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CENTRAL INTELLIGENCE AGENCY

Approved For Release 2005/02/15 : CIA-RDP89B00552R000800080004-0
Washington, D.C. 20505

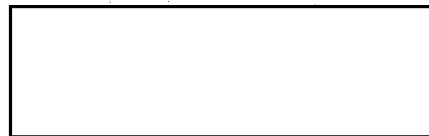
Review Staff: 76/0139
23 January 1976

Mr. A. Searle Field
Staff Director
Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Field:

It has occurred to me, even at this late date,
that this material on oversight might be of interest
to your staff and members of the HSC.

Sincerely,



Review Staff

Attachment:
As Stated

25X1A

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

29 October 1975

Cyrus R. Vance, President
Association of the Bar of the City of New York
42 West 44th Street
New York, New York 10036

Dear Cy:

Earlier this year we received a pamphlet entitled, "The Central Intelligence Agency: Oversight and Accountability" by the Committee on Civil Rights and the Committee on International Human Rights of the Association of the Bar of the City of New York. The report subsequently appeared in the April 1975 issue of The Record, published by the Association.

It is not our custom to comment on publications dealing with CIA, nor to argue with conclusions which anyone is entitled to draw, no matter how much we may disagree. However, in examining the report of your two committees, we found numerous factual errors, miscitations of statutes and texts, misquotations, and material out of context.

Because of the immense prestige of the Bar Association of the City of New York, we made a careful critique of this report, which is enclosed, together with a short summary. This paper is not a brief in opposition; it is designed to question the validity of some of the research and thus raise legitimate questions as to some of the statements and conclusions. The critique is paged to the original report which we received and not to the pagination as it subsequently appeared in The Record.

After you have read this critique, you may well wish to insert some statement in an early issue of The Record, in view of its large readership among members of the Bar and law libraries who rely on these reports for accuracy and ideas.

My best personal regards to you.

Sincerely,

[Redacted Signature]

John S. Warner
General Counsel

Enclosures



SUMMARY OF CRITIQUE

I. FACTUAL ERRORS AND MISCONCEPTIONS.

As set forth in the attached Critique, the Report's major weakness lies in its many factual errors, some large, some small, as well as what can best be described as misconceptions about CIA, its activities and statutory responsibilities. A few examples are illustrative of the more detailed explanations contained in the Critique.

One error which appears in several places in the Report is that in 1946 President Truman established the National Intelligence Authority and the Central Intelligence Group by Executive order. There was no Executive order; these organizations were established under the terms of a Presidential Directive issued to the Secretaries of State, War and the Navy. Nor did the subsequent National Security Act of 1947 remove CIA from "military control" (Report, p. 3, l. 1). Neither CIG nor CIA was ever under "military control." The National Intelligence Authority, which gave direction to CIG, was composed of the three Secretaries to whom the Directive was addressed, and Admiral Leahy, Chief of Staff to the President. The National Security Council, which directs the activities of CIA, is composed entirely of civilians and is chaired by the President.

Among other examples of factual errors is the statement that the National Security Act of 1947 established the Department of Defense (Report, p. 2, par. 3). That Act established the National Military Establishment, headed by a Secretary of Defense. The Department of Defense was not established until the National Security Act Amendments of 1949. Nor was Secretary Forrestal ever the Secretary of War (Report, p. 7, par. 2).

The Report presents a generally misconceived view of the functions of the National Security Council (NSC), especially vis-a-vis the CIA. At p. 14 of the Report, the NSC is described as an advisory and coordinating body, while overlooking the NSC's directive authority over CIA as set forth in section 103(d) of the National Security Act of 1947. From their misreading of the statute, the authors of the Report then continue that "Nowhere is the NSC directly given the power to conduct political operations" and then conclude that it is difficult for CIA to maintain that it conducts its covert action operations as a delegation of power from the NSC. NSC does not have the power to delegate, and CIA does not claim such delegation. CIA bases its authority in this field in part on its statutory provisions under the direction of the NSC.

Another area of misconception in the Report is its discussion of congressional intent as to CIA's role in clandestine collection (espionage). Footnote 74 of the Report (p. 11 at p. 40) argues that "as originally envisioned, the CIA was to be, primarily, a correlator and evaluator of intelligence gathered by others." This is not correct. From the earliest drafts of the concepts for a peacetime intelligence service in 1944 and 1945, it was envisioned that clandestine collection would be centralized in such a service. The members of the congressional committees which established CIA were well aware of what the CIA role was to be in this field. It was thoroughly considered in executive sessions by the committees involved, and CIA's primacy in that field was understood. It was also mentioned in the floor debate in the House (see Critique, III.B.h).

In order not to prolong this summary unduly, one can merely mention that we have detailed in the Critique other misconceptions regarding covert action activities, budgetary matters, and the Director's responsibilities to protect intelligence sources and methods from unauthorized disclosure. It should be emphasized, however, that the latter responsibility runs only to the field of intelligence and not to "all government documents and sources" as claimed on p. 11 of the Report.

II. MIS-CITATIONS OF STATUTES AND TEXTS.

There are several miscitations of statutes and texts in the Report. The statute most often miscited is the Foreign Assistance Act of 1974. In quoting the provision of that Act which deals with CIA, the Report cites (p. 15, par. 1, and elsewhere) section 663 of the Act. Actually, the section which should be cited is section 32 of the Foreign Assistance Act of 1974 which enacts an amendment to the Foreign Assistance Act of 1961, to be numbered section 662 of the latter Act. The Report then continues to misquote subsection (b) of the misnumbered section.

Other citations which seem to cause difficulty to the authors of the Report are to the National Security Act of 1947. For instance, at p. 14, par. 2 of the Report, the text cites a provision attributed to the National Security Act of 1947 which is actually section 7 of the Central Intelligence Agency Act of 1949.

A further miscitation appears in connection with footnote 103 (p. 15 at p. 42). There the cited House Report is correctly quoted but adds "as quoted in Wise & Rose," [The Invisible Government] at p. 10. First, one must note that the name of the second author of that book is Ross, not Rose. Secondly, there is no reference, nor any quotation, from the House Report at the cited p. 10 of their book. That page is about the Bay of Pigs.

III. MISQUOTATIONS AND MISLEADING STATEMENTS.

In the Report (p. 1, par. 2) there is a statement which is misleading, at least by implication, when it states that CIA's "activities may be any that the National Security Council directs, as long as they concern in some fashion 'the national security.'" The Report omits the important modifier in the National Security Act of 1947 which provides that the Agency shall perform such other functions and duties "related to intelligence affecting the national security" (emphasis supplied) as the NSC may from time to time direct.

Also misleading is the handling of the quotation in the Report (p. 3, par. 2) of the Director's authorities in the field of unvouchered funds. The Report at this point places in quotation marks what would appear to be the text of a part of section 8(b) of the CIA Act of 1949. As pointed out in the Critique (par. I.1) this is not an accurate quotation of the statute. The Report (p. 3, par. 2) is also at best misleading in its discussion of section 7 of the CIA Act of 1949 concerning CIA authorities to bring certain aliens into the United States for permanent residence (see Critique, Sec. I.m). The Report (p. 10, #18) also speaks of the Agency supplying equipment and safe houses "to other government officials," sourcing the statement to Mr. Colby's confirmation hearings. In those hearings at the cited page, Mr. Colby testified that such facilities had been provided to White House employees, a much narrower term than "other government officials."

IV. MATERIAL OUT OF CONTEXT.

In the very first paragraph of the Report, Director Colby is quoted as stating that CIA domestic activities have included the insertion of agents into "American dissident circles." It would have presented a fairer picture if Mr. Colby's entire sentence at this point had been used. It reads:

In order to obtain access to foreign circles, the Agency also recruited or inserted about a dozen individuals into American dissident circles in order to establish their credentials for operations abroad. [Emphasis supplied.]

Similarly, it would have been more even-handed if the Report in its first paragraph had included exactly what Director Colby did say about CIA's dossiers on American citizens. (See Critique, Introduction, par. b).

Under the general heading "Domestic Activities Viewed as Permissible by the CIA," the Report (pp. 9-10) lists 18 items. Several are taken from the Senate Hearing on the Nomination of Mr. Colby to be DCI. Actually, the cited items are taken from written replies to questions submitted by Senator Symington for inclusion in the Hearing record. It would have placed Mr. Colby's answers in a better context if the Report had included his preamble sentence to his answers. In that sentence, Mr. Colby stated:

Provided that CIA's activities within the U. S. are in the prosecution of foreign intelligence and do not contravene U. S. law, I believe they do not conflict with the statutory restriction against CIA involvement in domestic affairs.

CRITIQUE ON THE CENTRAL INTELLIGENCE AGENCY;
OVERSIGHT AND ACCOUNTABILITY: A Report by the Committees
on Civil Rights and International Human Rights of the Association
of the Bar of the City of New York

INTRODUCTION

a. In citing DCI Colby's Statement to the Senate Appropriations Committee on 15 January 1975, the Report (p. 1, par. 1) quotes him as stating that CIA domestic activities have included the insertion of agents into "American dissident circles." This is taken out of context. The full quote from the DCI's Statement reads:

In order to obtain access to foreign circles, the Agency also recruited or inserted about a dozen individuals into American dissident circles in order to establish their credentials for operations abroad. [Emphasis supplied.]

b. In again citing the DCI's Statement of 15 January 1975, the Report states (p. 1, par. 1) that CIA had compiled dossiers "on about 10,000 American citizens," by implication American dissidents. The DCI's explanation would have been appropriate here. It reads:

In the course of this program, files were established on about 10,000 citizens in the counterintelligence unit. About two-thirds of these were originated because of specific requests from the FBI for information on the activities of Americans abroad, or by the filing of reports received from the FBI for possible later use in connection with our work abroad.

c. The Report states (p. 1, par. 2) that CIA's "budget is exempt from legislative review." This is untrue. Subcommittees of both the Senate and House Appropriations Committees over the years have given the CIA budget close scrutiny. Furthermore, the special House Appropriations Subcommittee which has oversight of the CIA budget has recently been enlarged to include all the members of the Defense Appropriations Subcommittee.

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d. The Report (p. 1, par. 2) also contains a misleading statement, at least by implication, when it states that CIA's "activities may be any that the National Security Council directs, as long as they concern in some fashion 'the national security.'" The Report omits the important modifier in the National Security Act of 1947 in this connection; the statute reads:

[T]o perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct. [Emphasis supplied.]

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I. CREATION AND LEGAL DEVELOPMENT OF THE CENTRAL INTELLIGENCE AGENCY

a. Footnote 2 (p. 1 at p. 36) omits a word in citing the Ransom book. The footnote reads "extensive and covert activity." It should read "extensive espionage and covert activity."

b. The Report states (p. 2, ll. 1-2) that the plan for a post-war intelligence service was "sidetracked" by the Joint Chiefs of Staff. The Report does not point out that the sidetracking occurred as a result of the leak of the top secret plan to Walter Trohan of the Chicago Tribune, where the article appeared on 9 February 1945 (as well as in the Washington Times-Herald), resulting in discussions being temporarily suspended by the JCS on orders from Gen. Marshall. They were resumed in September 1945.

c. The Report states (p. 2, l. 2) that the OSS was disbanded on September 20, 1945. While this is the correct date for the issuance of the executive order, the effective date of the dissolution of OSS was 1 October 1945.

d. The Report states (p. 2, par. 1) that President Truman established the National Intelligence Authority by "executive order." Actually, it was established by a Presidential Directive to the Secretaries of State, War, and the Navy. Nor did the Directive designate Admiral Leahy as a member of the NIA, as stated in this paragraph. It merely designated "another person to be named by me as my personal representative;" and Admiral Leahy was subsequently so designated.

e. The Report states (p. 2, par. 2) that one of CIG's roles is "coordinating the activities of the intelligence agencies throughout the government." Actually, the Presidential Directive limited the coordination to the intelligence elements of State, War, and the Navy. The Report is only partially correct here in stating that one of CIG's first tasks was to furnish the President "with a daily report of intelligence information, a function which its successor continues to perform." It is true that CIG furnished the President with a daily intelligence report, but the CIA daily report now contains comments and evaluations of such information. This was not true of the original CIG reports, as State blocked the inclusion of any evaluation. This precipitated a long and continuing battle between the agencies concerned. This whole paragraph is taken with very little change from a law review article by Prof. Walden, error included.

f. The Report discusses (p. 2, par. 3) the "Report on the System Currently Employed in the Collection, Evaluation, and Dissemination of Intelligence ..." released by the House Military Affairs Committee in December 1946. In taking note of the Committee's call for permanent legislation for CIG, the authors of the Report are apparently unaware of the fact that Admiral Souers had made such a

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recommendation to the NIA in his final report to that body in June 1946; and that such legislation had already been drafted in the spring of 1946 by SSU/CIG's Office of General Counsel. The impact of the House Military Affairs Committee Report on the subsequent hearings and debate on the National Security Act of 1947 was minimal, and not the cause and effect implied here. CIG had little or nothing to do with the Military Affairs Committee's work and Report. The Bar Association Report also continues its error by designating President Truman's Presidential Directive as an "executive order." A further error in this paragraph is the statement that the National Security Act of 1947 established the Department of Defense. That Act established the National Military Establishment, headed by a Secretary of Defense. The Department of Defense was not established until the National Security Act Amendments of 1949.

g. At the bottom of p. 2, the Report digests the duties of CIA as set forth in the National Security Act of 1947. Conspicuously absent from duty #3 as set forth in the Report is the statutory requirement that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

h. The Report states (p. 3, l. 1) that, by the National Security Act of 1947, "the CIA was removed from military control" Neither CIG nor CIA was ever under "military control." The members of the NIA were all civilians, except for Admiral Leahy. The members of the NSC are all civilians.

i. Footnote 10 of the Report (p. 3 at p. 37) states that Rear Admiral Hillenkoetter became the first Director (of CIA) on September 15, 1947. This date is incorrect. Section 310 of the National Security Act of 1947 provided, with certain exceptions not pertinent here, that the Act would become effective on the day after the day on which the first Secretary of Defense takes office. Secretary Forrestal was sworn in as Secretary of Defense on 17 September, which brought the CIA provisions into effect the next day. Actually, Admiral Hillenkoetter did not take the oath until 26 September.

j. The Report states (p. 3, par. 1) that the DCI was empowered "to inspect all intelligence relating to national security gathered by any agency of the government" This is not accurate. A sharp distinction was drawn with regard to information from the FBI. A special proviso was written into sec. 102(e) of the Act which states that:

[U]pon the written request of the Director of Central Intelligence, the Director of the Federal Bureau of Investigation shall make available to the Director of Central Intelligence such information for correlation, evaluation, and dissemination as may be essential to the national security.

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The right of inspection which is given to the DCI vis-a-vis the other intelligence agencies of the government is not authorized vis-a-vis the FBI.

k. The Report (p. 3, par. 1) purports to quote the text of sec. 102(c) of the National Security Act of 1947. When quoted correctly, the word "interest" in the last line of the paragraph should read "interests." This error is doubtless caused by the use of Walden's text, cited in footnote 12, which contains this error, rather than checking the actual statutory language. Footnote 12, which follows this quotation, also cites in support, inter alia, Corey Ford's book, Donovan of OSS. However, there are no references to the DCI's termination authority in the Ford book at the pages cited.

l. The Report (p. 3, par. 2) discusses the CIA Act of 1949. It quotes two provisions of that Act. Then it quotes (par. 2, ll. 8-10) what would appear to be a third quotation from the Act, as follows:

[S]uch expenditures to be accounted for solely on the certificate of the Director without any further accounting therefor. [Emphasis supplied.]

The correct statutory quotation from the Act reads:

[S]uch expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified. [Emphasis supplied.]

It is misleading, to say the least, to have included this erroneous quotation in the text of the Report as if it were taken from the Act, even though it is preceded in the text of the Report by the phrase: "and granted him the extraordinary right to spend money simply by signing his name."

m. The Report (p. 3, par. 2) is certainly misleading to the general public when it states that the CIA Act of 1949 allows the Director:

[I]n collaboration with the Attorney General and the Commissioner of Immigration, to admit up to 100 persons into the United States each year secretly ...

without regard to immigration quotas. The word "collaboration" has the connotation of plot or something sinister, and the quote furthermore implies that CIA can bring in any 100 aliens that it might choose. The statute is certainly more explicit and reads:

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Whenever the Director, the Attorney General, and the Commissioner of Immigration shall determine that the entry of a particular alien into the United States for permanent residence is in the interest of national security or essential to the furtherance of the national intelligence mission
[Emphasis supplied.]

A correct presentation of the text of the statute, together with a reading of the Committee Reports on this legislation, as well as the extensive debate which accompanied its passage, would have presented a much fairer picture to the public instead of the misleading implication of the Report.

n. The Report (p. 3, par. 3) misquotes the quoted provision from the National Security Act of 1947. The last word in l. 4 should read "related" rather than "relating."

o. Footnote 19 to the Report states (p. 3 at p. 37), in discussing CIA's covert action role, that: "The CIA's real role is therefore spelled out in a series of top secret NSC directives (NSCIDs)." This is inaccurate. Covert action directives, such as the originating 10/2, are NSC Directives and not NSCIDs, the latter being a different series. The Report is led astray here by its reliance on poor or ill-informed sources. The last sentence of the footnote, based on a statement in Ransom's book, states that the DCI's participation in NSC meetings "suggests that the scope of Agency operations may be largely self-determined." The fact that the President presides over the NSC, whose membership includes the Vice President and the Secretaries of State and Defense, among others, would seem to negate this suggestion.

p. The second half of p. 3, par. 3 in the Report is somewhat confused. The operations authorized by NSC 10/2 were originally handled (commencing in June 1948) by a component of the Office of Special Operations. Mr. Wisner came in to take over these operations in the newly created Office of Policy Coordination on 1 September 1948. The statement in par. 3 that "A section was thereupon created by President Truman within the CIA" is placing too much administrative detail on the President. He merely assigned the functions to CIA by his approval of NSC 10/2. Nor, as this paragraph implies, was the Office of Special Operations created at the same time as OPC. The former Office was established (originally in CIG) on 11 July 1946. The Report is also incorrect in stating that the control of both Offices--OSO and OPC--was shared with the State Department and the Pentagon. This was true of OPC, which received policy guidance from State and the Pentagon, but was never true of OSO which was completely controlled by CIG/CIA from its inception. Even with the merger of the two Offices into the Directorate of Plans, CIA did not have "sole control over secret operations of all types." Policy guidance for covert action still continued to be given through a succession of mechanisms, starting with the Psychological Strategy Board, succeeded by the Operations Coordinating Board, down through the current Forty Committee.

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g. As is customary, no comment will be made on the accuracy or inaccuracy of the CIA personnel and budgetary figures in the Report (top of p. 4). The use of the word "trade" in this paragraph (l. 9) is puzzling. However, a check of the source in footnote 24 (p. 4 at p. 37), the book by Marchetti and Marks, reveals that the word "trade" in the Report should be "training."

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II. DOMESTIC ACTIVITIES AND THEIR LEGAL BASIS

A. Domestic Surveillance and Infiltration

a. Footnote 25 (p. 4 at pp. 37-38) cites a New York Times article of 29 December 1974 as stating that a former CIA agent said he was one of several assigned to spy on anti-war groups in New York between 1968 and 1972. The Report does not take note of DCI Colby's Statement before the Defense Subcommittee of the House Appropriations Committee on 20 February 1975. In that Statement, the Director said, regarding the allegations in the cited New York Times article, that:

Another allegation given prominence was apparently based on the statements of an anonymous source As I told the journalist involved before the story was printed, it does not bear any relation to CIA's actual activities in that area. Nor can we identify any former employee who answers to the journalist's description of his source. I fear that the journalist has been the victim of what we in the intelligence trade call a fabricator.

Footnote 25, in its second paragraph also cites a New York Times article of 8 January 1975 to the effect that CIA's mail opening operations were "alleged to have started in the summer of 1953." Actually, the Times article gives the date as "the summer of 1958."

b. The Report (p. 4, par. 3) states that in 1967, CIA and other government agencies adopted a statement of principles which provided that "the fact of government research support should always be acknowledged by sponsor, university and researcher." The footnote sources this quote to a law journal article by Prof. Walden, who in turn sources it to the New York Times of 12 August 1967. A review of our copy of the Times at the cited page discloses no such quotation.

c. The Report discusses (p. 5, ll. 1-6 and par. 1) the subject of CIA support to the National Student Association (NSA). The CIA aim was to preserve the freedom and integrity of NSA in whatever positions it chose to take. The Report distorts the NSA connection, which in part allowed the members to gain parliamentary expertise face to face with communist

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front groups abroad. Similar distortion appears in the lengthy quotation from Prof. Walden (p. 5, par. 1). He quotes one officer of NSA. Others could have been quoted per contra. It is also noted that footnote 32 (p. 5 at p. 38), which is the citation to the Walden article, gives the wrong page for the quote. It should be p. 188, not p. 185.

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B. Statutory Limitations Upon CIA Activities in the United States

a. There are several references in this section to President Truman's "executive order" of 22 January 1946. As noted above, (id.), this document is not an executive order; it is a Presidential Directive.

b. The opening sentence in section B (p. 5) states that "The only express statutory limitations upon the activities of the CIA are those found in section 102(d)(3) of the National Security Act of 1947 ... which provides that it shall be the duty of the Agency" The text then continues by quoting parts of sec. 102(d)(3). The only part of sec. 102(d)(3) quoted in the text here which contains a limitation upon Agency activities is the proviso against police subpoena, law-enforcement powers or internal-security functions. The earlier part of the quoted text sets forth duties and responsibilities and is not a limitation. The second quoted proviso regarding the protection of sources and methods is also not a limitation, and in any event it is a responsibility placed on the Director of Central Intelligence and not on the Agency.

c. The Report states (p. 6, par. 2) that, as finally passed, the National Security Act of 1947 "expressly adopted, generally verbatim, the powers and duties of the Agency and limitations thereon contained in the Order [sic]." One omission was paragraph 9 of the Executive Directive of 22 January 1946, quoted (p. 6, par. 1) in the Report. This limitation had originally been included in the Presidential Directive as a "late starter" at the request, or on behalf, of the FBI. Subsequently, CIG found that this proviso might make it impossible to talk to American travellers who had been abroad or American businessmen who could have information of value to contribute about matters overseas. After consultation with FBI Director Hoover, the latter stated that it was not the intent of the Bureau to block such activities; as a result, and because it was redundant, paragraph 9 of the Directive was omitted from the National Security Act as finally adopted.

d. The Report states (p. 6, par. 3) that:

[T]here was no doubt in the minds of the supporters of the National Security Act of 1947 that the Agency's ... activities in this country were to be strictly limited to those directly related to the correlation and evaluation of such [foreign] intelligence.

