more, elaborate procedures to these activities as are now applied to special activities does not seem warranted on public policy, substantive, or pragmatic grounds. The purpose is, of course, to ensure the same degree of high-level control, accountability, and careful consideration as is applied to special activities. An acceptable middle ground between no statutory controls and elaborate controls may be found in adoption of the executive order approach which retains Presidential flexibility to determine which foreign intelligence or counterintelligence activities, if any, require SCC, NSC, or Presidential review and approval, and what form that review and approval should assume.

X. Issue - Prohibition of Assassination and Particular Types of Special Activities:

a. Assassination. The Senate bill would have amended the U.S. criminal code to provide a maximum of life imprisonment for any person in the U.S. or any U.S. Government employee abroad who conspired or attempted to assassinate any foreign official abroad. Executive Order 12036 bars assassination activities on the part of U.S. Government employees but provides no penalties.

Since, historically, it has been U.S. intelligence employees that have been involved in such assassination-related activities as have occurred, it may be argued that such a bar is appropriate in the intelligence charter legislation. On the other hand, it may be opposed as part of that legislation on the ground that, even though not limited to intelligence employees, including such a bar and criminal penalties in the charter unnecessarily memorializes the past and stigmatizes the intelligence community. Further, the review, approval, and oversight mechanisms created by the bill will be sufficient to prevent such activities.

Several alternatives would be to (1) include a detailed criminal provision in the charter as an amendment to the criminal code, (2) oppose such a provision in the charter but support it as a separate initiative to amend the criminal code, (3) support a simple bar as in the executive order with no criminal penalty, leaving such a penalty to a separate initiative, (4) oppose any bar.

b. Certain Special Activities. The Senate bill would have barred explicitly initiating any special activity intended or likely, to result in (1) support of international terrorism, (2) mass destruction of property, (3) creation of food or water shortages, floods or epidemics, (4) use of chemical biological, or other weapons banned by treaty, (5) violent overthrow of democratic governments, (6) torture, or (7) support of any violation of human rights by foreign police, security, or intelligence services.

This type of prohibition is supported by the argument that certain types of activities are inherently abhorrent, unacceptable, and unnecessary as a means to accomplish U.S. foreign policy objectives and should be foresworn by law. Opposition to such a provision is based on the implication that what is not specified is allowable and the definitional problems raised (e.g., nonviolent overthrow of democratic governments would be favored and it is not always clear what is a "democratic government"), and the sufficiency of the elaborate executive-legislative oversight mechanism created by the charter.

United States Senate
SELECT COMMITTEE ON INTELLIGENCE
(PURSUANT TO S. RES. 400, 94TH CONGRESS)
WASHINGTON, D.C. 20510

November 22, 1978

IN REPLY PLEASE
REFER TO Q#6329

Anthony A. Lapham, Esquire
General Counsel
Central Intelligence Agency
Washington, D. C. 20505

Dear Tony:

I agreed in our November 15th meeting with Daniel Aaron, Deanne Siemer, and Sam Hoskinson in the Situation Room at the White House to write a letter to you with initial reactions to the working group's redraft of Title II of S.2525.

Before commenting on specific issues, I want to discuss briefly several basic conceptions in which the working group draft departs from S.2525. It has been our common purpose from the outset that charter legislation serve two purposes:

First, to provide the intelligence community with the authority to perform those functions essential to our national security, and

Second, to set forth limitations on certain intelligence activities to prevent the reoccurrence of abuses by our intelligence agencies.

Over a year ago we agreed to work together to try to achieve a reasonable balance between the flexibility needed by intelligence agencies to perform their necessary duties and the requirement to protect U.S. citizens from unnecessary intrusions into their privacy. Thus far we have come to agreement on the Executive Order 12036 and on Titles V and VI, and much of Titles I and IV.

The working group draft of Title II, which includes important sections of Title I of S.2525, appears to us unbalanced. I do not believe that it would receive the broad bipartisan support necessary for its passage. The provisions granting authority for certain intelligence activities that could intrude on the rights of U.S. citizens are now so broad that they could be read, and would be read by some, as legitimating what we all agree are unjustifiable activities. The draft provides for few real restrictions and no real assurance that appropriate measures will be taken to guard against abuses. As it now reads, the draft is inconsistent with the Select Committee's point of view and with the public pronouncements of the Carter Administration. Its promulgation in the present form would, I believe, be a disservice to the Administration.

We are in agreement with you and the working group that S.2525 should not be burdened with inflexible restrictions. We are in agreement that it is far preferable to have a crisp, clear basic charter which combines a delineation of the duties and missions of the intelligence agencies with the restrictions that are necessary. But in several fundamental respects the working group draft is miscast.

A basic concept contained in S.2525, that we believe most important, is effective oversight both within the Executive and Legislative branches. Effective Congressional oversight necessarily depends on full and current access to information. The working group drafts of both Titles I and II suggest that even this fundamental premise, previously agreed to by the President and carefully worked out after extensive discussions in the preparation of the Executive Order, is being set aside. There is no way legislation can pass the Congress unless the provisions contained in the Executive Order, which are virtually identical to S. Res. 400 and the corresponding House resolution, are included. The language chosen is informed by 20 years of practice with the Joint Committee on Atomic Energy, and has worked well over the past two years; the President has so informed this Committee, and all of the

intelligence entity heads have expressed satisfaction with the current arrangement. We find it hard to understand why an agreed upon formula, carefully drafted, which specifically takes account of the Constitutional duties, prerogatives and privileges of both branches, should have been called into question.

It has been the Committee's position, and we thought that of the Administration, that United States citizens are entitled to know what activities may be directed against them by their own intelligence agencies, on what occasions, and for what reasons. We agree that the intelligence agencies of the United States have a legitimate interest in conducting counterintelligence and foreign intelligence activities against a U.S. person when that person is reasonably believed to be engaged in criminal activities such as sabotage or espionage. We also acknowledge that there may be other non-criminal circumstances such as potential source investigations when the activities of a United States person not engaged in criminal activity may be of justifiable interest to the intelligence agencies. In most of these other non-criminal circumstances, however, the United States person is wholly innocent of any wrongdoing. Therefore, special care must be taken that his rights are not being infringed. The working group's draft provisions could be read to mean that such United States persons are of interest and have no real claim to protection from U.S. intelligence agencies' collection of information on them.

At present, the catchall saving clauses in the working group draft go far beyond the emergency clause provisions of S.2525. These catchalls undercut the basic intent of a charter to have clearly delineated authority and well understood and reasonable restrictions. Vesting an absolute discretionary power in the Attorney General or other key officials is unwise and undesirable and recalls the open-ended language of Sec. (d)(5) of the National Security Act of 1947 which allowed the CIA:

> "To perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct."

The working group draft does not follow the precedent set by the Foreign Intelligence Surveillance Act in dealing with surreptitious entries, mail openings, and overseas surveillance. That Act requires both a nexus of criminal activity and a court order before permitting electronic surveillance for national security purposes. The exceptions and the procedures to be followed are fully delineated. Use of other intrusive techniques, especially surreptitious entries or "black bag jobs," require similar safeguards.

Finally, the working group draft contains no standard or threshhold for the conduct of special activities or sensitive clandestine collection. The Committee is of the view that such activities are necessary for the security of our country. We recognize that several of the restrictions in S.2525 may be unworkable. At a minimum, however, we believe that there should be a standard for the initiation of these activities in the statute. The standard articulated by Secretary Vance seems eminently suitable. This standard would require that:

(1) Special activities should be engaged in only when overt measures will not be able to do the job required -- although it is clear that not all overt measures must first be tried,

(2) Special activities must be consistent with declared American policies, and

(3) Special activities must not be engaged in unless they are vital or essential to the national interest.

We recognize that it may be very hard for particular projects to meet the "vital" or "essential" standard; they may be justified, however, in the light of larger, long-term policy frameworks. It is our view that a reasonably high standard should be in the charter so that special activities are not used simply because the capability is available. In addition to a statutory standard, I believe that, as in the most recent Executive Order, certain procedures for review, for feasibility and risk assessment, as

well as a formal approval procedure for these activities must be spelled out in statute.

What follows are particular issues that are of concern. This list is not intended to be a complete one, but it does illustrate the most important issues.

The Role of Congress

The intelligence community should serve not only the Executive branch but also should provide Congress with information of benefit to the work of the Congress. This does not mean that Congress is to "task" the community or intends to "micromanage" it. The facts and analyses produced by the intelligence community are clearly helpful to Congress in carrying out its duties in foreign policy and national security matters.

Congressional Access to Information

The oversight committees must be kept "fully and currently informed" of the activities of the intelligence community, in the manner of the several decades of precedent in the Atomic Energy Act. The Executive branch would be required to keep Congress posted on major policy issues and undertakings of the community to a degree satisfactory to both and on the basis of mutual discussions of what kinds of information are required. It is not contemplated that a truck has to arrive at the Capitol each day. Obviously, the oversight committees do not need or want minute detail of community affairs in most matters. But clearly, in some areas such as covert action and on other ad hoc occasions, full and minute detail would be required. The present Executive Order and Senate Resolution 400 provisions have worked well to everyone's satisfaction. That is why it is contained in S.2525 in Sec. 152(a).