This is not strictly correct. CIG had commenced collecting foreign intelligence from knowledgeable sources in the U.S. as a service of common concern, as

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noted in paragraph c. above. General Vandenberg, the DCI, had alluded to this in a passing remark in his Statement to the Senate Armed Services Committee in support of S. 758. In that Statement he referred to the "great open sources of information" available, including "general information from people with a knowledge of affairs abroad."

e. The Report (p. 6, in the first of two quotations from General Vandenberg's Statement at the bottom of the page) omits the word "to" between the words "and" and "avoid" in the second line of the quotation. Footnote 38 (p. 6, at p. 38) misspells General Vandenberg's name "Vandenburg."

f. The Report (p. 7, par. 2) cites Secretary Forrestal as "Secretary of War." Mr. Forrestal was never Secretary of War; he was, at that time, Secretary of the Navy.

g. The Report (p. 8, pars. 2, 3) discusses the "Keith" case in paragraph 2 and then tries to link it up, in a negative way, with the discussion in paragraph 3. The result is a non sequitur. The discussion in paragraph 2 of the Report involves the definition and alleged interchangeable usage of the terms "domestic security" and "internal security" by the Court in "Keith." Mention is then made of the examples that Court used for what is, and what is not, "domestic security." Paragraph 3 of the Report then starts off with the statement that:

The Keith case notwithstanding, however, Messrs. Helms and Colby appear to have adopted a different definition of the term "internal security"

Use is then made of two quotations, one from Mr. Helms and one from Mr. Colby, to illustrate the attempted point. The only problem is that the quotes have nothing to do with a definition of "internal security," but rather relate to the respective responsibilities of the FBI and CIA for counterintelligence activities within the United States and abroad. (It should be noted in the second paragraph of the quotation from Mr. Colby's Statement (p. 8), that the text does not have the word "the" before "C.I.A.") The Report then continues (pp. 8-9) to discuss the case of Heine v. Raus. While the Court, in the "Keith" case did not define what internal security is, at least the Court, in the Raus case, gave one instance of what it is not.

h. Under the general heading "Domestic Activities Viewed as Permissible by the CIA," the Report lists (pp. 9-10) 18 items. Several are taken from the Hearing on the Nomination of Mr. Colby to be DCI. (Although included in the published record of the confirmation hearing, the cited items are actually taken from written replies to questions submitted by Senator Symington.)

p. 12

It would have been useful if the Report had included Mr. Colby's preamble sentence in answering Senator Symington's questions regarding CIA domestic activities. That sentence reads:

Provided that CIA's activities within the U.S. are in the prosecution of foreign intelligence and do not contravene U.S. law, I believe they do not conflict with the statutory restriction against CIA involvement in domestic affairs. (Colby, Hearing at p. 157)

#1--On the List in the Report (p. 9) is "Recruiting, screening, training and investigating employees." This is sourced (fn. 46, p. 9 at p. 38) to the Colby nomination hearing. In the cited portion (which is the Colby written answer to the Symington question on domestic activities), Mr. Colby does not mention "investigating employees."

#6--The Report (p. 9) lists CIA contracting with U.S. industrial firms or research institutes for "research and development of technical intelligence devices." This is sourced (fn. 51, p. 9 at p. 39) to the Colby Report to the Senate Appropriations Committee, 15 January 1975. In that Report the DCI, in the context of #6, refers to "technical intelligence capabilities" a much broader term than "devices," although earlier in his text the DCI did use the phrase "technical intelligence devices." (However, that phrase appears on p. 30, col. 3 in the New York Times text, whereas fn. 51 cites cols. 4, 5.)

#13--This item is stated in the Report (p. 10) as "Protecting intelligence sources and methods within the Agency." This is sourced (fn. 58, p. 10 at p. 39) to the Colby confirmation hearing (at p. 25). That citation is a general discussion of the subject between Mr. Colby and Senator Symington, and does not include specifically the strange phrasing of #13 regarding such protection "within the Agency." In fact, Mr. Colby states in his answer that:

My interpretation of that particular provision, Mr. Chairman, is that it gives me a charge but does not give me authority. It gives me the job of identifying any problem of protecting sources and methods, but in the event I identify one it gives me the responsibility to go to the appropriate authorities with that information and it does not give me any authority to act on my own.

#18--This item regards the supplying of equipment and safe houses to "other government officials" if used for a legitimate purpose (p. 10). It is sourced (fn. 63, p. 10 at p. 39) to Colby's confirmation hearing. In those hearings

p. 12

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#1--On the List in the Report (p. 9) is "Recruiting, screening, training and investigating employees." This is sourced (fn. 46, p. 9 at p. 38) to the Colby nomination hearing. In the cited portion (which is the Colby written answer to the Symington question on domestic activities), Mr. Colby does not mention "investigating employees."

#6--The Report (p. 9) lists CIA contracting with U.S. industrial firms or research institutes for "research and development of technical intelligence devices." This is sourced (fn. 51, p. 9 at p. 39) to the Colby Report to the Senate Appropriations Committee, 15 January 1975. In that Report the DCI, in the context of #6, refers to "technical intelligence capabilities" a much broader term than "devices," although earlier in his text the DCI did use the phrase "technical intelligence devices." (However, that phrase appears on p. 30, col. 3 in the New York Times text, whereas fn. 51 cites cols. 4, 5.)

#13--This item is stated in the Report (p. 10) as "Protecting intelligence sources and methods within the Agency." This is sourced (fn. 58, p. 10 at p. 39) to the Colby confirmation hearing (at p. 25). That citation is a general discussion of the subject between Mr. Colby and Senator Symington, and does not include specifically the strange phrasing of #13 regarding such protection "within the Agency." In fact, Mr. Colby states in his answer that:

My interpretation of that particular provision, Mr. Chairman, is that it gives me a charge but does not give me authority. It gives me the job of identifying any problem of protecting sources and methods, but in the event I identify one it gives me the responsibility to go to the appropriate authorities with that information and it does not give me any authority to act on my own.

#18--This item regards the supplying of equipment and safe houses to "other government officials" if used for a legitimate purpose (p. 10). It is sourced (fn. 63, p. 10 at p. 39) to Colby's confirmation hearing. In those hearings

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(at p. 22), Mr. Colby only discusses providing such facilities to White House employees, not "other government officials."

i. In the section of the Report (p. 10) under the heading "Domestic Activities Viewed as Prohibited by the CIA," four items are listed, three of them sourced. The source of Item #2 is not given, but it is taken from the Colby nomination hearing (at p. 24).

j. The next section of the Report (pp. 10-11) is devoted to "Domestic Activities of the CIA in 'Gray Area.'" It comprises seven items.

#2--Places in the "gray area" the providing of covert assistance to American educational or voluntary organizations. However, footnote 68 (p. 10 at p. 39) states:

Such assistance has been banned by the CIA by internal regulations, but this may have occurred not because the activity was thought to be unlawful but as a matter of policy.

The banning of such assistance was a result of the Report of the Katzenbach Committee on 29 March 1967. It placed this ban in its Statement of Policy, and the President, in a White House release on 29 March, stated: "I accept the Committee's proposed statement of policy and am directing all agencies of the government to implement it fully." The President's Statement and the Report were printed verbatim in the New York Times on 30 March. Thus, while footnote 68 is correct in that the legality of these acts was not at issue, the banning of them was not so much a matter of policy, but rather the result of a Presidential order to implement the ban as government-wide policy. Therefore, it would appear that the Report is incorrect in placing #2 in the "gray area." It is an activity viewed as prohibited by the CIA.

#3--Places in the "gray area" "Inserting agents 'into American dissident circles in order to establish their credentials for operations abroad.'" It might present a fairer picture, if the Report had included the beginning of the sentence it quotes, which comes from the Colby Statement of 15 January 1975, and reads: "In order to obtain access to foreign circles, the Agency also recruited or inserted about a dozen individuals into . . ." Similarly, in footnote 69 (p. 10 at pp. 39-40), which sources #3 to the Colby Statement, it would have left a much less sweeping and more accurate picture if the entire Colby sentence had been quoted. The footnote says: "In 1973, such information [on American dissidents] was limited to that collected abroad." The full Colby sentence reads:

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In 1973 this program was reviewed and specific direction given limiting it to collection abroad, emphasizing that its targets were the foreign links to American dissidents rather than the dissidents themselves

#7--This item (p. 11) places in the "gray area" various CIA activities (all domestic) such as surreptitious entry, physical surveillance, wiretapping, opening mail, and maintaining files on congressmen. Footnote 73 (p. 11 at p. 40), cites the Colby Statement of 15 January 1975 and a New York Times article of 6 March 1975 as the sources of these charges (the latter being on the DCI's appearance before Congresswoman Abzug's subcommittee). The footnote states that: "It is not clear whether Mr. Colby thought these activities were permitted or prohibited." A reading of the Colby statement, however, indicates that virtually all of these activities have been stopped by CIA. This is a rather clear expression of his view that they are in the "prohibited" category rather than in a "gray area."

k. In the conclusions which the Report draws (p. 11) from its listing of domestic activities allegedly viewed by CIA as "Permissible," "Prohibited," or in a "Gray Area," it states that Mr. Helms' view of foreign intelligence is "information associated with foreign happenings." Footnote 74 (p. 11 at p. 40) cites the Helms Statement of 16 January 1975 before the CIA Subcommittee of the Senate Armed Services Committee as the source. It would have been preferable if they had cited the whole Helms phrase, which reads: "information associated with foreign happenings that affect the national security." [Emphasis added.]

l. Again, in its first conclusion (see par. k above) the Report (p. 11) cites the Helms Statement of 16 January 1975 to the effect that the Agency's reason for being is to collect intelligence abroad. Footnote 76 (p. 11 at p. 40) argues: "It is interesting to note, however, that as originally envisioned, the CIA was to be, primarily a correlator and evaluator of intelligence gathered by others." This is incorrect. The members of the congressional committees who established CIA were well aware of CIA's role in clandestine collection. It was thoroughly considered in executive sessions by the committees, and CIA's primacy in this field was understood. It was also mentioned during the floor debate in the House.

m. Again, in its first conclusion (see par. k above), the Report states (p. 11) that:

The support structure in the United States which the Agency believes is necessary to carry out its intelligence function now permeates our national life and society to a very substantial extent.

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It is difficult to cope with so gross an exaggeration of fact. The Report, which often seeks definitions in its text, does not indicate what a "very substantial extent" means. It then speaks of the "Agency's intrusion into domestic areas only distantly related to the field of foreign intelligence." The many citations in the Report to the statements of DCI Colby and Ambassador Helms should be ample examples that virtually all of the CIA "transgressions" were directly related in some manner to the foreign intelligence field or the protection of its intelligence sources and methods.

n. Conclusion #2 of the Report at this point (p. 11) presents the views of the committees which drafted it, and it is not CIA's role to argue with these conclusions, erroneous though the Agency feels they may be. This analysis is confined to errors in fact in the Report. However, it should be noted that in the last paragraph on page 11, the Report states that it is the Agency's view that the DCI's responsibility to protect intelligence sources and methods from unauthorized disclosure "constitutes authority to protect not only CIA files and sources, but all government documents and sources." We know of no responsible official who has ever expressed this view; or that the DCI's responsibility extends beyond the field of intelligence. All of the alleged "transgressions" cited in the Helms and Colby statements and testimony in this connection, have involved intelligence activities or the leaking thereof. In citing Mr. Colby's testimony at his confirmation hearing, footnote 77 (p. 11 at p. 40) only partially states Mr. Colby's view that the protection of intelligence sources and methods provision gives him "only the job of identifying a problem but no authority to deal with it." However, a few lines further along in this Colby testimony (at p. 25), Senator Symington asks: "Well, if I understand, if there is a Government official that should have such a responsibility, it should be yourself?" To which Mr. Colby replied: "For the intelligence field, I think it is myself no question about it."

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III. FOREIGN INVOLVEMENTS AND THEIR LEGAL AND CONSTITUTIONAL BASIS

A. Foreign Activities

a. The Report (p. 12, par. 2) takes note of "armed invasion of Cuba at the Bay of Pigs by a small army organized, paid and equipped by the CIA" Footnote 80 (p. 12 at p. 40) sources this to the Colby confirmation hearing and the DCI's Address to the Fund for Peace Conference on CIA and covert action on 13 September 1974. All that Mr. Colby said at his confirmation hearing at the cited page was that:

[A]s a practical matter a covert operation cannot be a very big one because it stops being covert when it gets too big. I think this was the lesson of the Bay of Pigs, among other things.

In his Address, also cited in footnote 80, the DCI said about the same thing.

b. The Report states (p. 12, par. 2) Mr. Colby has emphasized that the appropriate congressional committees were informed of the war in Laos (presumably referring to the CIA role). In his Address, which is cited as a source in footnote 84, (p. 12 at p. 41), Mr. Colby said, and it is quoted here for emphasis, the CIA activities in Laos were "reported to and appropriated for on a regular basis by the authorized elements of the Congress--the war was no secret from them." On 2 May 1961, Allen Dulles, then the DCI, briefed the Senate Foreign Relations Committee on the details of CIA's role in Laos. (This predated the Geneva Accords of 1962 and the "war" in Laos.) Since then, various Senate committees and subcommittees have been fully briefed on CIA's role in Laos on 35 occasions (as of July 1973). As of the latter date, a total of 57 senators have been briefed at one time or another on the CIA role in Laos.

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c. The Report cites (p. 12, par. 2) a statement by Senator Ellender, then a member of the CIA Subcommittee of the Senate Appropriations Committee, that he had not been informed of "CIA plans to spend money on an army of 36,000 in Laos." While the Report correctly sums up Senator Ellender's colloquy with Senators Fulbright and Cranston on this point, Senator Ellender's responses have always been puzzling to us. Commencing in September 1969, Senator Ellender had been at several CIA Appropriations Subcommittee meetings which had covered CIA operations in Laos in some detail. In fact, he had chaired such a briefing in June 1971, less than six months before the statements were made which the Report cites. Whether the Senator's memory failed him, or he felt he should not make an admission because of security, it is impossible to say.

d. The Report states (p. 12, par. 3) that funds were made available to CIA from 1970-73 to be expended in Chile for such activities as "campaigns of anti-Allende candidates." Footnote 87 (p. 12 at p. 41) cites the New York Times of 8 September 1974 as the source. It would have been clearer if the Report had more completely noted the full New York Times statement of that date which cites Mr. Colby's to the effect that such funds had been provided for "anti-Allende candidates in municipal elections last year." [Emphasis supplied.] This is an important distinction, in the light of Ambassador Helms' testimony before the Senate Foreign Relations Committee on 22 January 1975, as reported in the New York Times on 10 February 1975 (fn. 88, p. 12 at p. 44). The article in the Times correctly notes Mr. Helms' denial that any funds were passed to candidates who were running against Allende for the Presidency in 1970.

e. Footnote 88 (p. 12 at p. 41) also cites Part I of the Hearings on ITT and Chile held in 1973 by the Subcommittee on Multinational Corporations of the Senate Foreign Relations Committee, and in particular p. 172 of those hearings (Testimony of ITT Senior Vice President Gerrity). The footnote says that Gerrity held a meeting with William Broe of CIA "on September 29 or 30, 1970." The alternative dates of 29 or 30 September come from a question put to Broe by Senator Church, but the footnote does not cite this testimony although this is where these dates surface. As a matter of fact, the paragraph in which these two dates appear (Hearings, pt. 1, p. 250) is headed "September 29 meeting with Gerrity." Furthermore, p. 172 of the Hearings, which the footnote does cite, describes a memorandum of conversation which Gerrity prepared following his meeting with Broe, and on p. 171 of the Hearings, it states that the memo is dated September 29, 1970. This should have pinned down the date. The footnote then says that Broe "suggested a series of possible actions designed to put economic pressure on Chile." Actually, what the Gerrity

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memorandum said, as quoted on the cited page of the Hearings (p. 172), is that Broe "made suggestions based on recommendations from our [ITT's] representative on the scene and analysis in Washington." Therefore, according to the memo, Broe's "suggestions" were largely based on ITT recommendations, rather than those of CIA, which is rather different from what the footnote suggests. In his oral testimony, however, Gerrity (on p. 172) then characterizes them as Broe's suggestions, as opposed to Gerrity's memo (described above) quoted on the same page. At best, both the footnote and the Hearings are confusing. Senator Church then continues to read from the Gerrity memo the five points that are quoted in footnote 88 (p. 12 at p. 41). In Item 5 of this list in footnote 88, the word "has" has been inserted in the third line of Item 5. This word "has" does not appear in the quoted Hearings at p. 172.

f. The Report cites (p. 12, par. 3) President Ford's press conference of 16 September 1974 (as printed in the New York Times the next day). The Report says:

President Ford subsequently stated that the covert funds had been spent in Chile to "preserve opposition political parties," but said that he would take no position on whether such CIA activities were permitted by international law.

Nowhere in the President's answers (or in the questions which elicited the replies) is there any specific reference to CIA's expenditure of covert funds. In merely quoting President Ford's statement to "preserve opposition political parties," the Report pulls the statement somewhat out of context. The President said:

In a period of time three or four years ago, there was an effort being made by the Allende Government to destroy opposition news media, both the writing press as well as the electronic press. And to destroy opposition political parties. And the effort that was made in this case was to help and assist the preservation of opposition newspapers and electronic media and to preserve opposition political parties.

The Report, as noted above, also cites the President as saying he would take no position on whether such CIA activities were permitted by international law. What the President said, in answer to a subsequent general question, and without specific mention of CIA, was that, "I'm not going to pass judgment on whether it's permitted or authorized under international law."

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g. In footnote 89 (p. 12 at p. 41), the Report cites The Invisible Government by Wise and Ross as the source of describing CIA "as organizing a putsch in Iran in 1953." Actually, Wise and Ross do not use the word "putsch" in their section on the Iran operation. They describe the operation as a "coup" or "coup d'etat." The footnote cites the same source when saying that CIA arranged a coup in Guatemala in 1954, replacing "the government of Jacobo Arbenz Guzman with that of Colonel Elfege Monzon" This is not completely accurate. The principal figure in the overthrow was Colonel Castillo Armas. Arbenz resigned on 27 June 1954, and was replaced by Colonel Diaz, who resigned on 29 June. Col. Monzon then headed a junta, which Castillo Armas joined. The latter became head of the junta in early July; the other members resigned at the end of August, leaving Castillo Armas in complete control, and he was proclaimed President following elections shortly thereafter.

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B. Statutory Framework for CIA Covert Political Operations

a. The Report correctly cites (p. 13, par. 1) 50 U.S.C. 403(d)(5) as the legal justification used for the performance of covert operations. Footnote 90 (p. 13 at pp. 41-42) then states that subsections (d)(3) and (4) "are sometimes also used to justify the CIA's covert activities." The footnote specifically quotes the protection of sources and methods proviso in subsection (d)(3). This is incorrect. Neither subsection (d)(3) nor (4) is used as the legal basis for covert action operations abroad. Footnote 90 misquotes Director Colby's 15 January 1975 Statement to the Senate Appropriations Committee when it cites him as making the distinction between "clandestine operations to collect foreign intelligence and counter-intelligence responsibilities" on the one hand and "covert foreign political or paramilitary operations" on the other. What the DCI enumerated was "To conduct clandestine operations to collect foreign intelligence, carry out counterintelligence responsibilities abroad, and undertake--when directed--covert foreign political or paramilitary operations."

b. The Report states (p. 13, par. 1):

Prior to the passage of the Foreign Assistance Act of 1974 ... foreign covert operations not directly linked to the gathering of intelligence were justified under the fifth and last of the duties established for the CIA under the National Security Act of 1947.

This implies that such activities can no longer be carried out under that provision of the National Security Act. This is incorrect, as section 50 U.S.C. 403(d)(5) coupled with the inherent powers of the President are still the basic authority for covert action operations. Section 32 of the Foreign Assistance Act of 1974 amends the Foreign Assistance Act of 1961 by adding a new sec. 662 which is designated "Limitation on Intelligence Activities." This new section does not change the basic authorizing legislation; it merely adds some procedural limitations. Nor does the Foreign Assistance Act use the phrase "foreign covert operations not directly linked to the gathering of intelligence." There is no such direct linkage, although intelligence is an occasional by-product of covert action and covert action is a function of intelligence. What the Act says is "operations in foreign countries, other than activities intended solely for obtaining necessary intelligence."

c. Footnote 95 (p. 13 at p. 42) is a miscitation. The correct citation is 50 U.S.C. sec. 402(b)(1).

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d. In quoting sec. 402(d) of the National Security Act (p. 14, l. 4), the Report starts the quotation "to make" The word "to" does not appear in the statute at that point. The section is also miscited in footnote 97 (p. 14 at p. 42). The correct number of the section is 402(d),

e. Commencing with part III, B, of the Report (p. 12), the authors attempt to show that CIA has no statutory authority to conduct covert action operations, and that the National Security Council (NSC) has no statutory basis for delegating such authority. This is summarized in the Report (p. 14, par. 1), which states that the powers which Congress gave the NSC "were either of an advisory nature or were related to the coordination of the policies and functions of the other agencies in the national security area." Of course the NSC powers quoted here are advisory; no agency of the Executive branch can direct the President. The latter power is often within the jurisdiction of the legislative and judicial branches. The Report does not point out here that the President is a member of the NSC--its presiding officer. However, as President, he can accept or reject its recommendations; an NSC Directive is the President speaking through his advisors in council. Furthermore, in describing the NSC's powers as "of an advisory nature or were related to the coordination" The Report overlooks section 103(d) of the National Security Act of 1947, the preamble of which states that "... it shall be the duty of the Agency, under the direction of the National Security Council" [Emphasis supplied.] The Act then lists five duties of the Agency, including the one cited in the Report as the source of CIA's statutory claim to perform covert action operations--"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," [Emphasis supplied.] Here again, the NSC has directive authority. The Report concludes (p. 14, par. 1) from its reasoning that "Nowhere is the NSC directly given the power to conduct political operations." This is correct in that the NSC is not an operational agency of the Government. Its statutory authority is to advise, coordinate and to direct the activities of CIA. The Report then continues that it is difficult for CIA to maintain that it conducts its covert action operations as a delegation of power from the NSC, as the NSC has no such power to delegate. CIA does not claim such a delegation, but rather bases its authority in this field on its statutory provisions under the direction of the NSC,

f. The Report states (p. 14, par. 2) "in the provision of the National Security Act of 1947" and proceeds to quote portions of 50 U.S.C. 403g (fn. 98, p. 14 at p. 42). The quoted provisions are not a part of the National Security Act of 1947. They are taken from sec. 7 of the Central Intelligence Agency Act of 1949. It is interesting to note that, at the end of the text of

50 U.S.C. 403g (which is the codification of sec. 7 of the CIA Act of 1949), there is an explanatory sentence which reads: "Section was not enacted as a part of the National Security Act of 1947 which comprises this chapter." In quoting sec. 403g, the Report states further that:

This means either that nonintelligence covert activities were not contemplated by Congress or that such activities were not intended to be exempted from the disclosure laws, an interpretation which is unlikely since it would render any such activities ineffective.

The basic error in this statement is that CIA does not conduct any "nonintelligence covert activities"; such activities are all "related to intelligence affecting the national security," as provided by the statute.

g. The Report (p. 14, par. 3) is rather loosely drawn. It mentions "CIA's covert activities not directly related to the gathering of intelligence." Covert activities, while employing many intelligence sources and techniques, are not primarily used for the "gathering" (i.e., collection) of intelligence, although such collection may well be a by-product of such operations. Furthermore, the Report continues, such operations are sometimes "inconsistent" with CIA's "basic purpose, that of gathering sufficiently detailed and accurate information to enable our Government to formulate foreign policy." The "gathering" of intelligence is not CIA's basic purpose; it is one of its duties. Such intelligence is normally of small value until it is collated and evaluated, two "basic" duties of CIA, in addition to collection. Nor is the end product of use only in the formulation of "foreign policy"; it is used in the formulation of policies affecting the national security, a much broader term. The Report then states that: "To the extent that the CIA's activities conflict with rather than assist in the formulation of foreign policy, congressional purpose would appear to have been thwarted." CIA activities do not "conflict" with U.S. foreign policy, they are supportive. The NSC, and its committee mechanisms for the approval of CIA covert activities, to say nothing of the President, would certainly discipline any Director who acted counter to American national security (including foreign) policy. (It should be stressed that "national security policy," as used herein, does not include any internal security functions.)

h. The Report (p. 14, par. 4) quotes from a law review article by Prof. Walden, in which he states that, in CIA's legislative history, there is nothing apparent that Congress intended that the Agency engaged in "subliminal warfare." Further, Walden states that "The CIA was touted as being an exclusively an intelligence coordinating body, and it was created as such." These sentences follow Prof. Walden's discussion, in his cited

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article, of both the National Security Act of 1947 and the Central Intelligence Agency Act of 1949. By his phrase "subliminal warfare," one presumes that Walden is talking about covert action operations. It is true that there is nothing in the open congressional debates of any moment during the discussions of the National Security Act of 1947. Covert action was not a factor at the time. However, it was certainly discussed in the closed hearings during consideration of the Central Intelligence Agency Act of 1949, as covert action operations were becoming an important factor by then. Walden is wrong, moreover, when he says that CIA was created "exclusively" as an "intelligence coordinating body." As stated elsewhere in this paper, the Congress was well aware that CIA would correlate and evaluate intelligence for the senior policy makers of the government (i. e., intelligence production), and the appropriate committees heard testimony in executive sessions regarding the functions of CIA in the field of clandestine collection. Footnote 101 (p. 14 at p. 42) again cites Walden's article at p. 82. It is interesting to note that he there quotes testimony by Admiral Nimitz that the National Security Act of 1947:

[W]ould establish an organization known as the Central Intelligence Agency, charged with the responsibility for collection of information from all available sources, including Government agencies [Emphasis added.]

Mr. Walden might also have quoted the remarks of Cong. Holifield during the floor debate, when he said:

I want to impress upon the minds of the Members that the work of this Central Intelligence Agency, as far as the collection of evidence is concerned, is strictly in the field of secret foreign intelligence, what is known as clandestine intelligence.

i. The Report (p. 14, par. 4) misquotes Walden's correct quote of Cong. Patterson. The phrase should read "operational procedures," not "operation procedures."

j. The Report (pp. 14-15, commencing at last par. on p. 14) is in error (and to some extent self-contradictory) in its statement that: "CIA was intended for intelligence gathering purposes only." In support of this statement, the Report cites the House Committee Report accompanying the National Security Act of 1947 to the effect that CIA was created to furnish information to the NSC so that the latter might have available "adequate information" in advising the President. What the Report is implying here is that CIA will furnish information, collected from all sources, collated, and properly evaluated for NSC deliberations. The quotations from the House Report in this

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paragraph are correctly quoted, with citation to footnote 103 (p. 15 at p. 42) which correctly cites the House Report but adds "as quoted in Wise & Rose," [The Invisible Government] at p. 10. First one must note that the name of the second author of that book is Ross, not Rose. Secondly, there is no reference, nor any quotations, from the House Report at p. 10 of their book. That page is about the Bay of Pigs.

k. The Report states (p. 15, par. 1):

... the only clear congressional authorization for the CIA to conduct covert activities ... is contained in Section 663 of the recently enacted Foreign Assistance Act of 1974

This is an incorrect reference. The section of the Foreign Assistance Act of 1974 which they are citing is section 32 of that Act. Section 32 enacts an amendment to the Foreign Assistance Act of 1961, to be numbered sec. 662 in the latter Act. The Report then quotes the text of the amendment, "Sec. 663." This is also not the correct citation. The correct citation for the amendment is section 662 which is the section the Report quotes, although not completely accurately. Subsection (b) of the amendment should read:

(b) The provisions of subsection (a) of this section shall not apply during military operations initiated by the United States under a declaration of war approved by the Congress or an exercise of powers by the President under the War Powers Resolution. [Emphasis added,]

The underlined portion of subsection (b) was not quoted in the text of the amendment in the Report, and there is no indication that it was deliberately omitted. Furthermore, footnote 105 (p. 15 at p. 42), which gives the legal citation for the Foreign Assistance Act of 1974, misdates it as December 31, 1974. The correct date is December 30, 1974.

1. The Report states (p. 16, l. 7) that the "basic concern" of section 663 [sic; section 663 has no applicability to CIA] is "the expenditure of funds by the CIA." This is incorrect. The "basic concern" of section 662 is a matter of foreign policy considerations--to allow the appropriate committees of the Congress to know what covert action operations are being conducted by CIA in support of American foreign policy, and to make certain that such operations are at least known to the appropriate committees of the Congress which deal in foreign affairs.

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B. [probably should be C] Imposition of Substantive Standards
in Foreign Political Activities

a. Footnote 106 (p. 16 at p. 42) states that one of the Bar Association committees which prepared this Report suggests that Congress should take action to prevent CIA from engaging in "foreign political operations" and "assure that the CIA will confine its activities to those intelligence-related activities permitted by its charter." CIA does not engage in activities abroad which are not "permitted by its charter."

C. [probably should be D] International Law

a. The Report (pp. 16-18) argues that CIA activities which violate our international treaties abrogate the international obligations of the United States. Various treaty provisions and citations to legal comments are set forth. However, the weakness of these arguments is suggested in the Report (p. 18, par. 3) when it states that "some questions may exist under the principles of international law." Furthermore, the Executive and the Congress have clearly intended, in expressions of their opinions, that CIA continue its traditional tasks, including covert action. No obligation of the United States undertaken pursuant to international law was intended by the United States Government to modify the scope of these tasks.

b. The Report cites (p. 16-17, par. 4, at p. 17) certain remarks by Prof. Quincy Wright as published in the Proceedings of the American Society of International Law (1969). The correct citation is at pp. 28-29 of the Proceedings, not pp. 8-9.

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D. [probably should be E] Constitutional Issues Regarding Foreign Covert Political Activities

a. Footnote 123 (p. 19 at p. 43) cites the editor of the cited work as N. Farrand. It should be M. for Max.

b. The Report (p. 19, par. 5, p. 20) cites the Bay of Pigs operation as a usurpation of congressional power "to raise and support Armies" and to "declare War" as set forth in the Constitution. This is highly doubtful. There was no war; and nothing in the Constitution prohibits Cubans from banding together to attempt to regain their homeland, regardless of how financed. The constitutional concept that Congress would have the authority to "raise and support Armies" would appear to be addressed solely to their right with regard to American troops.

c. The Report (p. 20, II. 1-3) also attacks as unconstitutional CIA support of a "large army in Laos without congressional knowledge." This has been discussed under III. A., supra. Suffice it to say again what Mr. Colby is quoted as saying in par. III. A. b., supra, namely that CIA activities in Laos were "reported to and appropriated for on a regular basis by the authorized elements of the Congress--the war was no secret from them." It is to these "authorized elements" that Congress has delegated the authority to approve CIA appropriations. The Report, therefore, is in error (p. 20, II. 5-6) in saying that the Congress was not involved in either the Bay of Pigs or the Laotian operations. It should also be recalled that Senator Fulbright, Chairman of the Senate Foreign Relations Committee, had been apprised of the forthcoming Bay of Pigs operation and sat in on President Kennedy's climatic meeting on 4 April 1961. While he expressed vigorous opposition to the plan as being out of proportion to the threat, his grounds for opposition were more on moral issues than any usurpation of congressional authority; and, despite his personal opposition, Senator Fulbright maintained the security of the operation.

d. Virtually the whole text of the Report at this point (p. 20, par. 1 through p. 21, l. 4) is based on erroneous premises. The whole text here ignores the role and position of the Presidency, the opinion of a long succession of Attorneys General, and the approval of the congressional leadership and designated subcommittees of the Congress. The Report states (p. 20, par. 1) that, in actions such as the CIA role in Chile, CIA "apparently" breached treaties and undermined the constitutional role of the Senate. This has been discussed under III. C., supra. To reiterate what we said there: Covert action is a traditional part of the right of self-preservation. The Executive and the Congress have clearly intended, in expressions of their opinions, that CIA continue its traditional tasks, including covert action.

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No obligation of the United States undertaken pursuant to international law was intended to modify the scope of these tasks. Even the Report is not sure of its ground here, when it merely alleges that CIA "apparently" breached treaties.

e. The Report (p. 20, par. 2) recommends, inter alia, that CIA have an internal "Inspector General" with a right to take administrative action, and the mandatory rotation of senior officials. CIA has long had an Inspector General, reporting directly to the Director of Central Intelligence. In the tradition of such positions, it is a staff responsibility, but his recommendations are not lightly taken. Virtually all senior CIA officials are rotated with some degree of regularity.

f. The Report states (p. 20, par. 3) that Congress has relinquished to CIA "its own constitutionally-based responsibility in the formulation of our foreign policy." With certain special exceptions not pertinent here, the Constitution is silent on the congressional role in foreign policy, outside of the power of appropriation. Furthermore, CIA does not make foreign policy by its actions. That is the prerogative of the Executive, and CIA's role is supportive.

g. The Report states (p. 20, par. 6 - p. 21, l. 4) that much classified and sensitive information has been furnished to the Congress by the Government over the years under appropriate safeguards as to disclosure. However, the leaking of CIA material can be costly to the very lives of CIA personnel or its sources abroad, and can have serious effects on the Agency's liaison arrangements with foreign governments. To describe CIA personnel, as the Report apparently implies, as "a small number of unaccountable bureaucrats" is completely untrue and an unwarranted and undeserving slur on a very dedicated group of public servants totally accountable to the designated committees in the Congress.

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IV. BUDGETARY PROCEDURE AND ITS STATUTORY BASIS

A. Funding Arrangements: The Present Process of Appropriation

a. The Report queries (p. 21, par. 1) why Congress has not acted sooner to prevent CIA from "carrying out foreign policy abuses." While it may be that CIA has conducted activities abroad with which some members of the Congress might disagree as a matter of policy, CIA has never carried out such "foreign policy abuses."

b. Footnote 135 (p. 21 at p. 43) states that the description of CIA budgetary procedures is "adapted" from an article by Robin Schwartzman in the N.Y.U. Journal of International Law and Politics. At the cited pages in the Schwartzman article, she in turn gives the source of some of her information as a telephone interview with "Samuel Preston, Staff Assistant, House Appropriations Committee." Preston's first name is Ralph, not Samuel. The Report (p. 21, par. 3) is in error in stating that the CIA budget is considered by the Intelligence Subcommittees of the Appropriation Committees of the House and Senate. While it qualifies this statement by saying "Until the present Congress," it does not state that, commencing with the present (94th) Congress, the CIA budget is handled by the full Defense Appropriations Subcommittee in the House. The Report is generally correct in stating that the Senate Intelligence Appropriations Subcommittee does not keep a stenographic transcript of the CIA hearings. However, there have been occasions in the past when such transcripts were made, and such transcripts have been made in the current Congress. The Report then states that once the Subcommittee decides the amount of the CIA budget, "it then divides up and disguises it in various appropriations." Actually the locations in which the CIA budget will be placed are decided by the Agency and OMB in advance; the subcommittees reach a judgment as to final amounts and approve the final allocations.

B. Statutory Basis and Constitutionality of Appropriations Process

a. The Report states (p. 22, par. 1) that section 6 of the CIA Act of 1949 "provides," and then quotes the Act. Footnote 144 (p. 22 at p. 44) correctly cites the section as quoted as 50 U.S.C. § 403f. It is therefore misleading for the text to cite this as section 6 of the Act of 1949, because the quoted text reads slightly differently because of the codification references in the quote. Similarly, the Report gives a few lines of what it denotes as section 10(a) of the CIA Act of 1949, while footnote 145 (p. 22 at p. 44) gives the Code citation. Actually here there are no differences in the quoted material.

b. The Report (p. 22, par. 3 - p. 23, l. 6) suggests that, in passing the CIA Act of 1949, Congress did not intend to exempt CIA from substantive limitations on expenditures enacted by subsequent Congresses, "but only to free it from compliance with technical funding limitations." The Report finds support for this suggestion in the fact that section 6(a) of the 1949 Act is followed by several sections [presumably secs. 6(b)-(e)] "exempting the CIA from other technical limitations" This is a misreading of the statute, because the limitations in subsecs. 6(b)-(e) in effect authorize CIA freedom from certain general statutory limitations, but these are not limitations on appropriations as suggested by the Report and the law journal article cited in support (fn. 147, p. 23 at p. 44). The authorizations for CIA expenditures contained in section 10(a) of the CIA Act of 1949 (Report at p. 23, ll. 6-10) are not limitations on appropriations. Most of these items are not new; they are similar in language to the OSS appropriations language.

c. The Report is quite misleading (p. 23, par. 1) in its presentation and "quotation" from Admiral Hillenkoetter's letter to Chairman Tydings. This paragraph attempts to give "Further support for the view that the 1949 Congress did not intend to exempt the CIA from future substantive limitations on expenditures." It then "quotes" Admiral Hillenkoetter's letter to Chairman Tydings of the Senate Armed Services Committee, stating that the DCI "assured Congress" that: and then giving the quote. However, the material "quoted," although it does appear in the Admiral's letter, is material that is itself in quotation marks there which the Admiral quoted from the Senate Committee Report which accompanied the CIA Act when it was first reported out in 1948. Thus, the quotation is not the DCI assuring the Congress, but rather the Congress assuring the American people. Furthermore, the material quoted commences with the phrase "In almost all instances. . . ." This is true. Most of the provisions of the Act of 1949 have to do with "housekeeping" activities, such as procurement, travel, overseas

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allowances, and the like. These are all modeled on, or allow the use of, legislation already on the books, such as the Foreign Service Act of 1946 and the Armed Services Procurement Act of 1947. What is different are the provisions with regard to appropriations, certain expenditures of funds, and exemptions from limitations on appropriations.

d. The Report states (p. 23, par. 2) that "An identical assurance [as cited in the previous paragraph of the Report, which is commented on in par. d, supra] was given to the House of Representatives by the sponsor of the bill, Representative Sasscer." Footnote 149 (p. 23 at p. 44) in support of this statement cites a law journal article by Prof. Futterman. In that article, Prof. Futterman quotes Cong. Sasscer as follows: "with one or two exceptions ... there is no authority in this bill which at some time or other has not been granted to some other agency of Government" What is important here, is what was omitted at the ellipses from Cong. Sasscer's statement. The quotation actually reads: "... with one or two exceptions to which your attention will be drawn" [Emphasis supplied.] The Congressman then went on to an exposition of the proposed legislation, section by section.

e. The Report states (p. 23, par. 3) that the authority of the 1949 Act concerning expenditures "does not free the CIA from compliance with later substantive restrictions on spending, such as those contained in the Foreign Assistance Act of 1974." The implication in this statement is that CIA does not comply with restrictions which are specifically directed at the Agency's expenditures. Obviously, the Agency does comply with such restrictions.

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C. The Present Accounting Procedure

a. The Report states (p. 23, par. 4) that "No agency within the executive branch has a statutory duty to audit CIA expenditures" In fact, there is no agency in the executive branch authorized to audit any agency of the Government. Such audits are performed by the General Accounting Office which is a part of the legislative branch.

b. The Report implies (p. 23, par. 4) that OMB treats CIA differently from other agencies of the Government. While it cites the Schwartzman law journal article in support of the text (fn. 152, p. 23 at p. 44), the text of the Report is not as accurate as its source in this respect. OMB gives CIA budgetary requests and submissions as detailed and careful a check as it gives to any agency of the Government.

c. The Report states (p. 23, par. 4 - p. 24, l. 2) that because of CIA's "hidden appropriations procedure," the Treasury's Combined Statement "contains no mention of monies received and expended by the CIA." If this statement were true, the Combined Statement would not be accurate or in balance. But actually the CIA totals are included in the Combined Statement; they are simply not designated as such for reasons of security.

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D. Statutory Basis for the Present Accounting Procedure

Originally the General Accounting Office (GAO) audited CIA's normal departmental expenditures. When it expanded its audit to a management type comprehensive audit, GAO felt it could not do so without access to those CIA expenditures which were placed by law solely on the certification of the Director of Central Intelligence. Therefore, GAO recommended that it withdraw from any CIA audit. This was approved by the House Armed Services Committee.

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E. The Constitutionality of the Accounting Procedure: The Richardson Case

a. The Report states (p. 27, par. 2) that the CIA Act of 1949 allows the DCI "far more authority to operate secretly than any other agency head." This is correct, and that was the intent of Congress when it enacted the law. The Report ignores the Senate debate on 4 June 1974 on the Proxmire amendment which would have the DCI report each year to the Congress, on an unclassified basis, the total figure requested for the Intelligence Community. This proposal would not break the figure down by agency; just one total figure for the Community. The Proxmire proposal was defeated by a vote of 55-23, again showing the intent of Congress on the secrecy of the intelligence budget. It is also interesting to note that the proposed special funding authorizations in the CIA Act of 1949 were approved, when this legislation was being introduced in 1948, by the then-Comptroller General, Lindsay Warren. At that time, in taking cognizance of the "much wider authority" granted under this bill than the Comptroller General would "ordinarily recommend for Government agencies generally," Mr. Warren stated:

... the purposes sought to be obtained by the establishment of the Central Intelligence Agency are believed to be of such paramount importance as to justify the extraordinary measures proposed therein. ... in an atomic age, where the act of an unfriendly power might, in a few short hours, destroy, or seriously damage the security, if not the existence of the nation itself, it becomes of vital importance to secure, in every practicable way, intelligence affecting its security. The necessity for secrecy in such matters is apparent, and the Congress apparently recognized this fully Under these conditions, I do not feel called upon to object to the proposals advanced

b. Footnote 165 (p. 27 at p. 45) points to the Atomic Energy Commission as an example of "an agency related to the national security whose budget is made public in some detail," including the amount available for confidential expenditure, and questions whether the CIA budget should be published in the same manner. The differences between the AEC and CIA are so obvious as to negate the question. The AEC has no secret intelligence operations abroad; the lives of its personnel are not threatened by hostile action overseas. The footnote then continues to cite some remarks of Mr. Colby in connection with the possible publication of the CIA budget figure. It cites the source as

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"Testimony, Fund for Peace Conference, September 13, 1974, at 47." This citation to Colby's views has not been found. In the Report, Mr. Colby's statement to the Conference is always cited as "Address." Nor did Mr. Colby testify; he made an address and answered questions. One question had to do with the possible publication of the CIA budget. In reply, Mr. Colby said:

With respect to the budget, the release of a single figure, one year at a time, would not create a serious security problem. But if you continue that over a few years, one could draw trend lines

This is somewhat different than the statement in footnote 165 which says:

... Mr. Colby has stated that publication of the total CIA budget would not threaten the national security, except insofar as trends in intelligence expenditures discernible after several years might reveal changes in priorities. [Emphasis added.]

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V. THE RANGE OF REMEDIES

1. Congressional Review of Foreign Political Activities: Prior Approval or Later Disclosure

a. The amendment to the Foreign Assistance Act of 1961 (added by sec. 32 of the Foreign Assistance Act of 1974) adds sec. 662 on CIA, not sec. 663 as stated in the Report (p. 32, par. 4).

2. Composition and Powers of Oversight Committees

a. The Report states (p. 33, par. 4) that "Regular reporting and submission of a proposed budget to a carefully organized joint committee representing all segments of Congress, should be a minimum." It is noted that even with a joint committee, it will be necessary for the Agency, as is true of every government agency, to seek its appropriations from the Appropriations Committees of the House and Senate.

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VI. RECOMMENDATIONS

a. The Report states (p. 33, recommendation 1) that CIA's "domestic activities--viewed as legitimate by the Agency--so pervade our national life and society as to make such restriction [against internal security functions] and prohibition almost meaningless." This statement is much overdrawn.

b. The Report cites (p. 33, recommendation 1) Mr. Colby's report to the Senate Appropriations Committee on 15 January 1975 regarding proposed amendments to CIA's legal authorities. In noting the DCI's suggestion to strengthen the prohibition language against internal security functions, the Report says:

However, this prohibition would be "supplemented" by an additional proviso preserving for the CIA the right to carry on within the United States any activity "in support of its foreign intelligence responsibilities" It is difficult to determine which of the domestic activities now regarded by the CIA as not prohibited even though they appear to involve internal security functions, would be curtailed under such a proviso.