Special Activities

A statutory standard for special clandestine activities is required. We proposed the Vance standard in S.2525. In addition, regular accountable procedures for approval of these special activities by the National Security Council are desirable. (See draft, Sec. 271.)

Sensitive Intelligence Collection Projects

Because sensitive intelligence collection projects can have the same "flak potential" as special activities, procedures for approval similar to those for special activities should be set forth in statute. This is regular practice now and all agree regular review is important for this area of intelligence activity. (See draft, Sec. 272.)

Assassinations

There should be a prohibition of assassinations which could apply to all U.S. government personnel.

Restrictions on the Use of Certain Professions by the Intelligence Agencies

The working group draft deletes the restrictions on the use of United States media employees or organizations; the use of religious organizations; academic institutions; the Peace Corps; and government scholarships, such as the Fulbright program. The Committee's approach contained in S.2525 was based on the special concern expressed in the Constitution for freedom of expression and religion, and the need to protect the independence and integrity of our academic institutions. The approach in S.2525 focused on paid or contractual relationships but did not interfere with the individuals who chose to engage in voluntary relationships.

Counterintelligence Investigations

It is the Committee's view that a criminal nexus is required to open a counterintelligence investigation of a United States person. Exceptions from the criminal standard need to be spelled out and careful procedures and guidelines set forth. (See draft, Sec. 212.)

Foreign Intelligence Collection

The view of the Committee as expressed in S.2525 is that there should be a presumption that a United States person has a right to expect that the government will not investigate him unless there is reasonable cause. Legitimate political activity, of course, cannot in itself be a reasonable cause. The presumption of the draft is that there is no countervailing concern to the interest an intelligence agency has in gathering information. For example, the working group draft has no restriction on what can be collected regarding United States businesses or commercial organizations. Under the terms of the working group draft, almost any multinational corporation may be targeted both within and outside the United States since almost any relations it has with a foreign power would constitute foreign intelligence. Thus, the intelligence agencies could obtain and maintain extensive files on United States persons working for such corporations even though they are innocent of any wrongdoing. (See draft, Sec. 213.)

Potential Source Investigations

Potential source investigations should be more limited in scope than counterintelligence investigations. The privacy of a potential source should be protected to the greatest extent possible. Investigations of this type should probably be limited to publicly available information, national agency checks, and interviews. In addition, the consent of any person investigated as a potential source should be required unless the request would jeopardize

the necessary activity for which the assistance is sought. Strict time limits should be placed on the duration of potential source investigations. (See draft, Sec. 215.)

Investigation of Present or Former Employees

The investigation of an employee or former employee of the intelligence community should have a higher standard than in the working group draft. There should be some evidence or reasonable probability that the person has or is about to violate security regulations. (See draft, Sec. 216.)

Catchall Provision for Investigations

The catchall provision (Sec. 217) that would permit additional types of investigations, once a determination of their necessity is made by the head of the entity and the Attorney General, is far too broad. COINTELPRO and CHAOS, for example, could conceivably be authorized under this provision.

Duration of Collection

There should be a regular review of collection undertaken with certain techniques, perhaps annually. The Attorney General or some group outside the collecting agency would seem to be appropriate for conducting such reviews. (See draft, Sec. 219.)

Retention of Data

Sec. 221 of the working group draft should be more carefully considered. We both agree that we should avoid the compilation of dossiers or the collection of unnecessary information. What, for example, are "administrative purposes"? Information that is acquired simply because it was collection in the course of an authorized collection activity should not be retained or disseminated.

There has to be some reasonable standard of relevancy to agreed upon intelligence missions. Otherwise, this kind of retention of data could result in serious intrusions on privacy, particularly by some of the means available to NSA and other technical collection agencies.

Certain Intrusive Techniques

Both the Committee and the Executive branch have to consider more carefully what intelligence collection techniques are intrusive. Clearly there are a number of techniques that do not reach the Fourth Amendment's definition of a search or seizure, yet which pose considerable threats to the privacy of United States persons. These include, for example, the examination of tax records, physical surveillance for purposes other than identification, and use of mail covers. In these areas procedural protections are required.

Dissemination to a Foreign Government

Personal information regarding a United States person should not be given to a foreign government simply because it is in the "interests of the United States". There should be a requirement for protection of information regarding United States persons unless there is some good reason such as possible involvement in terrorist activities (Sec. 222A.)

Catchall Provision on Dissemination

Section 222F of the working group draft would permit an entity head with the concurrence of the Attorney General to undertake any lawful dissemination on the basis of his own determination. Conceivably a future administration could authorize some of the harmful activities used in the COINTELPRO programs.

Collection of Public Information

There should be some standard for the collection of any information on United States persons. Obviously we all want to avoid the creation of dossiers, but it is also obvious that some public information on United States persons is necessary and useful for the functioning of government. (See draft, Sec. 211(d).)

Overseas Electronic Surveillance

Court orders should be required when a United States agency either conducts or requests the surveillance. (See draft, Secs. 225-229A.)

Physical Searches

For unconsented physical entries a court order and a criminal standard seem appropriate. Procedures based upon the Foreign Intelligence Surveillance Act may provide a solution. Distinctions would have to be made between kinds of searches; break-ins are, of course, very different than working with couriers. (See draft, Secs. 230-231B.)

Participation in United States Organizations

United States organizations which are not themselves agents of a foreign power should be protected against infiltration by the intelligence agencies. Under the terms of the working group draft (Sec. 245), agents of the intelligence community can participate in a United States organization "for the establishment, enhancement or maintenance of cover" or "in order to recommend or assist in the recruitment of employees, source of information or sources of operational assistance." Some additional measure of protection for United States organizations would seem to be necessary. Probably there should be no restriction on such circumstances as attendance at public meetings. The role of the FBI here should be reviewed.

Presidential Waiver

There need to be discussions on some aspects of the Presidential waiver provision (Sec. 261). Both S.2525 and the working group draft address the expected circumstances when a waiver would be necessary. Further consideration of conforming to the procedures of the War Powers Act and the National Emergencies Act would seem warranted.

Rights of Aliens

The rights of alien visitors in the United States should be protected. Reasonable distinctions between the protections afforded alien visitors and United States persons are obviously necessary.

Intelligence Activities in the United States

It is clear that we should have further discussions on the extent to which CIA activities in the United States should be permitted, and to what extent the FBI should be engaged in collection of positive intelligence.

Definitions

There are some definitional problems. For example, it would seem that we should have a common definition for agent of a foreign power. The working group draft modifies the definition of agent of a foreign power with the effect of diminishing protections afforded to United States persons. (Sec. 203(b)(2).)

I appreciate the opportunity to comment on the working group draft. We fully understand that the draft is preliminary, and by no means a final position. It would be profitable for us, and perhaps to you and the working group, if we could meet to discuss in detail the issues and problems that should be resolved in Titles I and II.

I want you to know that the Committee and the staff appreciate the courtesies and patience you and your colleagues have shown in working on this difficult and common endeavor.

Sincerely,

Bill

William G. Miller
Staff Director

WGM:mlh

Approved For Release 2007/05/11 : CIA-RDP86-00101R000100020011-0

15 March 1979

NOTE FOR: DCI

VIA: DDCI

FROM: Anthony A. Lapham
General Counsel

SUBJECT: Review and Approval of Sensitive Foreign Intelligence Collection Operations

The attached letter from Lee Marks to Fred Baron will give you an idea where the State Department is coming from on the issue of the role of the DCI and the SCC in the review and approval of sensitive foreign intelligence collection operations.

STAT

Tony Lapham

Attachment

cc: DDO
D/NFAC
DDS&T
AGC/DDO

OGC 79-02481
14 Mar 79

DEPARTMENT OF STATE

Washington, D.C. 20520

CONFIDENTIAL

March 9, 1979

Frederick D. Baron, Esq.
Special Assistant to
the Attorney General
Room 5123
Department of Justice
Washington, D.C. 20530

Dear Fred,

We have read your January 31, 1979 draft standards for sensitive collection operations and Tony Lapham's March 6 reply. The Secretary has not yet had an opportunity to focus on this issue, but I thought it might be helpful to give you the Department's reactions at the staff level.

We have the opposite concerns from Tony.

Without focusing on details, we concur generally with the approach taken in your draft with respect to SCC review of proposed operations, as summarized by Tony in paragraphs 2(d)-(e), and with the provisions for an annual review, as characterized by Tony in paragraph 2(g). We disagree with your draft guidelines insofar as they vest virtually total discretion in the DCI to determine what operations are "sensitive" and must therefore be reported to the SCC Chairman.

DCI Reporting to the SCC Chairman

The standards should contain criteria defining when a proposed operation will be deemed "sensitive." Only the DCI can determine whether a particular operation meets the criteria, but once the judgment is made that it does, the DCI should no longer have discretion to decide that the operation is not sensitive.

CONFIDENTIAL

It seems to us wrong, for example, to permit the DCI to decide that a proposed operation is not "sensitive" even though it involves a foreign head of state as a target, or an exception to applicable regulations, or a significant question of legality or propriety. (We have no fixed idea what the criteria should be, although the ones set forth in Judge Bell's October 24, 1978 standards seem sensible to us.)

I'm puzzled by Tony's insistence that the SCC have no role in reviewing and approving sensitive operations except at the sufferance of the SCC Chairman. Tony finds that "consistent" with the letter and spirit of the executive order; we respectfully disagree.

Tony urges on you a system in which the DCI has total discretion to decide that an operation is reportable to the SCC Chairman, and the SCC Chairman, in turn, has total discretion to decide whether the report should be shared with his colleagues on the SCC. This is essentially the system that prevailed for many years, and we do not believe that it was the Carter Administration's purpose, in promulgating E.O. 12036, to perpetuate it.

Our own view is that the principles set forth by Judge Bell in his October 24, 1978 memorandum made sense and should govern the drafting of the standards. We prefer that framework to your January 31 draft.

I'm not sure how best to proceed at this point, since the agencies involved seem to be far apart. I assume this will need to go back to the SCC; the question is whether it is worthwhile to convene a meeting at the staff level first to see whether the differences can be bridged.

Sincerely,

Lee R. Marks
Deputy Legal Adviser

cc: Deanne Siemer, General Counsel, Department of Defense
Sam Hoskinson, NSC Staff
Anthony A. Lapham, General Counsel, CIA

CONFIDENTIAL

Central Intelligence Agency

Washington, D.C. 20505

OGC 79-02211

6 March 1979

MEMORANDUM FOR: Frederick D. Baron
Special Assistant to the Attorney General

FROM: Anthony A. Lapham
General Counsel

SUBJECT: Review and Approval of Sensitive Foreign Intelligence Collection Operations

1. Your memorandum of 31 January 1979 invited my comments on an attached set of draft guidelines implementing Sections 1-303 and 1-306 of Executive Order 12036, which relate to the review and approval of sensitive foreign intelligence collection operations.

2. The essential elements of the review and approval process envisaged by the draft guidelines appear to be as follows:

(a) Proposed operations deemed by the DCI to be sensitive would be reported by the DCI to the Chairman of the SCC.

(b) The DCI would have full discretion in determining which operations were sensitive so as to require that they be reported. No particular operations or types of operations would be singled to be reported as a matter of course, but in exercising his discretion the DCI would be directed to take into account certain enumerated considerations of a general nature.

(c) The DCI reports to the Chairman could be either oral or written, and could refer to proposed operations by category, but the Chairman would be free to require an elaboration of any report.

(d) Review by the SCC of proposed operations reported by the DCI to the Chairman would be the rule, subject only to exceptions personally authorized by the President. In most if not all cases, apart from those as to which the President might authorize special handling, it would be the function of the SCC not just to review proposed operations but to approve or disapprove them as well.

(e) The independent approval or authority of the Chairman would be limited as follows: he could approve "routine operations, pending an SCC quarterly review," and "in exigent circumstances" he could approve "other operations provided that SCC members are promptly notified and the operation is presented to the SCC for approval as soon as possible."

(f) CIA would be required to maintain records detailing the nature and scope of any operations approved by the Chairman, and these records would be available on request to any SCC member designated in Section 1-303.

(g) The Chairman would report quarterly, both to the President and to the SCC, and the SCC would conduct an annual review both for the purpose of reevaluating its prior decisions to approve or disapprove particular operations and for the separate purpose of validating the entire process by means of an inquiry about selected operations not reported for approval by the DCI. The annual review would be the subject of a report to the NSC, as required by Section 1-306.

3. In some of its aspects, namely (a) through (c) above, the draft guidelines parallel the proposal made by the DCI and circulated for comment by the NSC staff in October 1978. In its other aspects, however, having to do with the role of the SCC in the review and approval process, the draft guidelines depart sharply from the DCI's proposal and are objectionable. A copy of that proposal is attached.

4. Under the DCI's approach, proposed operations deemed to be sensitive would be reported to the Chairman, and it would then be the Chairmen's responsibility to determine whether such operations "should be reviewed by the SCC, and whether such operations should be subject to approval by the SCC." These arrangements, which in my opinion are perfectly consistent with the letter and spirit of the Executive Order, would leave the role of the SCC to be defined on a case-by-case basis by the Chairman. He would be free in any given case not to involve the SCC at all, or to involve it only to the extent of presenting the case for review and comment, or to involve it to the fuller extent of seeking its approval, presumably with the expectation that the operation in question would be abandoned or modified if such approval was not forthcoming. It would likewise be the prerogative of the Chairman to determine the scope of the annual review.

5. Your draft guidelines would establish a far broader and more dominant role for the SCC. It would assume a mandatory review function and become the final approval authority as to all but the handful of operations that might warrant the personal attention and intervention of the President.

6. Obviously there are fundamental differences between the DCI's proposal of last October and your draft guidelines. The essential question is whether, as contemplated by the DCI's proposal, the SCC should serve in a standby capacity, to be consulted by the Chairman as that official might think appropriate, or whether it is to have the full line responsibilities that would be assigned to it under your draft guidelines.

7. While in my view either approach is legally permissible, the DCI's concept is more faithful to the intent of the relevant provisions of the Executive Order. As you know, those provisions were revised shortly before their adoption, at the DCI's urging and with the concurrence of the President, for the express purpose of limiting the role of the SCC in the review and approval of sensitive foreign intelligence collection operations. The pertinent background is summarized in John Harmon's memorandum for the Attorney General dated 27 June 1978. As I see it, your draft guidelines ignore that background and, by requiring SCC review and approval as the rule, would create the very situation that it was intended to avoid.

8. I have read the comments on your draft guidelines contained in Deanne Siemer's letter to you dated 16 February, and I agree with those comments so far as they are consistent with this memorandum. STAT

[redacted]

Anthony A. Lapham

Attachment

cc: Sam Hoskinson, NSC Staff
Deanne Siemer, General Counsel
Department of Defense
Lee Marks, Office of Legal Adviser
Department of State

OGC:AAL:sin
1 - DCI
1 - DDCI
1 - ER via Ex Secty
1 - DDO
1 - SA/DCI/CI
1 - OGC
1 - AAL signer
1 - Chrono
1 - NFAC
1 - DDS&T
Subj: Sensitive Foreign Intelligence Collection Operations w/OGC 79-02084 (NI)

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

February 16, 1979

Mr. Frederick Baron
Special Assistant to the
Attorney General
Department of Justice
Room 5123
Washington, D.C. 20530

Dear Frederick:

This is in response to your request for review of and comment on the draft standards and procedures for sensitive collection operations that were attached to your memorandum dated January 31, 1979.

It is our view that paragraph I(A) should be recast to make it the responsibility of each SCC member to review intelligence collection operations under his purview and to report to the DCI the details of those operations that are candidates for treatment as sensitive collection operations. The DCI would then make the final review so that the same standards would be applied across the board.

Paragraph II provides that the Chairman may approve routine operations. It is unclear what is contemplated here because, if operations are "routine" in the normal sense of that word, they would not be reported to the SCC at all. It appears that the authority of the Chairman to approve "sensitive" operations on the basis of exigent circumstances is all that is required.

Paragraph III(B) requires quarterly reporting. This would be in addition to the annual SCC review required by the Executive Order. We think these are unnecessary reporting requirements and we urge that we not go beyond the requirements of the Order.

Sincerely,

Deanne C. Siemer

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DD/O 79-0107

OGC 79-01579

13 February 1979

Executive Registry
79-3464

MEMORANDUM FOR: Director of Central Intelligence

VIA: Deputy Director of Central Intelligence

FROM: Anthony A. Lapham
General Counsel

SUBJECT: ~~Standards and Procedures for Review of Sensitive Foreign Intelligence Collection Operations~~

1. ~~Action Requested: Your guidance with respect to the issues discussed in paragraphs 5-7 below.~~

2. Background: On 2 October 1978 you wrote a letter to Brzezinski enclosing a set of proposed standards to implement Sections 1-303 and 1-306 of Executive Order 12036, which relate to the review and approval of sensitive foreign intelligence collection operations.* Copies of your letter and its enclosure are attached at Tab A.

*Section 1-303 provides:

> Under standards established by the President, proposals for sensitive foreign intelligence collection operations shall be reported to the Chairman by the Director of Central Intelligence for appropriate review and approval. When meeting for the purpose of reviewing proposals for sensitive foreign intelligence collection operations, the members of the SCC shall include the Secretary of State, the Secretary of Defense, the Attorney General, the Assistant to the President for National Security Affairs, the Director of Central Intelligence, and such other members designated by the Chairman to ensure proper consideration of these operations.

Section 1-306 provides in part that it will be the duty of the SCC to: "Conduct an annual review of ongoing special activities and sensitive national foreign intelligence collection operations and report thereon to the NSC."

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Declassified when separate from attachments.