In the first place, Mr. Colby did not say "any" activity, but merely "activities." Secondly, Mr. Colby, in the very next paragraph of his Report to the Committee, lists six examples of what these "activities" would include. Therefore, the proviso does not make it "difficult to determine" what the Director's meaning is.

c. The Report (p. 34, recommendation 3) is quite confused on the subject of the Director's use of his responsibility to protect intelligence sources and methods from unauthorized disclosure, and recommends that this authority be eliminated. They suggest, in regard to such protection outside the United States, that the authority to protect intelligence sources and methods is "implied as part of the Agency's intelligence-gathering function." The Report is incorrect in this, for there is no other provision in CIA statutes in which such authority is "implied." The Report states that "Any protection of domestic sources and methods other than routine safety measures which may be necessary must be carried out by the FBI." There is no indication as to what is meant by "routine safety measures." Nor does the protection of intelligence sources and methods extend, as the Report states, to "all Government documents and sources." CIA's use of the proviso is strictly for intelligence purposes. The Report also overlooks the use of this proviso in the case of Heine v. Raus and the two Marchetti cases, all three of which were upheld by the Circuit Courts, with certiorari denied.

d. The Report states (pp. 34-35, recommendation 4) that in effect neither the National Security Act of 1947 nor the CIA Act of 1949 contains "any express authority" for CIA to undertake "foreign political operations." The very next sentence of the Report, however, speaks of the amendment contained in the Foreign Assistance Act of 1974 requiring reports on such operations. Thus, in effect, Congress continues to recognize and ratifies CIA's authority to conduct such operations, although the Report indicates there is no such authority. Furthermore, the Report is in error (p. 35, ll. 2-3) when it cites the Foreign Assistance Act of 1974 as representing a congressional attempt to increase CIA's "accountability to Congress for its overseas activities." The Act (sec. 33) specifically exempts from its provisions foreign "activities intended solely for obtaining necessary intelligence." The Report then continues (p. 35, ll. 3-5) to the effect that "Congress has a constitutionally-based responsibility as a partner with the Executive in the establishment of foreign policy" This is a very broad interpretation of the Constitution, which assigns to the Congress in general and the Senate in particular rather limited activities in this field--outside of the power of the purse. The Report then continues that "the oversight committee should therefore consider any CIA political operation in the light of the foreign policy goals of Congress." The Report, in its recommendations, does not specifically recommend an oversight committee, so it is difficult in this quotation to determine what "oversight committee" means. But in talking about the "foreign policy goals" of Congress, it certainly overlooks the foreign policy goals of the Executive Branch, which are of major importance. The Report then continues (p. 35, ll. 7-9) that if the "committee members" [presumably the members of an undefined oversight committee] find that a particular CIA activity conflicts with the foreign policy goals of the Congress, "congressional policy should be ascertained without revelation of specific details to Congress as a whole." How this could be done is not explained. These particular recommendations fly in the face of the Presidential authority in the conduct of foreign relations, and are certainly questionable under the doctrine of separation of powers--a doctrine which the Report apparently does not recognize.

e. The Report states (p. 35, recommendation 5) that "the Constitution requires that at least the total [CIA] budget must be separately and knowingly appropriated by Congress." This would appear to be a misreading of the first phrase of Article I, sec. 9, clause 7 of the Constitution, which reads: "No money shall be drawn from the treasury, but in consequence of appropriations made by law" The CIA appropriations are included in appropriate appropriations legislation enacted by the Congress in accordance with provisions of the CIA Act of 1949. The second paragraph of recommendation 5 (p. 35) is also misleading, because the Report has confused the oversight function with the

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appropriations power which resides in the Appropriations Committees of the Senate and the House. It confuses the matter further by stating that budget oversight should include a study of CIA's proprietary corporations, a substantive matter. Here the Report switches from an oversight committee to a joint congressional committee responsible for oversight. It should also be noted that there are lawyers who question the constitutionality of a Joint Committee on Intelligence in view of the doctrine of separation of powers and the Supreme Court decision in the case of U.S. v. Curtiss-Wright Corp. (299 U.S. 304).

f. The final sentence in recommendation 6 (p. 35) states that legislation which is recommended here "must not be interpreted as detracting from any presently established substantive rights, whether statutory or constitutional." This raises the serious question of how any such statute as the Report recommends can take away any right guaranteed by the Constitution.

JSW

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The Central Intelligence Agency: Oversight and Accountability

By THE COMMITTEE ON CIVIL RIGHTS
and THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS

INTRODUCTION

The Central Intelligence Agency, although created expressly for the purpose of gathering and coordinating intelligence, has also been used as a secret instrument of domestic and foreign policy. William E. Colby, Director of the CIA, stated in his January 15, 1975 report to the Senate Appropriations Committee that the domestic activities of the CIA have included the insertion of agents into "American dissident circles" in the late 1960's and early 1970's, and the compilation of dossiers on about 10,000 American citizens. Mr. Colby stated further that a "major" function of the CIA was to undertake, when directed, "covert foreign political or paramilitary operations."

These activities have been facilitated by the extraordinary statutory scheme under which the CIA operates. Its budget is exempt from legislative review, a privilege shared by no other federal agency, and its activities may be any that the National Security Council directs, as long as they concern in some fashion "the national security."

As the debate grows over the historical role of the CIA, more questions have been posed concerning the statutory and constitutional limits of the CIA's authority. The purpose of this report is to respond to these questions. The report will (1) summarize the creation and legal development of the CIA, (2) discuss the CIA's domestic activities and their relation to the laws governing the Agency and to the Constitution, (3) discuss the foreign activities of the CIA and the legislative and constitutional basis for these activities, (4) describe the present funding arrangements of the Agency and their legal basis, and (5) discuss possible remedies and make recommendations concerning regulation of the CIA's activities in the future.

I. CREATION AND LEGAL DEVELOPMENT OF THE CENTRAL INTELLIGENCE AGENCY

Pearl Harbor convinced the United States that the need for an intelligence organization was imperative.¹ On June 13, 1942 the Office of Strategic Services (OSS) was created, headed by Col. (later Major-General) William J. Donovan, and throughout the war it gathered intelligence and conducted activities of a paramilitary nature in support of the war effort.² In 1944, Donovan prepared a plan for President Roosevelt which would establish a central intelli-

gence agency when the war was ended, but the plan was side-tracked by the Joint Chiefs of Staff,³ and the OSS was disbanded on September 20, 1945.

On January 22, 1946, President Truman by Executive Order⁴ established the National Intelligence Authority (NIA), composed of the Secretaries of State, War and Navy and a personal representative of the President, Admiral William Leahy, for the purpose of planning, developing and coordinating all federal foreign intelligence activities.⁵ The operating arm of the NIA was a new organization called the Central Intelligence Group to be staffed with personnel from the Departments of the respective Secretaries.⁶ The Group was to be headed by a Director of Central Intelligence who was also a non-voting member of the NIA.

The Central Intelligence Group was the first formal central organization in American history devoted to intelligence matters. Its duties included correlating and evaluating intelligence relating to the national security, disseminating the results thereof to interested government officials and coordinating the activities of the intelligence agencies throughout the government. One of the first tasks it undertook was to furnish the President with a daily report of intelligence information, a function which its successor continues to perform.⁷

Less than a year after the establishment of the Central Intelligence Group, the House Committee on Military Affairs issued a report recommending that instead of permitting the existence of the Group to remain dependent on an Executive Order, the Congress ought to enact enabling legislation giving the Group statutory authority and providing for its funding directly through congressional appropriations.⁸ Accordingly, the National Security Act of 1947,⁹ in addition to establishing the Department of Defense and unifying the armed services, created the National Security Council (NSC) and, under it, established the Central Intelligence Agency. The duties of the CIA were set forth in five short paragraphs, based very closely on the language contained in the NIA Executive Order. These duties were generally:

1. To advise the NSC in matters concerning such intelligence activities of the government departments and agencies as related to national security;
2. To make recommendations to the NSC for the coordination of such intelligence activities;
3. To correlate and evaluate intelligence relating to the national security, and to provide for the appropriate dissemination of such intelligence within the government, provided that the CIA was to have no police, subpoena, law-enforcement powers or internal security functions;
4. To perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the NSC determined could be more efficiently accomplished centrally; and
5. To perform such other functions and duties related to intelligence affecting the national security as the NSC might from time to time direct. (50 U.S.C. §403(d)).

By this legislation, the CIA was removed from military control and placed solely under the direction of the NSC. Heading the newly-formed CIA was a Director of Central Intelligence appointed by the President with the advice and consent of the Senate.¹⁰ The authority conferred upon him under the law was extensive. Subject to the recommendations of the NSC and the approval of the President, he was empowered to inspect all intelligence relating to national security gathered by any agency of the government, and all departments were directed to make available to him such intelligence gathered by them "for correlation, evaluation and dissemination."¹¹ Internally, the Director was empowered, in his personal discretion and notwithstanding any civil service statutes or regulations, to terminate the employment of any agency employee "whenever he shall deem such termination necessary or advisable in the interest of the United States."¹²

In 1949, even more specific powers were conferred upon the Director of the CIA by the passage of the Central Intelligence Agency Act.¹³ This Act exempted the CIA from all federal laws which required the disclosure of the "functions, names, official titles, salaries or numbers of personnel employed by the Agency."¹⁴ In addition, the Act gave the Director power to spend money "without regard to the provisions of law and regulations relating to the expenditure of government funds,"¹⁵ and granted him the extraordinary right to spend money simply by signing his name, "such expenditures to be accounted for solely on the certificate of the Director without any further accounting therefor."¹⁶ In addition, the 1949 Act allowed the Director, in collaboration with the Attorney General and the Commissioner of Immigration, to admit up to 100 persons into the United States each year secretly and without regard to immigration quotas.¹⁷

Neither of the foregoing Acts provided any explicit authority for the CIA to conduct so-called covert activities. All attempts to justify legally such activities, therefore, have had to rely upon the general catch-all provision which makes it the CIA's duty "to perform such other functions and duties relating to intelligence affecting the national security as the NSC may from time to time direct."¹⁸ Apparently relying upon this provision the NSC, in 1948, is said to have authorized the CIA to conduct such special operations, setting forth only two guidelines—first, that the operations be secret and second, that they be "plausibly deniable" by the Government.¹⁹ A section was thereupon created by President Truman within the CIA to conduct secret political operations,²⁰ and Frank G. Wisner, a former OSS man, was brought in from the State Department to head the section with the title of Assistant Director of the Office of Policy Coordination. In addition, the Office of Special Operations was created to conduct secret activities aimed solely at gathering intelligence. The machinery of both offices was in the CIA, but control was shared with the State Department and the Pentagon. On January 4, 1951, the Offices of Policy Coordination and Special Operations were merged into the Directorate of Plans, and thereafter the CIA had sole control over secret operations of all types. Allen Dulles was its first Chief; Frank Wisner was Deputy Chief.²¹

With its newly-formed Directorate of Plans and its involvement in the

Korean War, the CIA expanded rapidly. From less than 5,000 employees in 1950, it grew to about 15,000 in 1955 not counting others recruited specially as contract employees and foreign agents. During this period, the Agency is estimated to have spent well over one billion dollars on its various overt and covert activities.²² Although no information is publicly available, it is estimated that the CIA presently has an authorized manpower of 16,500 and an authorized budget of 750 million dollars,²³ and that approximately two-thirds of its funds and manpower are used for covert operations and supporting services, such as communications, logistics and trade which relate to its covert activities.²⁴

II. DOMESTIC ACTIVITIES AND THEIR LEGAL BASIS

A. Domestic Surveillance and Infiltration

In December, 1974, it was reported that the CIA had been engaged in considerable surveillance of American citizens, including the opening of mail, tapping of telephones, physical break-ins and the maintenance of files on about 10,000 individuals.²⁵ William E. Colby, the Director of the CIA, confirmed to the Senate Appropriations Committee that the domestic activities of the CIA had included:

- 1) The recruiting or insertion into "American dissident circles" of at least 22 CIA agents as part of two separate programs by the Agency to monitor such activities in the late 1960s and early 1970s.
- 2) The establishment of files by the counterintelligence unit on about 10,000 citizens including members of Congress.
- 3) The authorization by Richard Helms of the establishment of a unit inside the Agency's counterintelligence division "to look into the possibility of foreign links to American dissident elements."
- 4) The conducting between 1953 and 1973 of "several programs" to survey surreptitiously and open the private mail of American citizens who had correspondents in certain communist countries.²⁶

As a result of these and similar revelations the domestic activities of the CIA are currently being investigated by a 7-man Commission appointed by President Ford²⁷ and several congressional committees.

In addition to the CIA's domestic surveillance of dissident political organizations, it is also alleged to have participated in other kinds of domestic operations. These include the funding of special university programs, such as MIT's Center For International Studies, which was reported to have received \$300,000 in 1950 and additional financing until 1966.²⁸ In 1967, following a series of disclosures, the CIA and other government agencies adopted a statement of principles providing that "the fact of government research support should always be acknowledged by sponsor, university and researcher."²⁹

The CIA was also alleged to have infiltrated the National Student Association and other youth groups.³⁰ From 1952 to 1966, the CIA funnelled approximately \$3.3 million to the National Student Association, providing in some years up to 80% of its budget.³¹ Some of the money was used for schol-

arships for students from South Africa, Mozambique and Angola. None but the top officials of the Association knew of the CIA connection, much less of the fact that CIA agents were posing as students and influencing the policies of the organization by arguing on issues involving socialism. At the same time some students were recruited by the CIA to act as spies abroad, making dossiers on foreign student leaders.

The consequences growing out of the CIA's relationship with the National Student Association were succinctly analyzed by Professor Jerrold L. Walden:

"In the first place, the relationship constituted outright deception of the membership-at-large, which knew nothing about the CIA's affiliation with the NSA, and thereby violated their constitutional right to freedom of association. As one officer of the NSA observed after evidence of the longstanding relationship had come to light, 'Ninety percent of them wouldn't have anything to do with the organization if they'd known about the CIA business before they joined.' Furthermore, the fact that the CIA financed and influenced the policies of the NSA abroad all but makes meaningless the concept of a free and independent student organization in international affairs."³²

In 1967, after many of the CIA's domestic activities had been disclosed, President Johnson appointed a committee to examine the CIA's relationships with private organizations. The committee recommended unanimously, and the President adopted as national policy, that: "No federal agency shall provide any covert financial assistance or support, direct or indirect, to any of the nation's educational or private voluntary organizations."³³ However, CIA support to many domestic organizations apparently continued until new ways to finance them could be developed.³⁴ In some cases, such groups were supported for many years by CIA "severance payments."³⁵

The Agency's covert activities in respect to private organizations and the surveillance of domestic political groups acknowledged in Mr. Colby's January, 1975 testimony raise serious questions as to the statutory boundaries of the CIA's authority to operate within the United States. The subsequent section will analyze these boundaries, as well as the CIA's own conception of them as set out in the statements of the Director of Central Intelligence.

B. Statutory Limitations Upon CIA Activities in the United States

The only express statutory limitations upon the activities of the CIA are those found in Section 102(d)(3) of the National Security Act of 1947 (50 U.S.C. 403[d] [3]) which provides that it shall be the duty of the Agency

"(3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided*, That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions *And provided further*, That the Director of Central

Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;"

The language of the first *proviso* was derived from President Truman's Executive Order of January 22, 1946, establishing the Central Intelligence Group, the CIA's predecessor, which stated:

"4. No police, law enforcement, or internal security functions shall be exercised under this directive."

It was further provided:

"9. Nothing herein shall be construed to authorize the making of investigations inside the continental limits of the United States and its possessions, except as provided by law and Presidential directives."

The National Security Act of 1947 as originally proposed in Senate Bill 758 and House Resolution 2319 (80th Congress, 1st Session) did not expressly state either the powers and duties of the CIA or any limitations thereon. Instead, those bills in effect provided that the CIA would assume the responsibilities of the Central Intelligence Group as set forth in President Truman's Directive. As finally passed, however, the statute expressly adopted, generally verbatim, the powers and duties of the Agency and limitations thereon contained in the Order.³⁶

That part of the *proviso* which states that the CIA shall have "no police, subpoena, [or] law-enforcement powers" is clear, and no serious difference of opinion as to what is meant by that phrase appears to have arisen. The term "internal security functions," however, has no well established meaning and is nowhere defined in the Act. Nonetheless, there was no doubt in the minds of the supporters of the National Security Act of 1947 that the Agency's primary concern is with foreign intelligence and that its activities in this country were to be strictly limited to those directly related to the correlation and evaluation of such intelligence.³⁷

President Truman's Order dealt expressly with "Federal foreign intelligence activities," and it was clear to General Vandenberg, the Director of the Central Intelligence Group, that the CIA in assuming the responsibilities of the Central Intelligence Group would similarly be involved only in foreign intelligence.

Thus, he testified in Senate hearings that:

"The role of the Central Intelligence Group is to coordinate this collection of foreign intelligence information and avoid wasteful duplication . . ."³⁸

* * *

"One final thought in connection with the President's directive: It includes an express provision that no police, law enforcement, or internal security functions shall be exercised. These provisions are important, for they draw the lines very sharply between the CIG and

the FBI. In addition, the prohibition against police powers or internal security functions will assure that the Central Intelligence Group can never become a Gestapo or security police."³⁹

The House also held hearings with regard to the proposed National Security Act of 1947. Dr. Vannevar Bush, a witness in support of the Act, when asked whether there was any danger that the CIA might become a Gestapo, replied:

"I think there is no danger of that. The bill provides clearly that it is concerned with intelligence outside of this country, that it is not concerned with intelligence on internal affairs

"We already have, of course, the FBI in this country, concerned with internal matters, and the collection of intelligence in connection with law enforcement internally."⁴⁰

Secretary of War Forrestal, also testifying in favor of the Act, similarly said:

"The purposes of the Central Intelligence Authority [sic] are limited definitely to purposes outside of this country, except the collation of information gathered by other Government agencies.

"Regarding domestic operations, the Federal Bureau of Investigation is working at all times in collaboration with General Vandenberg. He relies upon them for domestic activities."⁴¹

Official recognition of these limitations has also been expressed by top CIA officials. Testifying before the Senate Armed Services Committee in January, 1975, former Director Richard Helms stated:

"It so happens that the word 'foreign' does not appear in the act. Yet there never has been any question about the intent of the Congress to confine the agency's intelligence function to foreign matters. All the directors from the start—and Mr. Colby is the eighth in the succession—have operated on the clear understanding that the agency's reason for being was to collect intelligence abroad."⁴²

William E. Colby, the present CIA Director, reported that he approved a proposed amendment to the National Security Act of 1947 to

"... add the word 'foreign' before the word 'intelligence' wherever it appears in the act, to make crystal clear that the agency's purpose and authority lie in the field of foreign intelligence."⁴³

There is general agreement, therefore, that the CIA's primary concern is "foreign intelligence" and that it is to have no "internal security functions." What is not clear is the exact meaning of those terms and the extent to which the CIA is or should be authorized to operate domestically.

We have found no source which defines the term "internal security functions" as used in the National Security Act or even attempts a definition, and there is nothing in the legislative history of the Act which provides any certainty as to exactly what Congress intended to prohibit.

Some limited assistance can be derived from judicial usage of the term in related areas. In *United States v. United States District Court*, 407 U.S. 297 (1971) (the so-called "Keith" case), the Supreme Court held that the Fourth Amendment prohibits warrantless electronic surveillance in cases involving "domestic security," a term which the Court used interchangeably with "internal security." The Court spoke of the difficulty of defining "the domestic security interest" and the "inherent vagueness of the domestic security concept" and never provided a complete definition. It did, however, indicate that in so far as the question related to electronic surveillance, "domestic security" was not involved where the activities were those of a foreign power or its agents, whether within or without the country, and, as a corollary, that "domestic security" was involved where the activities were those of American citizens who had no significant connection with a foreign power, its agents or agencies.

The Keith case notwithstanding, however, Messrs. Helms and Colby appear to have adopted a different definition of the term "internal security" based solely on whether or not the intelligence activities are conducted in this country. Thus according to Mr. Helms:

"... The F.B.I. handles the counterintelligence function inside our shores. The C.I.A. does the job abroad"44

and as stated by Mr. Colby:

"Counterintelligence activities in this country, for our internal security, are the responsibility of the F.B.I.

"However, the National Security Council has directed the C.I.A. to conduct 'clandestine counterintelligence outside the United States.' . . ."45

The limitations on the CIA's authority to act domestically have been confused by its power to protect "intelligence sources and methods from unauthorized disclosure" [§ 403(d)(3)]. The extent to which this is used to justify domestic operations is reflected in the one federal court opinion involving domestic CIA activities. In *Heine v. Raus*, 261 F. Supp. 570 (D. Md. 1966), vacated and remanded 399 F. 2d 785 (4th Cir. 1968), an employee of the CIA asserted a defense of absolute privilege against a charge of slander, on the ground that he had been instructed by his CIA superior to warn the members of an Estonian emigre group in the United States that plaintiff was a Soviet agent and that when he did so he was acting within the scope of his employment and authority.

Plaintiff contended that the statements made by defendant were actions beyond the statutory power of the CIA because 50 U.S.C. 403(d)(3) provides that the Agency shall have no internal security functions. Plaintiff argued

that agencies such as the FBI "must deal with security matters arising within the borders of the United States." The court noted, however, that one of the functions entrusted to the CIA was the protection of intelligence sources and methods, and cited the affidavit filed by Richard Helms stating that the defendant had been instructed to inform the emigre group about the plaintiff "to protect the integrity of the Agency's foreign intelligence sources." The court concluded (p. 376):

"It is reasonable that emigre groups from nations behind the Iron Curtain would be a valuable source of intelligence information as to what goes on in their old homeland. The fact that the immediate intelligence source is located in the United States does not make it an "internal-security function," over which the CIA has no authority. The Court concludes that activities by the CIA to protect its foreign intelligence sources located in the United States are within the power granted by Congress to the CIA."

In attempting to define the appropriate limits of CIA domestic activity, it is instructive to review the parameters established by the CIA itself. For that purpose, we set forth below an analysis of the public statements of Messrs. Colby and Helms regarding permissible activities of the CIA.