3. The NSC Staff made only one minor change in the proposed standards, substituting the President for the NSC as the recipient of any SCC reports based on its annual reviews, and then proceeded to circulate the standards to SCC principals for comment. DOD and the JCS commented favorably. The Attorney General, however, responded by proposing an alternative set of standards, which attracted support from the State Department. The differences between your proposal and the Attorney General's counterproposal were unresolved as of 8 November, when the SCC met to consider a counterintelligence agenda, including draft standards governing its counterintelligence functions under the Executive Order, at which time the Attorney General was instructed to redraft both the counterintelligence standards and the sensitive foreign intelligence collection standards. A copy of your memorandum to me regarding that meeting is attached at Tab B.

4. A new DOJ draft of the sensitive foreign intelligence collection standards arrived as an attachment to a memorandum to me from Frederick Baron dated 31 January. Copies of this draft and the covering memorandum are attached at Tab C. On some of the points that were previously in dispute, DOJ has yielded. So, for example, while the earlier DOJ draft would have required that certain specified types of operations be reported to the SCC as a matter of course, the new draft accepts the idea that the DCI is to have full discretion, taking into account various general considerations, in deciding what operations are sensitive and are therefore to be reported. Putting aside other less significant problems, the central issues that now remain have to do with the extent and nature of the role to be performed by the SCC with respect to those proposed operations that are reported.

5. Under your proposal of last October, proposed sensitive foreign intelligence collection operations would be reported to the SCC Chairman, either orally or in writing, and it would then be the Chairman's responsibility to determine whether such operations should be reviewed by the SCC and whether such operations should be subject to approval by the SCC. These arrangements, which in my opinion are perfectly consistent with the letter and the spirit of the Executive Order, would leave the role of the SCC to be defined on a case-by-case basis by the Chairman. He would be free in any given case not to involve the SCC at all, or to involve it only to the extent of presenting the case for review and comment, or to involve it to the fuller extent of seeking its approval, presumably with the expectation that the operation in question would be abandoned or modified if

such approval was not forthcoming. It would likewise be the prerogative of the Chairman to determine the scope of the required annual review. The criticisms directed at these arrangements were that the SCC would end up with too little authority, because it would be consulted only as the Chairman might see fit, while correspondingly the Chairman would end up with too much authority, allowing him to ignore the SCC completely if he elected to do so.

6. The new DOJ draft, like its predecessor, would establish a far broader and more dominant role for the SCC. Review by the SCC of proposed operations would be the rule, subject only to exceptions authorized by the President. In most instances it would be the function of the SCC not just to review proposed operations but to approve or disapprove them as well. The independent approval authority of the Chairman would be narrowly limited, as follows: "The SCC Chairman may approve proposed routine operations, pending SCC quarterly review, and in exigent circumstances he may approve other operations provided that SCC members are promptly notified and the operation is presented to the SCC for approval as soon as possible." Records describing the nature and scope of all operations approved by the Chairman, including "routine operations" (whatever that may mean in the context of procedures that are applicable only to the review of operations deemed sufficiently "sensitive" by the DCI to warrant reporting in the first place), would be maintained at CIA, available on request to any SCC member. In addition, there would be periodic reports by the Chairman, not less than quarterly, both to the President and to the SCC, indicating at least the number of approved operations in each of several categories.

7. Obviously your proposal of last October and the newest DOJ proposal represent fundamentally different approaches. The essential question is whether the SCC is to serve in a stand-by and largely advisory capacity, as contemplated by your proposal, or whether it is to have the full-line responsibilities that would be assigned to it under the DOJ proposal. As I see it, either approach is legally permissible, although your concept strikes me as more in keeping with the intent of the Executive Order, the relevant provisions of which as you will recall were rewritten shortly before their adoption for the express purpose of reducing the role of the SCC in the review and approval of sensitive foreign intelligence collection operations. DOJ of course will argue that the Executive Order, whatever its letter and intent, conveys the impression that the SCC is centrally involved in the review and approval process, and that we will be guilty of a deception unless the impression is converted into reality. It will also argue that the

interest in insulating certain highly sensitive operations from SCC review is accommodated under its proposal by the provisions authorizing exceptions to the review requirement in the case of operations personally approved by the President, but this extraordinary procedure will place another burden on the President and for that reason among others it is likely to be used only very sparingly. The net effect of the DOJ proposal will be to put the SCC at the top of the chain of command as to all but the handful of operations that may warrant personal attention by the President.

8. Recommendation: Baron's attached memorandum solicits my comments on the newest DOJ draft. My intention is to restate the view that the proper role of the SCC is the one that would be established by your proposal of last October, but before taking that position I would like your confirmation that it reflects your current thinking.

Approve

25X1

[redacted]

Anthony A. Lapham

Attachments

21 FEB 1979

To help develop our strategy I'd like now to compile a draft report to SCC on Covert activity / clearances since last annual review

25X1

[redacted]

Office of the Attorney General
Washington, D. C. 20530

January 31, 1979

MEMORANDUM TO: Anthony Lapham
General Counsel
Central Intelligence Agency

FROM: Frederick D. Baron
Special Assistant to the
Attorney General

FDB

Re: Standards for Sensitive Collection Operations

Pursuant to our prior discussions, I have redrafted the Attorney General's proposal for a written standard for sensitive collection operations. As you know, the SCC asked the Attorney General and the DCI to try to work out a mutually satisfactory draft to present for discussion at an SCC meeting.

The redraft contains the following changes, among others:

1. It deletes all mandatory standards for referral of sensitive collection operations by the DCI to the SCC chairman. Instead, it restores the discretionary balancing of factors by the DCI, as originally proposed by the NSC staff and the DCI.

2. The approval mechanism is rewritten to make it clear that there is a presumption in favor of SCC review and approval, but that the President can decide to unilaterally approve any operation and notify only those members of the SCC that he deems appropriate. Also, it again makes clear that the SCC chairman may approve proposed operations unilaterally, pending SCC review. This procedure should accommodate any proposed operations that arise on an urgent basis. In addition, the security procedure proposed by the DDO was adopted: storage of a written record only at the CIA and available only to SCC members.

3. As suggested at the SCC meeting when this proposed standard was first discussed, the annual review of the DCI's selection of operations for approval would be conducted by means of a sampling procedure.

CONFIDENTIAL MATERIAL ATTACHED

4. The SCC, along with the Chairman, could ask for written or oral briefing by the DCI as part of the periodic reports of operations approved during the previous quarter.

I would appreciate your comments on this draft. It has not been cleared yet with the Attorney General. I would hope that if we find it mutually acceptable, that we could show it simultaneously to the Attorney General and the DCI. I am also forwarding copies to the NSC staff, the State Department and the Defense Department, for their review and comment.

Attachment

cc: Samuel Hoskinson
National Security Council

Lee Marks
Department of State

Deanne Siemer
Department of Defense

D R A F T

SENSITIVE COLLECTION OPERATIONS
Standards and Procedures for Review and Approval

The following standards and procedures are hereby established relating to Special Coordination Committee (SCC) review of proposed and ongoing sensitive foreign intelligence collection operations, pursuant to Section 1-303 and 1-306 of Executive Order 12036. 25X1 [redacted]

I. Proposed Sensitive Collection Operations

A. It is the responsibility of the Director of Central Intelligence (DCI) to determine whether particular intelligence collection operations qualify as sensitive operations. In making these determinations, the DCI shall take into account the following considerations, among others: [redacted] 25X1

1. The risk of exposure or compromise of the operation; 25X1 [redacted]

2. the likely consequence of exposure or compromise in terms of: [redacted] 25X1

   (a) hazards to health and safety; [redacted] 25X1

   (b) loss of valuable intelligence information or sources; [redacted] 25X1

   (c) detrimental foreign relations effects, including effects on current or

CONFIDENTIAL
Classified by Frederick D. Baron, Special Assistant to the Attorney General
Reason for Classification, Intelligence Methods.
Date for Review of declassification, 1/31/1999

planned treaty or other negotiations and including the recruitment or targeting of foreign officials based upon consideration of the position of the official and the circumstances and the purpose of the operation; and [redacted] 25X1

(d) detrimental effects upon the conduct of other intelligence operations; [redacted] 25X1 25X1

3. whether the conduct of the operation requires that an exception be made to otherwise applicable policies or regulations concerning the conduct of foreign intelligence activities; and [redacted] 25X1

4. whether the operation involves any unresolved issues of legality or propriety. [redacted] 25X1

B. Proposed collection operations deemed by the DCI to be sensitive will be reported by the DCI to the Chairman of the SCC, either orally or in writing. Such reports will describe the nature and scope of the proposed operation, the reasons for its sensitivity, and the intelligence benefits to be derived. The Chairman may at any time require further elaboration of an oral or written report. [redacted] 25X1

C. Collection operations not originally deemed to be sensitive will be reported to the Chairman in the manner described in paragraph B above if in the view of the DCI they become sensitive prior to being terminated. [ ] 25X1

D. With the concurrence of the Chairman, the DCI may report proposed sensitive collection operations by category, but in such cases the Chairman may require additional reports concerning any specific proposals falling within the category. [ ] 25X1

II. Approval of Sensitive Collection Operations

The SCC Chairman shall normally submit proposed sensitive collection operations to the SCC for approval, unless the President approves a particular operation, in which case the President shall determine which SCC members should be notified of the operation. The SCC Chairman may approve proposed routine operations, pending SCC quarterly review, and in exigent circumstances he may approve other operations provided that SCC members are promptly notified and the operation is presented to the SCC for approval as soon as possible. A current record describing the nature and scope of all operations approved by the SCC Chairman shall be maintained at the Central Intelligence Agency, available upon request to the SCC members designated in Executive Order 12036, Section 1-303. [ ] 25X1

III. Reporting and Review of Sensitive Collection Operations

A. The SCC Chairman shall report periodically to the President, at least on a quarterly basis, on all approved sensitive collection operations. This report should at least include the total number of sensitive collection operations in the following categories: those approved by the SCC Chairman; those approved by the SCC; those approved by the President and referred to the SCC or to certain SCC members for informational purposes; and those approved by the President but not referred to the SCC. The reports on operations approved by the SCC should include any dissenting views of SCC members. [redacted] 25X1

B. The SCC Chairman shall report periodically, at least on a quarterly basis, to the SCC on all approved sensitive collection operations except those which the President has indicated should not be made available to all SCC members. This report should at least include the total number of sensitive collection operations in the following categories: those approved by the SCC Chairman; those approved by the SCC; and those approved by the President and referred to all SCC members for informational purposes. The SCC may require such written or oral briefings by the DCI or other officials as it deems appropriate. [redacted] 25X1

C. The SCC shall conduct an annual review of sensitve collection operations and report thereon to the NSC as required

by Section 1-306 of Executive Order 12036. The purpose of the annual review should include evaluation of decisions to approve or disapprove proposed operations and review by means of a sampling procedure of the DCI's selection of operations for approval.

25X1

The Director
Central Intelligence Agency

Executive Registry
78-4016/11

A

Washington, D.C. 20505

2 OCT 1978

Honorable Zbigniew K. Brzezinski
Assistant to the President for
National Security Affairs
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Zbig,

As you know, Sections 1-303 and 1-306 of Executive Order 12036 provide, respectively, that under standards established by the President proposed sensitive foreign intelligence collection operations be reported by me to you as Chairman of the SCC for appropriate review and approval and that the SCC conduct an annual review and report to the NSC concerning such activities. As you also know, the President has not formally established any standards or procedures in this regard, although he did make a relevant handwritten comment on a memorandum I sent him on 7 January 1978, prior to the issuance of the executive order, concerning the appropriate scope of this SCC responsibility.

In order to regularize the review process, I am proposing that the enclosed standards and procedures be considered for adoption by the President. If you agree with this proposal, you may wish to circulate it among the members of the SCC and request their views prior to its submission to the President with a recommendation that it be approved by him.

Yours,

/s/ Stansfield Turner

STANSFIELD TURNER

Enclosure

STANDARDS AND PROCEDURES FOR SPECIAL COORDINATION COMMITTEE REVIEW OF SENSITIVE FOREIGN INTELLIGENCE COLLECTION OPERATIONS

1. The following standards and procedures are hereby established relating to Special Coordination Committee (SCC) review of proposed and ongoing sensitive foreign intelligence collection operations, pursuant to Sections 1-303 and 1-306 of Executive Order 12036.

Proposed Sensitive Collection Operations

2. It is the responsibility of the Director of Central Intelligence (DCI) to determine whether particular intelligence collection operations qualify as sensitive operations. In making these determinations the DCI will take into account the following considerations, among others:

a. the risk of exposure or compromise of the operation;

b. the likely consequence of exposure or compromise in terms of

(1) loss of human life;

(2) loss of valuable intelligence information or sources;

(3) detrimental foreign relations effects, including effects on current or planned treaty or other negotiations;

(4) damage to our national image, domestically and internationally;

c. whether the conduct of the operation requires that an exception be made to otherwise applicable policies or regulations concerning the conduct of foreign intelligence activities.

d. whether the operation involves any unresolved issues of legality or propriety.

3. Proposed collection operations deemed by the DCI to be sensitive will be reported by the DCI to the Chairman of the SCC. The reports may be either oral or in writing. They will describe the nature and scope of the proposed operation, the reasons for its sensitivity, and the intelligence benefits to be derived. The Chairman may at any time require written elaboration of an oral report.

4. Collection operations not originally deemed to be sensitive by the DCI will be reported to the Chairman in the manner described in paragraph 3 above, if in the view of the DCI they become sensitive prior to being terminated.

5. With the concurrence of the Chairman, the DCI may report proposed sensitive operations by category, but in such cases the Chairman may require additional reports concerning any specific proposals falling within the category.

6. It is the responsibility of the Chairman to determine whether and to what extent proposed sensitive collection operations reported by the DCI should be reviewed by the SCC, and whether such operations should be subject to approval by the SCC.

Annual Review of Ongoing Sensitive Collection Operations

7. The SCC will conduct an annual review of ongoing sensitive collection operations. The Chairman will determine the scope of this review, including which specific operations or types of operations are to be covered. In this connection the Chairman may require such written or oral briefings by the DCI or other officials as he deems appropriate.

8. Following its annual review of sensitive foreign collection operations, the SCC will make such reports to the NSC as it deems appropriate.

OGC 79-03680
20 April 1979

MEMORANDUM FOR: Deputy Director for Operations
Deputy Director for Administration
Chief, Policy Coordination Staff/Policy Guidance and Legal Affairs/DDO
STAT [redacted] Policy and Plans Group/OS

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Charter Legislation Issues Papers To Be Discussed At SCC Meeting Scheduled for 24 April

1. Enclosed, for your information and review, are copies of two issues papers that were prepared by this Office in coordination with appropriate components of the DDO and the Office of Security and will be the subject of discussion and decision at an NSC SCC meeting now scheduled for 1500 on Tuesday, 24 April.

2. We are preparing a memorandum for the Director that will summarize the issues and make recommendations concerning which of the options in each case should be supported by him at the SCC meeting and you will be provided with a copy of that memorandum when it has been completed. You may wish to provide the Director with your own views on these issues and options prior to the SCC meeting, either independently of, or in response to, that memorandum.

STAT [redacted]

Anthony A. Lapham

Enclosures

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

OGC 79-03474

13 April 1979

MEMORANDUM FOR: Department of Defense
Attn: Deanne Siemer
Department of Justice
Attn: Ken Bass
Department of State
Attn: Jeffrey Smith
Department of the Treasury
Attn: J. Foster Collins
Department of Management and Budget
Attn: Arnold E. Donahue
Federal Bureau of Investigation
Attn: James Nolan
National Security Agency
STAT Attn: [redacted]
National Security Council
Attn: Sam Hoskinson
Office of the Vice President
Attn: Marilyn Haft

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Issues Paper for the Special Coordination Committee Concerning Potential Sources of Assistance

Enclosed, for your information, is a copy of the final revision of the Issue Paper concerning potential source investigations as provided to the NSC and incorporating relevant comments from you. I presume this paper will be the subject of an SCC meeting in the near future.

[redacted] STAT

Anthony A. Lapham

Attachments

OGC:ARC:tad
Distribution:
Orig - Addressees
1 - OGC SUBJ: LEGISLATION-Intelligence Charters ARC holding
1 - Chrono
1 - JED
1 - ARC Signer

Washington D.C. 20505

OGC 79-03473

12 April 1979

MEMORANDUM FOR: David Aaron
Special Coordination Committee
The White House

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Issues Paper for the Special Coordination Committee Concerning Potential Sources of Assistance

The 28 March memorandum from the Assistant to the President for National Security Affairs assigned to CIA responsibility for, among other things, the preparation and coordination of an SCC Issues Paper regarding the collection of information concerning U.S. persons who are considered to be potential sources of intelligence information or assistance. The final version of such a paper, having been coordinated with DOD, DOJ, State, Treasury, OMB, FBI, NSA, the NSC, and the Office of the Vice President, is enclosed for your use in arranging an SCC meeting on this subject.

STAT

Anthony A. Lapham

Enclosure
OGC:ARC:am

cc: Working Group Members
Distribution:
Orig - Addressee
1 - OGC Subj; Legislation-Intelligence Charters ARC holding
1 - Chrono
1 - JED
1 - ARC Signer

COLLECTION OF INFORMATION CONCERNING POTENTIAL SOURCES

INTELLIGENCE CHARTER ISSUE PAPER FOR THE

SPECIAL COORDINATION COMMITTEE

I. Background: It is the purpose of this paper to present for SCC consideration and resolution issues relating to the collection of information concerning United States persons without their consent when such persons are determined by United States intelligence entities to be potential sources of information or operational assistance. Since there appears to be no serious objection to collection of information concerning United States persons who have agreed to provide assistance and have consented to such collection or who are being considered for employment or as contractors with an intelligence entity, even utilizing false credentials to conceal the intelligence interest because of the nature of the activity for which assistance is sought, these two types of collection are not discussed further below.