DOMESTIC ACTIVITIES VIEWED AS PERMISSIBLE BY THE CIA

1. Recruiting, screening, training and investigating employees.⁴⁶
2. Investigating Americans with whom the CIA "anticipates some relationship—employment, contractual, informational or operational." These include actual or potential contacts of the Agency, consultants and independent contractors, and individuals employed by contractors.⁴⁷
3. Identifying "individuals who might be of assistance to agency intelligence operations abroad."⁴⁸
4. "Interviewing American citizens who knowingly and willingly share their information about foreign subjects with their government."⁴⁹
5. "Contracting for supplies essential to foreign intelligence operations."⁵⁰
6. Contracting with U.S. industrial firms or research institutes for research and development of technical intelligence devices and enlisting the capabilities of the American scientific, technical and other research communities to assist in research and analysis. This includes, in some cases, the establishment of separate organizations "under a cover story of commercial justification."⁵¹
7. Collecting foreign intelligence from foreigners in the United States; developing relationships with foreigners in the United States who might be of assistance to the collection of intelligence abroad.⁵²
8. Resettling foreign defectors who take up residence in the United States.⁵³
9. Establishing support structures in the United States to permit CIA operations abroad.⁵⁴

10. Providing training to foreigners in the United States.⁵⁵
11. Carrying on ostensibly private commercial and funding activities to support CIA operations, and in that connection negotiating with cooperating United States business firms and others on private cover arrangements.⁵⁶
12. Carrying on investigations within the Government of unauthorized disclosures of classified intelligence.⁵⁷
13. Protecting intelligence sources and methods within the Agency.⁵⁸
14. Disseminating to responsible United States agencies information on the foreign aspects of the anti-war, youth and similar movements, and their possible links to American counterparts; also supplying information to a Government committee on the foreign aspects of civil disorders.⁵⁹
15. Passing on to the FBI "information on foreign connections with Americans"; advising the FBI of "possible foreign links with domestic organizations"; providing at the request of the FBI coverage of foreign travel of FBI suspects.⁶⁰
16. Contributing to a "joint effort" to cover domestic unrest by increasing its coverage of American students and others involved with foreign subversive elements while travelling or living abroad.⁶¹
17. Passing the results of foreign intelligence operations to appropriate U.S. agencies having a legitimate interest therein, e.g. advising the FBI of the imminent arrival in the U.S. of a foreign terrorist, advising the Drug Enforcement Administration regarding details of the drug traffic and appropriate authorities regarding the evasion of U.S. export controls, etc.⁶²
18. Supplying equipment and "safe houses" to other government officials if to be used for a legitimate purpose.⁶³

DOMESTIC ACTIVITIES VIEWED AS PROHIBITED
BY THE CIA

1. Identifying and countering foreigners working within the United States against our internal security (this, Mr. Colby says, is a function of the FBI).⁶⁴
2. Helping to make policy regarding the collection of intelligence on domestic groups.
3. Collecting, or providing the support necessary for collecting, intelligence within the United States on domestic groups.⁶⁵
4. Collecting intelligence on U.S. citizens abroad who do not appear to be involved with the activities of foreign governments or foreign institutions.⁶⁶

DOMESTIC ACTIVITIES OF THE CIA IN "GRAY AREA"

1. Preparing a psychological profile on a U.S. citizen such as Daniel Ellsberg.⁶⁷
2. Providing covert assistance to American educational or voluntary organizations.⁶⁸
3. Inserting agents "into American dissident circles in order to establish their credentials for operations abroad."⁶⁹
4. Inserting agents into American dissident organizations to gather infor-

that might endanger CIA personnel, facilities and information.⁷⁰

5. Training local police personnel.⁷¹
6. Making a vulnerability study of a foreign embassy in Washington.⁷²
7. Surreptitious entry into homes of employees and former employees; physical surveillance and wiretapping of some persons who were not employees or former employees; opening the mail of attorney Bella Abzug and other persons, and maintaining counter-intelligence files on her activities and those of three other members of Congress.⁷³

What conclusions can be drawn from the foregoing listings and the statements of Messrs. Helms and Colby?

1. To the Agency, the term "foreign intelligence" means "information associated with foreign happenings"⁷⁴ or "intelligence pertaining to foreign areas and developments."⁷⁵ Nonetheless, although in Mr. Helms' words, "the agency's reason for being . . . [is] to collect intelligence abroad,"⁷⁶ it is evident from the activities listed above that much of its work is done in this country and that the support structure in the United States which the Agency believes is necessary to carry out its intelligence function now permeates our national life and society to a very substantial extent. It is also apparent that the operation of such a structure and the "need" to protect it have resulted in, and served as a justification for, the Agency's intrusion into domestic areas only distantly related to the field of foreign intelligence.

2. It is evident from the foregoing tabulation of permissible and prohibited powers, as well as other statements of Messrs. Helms and Colby, that they have had no consistent and common understanding of the activities prohibited to the Agency by statute.

How is it that the Agency has become involved in "internal security" matters, despite its public position that subversive activities carried on within the United States, whether by a foreign power or an American citizen, are not within its jurisdiction?

One answer is that even though the Agency appears to have developed its own working definition of "internal security functions," the lack of a statutory definition permits the Agency to adjust its meaning or to carve out exceptions to it to fit the circumstances. As experience has shown, this is particularly likely to occur when the Agency is under pressure from others in the Executive Branch to provide information or assistance or when the Agency believes one of its activities requires "protection."

Another answer in many cases seems to be that in the Agency's view, the responsibility put upon the Director by the National Security Act to protect "intelligence" sources and methods from unauthorized disclosure constitutes authority to protect not only CIA files and sources, but all government documents and sources. There is no legislative history regarding Congress' intention in giving the Director this responsibility. Even Mr. Helms and Mr. Colby appear not to agree as to the interpretation of the provision.⁷⁷ However interpreted, the provision has been used to justify CIA domestic activity which in our view involves the exercise by the CIA of internal security functions, and thus to nullify the statutory prohibition against such activity.⁷⁸

III. FOREIGN INVOLVEMENTS AND THEIR LEGAL
AND CONSTITUTIONAL BASIS

A. Foreign Activities

That the Central Intelligence Agency conducts disruptive political operations abroad that are not directly related to the gathering of information is not disputed. CIA Director William E. Colby, in his January 15, 1975 report to the Senate Appropriations Committee, described the third of the CIA's "three major functions" as being

"To conduct clandestine operations to collect foreign intelligence, carry out counterintelligence responsibilities abroad, and undertake ~~when directed~~ covert foreign political or paramilitary operations." (Emphasis added)⁷⁹

One such paramilitary operation was the armed invasion of Cuba at the Bay of Pigs by a small army organized, paid and equipped by the CIA in April, 1961.⁸⁰ Another was the war in Laos, where from 1953 to 1973 the CIA with financial assistance from AID and the Defense Department, paid, equipped and directed an armed force of irregulars to fight the Pathet Lao and North Vietnamese Communists in Laos.⁸¹ In fiscal 1973 the United States spent \$353 million on military activities in Laos.⁸² In discussing these involvements Mr. Colby has emphasized that they were directed by the National Security Council⁸³ and that the appropriate congressional committees were informed of the war in Laos.⁸⁴ However Senator Symington, Chairman of the Senate Armed Services Committee, has stated that he was not informed until long after the fact.⁸⁵ And Senator Ellender, then a member of the Senate Appropriations Intelligence Subcommittee charged with CIA oversight, stated in 1971 that he had not been informed of CIA plans to spend money on an army of 36,000 in Laos.⁸⁶

The CIA has also acknowledged its covert political operations in Chile. In September, 1974 Representative Harrington made public the substance of testimony by Mr. Colby to the Intelligence Subcommittee of the House Armed Services Committee regarding political activities in Chile by the CIA from 1970 to 1973.⁸⁷ According to this account, the Nixon Administration authorized a total of \$8 million for expenditure on such activities as campaigns of anti-Allende candidates, subsidy of an anti-Allende newspaper, purchase of a radio station and other projects, although a lesser amount was actually disbursed.⁸⁸ President Ford subsequently stated that the covert funds had been spent in Chile to "preserve opposition political parties," but said that he would take no position on whether such CIA activities were permitted by international law.⁸⁹

B. Statutory Framework for CIA Covert
Political Operations

Serious questions have been raised regarding the legal justification for and the political wisdom of the CIA's foreign political operations. Since this re-

port is concerned solely with the constitutional and statutory issues affecting the CIA, it will not focus on any of the political issues but rather will be limited to a review of the legal authority upon which the CIA's foreign covert operations are said to be based.

Prior to the passage of the Foreign Assistance Act of 1974 which was signed into law on December 31, foreign covert operations not directly linked to the gathering of intelligence were justified under the fifth and last of the duties established for the CIA under the National Security Act of 1947. Pursuant to that provision it was the CIA's duty "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."⁹⁰ Richard Helms, while Director of the CIA, took this approach in a speech delivered on April 14, 1971 in which he said that the language of this provision

"was designed to enable us to conduct such foreign activities as the national government may find it convenient to assign to a 'secret service'."⁹¹

Director Colby also implied as much in his nomination hearings when he referred to that provision as "the authority under which a lot of the Agency's activities are conducted."⁹²

Upon careful analysis of the provision's language, however, the interpretation forwarded by Messrs. Helms and Colby does not appear to be warranted. Not only must the "other functions and duties" be "related to intelligence," they must also be performed only upon the direction of the National Security Council. The authority of the National Security Council is therefore the key issue and the limitations upon the NSC's authority are clear. The NSC is not an action agency. Its primary function is

"To advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security." (Emphasis added)⁹³

The NSC was also given certain "additional functions," none of which gave it any more operational responsibility than its primary function. These additional functions were

(a) to perform "such other functions as the President may direct, for the purpose of more effectively *coordinating* the policies and functions of the departments and agencies of the Government relating to the national security . . .";⁹⁴

(b) "to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith";⁹⁵

(c) "to consider policies on matters of common interest to the de-

...and to make recommendations to the President in connection therewith."⁹⁷

...and to make such recommendations, and such other reports to the President as it deems appropriate or as the President may require."⁹⁸

The powers given to the National Security Council by Congress, therefore, were either of an advisory nature or were related to the coordination of the policies and functions of the other agencies in the national security area. Since the NSC directly given the power to conduct political operations. It is therefore difficult to maintain that the CIA can define its covert activities as a delegation of power from the National Security Council, since the NSC has no such power to delegate.

It is also interesting to note that in the provision of the National Security Act of 1947 headed "Protection of Nature of Agency's Functions," which exempts the CIA from the provisions of any law requiring the publication or disclosure of organizational information, justification for the exemption is based solely upon "the interests of the security of the foreign intelligence activities of the United States" and the protection of "intelligence sources and methods from unauthorized disclosure."⁹⁹ This means either that nonintelligence covert activities were not contemplated by Congress or that such activities were not intended to be exempted from the disclosure laws,⁹⁹ an interpretation which is unlikely since it would render any such activities ineffective.

On a more general level, the CIA's covert activities not directly related to the gathering of intelligence are in some instances inconsistent with its basic purpose, that of gathering sufficiently detailed and accurate information to enable our Government to formulate foreign policy. To the extent that the CIA's activities conflict with rather than assist in the formulation of foreign policy, congressional purpose would appear to have been thwarted.

Prof. Jerrold L. Walden has concluded as the result of a detailed analysis of the congressional debates establishing the CIA that "at no place in the legislative history of the C.I.A. is it apparent that Congress intended the Agency to engage in subliminal warfare. The C.I.A. was created as being exclusively an intelligence coordinating body, and it was created as such."¹⁰⁰ Walden points out that what few recommendations there were that such activities be allowed were not adopted.¹⁰¹ Other participants favorable to such operations explicitly acknowledged their exclusion from the coverage of the legislation. For example, Representative Patterson (R. Conn.) stated in the debate leading to enactment of the 1947 law that while he clearly wanted "an independent intelligence agency working without direction by our armed services, with full authority in operation procedures," he recognized that it was "impossible to incorporate such broad authority in the bill now before us..."¹⁰²

That the CIA was intended for intelligence gathering purposes only is also reflected in the relevant House and Senate committee reports. According to

one House report the CIA was created in order that the National Security Council "in its deliberations and advice to the President, may have available adequate information," the CIA to "furnish such information."¹⁰³ The Senate Armed Services Committee's report set out in its statement of basic objectives that "... we must make certain ... that a central intelligence agency collects and analyzes that mass of information without which the Government cannot either maintain peace or wage war successfully ..."¹⁰⁴ Nowhere in any report is any reference made to activities other than those of an intelligence-gathering nature.

Ironically, the only clear congressional authorization for the CIA to conduct covert activities resulted from an attempt to limit those activities. This authorization is contained in Section 66g of the recently enacted Foreign Assistance Act of 1974 which amends the Foreign Assistance Act of 1961 to add the following new section:

"Sec. 66g. Limitation on Intelligence Activities—(a) No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, *unless and until* the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives. (emphasis added)

"(b) The provisions of subsection (a) of this section shall not apply during military operations initiated by the United States under a declaration of war approved by the President under the War Powers Resolution."¹⁰⁵

Under this provision no covert activity is permitted until (a) the President makes a finding that such an operation is important to the national security of the United States, *and* (b) the President reports "in a timely fashion" to the appropriate congressional committee. While this provision makes it clear that such a Presidential finding and report is a prerequisite to any CIA covert operation, it provides no guidance as to what the report should contain.

As will be shown in greater detail in a subsequent section, both Congress and the Executive have constitutionally-based responsibilities in the establishment of foreign policy. Congressional supervision of CIA foreign political activities is possible only if Congress is sufficiently informed; the report required under the Foreign Assistance Act of 1974 could provide the necessary information.

To assure the usefulness of the report, however, further guidelines should be established by Congress, such as a set of basic questions to be answered by each such report. At a minimum, Congress should require legislatively that

each such report be accompanied by a proposed budget to be followed up, as promptly as possible, by a statement of the funds actually expended for the operation. The proposed budget would give the legislators an idea of the scope of the program intended, enabling them to focus more clearly on the plan, and the follow-up budget would serve as a check on the accuracy of the initial report. Such a requirement would be a logical addition to Section 66g, the basic concern of which is the expenditure of funds by the CIA.

B. *Imposition of Substantive Standards in Foreign Political Activities*

Professor Stanley Futterman suggests that if the CIA is to be allowed to continue to conduct political activities abroad, some standards should be established to place limits on these activities. Futterman, *Toward Legislative Control of the CIA*, 4 Int'l Law & Pol. 431, 446 (1971). For example, Professor Futterman urges that the CIA "should never torture holders of information, or, at least short of a war situation, engage in political assassination." Others, including Rep. Michael Harrington, have suggested that the CIA should be limited to gathering intelligence, purportedly the intention of Congress in 1947 in establishing the Agency, and prohibited from conducting any clandestine political activities.¹⁶⁶

Establishment of standards is related to the basic question of what role the United States should play in international affairs—i.e., should a nation engage in espionage and undeclared wars—and of what role Congress should play vis-a-vis the President in directing the foreign affairs of our country.

These issues can be raised but not answered within the scope of this report. However, they are appropriate, and indeed vital, for congressional consideration.

C. *International Law*

In order to assess whether or not the activities of the CIA have violated international law, one must recognize that international law itself is a continually evolving area. As one commentator has explained, "the emphasis nations currently place on political and ideological warfare has, as a matter of necessity, resulted in the creation of new forms of 'indirect' or 'subversive' intelligence that are not amenable to traditional criteria and definitions [of international law]." Comment, *The Dominican Crisis*, 4 Duquesne Univ. L.R. 547, 556 (1965-6).

It has been urged that direct military intervention, such as the Bay of Pigs incident in 1961, is clearly an interference in the internal affairs of another state. Friedman, *United States Policy and the Crisis of International Law*, 59 A.J.I.L. 857, 865 (1965). It has also been argued that international law precludes the more indirect CIA operations, such as the alleged funding and other assistance provided various political groups in Latin America.¹⁶⁷ Professor Quincy Wright suggests that as a basic proposition of international law, every state has the right to enact within its territory any legislation whatever (except an abridgment of diplomatic immunities), and that such legis-

lation must be respected by other states in time of peace. He therefore concludes that all espionage activities authorized by a government which violate the internal law of the target country (which would presumably include bribery, riots, and disruptive activity, along with murder, theft and other violent actions) are in violation of international law. *The Pueblo Seizure, Facts, Law, Policy*, 69 Proc. Am. Soc. Int. L.2, at 8-9 (1969). The Universal Declaration of Human Rights and the Covenants also contain standards which guarantee to the citizens of all states the fundamental right of self-determination and the right to govern their own affairs.

On the other hand, it has been asserted that since the communist countries take the position that wars of "national liberation" are valid under international law, see Reisman, *Private Armies in a Global War System: Prologue to Decision* 14 Va.J. Int. Law 1 at 4-5 (1973), the actions taken by the West to anticipate, counteract and otherwise prevent such communist activities prior to the full outbreak of war are lawful either as legitimate means of self-defense or otherwise.¹⁰⁸ As State Department Legal Advisor Leonard Meeker stated with regard to United States intervention in the Dominican Republic:

"... [R]eliance on absolutes for judging and evaluating the events of our time is artificial, . . . black and white alone are inadequate to portray the actuality of a particular situation in world politics, and . . . fundamentalist views on the nature of international legal obligations are not very useful as a means to achieving practical and just solutions to difficult political, economic, and social problems. . . . It does not seem to me that law and other human institutions should be treated as abstract imperatives which must be followed for the sake of obeisance to some supernatural power or for the sake of some supposed symmetry that is enjoined upon the human race by external forces. Rather, it seems to me that law and other institutions of society should be seen as deliberate and hopefully rational efforts to order the lives of human communities—from small to great—in such a way as to permit realization by all members of a community of the full range of whatever creative powers they may possess. . . . We recognize that, regardless of any fundamentalist view of international law, the situation then existing required us to take action to remove the threat and at the same time to avoid nuclear war. In the tradition of the common law we did not pursue some particular legal analysis or code, but instead sought a practical and satisfactory solution to a pressing problem."¹⁰⁹

Greater guidance can be found in the treaties into which the United States has entered and to which it is bound. Because of the large number of treaties to which the United States is a party, we have limited our review to the countries of Latin America. Despite the small size of this sampling, several interesting points emerge.

In the additional Protocol Relative to Non-Intervention, signed in 1936 by Argentina, Paraguay, Honduras, Costa Rica, Venezuela, Peru, El Salvador,

Mexico, Brazil, Uruguay, Guatemala, Nicaragua, Dominican Republic, Colombia, Panama, Chile, Ecuador, Bolivia, Haiti, Cuba and the U.S.A.,¹¹⁰ the parties "declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties" (Article 1). Similarly, the "Convention on Rights and Duties of States," proclaimed Jan. 18, 1935,¹¹¹ provides in Article 8: "No state has the right to intervene in the internal or external affairs of another."¹¹² Article 11 asserts:

"... The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily."

In the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), proclaimed in December, 1948,¹¹³ the parties "undertake to submit every controversy which may arise between them to methods of peaceful settlement" (Article 2). In Article 6, the treaty sets forth that if "the inviolability of the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is *not* an armed attack . . . the Organ of Consultation shall meet immediately in order to agree on measures which must be taken to assist the victim of aggression" (emphasis added).

Finally, in the Charter of the Organization of American States,¹¹⁴ the signatories affirm that "International order consists essentially of respect for the personality, sovereignty and independence of States . . ." (Article 5[b]), that "Every American State has the duty to respect the rights enjoyed by every other State in accordance with international law" (Article 7) and that "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." (Article 16).

Thus, although some questions may exist under the principles of international law, the obligations of the United States under its treaties are clear. To the extent that the activities of the CIA violate these treaties, the Executive is abrogating policy established through the advice and consent of the Senate as the foreign policy of the United States and international obligations of our Government.

D. Constitutional Issues Regarding Foreign Covert Political Activities

The Constitution draws no clear boundaries between the foreign affairs responsibilities of Congress on the one hand and those of the President on the other. No cut-off point exists where the powers of one end and those of the other begin. Certain limited powers are assigned to both but an enumeration of those powers provides little help in defining the relative jurisdictions of the two branches of Government. What remains is a broad area in which either branch is able to operate subject only to its own limitations and to any

counter-efforts which might be undertaken by the other. Differences in this area are resolved not by the courts but through intra-governmental conflict, each branch making such use as it is able of its unique powers and its ability to gather support in the political arena.

As far as Congress is concerned, it was expressly vested by the Constitution with the general "power to provide for the common Defence . . . of the United States,"¹¹⁵ supported by the more specific powers to "declare War,"¹¹⁶ "raise and support Armies . . .,"¹¹⁷ "provide and maintain a Navy,"¹¹⁸ "make rules for the Government and Regulation of the land and naval Forces,"¹¹⁹ and "provide for calling forth the Militia."¹²⁰

By giving Congress the power to declare war, the framers of the Constitution were attempting to make certain that no such action would be taken without broad and meaningful public debate. James Wilson, one of the most active participants in the drafting and passage of the Constitution, expressed this attitude when he told the Convention that the power to "declare" war was lodged in Congress as a guard against being "hurried" into war, so that no "single man [can] . . . involve us in such distress."¹²¹ Congress' power to declare war is limited only by the power of the President to repel sudden attacks without congressional authorization.¹²² Such an exception, which recognizes that Congress as a deliberative body might not be able to respond sufficiently quickly to an attack, was the express intent of James Madison and Elbridge Gerry during the drafting of the Constitution when they moved to replace the phrase "make war" with the ultimately adopted "declare war."¹²³

Whatever might have been the intentions of the framers, however, it is clearly unrealistic to believe that the power to declare war, taken literally, automatically gives Congress control over the country's military involvement. Only the Executive Branch is structured to deal with the complexities of foreign affairs on a daily basis, and whether the President's power to do so is founded solely in the powers enumerated in the Constitution or derives in bulk through his duty to "take Care that the Laws be faithfully executed,"¹²⁴ his power in conducting foreign affairs cannot be seriously questioned.¹²⁵ While this power relates basically to the execution of our foreign policy, however, left unchecked by a benign Congress it becomes the force which dictates what our foreign policy is to be.

The President's role in foreign affairs has explicit limits. The ultimate policy decision to engage in war can be made only by Congress; a formal declaration is not required, any action from which congressional consent or ratification might be clearly inferred being constitutionally sufficient.¹²⁶ Armed forces and the militia can be raised and supported only by Congress. Treaties can be entered into only with the concurrence of two-thirds of the Senators present.¹²⁷

Many aspects of the CIA's covert political activities abroad remain unclear or unverified. However, certain CIA operations which have been acknowledged by the Agency appear to be patently unconstitutional. The Bay of Pigs invasion, for example, was a usurpation by the Executive of Congress' power to raise and support Armies . . ."¹²⁸ and to "declare

War."¹²⁹ Similarly unconstitutional was the recruiting and supporting over a period of years of a large army in Laos without congressional knowledge.¹³⁰ Both the Cuban and Laotian operations might have been justifiable had they involved the need to act promptly to repel sudden attacks upon the United States. The planning of both operations, however, took sufficiently long as to eliminate any reason for not involving Congress.