The issues presented relate to whether charter legislation should:

a. Authorize collection of information concerning United States persons who are identified as potential sources of information or assistance without their consent;

b. Limit the length of time during which such collection without consent may be conducted; and,

c. Limit the means by which such collection without consent may be conducted.

II. Current Practice: United States persons who may be in a position to provide information or assistance to an intelligence entity may come to its attention in a variety of ways including chance encounters, recommendations from existing sources, official inquiries and positive efforts to seek out persons with particular types of contact or capabilities.

Executive Order 12036 provides that information that is not available publicly may be collected without the consent of the United States person concerned when that person is reasonably believed to be a potential source or contact, but only for the purpose of determining suitability or credibility. Such collection activities are required to be conducted subject to the order's restrictions on the use of various collection techniques and pursuant to procedures approved by the Attorney General. The required procedures, while under development, have not yet been finalized or implemented.

When a United States person who may be a useful source or contact is identified, preliminary inquiries may be made without the knowledge or consent of that person in order to determine whether to attempt to solicit the person's assistance. During this preliminary stage, a review of publicly available information may be conducted, requests may be made for reviews of the records of the intelligence entity and other entities, and inquiries may be made to establish or confirm identity or suitability. To make these potential sources aware of the intelligence interest and objective before assessing their veracity, reliability, loyalty, and receptiveness is to risk premature disclosure and frustration of the objective, undue exposure of the identities of the intelligence employees involved, or the subsequent failure of the activity itself due to difficulties with the source that could have been anticipated as a result of a preliminary inquiry.

When it appears that the United States person has the requisite contacts or capabilities, and may be a suitable prospect (a benchmark that may take varying lengths of time to reach depending upon the circumstances of each case) the person's assistance is solicited and the intelligence, or, in limited circumstances abroad, the United States Government, interest is revealed. If the person agrees to cooperate, consent is obtained for further inquiries.

III. Issue - Whether Consent Should Be Required: Under Executive Order 12036, nonpublic information may be collected concerning United States persons who are reasonably believed to be potential sources or contacts without their consent. The order does not require that such collection be approved at any particular level of authority within the collecting entity. However, such collection is limited under the order by the restrictions on the use of various techniques and by the requirement that collection be limited to that information necessary to determine suitability or credibility and be conducted pursuant to procedures approved by the Attorney General.

The Senate bill, S. 2525, would have authorized collection of information concerning a United States person reasonably believed to be a potential source of information or operational assistance to the extent necessary to determine suitability or credibility. The consent of the subject would be required except where a designated official of the intelligence entity collecting the information has determined there to be a serious intention to utilize the United States person as a source and that requesting consent would jeopardize the activity for which the assistance of the United States person is to be sought. The SSCI has continued to maintain this position in its most recent (November 1978) statement of the intended conduct of charter legislation.

A general requirement, with narrow exceptions, to obtain the consent of any United States person believed to be a potential source or contact prior to collecting non-public information as to that person's suitability would be intended, obviously, to limit the numbers and circumstances of unconsented collection activities of this type. Rather than proceeding without consent in all cases, a careful determination would be required in each case as to whether to obtain the subject's consent and only a select number of such collection activities likely would be conducted without such consent.

In opposition it may be argued that such a requirement is needless since the collection would be self-limiting (i.e., information necessary to determine "suitability" or "credibility") and the most threatening collection techniques (i.e., electronic surveillance and monitoring, physical searches and mail surveillance) would not be available for this purpose. Further, a requirement that consent be obtained except where security concerns militate against requesting it, may be ineffectual and the exception might quickly become the rule since preliminary collection of one degree or another is necessary in virtually all cases to determine whether the assistance and consent of the person should be requested.

The alternatives appear to include:

Option A - Require consent in all cases prior to any collection of nonpublic information to determine suitability or credibility of a U.S. person as a potential source or contact;

Option B - Require such consent as a general rule coupled with authority for officials at appropriate levels of the entity to invoke exceptions in cases where there is some concern as to the subject's suitability or credibility;

Option C - Do not require consent but leave it to limited authorizing language and the restricted means by which it may be accomplished to regulate unconsented collection;

Option D - Do not require consent in statute but leave it to entity procedures approved by the Attorney General to limit the nature and extent of such collection.

IV. Issue - Limitations on the Time Allowed for Unconsented Collection: If it is determined that some degree of collection should be authorized without the consent of the United States

person who is the potential source or contact is raised concerning whether a time limit should be imposed on such collection activities.

Executive Order 12036 includes no such time limit.

The Senate bill would have limited all collection for such purposes, apparently whether consented or unconsented, to 90 days without exception and without provision for renewal or extension. The most recent SSCI position paper advocates "strict time limits."

A time limit on collection of this type would be intended to prevent extended gathering and accumulation of information concerning any unwitting United States person merely on the basis of an intention to utilize the person as a source or contact at some future date. Requiring that all such collection cease after 90 days would require that only a limited, specific inquiry be conducted and would discourage overbroad collection activities.

The difficulty with such a time limit, especially where no provision is allowed for extention or exception, is that it presumes a precise and focused dedication of resources and fails to recognize the realities or practicalities of this type of collection. Merely requesting, receiving and assimilating information in the records of selected federal agencies may frequently require over 30 days, especially when the United States person has had extensive foreign contacts. Such a time limit would effectively bar such collection if it were to include in the 90-day limit the collection that occurs after the consent of the subject is obtained since such background investigations often require a minimum of 180 days.

The alternatives appear to include:

Option A - Impose a specific time limit, such as 90 or 180 days, on unconsented collection of non-public information to determine the suitability or credibility of a U.S. person as a potential source or contact;

Option B - Impose such a limit on unconsented collection of this type but allow officials at appropriate levels of the entity to invoke exceptions or allow extensions and renewals;

Option C - Impose no time limit on such collection but leave it to the finiteness of available resources, the non-availability of the most intrusive techniques, and the language of the authorizing provision to narrow the type and amount of information that may be

collected and thus the period of time during which collection will continue; or,

Option D - Include no time limit in statute, leaving it to procedures approved by the Attorney General to regulate the duration of such collection.

V. Issue - Restrictions on the Means By Which Unconsented Collection May Be Accomplished: A determination that unconsented collection of nonpublic information to determine the suitability or credibility of United States persons as potential sources or contacts should be authorized also results in an issue concerning whether there should be statutory limits on the means by which such collection may be conducted.

Executive Order 12036 does not limit collection of public information and does not include specific limitations on techniques for collection of nonpublic information that concerns a United States person's suitability or credibility as a potential source or contact. However, the conditions imposed by that Order on the use of electronic surveillance and monitoring, physical search and mail opening, and mail surveillance, effectively prohibit the utilization of any of those techniques (except that physical surveillance may be used by the FBI "in the course of a lawful investigation") to collect information concerning an unconsenting United States person because that person is considered to be a potential source or contact.

The Senate bill would have gone further and limited collection for this purpose to gathering of publicly available information, requests for existing information from the records of federal agencies, and "interviews" (not defined but apparently understood to mean individual inquiries without disclosure of the intelligence or United States Government affiliation of the person initiating the inquiry).

It is argued in support of such restrictions that this type of collection should be strictly limited because the United States persons involved may not only have violated no law, but may not even be in possession of information of foreign intelligence or counterintelligence value. Yet they may be subjected to scrutiny by the government because of mere circumstance or acquaintance. On the other hand, such limitations on techniques are opposed as impractical and unnecessary since there will be sufficient limitations on the type of information to be collected, and the use of the most intrusive techniques will be effectively prohibited for this purpose. Accordingly, the practical difficulties raised by arbitrarily limiting the remaining means of

collection, and the definitional problems (e.g., what is "publicly available," what are "interviews") outweigh the benefit to be gained.

The alternatives appear to include:

Option A - Impose no additional limitations on use of particular techniques to collect nonpublic information concerning the suitability or credibility of United States persons who are potential sources or contacts without their consent;

Option B - Impose no additional limitations on such collection but note that electronic surveillance or monitoring, physical search and mail opening, and mail surveillance may not be used for this purpose;

Option C - Limit collection for this purpose to public information, "national agency checks," and "interviews" as in S. 2525;

Option D - Limit collection for this purpose by specific reference to all or some of the additional techniques available, such as acquiring "public" and "nonpublic" information, pretextual and third-party interviews, physical surveillance, incidental collection, inquiries to existing or newly-developed sources, and national agency checks; or,

Option E - Include no limitations on techniques in statute but leave it to procedures approved by the Attorney General and restrictions on intrusive techniques to regulate these collection activities.

Washington, D.C. 20505

17 April 1979

MEMORANDUM FOR: Department of Defense
Attn: Deanne Siemer
Department of Justice
Attn: Ken Bass
Department of State
Attn: Jeffrey Smith
Department of the Treasury
Attn: J. Foster Collins
Office of Management and Budget
Attn: Arnold E. Donahue
Federal Bureau of Investigation
Attn: James Nolan
National Security Agency
STAT Attn: [redacted]
National Security Council
Attn: Sam Hoskinson
Office of the Vice President
Attn: Marilyn Haft

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Issues Paper for the Special Coordination Committee Regarding Personnel and Physical Security Investigations

Enclosed, for your information, is a copy of my memorandum to the NSC transmitting a copy of the issue paper concerning personnel and physical security investigations. This should be added to your list of items that will be discussed at a future meeting of the SCC.

[redacted] STAT

Anthony A. Lapham

Enclosure

Central Intelligence Agency

Washington D.C. 20505

17 April 1979

MEMORANDUM FOR: David Aaron
Special Coordination Committee
The White House

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Issues Paper for the Special Coordination Committee Regarding Personnel and Physical Security Investigations

The 28 March memorandum from the Assistant to the President for National Security Affairs assigned CIA responsibility for preparation and coordination of an SCC issues paper regarding collection of information that concerns U.S. persons in the context of physical and personnel security investigations. Enclosed, for consideration by the SCC, is a copy of such a paper that has been coordinated with DOD, FBI and NSA, and has been made available for comment by the other members of the Working Group.

STAT

Anthony A. Lapham

Enclosure

PHYSICAL AND PERSONNEL SECURITY INVESTIGATIONS

INTELLIGENCE CHARTER ISSUE PAPER FOR THE

SPECIAL COORDINATION COMMITTEE

I. Background: This paper describes in summary fashion current practices and procedures in the conduct of personnel and physical security investigations by the entities of the intelligence community and presents basic issues that require resolution by the Special Coordination Committee in order to develop intelligence charter provisions governing the collection of information that concerns United States persons for these purposes. The general issues in this area are:

a. Whether, and under what conditions, authority should be granted for unconsented collection of nonpublic information that concerns U.S. persons in the course of personnel security investigations;

b. Whether, and to what extent, should authority be granted for such collection in connection with maintaining the physical security of intelligence facilities, information, and personnel; and,

c. Whether, and subject to which limitations, should such collection be authorized in order to identify, investigate or prevent breaches of security rules, regulations and contractual obligations.

II. Current Practice: Executive Order 12036 currently authorizes CIA, DOD and NSA to protect the security of their installations, activities, information and personnel by "appropriate means" including "such investigations of applicants, employees, contractors, and other persons with similar associations" with those entities as are necessary. Current security investigative activities that concern U.S. persons may be loosely grouped under three general headings: (i) personnel security, (ii) physical security of facilities, information and personnel, and (iii) violations of security rules and regulations. These types of activities are all engaged in, to one degree or another, by CIA, DOD, FBI, State, and NSA.

(i) Personnel security investigations would include the collection of information concerning U.S. persons who are being considered for access to intelligence information or facilities and would include applicants for various forms

of staff or contract or proprietary employment or for clearances, sources or contacts who have agreed to assist the government, contractors, consultants, detailees, and service personnel (such as guards, painters, and telephone and other equipment maintenance personnel), and present employees, contractors, consultants, or other persons with current access to intelligence information to determine their continued suitability for such access. Background information would be collected concerning individuals in these categories through means and to a depth that would vary depending on the degree and scope of access to be granted. The minimum inquiry would consist of a request for review of entity, national agency, or local and municipal police records for any existing information concerning the subject, and the maximum inquiry would involve a "full field investigation" that could delve as much as 15 years into the subject's background and include, at least as to CIA employees and civilian employees of NSA, a polygraph interview. In addition, periodic reinvestigations of these types of persons, including a counterintelligence-oriented polygraph interview, could be scheduled as appropriate covering the intervening period since the last investigation. All such inquiries currently are conducted only with the consent of the invididual concerned, except for preliminary national agency records reviews that may be conducted by CIA solely to establish the identity of a potential source or contact. (The collection of information concerning potential sources is the subject of a separate issue paper.) Spouses of applicants for employment may be the subject of national agency records reviews, and the new spouse of a current employee may be the subject of a field investigation inquiry extending over the prior five years. Field investigations could include neighborhood inquiries, birth records, and police and, if appropriate, credit inquiries. In certain background inquiries conducted by CIA where cover considerations require, the subject, although providing biographic data and consenting, or the persons being interviewed, may not be aware that the subject of the inquiry will be working either for an intelligence entity or for an entity assisting the U.S. Government.

(ii) Physical security investigations encompass so-called "site suitability" reviews and threats to the integrity or safety of entity facilities, information, or personnel. Site suitability investigations entail preliminarily surveying the area surrounding the proposed location of an overt or clandestine intelligence activity and reviewing entity, and sometimes national agency, records to determine whether entities or persons in the immediate area pose a security problem for the activity. For example, it would not do to locate a CIA or FBI meeting site next door to a Soviet trade mission. Investigations relating to threats to facilities,

information, or personnel are tailored to the circumstances. Where a crowd or demonstration appears to pose a threat to an installation, the appropriate federal, state, military, or local police authorities are contacted and the intelligence entity representatives generally limit their activities to support of these police officials and to observing the crowd behavior at or near the facility. Suspicious activities by individuals outside entity facilities (for example, use of telephoto lens cameras or listing license plate numbers of cars entering or leaving) are also reported to the police, and the entity activity may be limited to obtaining a license plate number and attempting to identify the persons involved. Entity officials also would notify the FBI or Secret Service, as appropriate, of the contents of threatening mail or if the author of such mail should appear in the area. Where intrusion into an intelligence entity facility has occurred, the FBI, or local police if cover considerations require, would be notified and would investigate from a criminal or counterintelligence standpoint depending on the circumstances. Overseas, depending upon the circumstances, the local police may be contacted or the entity may conduct its own inquiry.

(iii) Breaches of security may be either inadvertent or deliberate. Inadvertent breaches by employees are usually discovered, investigated, and remedied administratively. Collection of information would proceed through interviews with the offending and other employees to determine the circumstances of the breach. Deliberate breaches of security regulations or suspected leaks by employees would be investigated by interviews with employees with knowledge of the situation. Executive Order 12036 requires that senior intelligence officials recommend to the Attorney General that serious or continuing security breaches be investigated by the FBI and where it is suspected that an employee may be furnishing information to a foreign entity, the matter would be turned over to the FBI.

III. Issues

1. Personnel Security. Executive Order 12036 authorizes the DCI to protect intelligence sources and methods, by lawful means, against disclosure by present CIA employees or contractors. It also authorizes investigations, as necessary, of applicants, employees, contractors, and other persons similarly associated with CIA, DOD, or NSA and permits by other than intrusive techniques the collection (using physical surveillance in some cases), retention, and dissemination of nonpublic information concerning U.S. persons without their consent when acquired in the course of "lawful" personnel security investigations or when related to present or former employees, present or former contractors or their employees, and applicants for such employment or

contracting when necessary to protect intelligence sources or methods. In limited circumstances this collection may include physical surveillance and pretext interviews.

S. 2525 would have authorized CIA to conduct "background investigations" (without elaboration but presumed to require consent) concerning applicants for employment, and would have authorized dissemination of information concerning the trustworthiness of any U.S. person who has, had, or is being considered for, access to classified information.

The issue is whether, and to what extent, statutory authority should be provided to collect nonpublic information that concerns U.S. persons without their consent in the context of personnel security investigations. It is assumed that any such authority for personnel security investigations need not extend to persons beyond present employees and their spouses to a limited degree, present contractors of various types and their employees, applicants for employment with an intelligence entity or proprietary and their spouses and close relatives to a limited degree, applicants for contractor status, and persons who are being considered for access to intelligence facilities or information. It is also assumed that such authority need not include use of electronic surveillance (or monitoring), physical searches (including mail opening), or mail covers. The techniques that remain for consideration include only nonpublic sources of information, physical surveillance, covert human source inquiries, pretext and third party interviews, and federal, state and local records reviews. The options then appear to include:

Option A - Provide no authority for collection of nonpublic information without consent;

Option B - Provide limited authority for such collection only to the extent consent is unavailable or impractical, and only as necessary to determine suitability or trustworthiness, and only through use of all or some of the available techniques;

Option C - Provide unlimited authority for such collection, or authority limited in some general way as to extent or technique, but subject to regulation by entity procedures approved by the Attorney General;

Option D - Provide unlimited authority, leaving regulation to entity heads.

2. Physical Security. Executive Order 12036 authorizes CIA, DOD and NSA to protect the security of their facilities, information, and personnel by "appropriate means". The Order also permits collection (using physical surveillance in some cases), retention, and dissemination of nonpublic information that concerns an unconsenting U.S. person arising out of "lawful" physical security investigations, or concerning present or former employees or contractors or their contacts, or concerning persons or activities that constitute a "clear threat" to any intelligence facility or personnel provided it is retained only by the threatened entity and the Secret Service and FBI if appropriate. The Order further exempts from its restrictions concerning relations with law enforcement authorities, cooperation with law enforcement entities to protect facilities and personnel.