In still other actions, such as those in Chile,¹³¹ the CIA conducted activities which apparently breached treaties ratified by the Senate. In ratifying these treaties, the Senate was exercising its constitutional power to set the standards which guide the President in the conduct of foreign policy. The CIA's violation of these treaties contravened the standards established by the Senate and undermined its constitutional role.

It is the opinion of some that many of these abuses result from improper internal controls or lack of accountability. It is thought, therefore, that organizational reform could be used to create an effective deterrent to further illegal activities. Among the steps recommended are a limit on the Director's term of office, clearly designated channels of responsibility, an internal "Inspector General" with the right to take administrative action against individuals, and the mandatory rotation of senior officials. We believe that these and similar reforms should be given serious consideration.

By failing to provide proper review of CIA operations, Congress has relinquished to the CIA its own constitutionally-based responsibility in the formulation of our foreign policy.

Under such circumstances, a President acting entirely within his constitutional prerogatives could lead the country to a point where Congress could do nothing but support the *status quo*, thus effectively "declaring" war. To the extent that Congress by its inaction allows such a situation to arise, it is violating its constitutional trust as seriously as if it were affirmatively passing legislation unconstitutional on its face.

Congress has not necessarily met its constitutional obligations with the passage of the CIA amendment to the Foreign Assistance Act of 1974. If this provision serves merely to perpetuate the past practice of providing limited information to a few sympathetic senior committee members,¹³² the new law will provide no effective means for congressional assertion of its constitutional role. Only by subjecting the CIA to a continual and meaningful review process and by promptly challenging any activities which are contrary to its own general foreign policy objectives will Congress be realizing this duty.

Mr. Colby has referred to the Agency's need to protect "intelligence secrets" as in "obvious potential conflict . . . with the right of citizens in a democracy to know what their Government is doing in their name (and with their money)."¹³³ It should be recognized that Congress has in the past worked out a variety of procedures for safeguarding information while continuing to exercise oversight of Executive actions. Former Attorney General Elliot Richardson has testified that classified and other sensitive information is "constantly" made available to congressional committees in executive session or otherwise under terms and conditions limiting or prohibiting disclosure to the public.¹³⁴ However, if the ultimate choice in balancing these interests

were between the constitutional requirement of effective control of American foreign policy by our elected representatives on the one hand and the clandestine foreign political activities of a small number of unaccountable bureaucrats on the other, we would opt for congressional control.

IV. BUDGETARY PROCEDURE AND ITS STATUTORY BASIS

A. *Funding Arrangements: The Present Process of Appropriation*

The question persists why Congress has not acted sooner to prevent the CIA from carrying out foreign policy abuses. Part of the answer lies in the fact that by enacting and implementing unique budgetary procedures which allow the Congress to vote on the CIA budget without knowing its contents, the Congress has abandoned its most effective method of controlling the activities of the CIA. An understanding of these procedures is essential to any evaluation of Congress' present role in overseeing the Agency.

The CIA budget process begins like that of any other executive agency, with a budget request to the Office of Management and Budget (OMB).¹³⁵ This request is supposedly reviewed by the Intelligence Resources Advisory Committee (IRAC) chaired by the Director of Central Intelligence (DCI) and consisting of representatives from the Departments of State, Defense and the OMB, and coordinated with the intelligence requests of other agencies before it is formally submitted to the OMB, but such review is reportedly sketchy.¹³⁶ The OMB then conducts a detailed review of the CIA budget request, consisting of a written justification for the request, written responses to detailed questions posed by OMB staff and oral hearings.¹³⁷ During the review process, the CIA budget is coordinated with those of the other foreign intelligence agencies and the total intelligence budget is then forwarded to the President for submission to Congress.

However, the Congress never sees the actual CIA budget, nor do the Appropriations Committees of the House and Senate. Rather, the budget is reviewed and approved only by the Intelligence Subcommittee of the Appropriations Committee of each house.¹³⁸ Until the present Congress, the Intelligence Subcommittees have been composed of the chairmen of the full Appropriation Committees, the ranking minority member of the full committees and senior members of the Appropriations Subcommittees on Defense.¹³⁹ They are said to conduct extensive budget hearings attended by staff members of the Intelligence Subcommittees and representatives of the CIA.¹⁴⁰ In the House, a complete stenographic record is made of these proceedings, which is then stored at the CIA and delivered to the Capitol on request; in the Senate, no record of CIA budget hearings is made.¹⁴¹ Once the Subcommittee decides what the CIA budget will be, it then divides up and disguises it in various appropriations of the Defense Department and other agencies.

Congress then votes on appropriations inflated by sums destined for the

CIA without knowing either that they are doing so or the dollar amount earmarked for the CIA. Even if a Congressman suspects that an appropriation contains CIA funds, he has no means of discovering how much CIA money is entailed. Once the bills are enacted, the Appropriations Committee Chairmen supply the OMB with instructions as to which funds are to be transferred to the CIA, and the OMB carries out these instructions.¹⁴²

B. *Statutory Basis and Constitutionality of Appropriations Process*

The legal authority for these extraordinary procedures is found in the Central Intelligence Agency Act of 1949.¹⁴³ Section 6 of the Act provides:

"In the performance of its functions, the Central Intelligence Agency is authorized to:

- (9) Transfer to and receive from other Government agencies such sums as may be approved by the Bureau of the Budget, for the performance of any of the functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of this Act without regard to limitations of appropriations from which transferred."¹⁴⁴

Section 10(a) provides:

Notwithstanding any other provisions of law, sums made available to the Agency by appropriation or otherwise may be expended for purposes necessary to carry out its functions . . .¹⁴⁵

The language in these sections allowing transfers of money to the CIA "without regard to any provisions of law limiting or prohibiting transfers between appropriations" and providing for expenditure of "sums made available to the Agency by appropriation or otherwise" (emphasis added) and "without regard to limitations of appropriations from which transferred" seems difficult to reconcile with the *constitutional* requirement contained in Article I Sec. 9, Cl. 7 that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."¹⁴⁶ A transfer of money to the CIA despite a prohibition against such transfer and the expenditure of that money in a manner forbidden by the appropriation legislation would not be "in consequence of appropriations made by law," but rather would be in derogation of such appropriations.

It has been convincingly argued that in passing the 1949 Act, Congress did not intend to exempt the CIA from substantive limitations on expenditures enacted by subsequent Congresses, but only to free it from compliance with technical funding limitations. Support for this argument can be found in the

fact that Section 6(a) quoted above, is followed by several sections exempting the CIA from other technical limitations, such as prohibitions on the exchange of appropriated funds other than for silver, gold, United States notes and national bank notes, restrictions on using personnel of other government agencies, and limitations on the payment of rent and making of improvements to leased premises.¹⁴⁷ Similarly, Section 10(a) contains a long list of housekeeping purposes for which sums may be expended, including "purchase, maintenance, and cleaning of firearms," "printing and binding," "association and library dues" and "repair, rental, operation and maintenance of buildings, utilities, facilities and appurtenances."

Further support for the view that the 1949 Congress did not intend to exempt the CIA from future substantive limitations on expenditures is found in the legislative history of the 1949 Act. Former CIA Director Rear Admiral Hillenkoeter, in a letter to Senator Millard E. Tydings, assured Congress that:

"In almost all instances, the power and authorities contained in the bill already exist for some other branch of the Government, and the bill merely extends similar authorities to the Central Intelligence Agency."¹⁴⁸

An identical assurance was given to the House of Representatives by the sponsor of the bill, Representative Sasser.¹⁴⁹

Thus the authority in the 1949 Act for the CIA to spend money "[n]otwithstanding any other provisions of law" does not free the CIA from compliance with later substantive restrictions on spending, such as those contained in the Foreign Assistance Act of 1974. Moreover, the existence of such restrictions, while providing a check on CIA expenditures, does not resolve the conflict between the present practice of concealing the CIA budget from the legislature and the constitutional requirement that money may not be disbursed except "in consequence of appropriations made by law." That requirement would be met only if Congress knowingly voted on the total budget amount.¹⁵⁰

C. *The Present Accounting Procedure*

Once the money for the CIA has been appropriated and transferred, there is no way under present arrangements for Congress, much less the public, to know how it has been spent. In order to assure that CIA activities will remain secret, the four subcommittees charged with oversight of the CIA meet in executive session and are not required to report to Congress as a whole.¹⁵¹ No agency within the executive branch has a statutory duty to audit CIA expenditures, and although OMB performs some budgetary oversight, it relies on financial data supplied by the CIA, which it does not check independently.¹⁵² As a result of the hidden appropriations procedure described above, the annual "Combined Statement of Receipts, Expenditures and Balances of the United States Government" (Combined Statement) published by the Secretary of the Treasury pursuant to 31 U.S.C. §1029 and Article I, Section

9. Clause 7, of the Constitution, contains no mention of monies received and expended by the CIA.¹⁵³

Neither of these provisions expressly exempts the CIA from its coverage, however. The relevant part of Article I, Section 9, clause 7, the Statements and Accounts Clause, requires that:

"a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

The legislation implementing this requirement, 31 U.S.C. §1029, states:

"It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post-Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures, by each separate head of appropriation."¹⁵⁴

Read alone, these provisions would seem to require an accounting of CIA receipts and expenditures along with those of all other executive agencies. However, the argument is generally made that the 1949 Act provides an exception to these requirements in the case of the CIA.

D. *Statutory Basis for the Present Accounting Procedure*

The language of the 1949 Act does not seem to free the CIA entirely from any duty to account to Congress or the public. The relevant provision states:

"The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified."¹⁵⁵

Logic dictates that "the provisions of law and regulations relating to the expenditure of Government funds" referred to in the first half of subsection (b) must be provisions other than those relating strictly to accounting requirements. If accounting requirements were included among such "provisions" then the CIA would be exempted from them by this language, and the second half of the sentence would be rendered either superfluous or meaningless. Although it is addressed solely to the question of accounting, the second half of the sentence does not exempt the CIA from all accounting requirements, but only from accounting for expenditures made "for objects of a confidential, extraordinary, or emergency nature." Thus Congress seems to have expected that the CIA's expenditures for compiling and analyzing, if not gathering, intelligence would be publicly accounted for. If no accounting from the CIA were mandated, there would have been no need to define the particular types of expenditures for which the Director was not required to account.

The Richardson Case

The failure of the CIA to account publicly for its receipts and expenditures was recently challenged as unconstitutional in a suit brought under the Mandamus and Venue Statute, 28 U.S.C. §1361, to compel the Secretary of the Treasury to publish a complete Combined Statement. The district court dismissed the complaint for lack of standing and justiciability, but the Court of Appeals reversed, finding that the plaintiff had standing as a taxpayer to raise the claim that insofar as the 1949 Act excused the CIA from reporting its receipts and expenditures it was unconstitutional, and that he had raised a justiciable question. *Richardson v. United States*, 465 F.2d 844 (3d Cir. 1972). The Supreme Court granted certiorari on the question of taxpayer's standing and reversed 5-4, holding that the requirements of *Elliott v. Cohen*, 392 U.S. 63 (1968) had not been met. *United States v. Richardson*,—U.S.—, 41 L.Ed.2d 678 (1974).

Although the merits of Richardson's claim were never decided, they were discussed briefly by the Third Circuit in the course of its determination that a substantial constitutional question had been raised, and were again argued by both parties in their briefs to the Supreme Court. The Government maintained that the Statements and Accounts Clause had been intended by the Framers to allow the Congress to decide which Government expenditures should be made public. It noted that Mason, the author of the clause, had originally proposed an *annual* statement of account but that Madison's amendment had substituted the words "from time to time." Mason had opposed this amendment on the ground that it might allow too much secrecy by not requiring a report at regular intervals.¹⁵⁶

In its brief, the Government urged the Supreme Court to infer from the fact that Madison's language was accepted despite these fears, that a certain latitude in the reporting requirement must have been intended.

Richardson, on the other hand, pointed out that the reason for Madison's amendment was his belief that to require reporting at regular intervals might lead to no reporting at all. This, Madison noted, was what had happened under the Articles of Confederation, which required semi-annual reporting: "a punctual compliance being often impossible, the practice has ceased altogether."¹⁵⁷ Richardson also pointed to the Virginia debates on the Constitution where Mason again objected to the words "from time to time" as being too "loose," and Lee replied that Mason's concern was "trivial," that the phrase "must be supposed to mean, in the common acceptation of language, short, convenient periods," and that [t]hese who would neglect this provision would disobey the most pointed directions."¹⁵⁸ To this Madison added that:

"[he] thought it much better than if it had mentioned any specified period; because, if the accounts of the public receipts and expenditures were to be published at short, stated periods, they would not be so full and connected as would be necessary for a thorough comprehension of them, and detection of any errors. But by giving them an op-

portunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent."¹⁵⁹

Based on this statement, Richardson argued that Madison and Mason were in wholehearted agreement as to the desirability of full disclosure and differed only in their views as to how best to achieve it.¹⁶⁰

Both Richardson and the Government drew the Court's attention to the language of Article I Section 5 Clause 3, which states "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy." The Government argued that it would be illogical to allow the Legislature an exception for matters requiring secrecy while not allowing the Executive Branch such an exception. Richardson maintained that the difference in language was intended to reflect the Framers' belief that while some matters may require secrecy, the receipts and expenditures of public money should never be concealed.¹⁶¹

The Government further bolstered its interpretation of the Statements and Accounts Clause by citing two instances in which Congress enacted secret appropriations bills prior to its passage of the 1949 Act. The first occurred in 1811 when President Madison requested of Congress a secret appropriation to be used in purchasing parts of Spanish Florida. This was not made public until 1818. The second instance consisted of the secret \$2 billion appropriated for the Manhattan Project to develop the atomic bomb during World War II. It should be noted, however, that each of these examples involved one appropriation or series of appropriations for one specific purpose, not an entire system of appropriating money to be used on an annual basis for a particular agency regardless of the goals for which the money will be used. It should also be noted that at least in the case of the Florida appropriations bill, the entire Congress was aware of the acquisition plan, which is not the case when money is appropriated for the CIA.

As its final argument on the merits, the Government cited three other statutes which authorize Congress to exempt certain appropriated funds from the public accounting requirement. The oldest of the statutes, dating from 1793, is 31 U.S.C. §107, which states:

"Whenever any sum of money has been or shall be issued, from the Treasury, for the purposes of intercourse or treaty with foreign nations, in pursuance of any law, the President is authorized to cause the same to be duly settled annually with the General Accounting Office, by causing the same to be accounted for, specifically, if the expenditure may, in his judgment, be made public; and by making or causing the Secretary of State to make a certificate of the amount of such expenditure, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended."

Although this statute allows the President or Secretary of State to certify

expenditures without specifying their purposes, it does not become effective until Congress has appropriated money "for the purposes of intercourse or treaty with foreign nations." It does not permit a practice of concealing both receipts and expenditures regardless of the purpose for which they were appropriated, as is done by the CIA.¹⁶²

A second statute cited by the Government was 28 U.S.C. §557, covering expenditures by the Federal Bureau of Investigation for unforeseen emergencies of a confidential character. It provides as follows:

"Appropriations for the Federal Bureau of Investigation are available for expenses of unforeseen emergencies of a confidential character, when so specified in the appropriation concerned, to be spent under the direction of the Attorney General. The Attorney General shall certify the amount spent that he considers advisable not to specify, and his certification is a sufficient voucher for the amount therein expressed to have been spent."

This statute, even more clearly than the previous one, limits the Executive's authority to spend money secretly to cases where Congress has specifically provided for it in a separate appropriations act. This is also true of the third statute relied on by the Government, 42 U.S.C. §2017 (b), regarding appropriations for the Atomic Energy Commission, which states simply:

"(b) Any Act appropriating funds to the Commission may appropriate specified portions thereof to be accounted for upon the certification of the Commission only."

In contrast to the Government's interpretation of the 1949 Act, neither of these statutes purports to confer blanket authority on an Executive agency to ignore the requirements of the Statements and Accounts Clause and the statutes implementing it.¹⁶³

In examining the scope of the Director's authority not to account for sums expended under the 1949 Act, it is important to view this authority in the context of a unique appropriations process applicable to no other agency. When other agency heads give special certification instead of accounting for their expenditures, the public can at least determine the amount secretly spent because the agency's total budget is listed in the Combined Statement, and its normal expenditures are accounted for. In the case of the CIA, its total budget is never known even to Congress, and no receipts or expenditures are listed in the Combined Statement. Thus the 1949 Act as presently applied allows the Director of Central Intelligence far more authority to operate secretly than any other agency head.

This degree of secrecy conflicts with the constitutional mandate of the Statements and Accounts Clause. That Clause requires that at least the total amounts actually spent by the CIA be published in the Combined Statement.¹⁶⁴ Whether greater detail is mandated and, if so, what degree of specificity, are more difficult questions requiring a balance between the interests of national security and the right of the public to know.¹⁶⁵

A. Suits Challenging CIA Activities

Because of the sensitive nature of the CIA's legitimate functions the courts may be reluctant to entertain challenges to its other activities. If the courts are to provide redress, however, a threshold question to be resolved is that of standing to sue.

(1) TAXPAYER'S STANDING

Although the previously discussed decision of the Supreme Court that Richardson lacked standing rested on narrow grounds, it contained broad language to the effect that Richardson's complaint lay more properly within the province of Congress than of the courts. It has therefore been argued that the decision closed the door to any judicial enforcement of the Statements and Accounts Clause.

The majority opinion in *Richardson* held only that the first requirement of *Must v. Cohen*, 399 U.S. 83 (1968) had not been met, in that the plaintiff had failed to establish a logical nexus between his status as a taxpayer and the statute he was attacking. To establish this nexus, a taxpayer must challenge an exercise of the taxing and spending power of Congress. Technically, the *Richardson* holding does not foreclose a plaintiff who seeks not only to enforce the Statements and Accounts Clause but also to enjoin the expenditure of money by the CIA unless openly appropriated and accounted for, from claiming taxpayer's standing.

However, in dictum the Court conceded the correctness of Richardson's argument that if he lacked standing then no one could bring such a suit. The Court stated:

"It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied

citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them."

In view of this language, it appears doubtful that another plaintiff would be held to have standing even on a more expertly pleaded complaint.

(2) CONGRESSMAN'S STANDING

To the extent that the activities engaged in by the CIA have exceeded the scope of its statutory authority, one possible remedy is a Congressman's lawsuit. Congressman's standing has been held to rest on a broader basis than taxpayer's standing and to include challenges to the conduct of foreign policy. *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973).

In *Coleman v. Miller*, 307 U.S. 433 (1939), a leading case on legislator's standing, the Supreme Court held that twenty members of the Kansas Senate had standing to challenge the casting of a deciding vote on the ratification of the Child Labor Amendment to the United States Constitution by the Lieutenant Governor of Kansas. The court noted that the twenty Senators had all voted against ratification of the amendment, and that it would not have been ratified but for the vote of the Lieutenant Governor. The basis for standing was the legislators' interest in protecting their votes. This interest was also found to constitute a basis for standing in a suit by Senator Kennedy challenging President Nixon's use of the pocket veto. *Kennedy v. Sampson*, 364 F. Supp. 1075 (D.D.C. 1973).

A broader basis for standing was found in *Trombetta v. State of Florida*, 253 F. Supp. 575 (M.D. Fla. 1973) where members of the Florida legislature sought a declaratory judgment as to whether a provision in the Florida Constitution governing ratification of amendments to the United States Constitution conflicted with Articles V and VI of the Constitution. There the legislators were attempting to protect votes as yet uncast, and the court based its finding of standing on the "unresolved constitutional dilemma" confronting them.¹⁶⁶

Other grounds for findings of Congressmen's standing have included their duties to consider whether to impeach, to make appropriations for the Vietnam war, and to take other legislative actions.¹⁶⁷ *Mitchell v. Laird*, *supra*. However, even when the standing requirement is met, a Congressman's suit challenging the conduct of foreign policy may be dismissed as raising a non-justiciable political question. *Holtzman v. Schlesinger*, 484 F. 2d 1307 (2d Cir. 1973).

The question of Congressmen's standing is currently being tested in a suit filed in December, 1974 by Congressman Michael Harrington against William E. Colby, Henry Kissinger and William E. Simon. The complaint seeks four types of declaratory and injunctive relief: 1) a declaration that the performance of any non-intelligence related foreign activities by the CIA or any domestic surveillance break-ins or wiretapping by the CIA is illegal and an injunction against all such activity; 2) a declaration that the expenditure of

funds or use of services under the purported authority of the exemptions contained in the Act is illegal when used for any of the purposes set forth in (1) above and an injunction against such expenditures; 3) a declaration that the failure of the CIA to report the activities listed in (1) above in the Federal Register in compliance with the Freedom of Information Act (5 USC §552) is illegal and a mandatory injunction requiring such reporting; and 4) a declaration that the failure of defendants to report in the Combined Statement receipts and expenditures used for the activities listed in (1) above is illegal and a mandatory injunction requiring such reporting. The theory of the Harrington complaint is that the 1949 Act exempts from reporting only such expenditures by the CIA as are spent in intelligence-related activities and that any exemptions taken pursuant to the 1949 Act for purposes other than those specified therein are illegal and should be enjoined.

In order to establish standing, the complaint alleges that the plaintiff Congressman's interest in a declaratory judgment stems from his constitutional duties (1) to consider impeachment of Colby, Kissinger and other civilian members of the United States, (2) to consider and vote for legislation proscribing the activities of the CIA, (3) to consider and vote for legislation proscribing or limiting the use by the Agency of any public funds and (4) to take other legislative actions relative to the activities of the Agency. It further alleges that Congressman Harrington has an interest in preserving the constitutional powers and prerogatives of Congress and that he has an interest in insuring that the Executive seek and obtain express and specific appropriations from Congress for the Agency except as the Executive may have been constitutionally authorized by statute to do otherwise. Related to this interest is the right as a Congressman to be informed whether the funds appropriated by any given appropriations bill may be expended by the CIA, and to participate in the legislative process upon the basis of such knowledge. Similarly the complaint asserts Harrington's interest as a Congressman in having the CIA comply with reporting and transfer provisions except insofar as it is legally and constitutionally exempt from them. The care and specificity with which standing is pleaded reflects the concern of Harrington's counsel that standing will be an important threshold issue in the case. However, even if he is held to have standing, the case might nonetheless be dismissed on "political question" grounds.

(3) CONGRESSIONAL GRANT OF STANDING TO SUE

It seems clear that if there is to be effective control of domestic surveillance activities of the CIA, standing to sue will have to be given to individual citizens who have been the targets of such activity.