S. 2525 would have authorized unconsented collection of information concerning any U.S. person in or near an intelligence facility to determine whether to exclude that person, but such collection would have been limited to physical surveillance, and requests for reviews of federal, state and local entities. In addition, S. 2525 would have authorized unconsented, nonpublic collection as to U.S. persons who are "reasonably believed to be engaging in any activity which poses a clear threat" to any intelligence facility or personnel, but such collection would have been limited to physical surveillance in the immediate vicinity of the facility, pretext interviews, and requests for reviews of federal, state and local entities.

Again the issue centers on whether and to what extent should authority be provided to collect nonpublic information that concerns U.S. persons without their consent in the context of physical security investigations. It is assumed here also that specialized authority to use electronic surveillance and monitoring, physical searches (including mail opening), or mail covers is unnecessary. This leaves open for discussion the use of such techniques as physical surveillance, nonpublic sources of information, covert human sources, pretext and third party interviews, and federal, state, and local records reviews. The options then appear to include:

Option A - Provide no authority for collection of nonpublic information without consent.

Option B - Provide limited authority for such collection only to the extent necessary to protect intelligence activities (e.g., site suitability investigations) or in the U.S. to determine whether to refer a matter (e.g., threats or disturbances) to law enforcement authorities, and only through use of all or some of the available techniques.

Option C - Provide unlimited authority for such collection, or authority limited in some general way as to extent or techniques, but subject to regulation by entity procedures approved by the Attorney General;

Option D - Provide unlimited authority, leaving regulation to entity heads.

3. Breaches of Security. Executive Order 12036 places responsibility in the DCI to protect against disclosure of intelligence sources and methods by present or former CIA employees or contractors through "lawful means". Senior intelligence officials are charged by the Order with reporting serious or continuing security breaches to the Attorney General and recommending an FBI investigation. This provision was intended to focus responsibility for investigating security violations in the FBI and, to some extent, to compensate for the limitations imposed upon such activities by the intelligence entities. The Order also authorizes CIA, DOD and NSA to protect security by "appropriate means", including necessary investigations of applicants, employees, contractors, and other similarly associated persons. Physical surveillance is permitted by the Order for the purpose of protecting intelligence sources and methods so long as limited within the U.S., insofar as U.S. persons are concerned, to present employees, contractors and their employees, military personnel, and persons in contact with such persons, and outside the U.S. also to persons formerly in any of these categories. Collection, retention, and dissemination of nonpublic information concerning U.S. persons without their consent is permitted under the Order regarding present or former employees, contractors and their employees, and persons in contact with them, when necessary to protect sources and methods from disclosure.

S. 2525 would have provided authority to collect information concerning U.S. persons who are employees, or contractors and their employees to determine whether they have violated any security rule or regulation. Such collection would have required entity head approval to proceed beyond 180 days or to use covert human sources, mail covers, physical surveillance, or tax or other confidential records. In addition, S. 2525 would have provided authority to collect information concerning U.S. persons in contact with suspected intelligence agents, but limited to 90 days and only to identify the person and determine whether the person has, had, or will have access to sensitive information. In its November 1978 position paper, the SSCI indicated its preference that investigations of employees or former employees not be authorized unless there is "some evidence or reasonable probability" that the person has or is about to violate security regulations.

The issue here, as before, is focused on the nature and extent of the authority that should be granted in statute to collect nonpublic information and investigate actual or suspected breaches of security rules, regulations, or contractual obligations by U.S. persons without their consent, and the means by which such investigations should be carried out. Again it is assumed that electronic surveillance and monitoring or physical searches (including mail opening) will not be used for these purposes. It is also assumed that investigatory authority in this context need not extend beyond present and former employees and contractors and their employees, as well as, to a limited degree, persons with whom these individuals come into contact. The options appear to include:

Option A - Provide no authority for collection of nonpublic information without consent.

Option B - Provide unlimited authority for intelligence entities to collect nonpublic information concerning U.S. persons for these purposes, with or without a specific statutory standard.

Option C - Same as Option A but require entity procedures approved by the Attorney General.

Option D - Provide limited authority through such means as time limitations and restrictions on the use of certain techniques.

Option E - Provide limited authority to the intelligence entities but augment the responsibility and authority of the FBI to conduct such investigations on behalf of the intelligence entities.

OGC 79-03751

23 April 1979

MEMORANDUM FOR: Director of Central Intelligence

VIA : Deputy Director of Central Intelligence

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Background for SCC Meeting Scheduled for Tuesday, 24 April

1. Action Requested: It is requested you review and consider this memorandum and its attachments in preparation for the 24 April SCC meeting at which the attachments will be discussed. Copies of this memorandum and the background papers have been provided to the DDO, the DDA, and the Office of Security in order that they might provide their comments and recommendations directly to you.

2. Background: The attached issues paper on collection of information concerning U.S. persons who are potential sources of assistance (Tab A) and physical and personnel security investigations (Tab B) were prepared by this Office in coordination with appropriate Agency components and the other intelligence entities represented on the Charter Legislation Working Group. They will be discussed and the issues they describe will be resolved by the SCC on 24 April. The issues are summarized below along with a recommendation of the position to be advocated.

3. Potential Source Collection

a. Whether to authorize collection of nonpublic information that concerns U.S. persons without their consent when such persons are considered to be potential sources of assistance or information (Recommendation: Option D - do not require consent but allow such collection to be regulated by AG-approved procedures).

Choosing this option will essentially maintain the status quo, except insofar as we are constrained by the very unclear decision in the case of Weissman v. CIA, 565 F. 2d 692 (D.C. Cir. 1977), which limits our authority to conduct "investigations" of unwitting Americans who have no "connection" with CIA, without their consent. Leaving aside this decision,

which has been given effect in [redacted] E.O. 12036 authorizes STAT unconsented collection of nonpublic information concerning U.S. persons who are reasonably believed to be potential sources or contacts to the extent necessary to determine their suitability or credibility, subject to AG-approved procedures governing collection generally as well as the use of various collection techniques. The absence of authority to conduct at least preliminary inquiries of this nature without consent would result in substantial harm to the Agency's recruitment activities.

b. Whether to include in statute a specific time limit on such unconsented collection (Recommendation: Option C - do not impose a time limit in statute but leave regulation in this regard to the indirect controls resulting from the limited nature of authorized collection and AG-approved procedures governing use of particular techniques).

Again this would essentially maintain the status quo since E.O. 12036 includes no time limit on such collection. Also, the absence of a time limit would be consistent with the SCC decisions previously arrived at that have resulted in no time limits in the statutory provisions governing collection of foreign intelligence and counterintelligence that concerns U.S. persons.

c. Whether to impose statutory limitations upon the techniques that may be used to accomplish such collection (Recommendation: Option E - do not include limits on use of various techniques but leave regulation to AG-approved procedures governing their use).

This option also conforms to current practice since E.O. 12036 does not require that particular types of collection be accomplished only through specific, identified techniques. Rather, collection of various types is authorized and specific techniques are made available in certain circumstances and are regulated by AG-approved procedures.

4. Personnel, Physical Security Investigations

a. Whether, and to what extent, to authorize collection of nonpublic information that concerns U.S. persons without their consent as part of a personnel security investigation (Recommendation: Option C - provide authority for such collection through all except the intrusive techniques and subject generally to AG-approved procedures).

This option essentially captures existing practice since E.O. 12036 permits such collection in the course of a "lawful personnel security investigation," but requires regulation of collection generally and of the availability of particular techniques by AG-approved procedures. As is noted in the issues paper, at the current time almost all CIA inquiries of this type have the consent of the subject.

b. Whether, and to what extent, to authorize collection of nonpublic information that concerns U.S. persons without their consent as part of a physical security investigation (Recommendation: Option C - provide authority for such collection through all but the intrusive techniques, and subject generally to AG-approved procedures).

Again, this option merely preserves current practice under E.O. 12036 which allows such collection in connection with "lawful physical security investigations" or "clear threats" to Agency facilities. The Agency engages in a limited, although potentially important, amount of this collection, such as "site suitability" inquiries.

c. Whether, and to what extent, authority should be granted to collect nonpublic information that concerns U.S. persons without their consent as part of an investigation into actual or suspected breaches of security (Recommendation: Option E -Provide limited authority of this nature to the intelligence entities, but augment and emphasize the responsibility, duty and authority of the FBI to conduct such investigations on their behalf).

Choosing this option would conform to existing lines of responsibility, but would clarify the role of the FBI in this regard. Under E.O. 12036, the intelligence entities are granted limited authority to collect information concerning present or former employees, contractors and their employees, and persons in contact with such persons. Serious or continuing breaches of security are required to be reported to the Attorney General with a recommendation for an FBI investigation. As you know, however, all too often there is no such investigation, or a half-hearted affair at best, because of the tendency not to take seriously inquiries that in most cases would not lead to criminal prosecutions. The recommended Option would attempt to alter the FBI's role and strengthen this responsibility whether or not related to the commission of a crime.

5. Recommendation: It is recommended you advocate the positions described above at the SCC meeting on these questions, or authorize me to advocate these positions if I attend the meeting in your stead.

STAT

Anthony A. Lapham

Attachments