An analogy can be made to military surveillance of civilian political activities.¹⁰⁸ In our view, the domestic surveillance activities of the CIA, like those of the Army, exceeded its statutory authority. Some of the reported activities such as warrantless electronic surveillance would of course be unconstitutional even if not contrary to statute, if they involve domestic security. But the decision of the Supreme Court in *Laird v. Tatum*, 408 U.S. 1

1972), requiring a showing of direct injury or the threat of imminent injury, makes it difficult, if not impossible, effectively to control such surveillance activities under present law.¹⁶⁹

The proposed Freedom From Surveillance Act of 1973 (S. 2318, 93rd Congress, 1st Session) which would prohibit surveillance by the military, serves as an excellent model of the type of legislation which appears to be needed with respect to CIA activities impinging upon the rights of individual citizens. The proposed statute first sets forth a broad, but nonetheless precise, description of the prohibited activities and the penalties imposed and then narrowly describes the exceptions to the general rule.

New legislation which would not only impose sanctions¹⁷⁰ but would give targeted citizens standing to sue is, therefore, clearly desirable. Such persons should be granted the following rights, at a minimum:

1. The right to bring a civil action for damages (including punitive damages) and/or for equitable relief regardless of the actual amount of pecuniary damage suffered.
2. The right to recover attorneys' fees if plaintiff substantially prevails.
3. The right to bring suit in the district where the violation occurs, where plaintiff resides or conducts his business, or in the District of Columbia.

Other provisions which might be considered would be: giving any case brought pursuant to the statute docket precedence and requiring the Government to answer the complaint within thirty rather than sixty days.¹⁷¹ The proposed Freedom From Surveillance Act, *supra*, also includes a provision authorizing class actions to enjoin surveillance by the military, and such a provision would seem to be equally desirable in the case of the CIA.

Finally, in view of the trepidation with which the courts have habitually dealt with matters relating to national security and foreign relations, particularly where the CIA is involved, it might be desirable to include provisions expressly granting the trial court power to review *in camera* relevant documents as to which a privilege is claimed (this power is now granted under the Freedom of Information Act, as recently amended) and making clear plaintiff's right to ascertain through speedy and effective discovery procedures whether improper domestic surveillance has, in fact, occurred.

B. Stricter Congressional Oversight

As a result of disclosures concerning CIA domestic and foreign activities, many bills and resolutions have been introduced in Congress to define and limit the CIA's functions, to restrict its domestic operations and to provide for more effective congressional oversight over its foreign political activities.¹⁷²

It is easier to agree in principle that each of these is desirable than to put in statutory form a clear, workable application of the principle. We will discuss below some of the approaches presented.

(1) DOMESTIC ACTIVITIES

A number of bills seek to eliminate domestic surveillance operations. In S. 8767, 93rd Cong., 2d Sess. (1974), the CIA is specifically unauthorized to:

"(1) carry out, directly or indirectly, within the United States, either on its own or in cooperation or conjunction with any other department, agency, organization, or individual any police or police-type operation or activity, any law enforcement operation or activity . . ."

In addition, the CIA would not be permitted to:

"(2) participate, directly or indirectly, in any illegal activity within the United States.¹⁷³

Others (e.g. S. 2597 93rd Cong., 1st Sess. [1973]) create exceptions for "carrying on within the United States activities necessary to support its foreign intelligence responsibilities." This would appear to provide a broad loophole which would not effectively bar such activities as opening the mail of Bella Abzug while she was a practicing attorney, and keeping counter-intelligence files on her activities and those of three other members of Congress (see Point IIB, *supra*).

Some members of the Committees preparing this report believe that such an exception would be appropriate if it were coupled with a *proviso* that internal security functions in support of foreign intelligence activities would be impermissible.

(2) CONGRESSIONAL REVIEW OF FOREIGN POLITICAL ACTIVITIES:
PRIOR APPROVAL OR LATER DISCLOSURE

The amendment to the Foreign Assistance Act of 1961, enacted as Public Law 93-559, Dec. 30, 1974, adding Sec. 663, requires only a report by the President as to CIA foreign operations "other than activities intended solely for obtaining necessary intelligence," to the appropriate committees of Congress, including the Senate Foreign Relations and the House Foreign Relations Committees. This Act does not, however, mandate authorization by Congress or any committee.

Some of the proposed legislation goes farther. H.R. 9511, 93rd Cong., 1st Sess. (1973), would prevent "covert" action without written approval of an oversight committee of Congress. "Covert" action is inadequately defined as being "the commonly accepted understanding of that term within the intelligence community of the Federal Government."

In H.R. 16,905, 93rd Cong., 2d Sess. (1974), funds are not to be appropriated for intelligence activities unless such operations are authorized by further legislation. The approach of this bill is to set up a congressional council which would have powers somewhat similar to the National Security Council. The limitation imposed by requiring authorization of intelligence operations by legislation enacted after the date of this Act would have conse-

quences perhaps unintended by the draftsmen. It would appear that the CIA cannot receive funds for any activity unless Congress as a whole so authorized by vote, which would in effect impair any secret operations including intelligence-gathering.

(3) COMPOSITION AND POWERS OF OVERSIGHT COMMITTEES

Many different approaches have been suggested as to the composition of a joint committee to oversee the Agency's operations. One bill seeks a fourteen member committee, seven from the House and seven from the Senate, each to be divided among the two parties (H.R. 16,905); another seeks twenty-five members (S. 1547, 93rd Cong., 2nd Sess. [1974]).

In H.R. 16,905, the joint committee is authorized to conduct continuing studies and investigations of all security agencies, namely, the CIA, FBI, Secret Service, Defense Intelligence Agency, the National Security Agency and all other intelligence departments and agencies of the Federal Government.

Other bills have sought (1) detailed and regular reports to congressional committees (H.R. 7596, 93rd Cong., 1st Sess. [1973]); (2) increased powers of congressional committees to obtain as a matter of law, further information from the CIA (H.R. 13,798, 93rd Cong., 2nd Sess. [1974]) "Central Intelligence Agency Disclosure Act";¹⁷⁴ and (3) further study and correlating of information available to Congress relating to intelligence (S. Con. Res. 23, 93rd Cong., 1st Sess. [1973]).

It is apparent that congressional oversight has many variations. Regular reporting and submission of a proposed budget to a carefully organized joint committee representing all segments of Congress, should be a minimum.

VI. RECOMMENDATIONS

1. Despite the present restriction of the CIA to the foreign intelligence field and despite the prohibition against its exercising any internal security functions, its domestic activities—viewed as legitimate by the Agency—so pervade our national life and society as to make such restriction and prohibition almost meaningless. A revision of the National Security Act so as to define more precisely both the authority of, and the restrictions on, the Agency is plainly necessary.

Legislation for this purpose referred to in CIA Director William E. Colby's report to the Senate Appropriations Committee as acceptable to the CIA is inadequate. This legislation would add the word "foreign" before the word "intelligence" wherever it appears in the Act, and would add a prohibition against "any domestic intelligence operation or activity" to the existing ban against the exercise of police, law-enforcement or internal security functions. However, this prohibition would be "supplemented" by an additional proviso preserving for the CIA the right to carry on within the United States any activity "in support of its foreign intelligence responsibilities . . ." ¹⁷⁵ It is difficult to determine which of the domestic activities now regarded by the CIA as not prohibited even though they appear to involve internal security functions, would be curtailed under such a proviso.

It is recommended that new legislation be formulated which would clearly define the terms "internal security operation" and "domestic intelligence operation" in accordance with Recommendations 2 and 3 below, (b) permit no exceptions to the ban on such operations by the CIA.

2. In light of recent testimony about CIA domestic activities, special attention should be given in any new legislation to the protection of First Fourth Amendment rights of speech, association and privacy. In our view CIA surveillance within the United States of any person who is not an employe of the CIA constitutes an "internal security function" proscribed by its present charter. Equally unlawful is the CIA's maintenance and dissemination of information concerning individuals in this country with no direct and direct involvement with foreign powers. Such CIA activities have a serious potential for infringement of First Amendment rights and are not necessary to the Agency's authorized objectives.

In addition, the exemption of the CIA from the restrictions contained in the Privacy Act of 1974¹¹⁹ should be revised. That Act provides that a citizen or resident alien about whom records are kept by a federal agency may inspect and make copies of such records, request corrections, and add to the records a statement of the reasons for his disagreement if the agency refuses to make such corrections. Exceptions to the requirement of allowing individuals to inspect and correct their own records are made, *inter alia*, for (a) investigative material compiled by a law enforcement agency; (b) information specifically authorized by Executive order to be kept secret in the interest of national defense or foreign policy; and (c) records maintained by the CIA. The total exemption for any records kept by the CIA constitutes a broad and unnecessary loophole which severely weakens the protection to individual privacy which the Act otherwise affords. This exemption should be limited to cases where the CIA can demonstrate that the individual making the request has a clear and direct connection with a foreign power.

3. The responsibility placed upon the Director to protect intelligence sources and methods from unauthorized disclosure should be eliminated. Mr. Helms and Mr. Colby disagree as to how the present provision is to be interpreted, but however interpreted, the provision has been used to justify CIA domestic activity—such as the Ellsberg profile, the insertion of CIA agents into domestic "dissident" groups, and CIA investigations within the Government of unauthorized disclosures of classified intelligence—which in our view conflicts with the prohibition against the exercise by the CIA of internal security functions. This domestic activity is premised on an overly broad definition of "intelligence" which encompasses not only CIA files and sources, but all Government documents and sources. Any protection of domestic sources and methods other than routine safety measures which may be necessary must be carried out by the FBI. With regard to sources and methods outside the United States, the authority to protect them is implied as part of the Agency's intelligence-gathering function.

4. Neither the National Security Act of 1947 nor the Central Intelligence Act of 1949 contains any express authority for the CIA to undertake foreign political operations. The amendment to the Foreign Assistance Act requir-

ing the President promptly to report any such operation to the appropriate congressional committees represents an attempt to increase the CIA's accountability to Congress for its overseas activities. Congress has a constitutionally-based responsibility as a partner with the Executive in the establishment of foreign policy; the oversight committee should therefore consider any CIA political operation in the light of the foreign policy goals of Congress. If the committee members find that a particular CIA activity may conflict with these goals, congressional policy should be ascertained without revelation of specific details to Congress as a whole.

In order for the appropriate congressional committee to exercise its oversight responsibilities effectively under the 1974 amendment to the Foreign Assistance Act, the Act should be amended to require that the President's report on any proposed foreign political activity be defined to include a detailed proposed budget to be followed at a later date by an account of actual expenditures. Such a budget could assist the committee members in analyzing the scope and objectives of the proposed operations.

5. The funding process for the CIA is unique, in that the annual budget is discussed and voted upon only by one intelligence sub-committee of the Appropriations Committee in each house and is then divided up by the committee chairmen and disguised in various other appropriations so that the Appropriations Committee and the Congress as a whole do not know when, much less what total amount, they are voting for the CIA budget. However, the Constitution requires that at least the total budget must be separately and knowingly appropriated by Congress. The Constitution further requires the Executive to make a regular statement of account of all public money spent; thus, the total sum actually disbursed by the CIA should be published in the Combined Statement.¹⁷⁷

The entire CIA budget should be reviewed by the joint congressional committee responsible for CIA oversight. This committee should be equipped with an adequate information-gathering staff and with enough professional accountants to allow it to perform meaningful budgetary review, and should require regular and special reports from the CIA. Budget oversight by this committee should include serious study of the CIA's proprietary corporations.

6. The legislation required to implement the above recommendations should confer standing to sue on injured citizens, such as those who have been the objects of surveillance. The holding of the Supreme Court in *Laird v. Tatum* to the effect that Government surveillance does not in itself create a chilling effect on First Amendment rights, has diminished still further the likelihood that a citizen who has been the object of CIA surveillance would be accorded standing under current constitutional standards, and has augmented the need for a new statutory enactment. It should be understood, however, that such legislation must not be interpreted as detracting from any presently established substantive rights, whether statutory or constitutional.

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Dated: March, 1975

FOOTNOTES

¹ See, e.g., letter dated 4/25/47 from Allen Dulles to Chan Gurney, Chairman of the Committee on Armed Forces, reproduced in *National Defense Establishment (Unification of the Armed Services) Hearings before the Committee on Armed Services, United States Senate, 80th Cong., 1st Sess. on S.758, at 584.*

² Wise & Ross, *THE INVISIBLE GOVERNMENT* (New York, Random House, 1964) at 91-93. With the creation of the OSS, the United States for the first time became engaged in intensive strategic intelligence research, and extensive and covert activity, on a world-wide scale. RANSOM, *CENTRAL INTELLIGENCE AND NATIONAL SECURITY* (Cambridge, Harvard Press, 1958) at 64.

³ HILLSMAN, *STRATEGIC INTELLIGENCE AND NATIONAL DECISIONS* (1956) at 29. The Joint Chiefs of Staff are credited with developing the plan eventually adopted by President Truman in the Statement of Lt. Gen. Hoyt S. Vandenberg, Director of Central Intelligence, reproduced in *National Defense Establishment, supra* at n.1, at 491, 494.

⁴ Presidential Directive of 1/22/46, 3 C.F.R. 1080 (1943-48 Comp.). See 11 Fed. Reg. 1337, 1339 (2/5/46); KIRKPATRICK, *THE REAL CIA* (1968) at 74; Ransom, *supra* at n.2, at 75.

⁵ Wise & Ross, *supra* at n.2, at 93; Walden, *The C.I.A.: A Study in the Arrogation of Administrative Powers*, 39 Geo. Wash. L.Rev. 66, 70 (1970).

⁶ Wise & Ross, *supra*, at 93; Walden, *supra* at n.5, at 70.

⁷ Walden, *supra*, at 71.

- 9 50 U.S.C. §401 *et seq.*
- 10 Rear Admiral Roscoe H. Hillenkoeter became its first Director on September 15, 1947.
- 11 50 U.S.C. §403(e) (1964); Walden, *supra*, at 73.
- 12 50 U.S.C. §403(c) (1964); FORD, DONOVAN OF OSS, (Boston, Little Brown & Co., 1970) at 316-17. Professor Walden notes that heads of other government agencies were authorized in 1950 to suspend any employee "when deemed necessary in the interest of national security," 5 U.S.C. §22-1 (1964), but the broad authority granted to the Director of Central Intelligence is paralleled only by that conferred upon the Secretary of Defense with respect to employees of the National Security Agency, 50 U.S.C. §833 (1964). Walden, *supra*, at 74.
- 13 50 U.S.C., §403a-§403j (1964).
- 14 *Id.* at §403 g.
- 15 *Id.* at §403 j (b).
- 16 In other words, the Director can spend money from the CIA's appropriations on his personal voucher. The CIA is said, however, to have taken administrative measures strictly to control its expenditures and to require a complete internal accounting for the use of all its funds, vouchered or unvouchered. Ransom, *supra* at n.2, at 81, 283, n.5. See DULLES, THE CRAFT OF INTELLIGENCE (New York, Harper & Row, 1963) at 239.
- 17 50 U.S.C. §403(h).
- 18 *Id.* at §403(d)(3). See e.g. *Hearing before the Committee on Armed Services, United States Senate, 93rd Cong., 1st Sess., on Nomination of William E. Colby to be D.C.I.*, at 14, 19.
- 19 Wise & Ross, *supra*, n.2 at 94-5; MARCHETTI & MARKS, THE C.I.A. AND THE CULT OF INTELLIGENCE (New York, Knopf, 1974) at 22-23. According to one authority, the NSC gave the CIA responsibility for "political, psychological, economic and unconventional warfare operations," Harry Rositzke, "America's Secret Operations: A Perspective," 53 *Foreign Affairs* 334, 341 (1975). The CIA's real role is therefore spelled out in a series of top-secret NSC directives ("NSCIDs"). Marchetti & Marks, *supra*, at 323. The fact that the Director participates in NSC meetings suggests that the scope of Agency operations may be largely self-determined. Ransom, *supra* at n.2, at 82.
- 20 According to Marchetti & Marks, *supra*, at 22, this was accomplished by means of a secret National Security Council Directive, NSC 10/2.
- 21 Marchetti & Marks, *supra*, at 23.
- 22 *Id.*
- 23 *Id.* at 58; see Schwartzman, *infra* at n.86, at 493 n.1.
- 24 *Id.* at 78-9.
- 25 New York Times, Dec. 22, 1974, p. 1, col. 8.
- On December 29, 1974 an ex-agent was quoted as describing his infiltration of the Students For A Democratic Society as one of a number of CIA agents assigned to spy on anti-war groups in New York between 1968 and 1972. He stated that the Agency had supplied him with psychological assessments of more than forty individuals to be used in connection with this spying. New York Times, Dec. 29, p. 1, col. 1.
- In San Diego a former CIA official, Dr. Melvin Crain, who resigned in 1959 and is now a professor of political science, recalled an Agency practice of opening the mail of American citizens who were corresponding with relatives or friends in Russia, a practice alleged to have started in the summer of 1953. New York Times, Jan. 8, 1975, p. 24, col. 1.

A few days later Ralph Stein, an ex-Army intelligence agent, described how he had briefed CIA officers on radical activities in 1967, and how they seemed already familiar with the literature and the personalities of the left-wing movement. *New York Times*, Jan. 11, 1975, p. 11, col. 4.

²⁶ *New York Times*, Jan. 16, 1975, p. 1, col. 1.

²⁷ *New York Times*, Jan. 5, 1975, p. 1, col. 8.

²⁸ Jervold L. Walden, "Proselytes for Espionage--The CIA and Domestic Fronts," *J. Pub. L.* 179, 183. (1976). Michigan State University was alleged to have received \$3,854,352.75 for a public administration and law enforcement program for the Government of South Vietnam. Walden, *supra*, at 181-182.

²⁹ As quoted in Walden, *supra* at n.28, at 185.

³⁰ *Id.* at 185-188.

³¹ *Id.*

³² *Id.* at 185.

³³ Marchetti and Marks, *supra*, at 50.

³⁴ *Id.* at 51.

³⁵ *Id.*

³⁶ The House Committee on Expenditures in the Executive Departments reported that the provision "prohibiting the agency from having the power of subpoena and from exercising internal police powers, provisions not included in the original bill nor in S. 758, were added by your committee." H.R. Rep. No. 661, 80th Cong., 1st Sess. (1947), p. 4. (Emphasis supplied.) Still another version of the functions to be prohibited to the CIA was set forth in a suggested redraft of S. 758 offered by the Reserve Officers Association of the United States which provided that the CIA was to have "no police or law-enforcement functions and no domestic counter-intelligence functions." *Hearings on S. 758 before the Committee on the Armed Services, United States Senate, 80th Cong., 1st Sess. (1947), Pt. 3, p. 535* (hereinafter cited as "S. 758 Hearings") (Emphasis supplied).

³⁷ One possible "gray area," however, which will be considered hereafter, is the question of Congress' intention in charging the Director of the CIA with responsibility for the protection of intelligence sources and methods from unauthorized disclosure.

³⁸ Testimony of General Hoyt Vandenberg at S. 758 Hearings, p. 428.

³⁹ *Id.* at 497.

⁴⁰ *Hearings on H.R. 2319 before the Committee on Expenditures in the Executive Departments, United States House of Representatives, 80th Cong., 1st Sess. (1947), p. 539.*

⁴¹ *Id.* at 127.

⁴² From the statement of Richard Helms before the Senate Armed Services Subcommittee on Central Intelligence on January 16, 1975, as reported in the *New York Times*, January 17, 1975. (hereinafter, "Helms Statement").

⁴³ From the report of William E. Colby submitted on January 15, 1975, to the Senate Appropriations Committee, as reported in the *New York Times* on January 16, 1975, pp. 30-31 (hereinafter, "Colby Report").

⁴⁴ *Helms Statement*, *New York Times*, January 17, 1975, p. 10, col. 4.

⁴⁵ *Colby Report*, *New York Times*, January 16, 1975, p. 30, col. 3.

⁴⁶ *Hearing before the Committee on Armed Services, United States Senate, 93rd Cong., 1st Sess., on Nomination of William E. Colby to be Director of Central Intelligence, July 2, 20 and 25, 1973* (hereinafter "Colby Hearing"), at 157.

⁴⁷ *Colby Report*, *New York Times*, January 16, 1975, p. 30, col. 4.

⁴⁸ *Colby Report*, *New York Times*, January 16, 1975, p. 30, col. 3.

⁴⁹ *Colby Hearing* at 157; see also *Colby Report, supra*, p. 30, col. 3.

⁵⁰ Colby Hearing, at 157.

⁵¹ Colby Report, *supra*, p. 30, cols. 4 and 5.

⁵² Colby Report, *supra*, p. 30, col. 4. Cf. Colby Hearing, at 157, where the reference is to "foreigners temporarily within the U.S." The operation of CIA agents among emigre groups in this country has reportedly been terminated. *Hearings before the Committee on Foreign Relations, United States Senate, 93rd Cong., 1st Sess., on Nomination of Richard Helms to be Ambassador to Iran and CIA International and Domestic Activities, February 3 and 7 and May 21, 1973*, (hereinafter "Helms Hearings"), at 34.

⁵³ Colby Report, *supra*, p. 30, col. 3.

⁵⁴ Colby Hearing at 157. This, presumably, includes CIA "proprietarys" such as Pacific Corporation, Air America, Air Asia, etc. See Marchetti & Marks, *supra*, at 134-153.

⁵⁵ *Id.*

⁵⁶ Colby Report, *supra*, p. 30, col. 4.

⁵⁷ *Id.* This function stems, Mr. Colby states, from the Director's responsibility to protect intelligence sources and methods.

⁵⁸ Colby Hearing at 25.

⁵⁹ Colby Report, *supra*, p. 30, col. 5. See also Colby Hearing, at 24. Cf. Helms statement that CIA was not involved in investigations of the anti-war movement because "it seemed to me that was a clear violation of what our charter was." *Helms Hearings* at 43.

⁶⁰ Colby Report, *supra*, p. 30, col. 6. But at his confirmation hearing, Mr. Colby had said that the authority of the CIA did not extend to collecting intelligence on U.S. citizens abroad who do not appear to be involved with the activities of foreign governments or foreign institutions. *Colby Hearing* at 23.

⁶¹ Colby Report, *supra*, p. 30, col. 5. At his confirmation hearing, Mr. Colby referred to this area of activity in response to questions about the so-called Huston White House Plan. *Colby Hearing* at 157.

⁶² Colby Hearing at 157.

⁶³ Colby Hearing at 22. Mr. Colby testified, however, that a mistake had been made in furnishing equipment to E. Howard Hunt.

⁶⁴ Colby Report, *supra*, p. 30, col. 4. Mr. Helms agrees. *Helms Hearings* at 69.

⁶⁵ Colby Hearing at 24-25. See also *Helms Hearings* at 34, where Mr. Helms states that surveillance in this country of people shuttling between here and Hanoi is not a function of the CIA.

⁶⁶ Colby Hearing at 23. Cf. item 15 under Permissible Domestic Activities, *supra*. But information regarding improper conduct if obtained as a by-product of foreign intelligence activities is reported to the FBI. *Colby Report, supra*, p. 30, col. 6. *Colby Hearing* at 23.

⁶⁷ This is not a function of the CIA in the view of Mr. Colby. *Colby Hearing* at 21. But Mr. Helms defended such profile as being authorized by the statutory provision making the Director responsible for protecting intelligence sources and methods from unauthorized disclosure since it is "difficult to protect sources and methods from disclosure unless you know who is doing the disclosing." *Helms Hearings* at 63.

⁶⁸ Colby Report, *supra*, p. 31, col. 2. Such assistance has been banned by the CIA by internal regulations, but this may have occurred not because the activity was thought to be unlawful but as a matter of policy.

⁶⁹ Colby Report, *supra*, p. 30, col. 6. Until 1973, Mr. Colby stated, some information on American dissidents collected in the United States by said agents was furnished to the FBI. In 1973, such information was limited to that collected abroad. In March, 1974, the program was terminated, and the Director issued specific guid-

ance that any collection of counter-intelligence information on Americans would take place only abroad and only in response to a request from the FBI. However, Mr. Colby neither defends nor deprecates the practice of infiltrating "dissident" organizations to provide CIA agents with cover.

⁷⁰ *Colby Report, supra*, p. 30, col. 6. Mr. Colby reports that information acquired was made available to the FBI, Secret Service and local police departments and that this program was terminated in December, 1968. But, again, Mr. Colby does not indicate whether in his view these activities were permissible or not. Cf. with Mr. Helms' testimony (*Helms Hearings*, at 99) that attempts to involve the CIA in doing something about leaks and demonstrations and trouble in the streets were totally and 100 percent resisted.

⁷¹ *Colby Hearing*, at 27-28, where Mr. Colby states that the legality of such training by the CIA might be defended. But Mr. Helms disagrees. *Helms Hearings* at 23.

⁷² *Helms Hearings* at 100-101. Mr. Helms thought that since foreign embassies are extraterritorial installations, this was a gray area and it was not clear whether or not such a study was a "domestic activity." But based upon the relations of the CIA and FBI over the years, he said, it would be an FBI function.

⁷³ *Colby Report, supra*, p. 31, cols. 1 and 2; *New York Times*, March 6, 1975, p. 1, col. 4. It is not clear whether Mr. Colby thought these activities were permitted or prohibited.

⁷⁴ *Helms Statement, New York Times*, January 17, 1975, p. 10, col. 1.

⁷⁵ *Colby Report, supra*, p. 30, col. 1.

⁷⁶ *Helms Statement, supra*, p. 10, col. 2. It is interesting to note, however, that as originally envisioned, the CIA was to be, primarily, a correlator and evaluator of intelligence gathered by others.

⁷⁷ Mr. Helms does not know whether this responsibility conflicts with the prohibition against the exercise by the CIA of internal security functions, but does believe that it creates a "gray area." *Helms Hearings* at 76-77. Mr. Colby believes that the provision gives the Director only the job of identifying a problem but no authority to deal with it and, hence, he sees less of a "gray area in that regard." *Colby Hearing* at 25. A proposed amendment to Section 102(d)(5) of the National Security Act (S. 2597, 93rd Cong., 1st Sess.) would give the Director only the responsibility of developing plans, policies and regulation for the protection of intelligence sources and would make it clear that such responsibility should not be construed as authorizing the Agency to engage in any activity prohibited by the first proviso of clause (5) (50 U.S.C. 402 (d)(5)).

⁷⁸ E.g. the Ellsberg profile, the insertion of CIA agents into domestic "dissident" groups, CIA investigations within the Government of unauthorized disclosures of classified intelligence, the wiretapping of telephones of private American citizens.

⁷⁹ *Colby Report, supra*, pps. 30-31.

⁸⁰ *Colby Hearing* at 20; Address to the Fund for Peace Conference on CIA and Covert Actions by William E. Colby, September 13, 1974 (hereinafter, "*Colby Address*") at 8.

⁸¹ *Colby Address, supra*, at 7-8; See Wise & Ross, *supra*, at 147-54; Marchetti & Marks, *supra*, at 31-32; *AID Activities in Laos, Hearing Before the Subcommittee on U.S. Security Agreements and Commitments Abroad of the Committee on Foreign Relations, United States Senate, 92nd Cong., 2nd Sess., April 13, 1972* at 3-4; Staff report prepared for Subcommittee on U.S. Security Agreements and Commitments Abroad of the Committee on Foreign Relations of the United States Senate, 92nd Cong., 1st Sess., April 1971.

⁸² *Hearings Before the Committee on Armed Services, United States Senate, 93rd Cong., 1st Sess., on S. 1263, June-August, 1973, Pt. VIII* at 5886-5887.

⁸³ Colby Hearing, *supra*, at 19; Colby Address, *supra*, at 6.

⁸⁴ Colby Address, *supra*, at 8.

⁸⁵ Helms Hearings, *supra*, at 41.

⁸⁶ 117 Cong. Rec. 42, 923-31 (1971) as quoted in Robin Schwartzman, *Fiscal Oversight of the CIA*, 7 N.Y.U. J. Int'l Law and Pol. 493 (1974) at 499.

⁸⁷ New York Times, Sept. 8, 1974, p. 1, col. 6.

⁸⁸ *Id.* Former DCI Richard Helms also reportedly testified to the Senate Foreign Relations Committee on January 22, 1975 that the Nixon Administration sought ways to overthrow President Allende after his election in September, 1970. New York Times, Feb. 10, p. 1, col. 7.

In March, 1973, William V. Broe, then in charge of Clandestine Operations for the Western Hemisphere, testified that on the instructions of Richard Helms, then DCI, he met with a Senior Vice President of International Telephone and Telegraph (ITT) on September 29 or 30, 1970, and suggested a series of possible actions designed to put economic pressure on Chile. There was no evidence that these actions were implemented. However, the ITT Vice President summarized the suggestions as follows:

1. Banks should not renew credits or should delay in doing so.
2. Companies should drag their feet in sending money, in making deliveries, in shipping spare parts, etc.
3. Savings and loan companies there are in trouble. If pressure were applied they would have to shut their doors, thereby creating stronger pressure.
4. We should withdraw all technical help and should not promise any technical assistance in the future. Companies in a position to do so should close their doors.
5. A list of companies was provided and it is suggested that we approach them as indicated. I was told that of all the companies involved, ours alone has been responsive and has understood the problem. The visitor added that money was not a problem."

Hearings on ITT and Chile 1970-71, Before the Subcommittee on Multinational Corporations of the Committee on Foreign Relations, United States Senate, 93rd Cong., 1st Sess., March-April, 1973, Pt 3, at 172.

⁸⁹ As quoted in New York Times, Tuesday, Sept. 17, 1974, p. 1, col. 1. The President further stated:

"It's a recognized fact that historically as well as presently, such actions are taken in the best interests of the countries involved."

Examples of such covert activities can be found in Wise and Ross, *supra*, at n.c., where the CIA is described as organizing a putsch in Iran in 1953 which overthrew Premier Mohammed Mossadeq, arranging a coup in Guatemala in 1954 which replaced the government of Jacobo Arbenz Guzman with that of Colonel Efraim Monzon, assisting the Diem regime to become established in South Vietnam and supporting an attempt to overthrow President Sukarno of Indonesia in 1958.

The CIA is also depicted in Marchetti and Marks, *supra*, at n. 19 at 27-28 as having assisted Magsaysay's election in the Philippines in 1953 and provided him with help in fighting the Huks, including the use of psychological warfare.

In addition, the CIA allegedly carried on political activities in the 1960's in Ecuador (1960-63), Brazil (1962-63), Zaire (1960-63), Somalia (1967-69) and Indonesia (1965). Morris, "Reflections on Five Case Histories," unpublished paper presented at Fund for Peace Conference on CIA and Covert Actions, September 12-13, 1974.

⁹⁰ 50 USC, §103(d)(5). Subsections (3) and (4) are sometimes also used to justify the CIA's covert activities. Subsection (3) provides in part that "the director of Cen-

tral Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure" and subsection (4) provides that it is the duty of the CIA "to perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally." Both these functions, however, are explicitly related to intelligence gathering and, as Director Colby noted in his January 15, 1975 report to the Senate Appropriations Committee, *supra*, the CIA itself makes the distinction between "clandestine operations to collect foreign intelligence and counterintelligence responsibilities" on the one hand and "covert foreign political or paramilitary operations" on the other. *Colby Report, supra*, p. 30.

⁹¹ Address to the American Society of Newspaper Editors, April 14, 1971 (text p. 5) (referred to in unpublished paper by David Wise entitled "Covert Operations Abroad: An Overview," pp. 7-8).

⁹² *Colby Hearing*, at 13-14.

⁹³ 50 U.S.C. §402(a).

⁹⁴ 50 U.S.C. §402(b).

⁹⁵ 50 U.S.C. §402(b)(1).

⁹⁶ 50 U.S.C. §402(b)(2).

⁹⁷ 50 U.S.C. §502(d).

⁹⁸ 50 U.S.C. §403g.

⁹⁹ The theory that such activities are not legally exempted from the disclosure law is currently being advanced by Congressman Michael Harrington in a suit to enjoin such activities discussed *infra* at Point V.

¹⁰⁰ Walden, *supra* at n.5, at 84.

¹⁰¹ *Id.* at 82.

¹⁰² *Id.* at 83, n.83.

¹⁰³ "National Security Act of 1947," Report of the Committee on Expenditures in the Executive Department, to accompany H.R. 4414, p. 28 quoted in Wise & Rose, *supra*, at 10.

¹⁰⁴ Senate Committee on Armed Services, Senate Report No. 259, June 5, 1947, U.S. Code Cong. Serv., 80th Cong., 1st Sess., 1947, p. 1487.

¹⁰⁵ Pub. L. 93-559, 93rd Cong., S. 3418, December 31, 1974, 88 Stat. 1795.

¹⁰⁶ The Committee on International Human Rights of the Association of the Bar of the City of New York, which assisted in the development of this report, believes that Congress should take appropriate action to prevent the CIA from engaging in foreign political operations and to assure that the CIA will confine its activities to those intelligence-related activities permitted by its charter.

¹⁰⁷ See notes 88 and 89, *supra*.

¹⁰⁸ *The Dominican Crisis, supra*.

¹⁰⁹ *Id.* at 550.

¹¹⁰ 51 Stat. 41.

¹¹¹ 49 Stat. 3097. Signed by Honduras, El Salvador, Dominican Republic, Haiti, Argentina, Venezuela, Uruguay, Paraguay, Mexico, Panama, Guatemala, Brazil, Ecuador, Nicaragua, Columbia, Chile, Peru, Cuba and the United States.

¹¹² United States bilateral treaties with Ecuador, Brazil, Chile and Guatemala, signed during or shortly after World War I, make no reference to intervention but provide that all disputes between them of whatever nature, will be referred to arbitration. See, e.g., Treaty for Advancement of Peace (Ecuador-U.S.A.), proclaimed Jan. 24, 1916; Treaty for Advancement of Peace (Brazil-U.S.A.), proclaimed Oct. 30, 1916; Treaty for the Settlement of Disputes (Chile-U.S.A.), proclaimed Jan. 19, 1916. It should be noted, of course, that to the extent the United States believes

that one of its treaty partners has taken actions which violate its treaties with the United States (and such violations may consist of a number of activities, such as expropriation of American property, making agreements with nations that pose a threat to the security of the United States, etc.), the United States may well be free to treat said treaty as abrogated and consider itself no longer bound by its provisions.

113 62 Stat. 1681. The Treaty was ratified by Brazil, Dominican Republic, Panama, Columbia, Honduras, Uruguay, Paraguay, Nicaragua, Mexico, and the United States.

114 2 USC 2302. The Protocol of Amendment adopted in 1967, 21 USA 607, does not make any substantive changes in regard to the matters discussed herein.

115 Article I, Sec. 8, Clause 1.

116 Article I, Sec. 8, Clause 11.

117 Article I, Sec. 8, Clause 12.

118 Article I, Sec. 8, Clause 13.

119 Article I, Sec. 8, Clause 14.

120 Article I, Sec. 8, Clause 15.

121 Prof. Knoul Berger, *War-Making by the President*, Cong. Rec., February 20, 1973, S 2783, S 2785, n. 62.

122 If "a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist by force." *The Prize Cases*, 2 Black 635, 668 (U.S. 1862); see also *Meritt v. Mott*, 12 Wheat. 19, 30 (U.S. 1827); *Mitchell v. Laird*, 488 F.2d 611, 613-614 (D.C. Cir. 1973).

123 *The Records of the Federal Convention of 1789*, at 318-319 (N. Farrand ed 1911), (August 17, 1787), as reported in William Van Alstyne, *Congress, The President and the Power to Declare War: A Requiem for Viet Nam*, 121 Univ. of Pa. L. Rev. 1, 6.

124 Article II, Sec. 3.

125 LOUIS HENKIN, "FOREIGN AFFAIRS AND THE CONSTITUTION," (New York, The Foundation Press, 1972) Chapter II.

126 *Mitchell v. Laird*, *supra*, at 615; *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970).

127 Article II, Sec. 2, Cl. 2.

128 See n.117, *supra*.

129 See n.116, *supra*.

130 See ns. 81-86, *supra*.

131 See ns. 88 and 89, *supra*.

132 For a detailed description of the present procedure, see Point IV, *infra*.

133 *Colby Report*, *supra*, p. 30.

134 *Joint Hearings before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations and the Subcommittee on Separation of Powers and Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess., on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923, and S. 2073, April 10, 11, 12, May 8, 9, 10, and 16, 1973, Vol. 2 at 225.*

135 The following description is adapted from Robin Schwartzman, *Fiscal Oversight of the CIA*, 7 N.Y.U.J. Int'l L. & Pol. 493 (1974).

136 Schwartzman, *supra*, at 495-96.

137 *Id.* at 496-97.

138 *Id.* at 497. In the House of Representatives this Subcommittee is called a Special Group, rather than a Subcommittee, because each Appropriations Subcommittee is responsible for a particular appropriations bill, and there is no separate appropriations bill for intelligence services. *Id.* at 497.

139 *Id.*

140 *Id.* at 497-500. The House subcommittee apparently conducts a more thorough review than the Senate Subcommittee.

141 *Id.* at 497-98.

142 *Id.* at 501.

143 50 U.S.C. §§403a-403j (1954).

144 50 U.S.C. §403f.

145 50 U.S.C. §403j(a).

146 Several legislative corollaries to this constitutional requirement are found in Title 31 of the United States Code.

Section 529, for example, provides:

"No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law."

Section 526 similarly states:

"Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

A third provision which the 1949 Act appears to make inapplicable is §627:

"No Act of Congress passed after June 30, 1906, shall be construed to make an appropriation out of the Treasury of the United States, or authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed."

147 Stanley Futterman, *Toward Legislative Control of the CIA*, 4 N.Y.U. J. Int'l L. & Pol. 431 (1971), at 451.

148 Letter to Hon. Millard E. Tydings, Feb. 11, 1949, printed in S. Rep. No. 106, 81st Cong. 1st Sess. (1949), 2 U.S. Code Cong. and Adm. News 1399 (1949), as quoted in Futterman, *supra*, at 452.

149 95 Cong. Rec. 1944 (1949) as quoted in Futterman, *supra*, at 452.

150 See Note "The CIA's Secret Funding and the Constitution" 84 Yale L.J. 608 (1975) at 619.

151 Schwartzman, *supra* at n.125, at 507. Both the intelligence subcommittee of the Senate Armed Services Committee and that of the House Armed Services Committee, which are composed of senior members of the full committees and which together perform most of the oversight function, have become increasingly active since 1971. In that year the House subcommittee was disbanded and the Senate subcommittee did not meet. After the House subcommittee was reconstituted under the chairmanship of Rep. Lucien Nedzi, Ms. Schwartzman reports, based on information received from counsel to the committee, that it met nine times in 1972, 24 times in 1973, and 17 times in 1974. The Senate subcommittee on the other hand, held only two formal meetings during the 93rd Congress, although it met informally a number of other times, and occasionally reviewed CIA spending in great detail, according to a committee staff member. See Schwartzman, *supra* at 508-509.

152 Schwartzman, *supra*, at 508-507.

153 Items in the Combined Statement are listed by appropriation heading and there is no item for the CIA. Money transferred to the CIA is listed the same way as money routinely transferred between agencies--i.e. listed as a transfer without specifying the destination.

154 This section was enacted in 1894. A 1950 statute, 31 U.S.C. §665b(a), provides for cooperation by all executive agencies in the preparation of the Secretary's report:

(a) The Secretary of the Treasury shall prepare such reports for the information of the President, the Congress, and the public as will present the re-

sults of the financial operations of the Government: *Provided*, That these shall be included such financial data as the Director of the Bureau of the Budget may require in connection with the preparation of the Budget or for other purposes of the Bureau. Each executive agency shall furnish the Secretary of the Treasury such reports and information relating to its financial condition and operations as the Secretary, by rules and regulations, may require for the effective performance of his responsibilities under this section.

133 50 U.S.C. §403j(b).

136 2 Farrand, ed., "The Records of the Federal Convention of 1787" (1911) (hereafter Farrand) at 318-19; see also G. Hunt and J.B. Scott, eds., "The Debates in the Federal Convention of 1787, Reported by James Madison" (1920) (hereafter Hunt and Scott) at 566-67. Mason's fear was shared by Patrick Henry who argued at the Virginia debates on the Constitution that the Statements and Accounts Clause did not provide sufficient protection against government secrecy, and urged the adoption of a bill of rights. 3 J. ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* (1830) (hereafter Elliot) at 462.

137 2 Farrand at 612; Hunt and Scott at 566.

138 2 Elliot at 452.

139 *Id.* at 450.

140 At least two commentators have also reached this conclusion. See Schwartzman, *supra*, at 352; Note, *The CIA's Secret Funding and the Constitution*, *supra* at n.150, at 611-15 and 622-23.

141 3 Elliot at 452.

142 The "Historical Note" accompanying this statute remarks that Congress in several years prior to and including 1926 appropriated money specifically to be used pursuant to the requirements of this section.

143 A statute more broadly framed but not cited by the Government is 31 U.S.C. §529d which provides:

"A certificate by the Commissioner of Customs stating the amount of an expenditure made from funds advanced and certifying that the confidential nature of the transaction involved renders it inadvisable to specify the details thereof or impracticable to furnish the payee's receipt shall be a sufficient voucher for the sum expressed to have been expended."

Even this statute, however, requires a separate certificate and explanation for each expenditure, whereas 50 U.S.C. §403j(b) is framed in the plural and does not require a written explanation by the Director, thus allowing him to include a number of expenditures in one certificate.

144 Note, *The CIA's Secret Funding and the Constitution*, *supra* at n.150, at 622.

145 The Atomic Energy Commission is an example of an agency related to the national security whose budget is made public in some detail, including the amount spent on "objects of a confidential nature." See Note, *The CIA's Secret Funding and the Constitution*, *supra*, at 618. Whether the CIA budget should be published in the same manner is a question for Congress to consider. However, Mr. Colby has stated that publication of the total CIA budget would not threaten the national security, except insofar as trends in intelligence expenditures discernible after several years might reveal changes in priorities. Testimony, Fund for Peace Conference, September 13, 1974, at 47.

146 See Note, *Standing to Sue for Members of Congress*, 83 Yale L. J. 1665 (1974) at 1684.

147 These bases were not considered sufficient by the Second Circuit, however, in a suit to challenge the United States involvement in Cambodia. *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973).

168 Report of the Civil Rights Committee, *Military Surveillance of Civilian Political Activities: Report and Recommendations for Congressional Action*, 28 Record of the Association of the Bar of the City of New York 631 (October, 1973).

169 The decision in *United States v. Richardson*,—U.S.—, 41 L. Ed.2d 678 (1973), holding that plaintiff taxpayer lacked standing to challenge that provision of the statutes regulating the CIA which allows the Agency to account for expenditures solely on the certificate of the Director, indicates the difficulty which private citizens will have in questioning other activities of the CIA.

170 A prerequisite to imposition of sanctions on CIA employees who violate the law would be a clearly drawn statute setting out precisely the actions prohibited. Such sanctions under other statutes relating to government employees have included the imposition of fines, 18 U.S.C. §§209, 219, 432, 435-437, 755, 1385, 1901-1913, 2075; removal from office, 18 U.S.C. §§437, 1901, 1905, 1908, 1912, 1913; 31 U.S.C. 665; forfeiture of pension benefits, 5 U.S.C. §§8311-8315; and disciplinary action, 5 U.S.C. §532.

171 These provisions appear in the Freedom of Information Act, 5 U.S.C. §552, as recently amended over President Ford's veto.

172 92d Congress, 1st Sess. (1973): H.R. 2486, 2572, 7506, 9347, 9370, 9511, 9583, 10363, 11,054, 93rd Cong., 2nd Sess. (1974): H.R. 13,798, 15,235, 15,845, 16,588, 93rd Cong., 2nd Sess., (1974): S. 1547, 2307, 3767, 4019; H. Res. 1251, 1232, 1441, 93rd Cong., 1st Sess. (1973): S. Con. Res. 25.

173 In H.R. 9311, the CIA is prevented from engaging in police type of law enforcement or internal security operations; and from providing assistance to any Federal, State or police agencies unless written approval of an oversight subcommittee of Congress (Appropriations and Armed Services) is given.

174 This bill provides for rather widespread dissemination of data to congressional committees, but without adequate safeguards as to security information.

175 *Colby Report, supra*, at p. 31.

176 Pub. Law 93-579, 93rd Cong., Dec. 31, 1974, 43 U.S.L.W. 148 (Jan. 21, 1975). Under this statute, the Executive could order that CIA files relating to the national defense be treated as exceptions. Thus, the separate exemption for all CIA files appears unnecessary, and should be given careful reconsideration.

177 The CIA's charter exempts from this requirement only expenditures for "objects of a confidential, extraordinary or emergency nature." 50 U.S.C. §403j(b). See discussion in Point IV, *supra*.