IV. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

The findings which have emerged from our investigation convince us that the Government's domestic intelligence policies and practices require fundamental reform. We have attempted to set out the basic facts; now it is time for Congress to turn its attention to legislating restraints upon intelligence activities which may endanger the constitutional rights of Americans.

The Committee's fundamental conclusion is that intelligence activities have undermined the constitutional rights of citizens and that they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied.

Before examining that conclusion, we make the following observations.

—While nearly all of our findings focus on excesses and things that went wrong, we do not question the need for lawful domestic intelligence. We recognize that certain intelligence activities serve perfectly proper and clearly necessary ends of government. Surely, catching spies and stopping crime, including acts of terrorism, is essential to insure "domestic tranquility" and to "provide for the common defense." Therefore, the power of government to conduct *proper* domestic intelligence activities under effective restraints and controls must be preserved.

—We are aware that the few earlier efforts to limit domestic intelligence activities have proven ineffectual. This pattern reinforces the need for statutory restraints coupled with much more effective oversight from all branches of the Government.

—The crescendo of improper intelligence activity in the latter part of the 1960s and the early 1970s shows what we must watch out for: In time of crisis, the Government will exercise its power to conduct domestic intelligence activities to the fullest extent. The distinction between legal dissent and criminal conduct is easily forgotten. Our job is to recommend means to help ensure that the distinction will always be observed.

—In an era where the technological capability of Government relentlessly increases, we must be wary about the drift toward "big brother government." The potential for abuse is awesome and requires special attention to fashioning restraints which not only cure past problems but anticipate and prevent the future misuse of technology.

—We cannot dismiss what we have found as isolated acts which were limited in time and confined to a few willful men. The failures to obey the law and, in the words of the oath of office, to "preserve, protect, and defend" the Constitution, have occurred repeatedly throughout administrations of both political parties going back four decades.

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—We must acknowledge that the assignment which the Government has given to the intelligence community has, in many ways, been impossible to fulfill. It has been expected to predict or prevent every crisis, respond immediately with information on any question, act to meet all threats, and anticipate the special needs of Presidents. And then it is chastised for its zeal. Certainly, a fair assessment must place a major part of the blame upon the failures of senior executive officials and Congress.

In the final analysis, however, the purpose of this Committee's work is not to allocate blame among individuals. Indeed, to focus on personal culpability may divert attention from the underlying institutional causes and thus may become an excuse for inaction.

Before this investigation, domestic intelligence had never been systematically surveyed. For the first time, the Government's domestic surveillance programs, as they have developed over the past forty years, can be measured against the values which our Constitution seeks to preserve and protect. Based upon our full record, and the findings which we have set forth in Part III above, the Committee concludes that:

> *Domestic Intelligence Activity Has Threatened and Undermined The Constitutional Rights of Americans to Free Speech, Association and Privacy. It Has Done So Primarily Because The Constitutional System for Checking Abuse of Power Has Not Been Applied.*

Our findings and the detailed reports which supplement this volume set forth a massive record of intelligence abuses over the years. Through a vast network of informants, and through the uncontrolled or illegal use of intrusive techniques—ranging from simple theft to sophisticated electronic surveillance—the Government has collected, and then used improperly, huge amounts of information about the private lives, political beliefs and associations of numerous Americans.

Affect Upon Constitutional Rights.—That these abuses have adversely affected the constitutional rights of particular Americans is beyond question. But we believe the harm extends far beyond the citizens directly affected.

Personal privacy is protected because it is essential to liberty and the pursuit of happiness. Our Constitution checks the power of Government for the purpose of protecting the rights of individuals, in order that all our citizens may live in a free and decent society. Unlike totalitarian states, we do not believe that any government has a monopoly on truth.

When Government infringes those rights instead of nurturing and protecting them, the injury spreads far beyond the particular citizens targeted to untold numbers of other Americans who may be intimidated.

Free government depends upon the ability of all its citizens to speak their minds without fear of official sanction. The ability of ordinary people to be heard by their leaders means that they must be free to join in groups in order more effectively to express their grievances. Constitutional safeguards are needed to protect the timid as well as the courageous, the weak as well as the strong. While many Americans have been willing to assert their beliefs in the face of possible govern-

mental reprisals, no citizen should have to weigh his or her desire to express an opinion, or join a group, against the risk of having lawful speech or association used against him.

Persons most intimidated may well not be those at the extremes of the political spectrum, but rather those nearer the middle. Yet voices of moderation are vital to balance public debate and avoid polarization of our society.

The federal government has recently been looked to for answers to nearly every problem. The result has been a vast centralization of power. Such power can be turned against the rights of the people. Many of the restraints imposed by the Constitution were designed to guard against such use of power by the government.

Since the end of World War II, governmental power has been increasingly exercised through a proliferation of federal intelligence programs. The very size of this intelligence system, multiplies the opportunities for misuse.

Exposure of the excesses of this huge structure has been necessary. Americans are now aware of the capability and proven willingness of their Government to collect intelligence about their lawful activities and associations. What some suspected and others feared has turned out to be largely true—vigorous expression of unpopular views, association with dissenting groups, participation in peaceful protest activities, have provoked both government surveillance and retaliation.

Over twenty years ago, Supreme Court Justice Robert Jackson, previously an Attorney General, warned against growth of a centralized power of investigation. Without clear limits, a federal investigative agency would "have enough on enough people" so that "even if it does not elect to prosecute them" the Government would, he wrote, still "find no opposition to its policies". Jackson added, "Even those who are supposed to supervise [intelligence agencies] are likely to fear [them]." His advice speaks directly to our responsibilities today:

> I believe that the safeguard of our liberty lies in limiting any national police or investigative organization, first of all to a small number of strictly federal offenses, and secondly to nonpolitical ones. The fact that we may have confidence in the administration of a federal investigative agency under its existing head does not mean that it may not revert again to the days when the Department of Justice was headed by men to whom the investigative power was a weapon to be used for their own purposes.[1]

Failure to Apply Checks and Balances.—The natural tendency of Government is toward abuse of power. Men entrusted with power, even those aware of its dangers, tend, particularly when pressured, to slight liberty.

Our constitutional system guards against this tendency. It establishes many different checks upon power. It is those wise restraints which keep men free. In the field of intelligence those restraints have too often been ignored.

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[1] Robert H. Jackson, *The Supreme Court in the American System of Government* (New York: Harper Torchbook, 1955, 1963), pp. 70–71.

The three main departures in the intelligence field from the constitutional plan for controlling abuse of power have been:

(*a*) *Excessive Executive Power.*—In a sense the growth of domestic intelligence activities mirrored the growth of presidential power generally. But more than any other activity, more even than exercise of the war power, intelligence activities have been left to the control of the Executive.

For decades Congress and the courts as well as the press and the public have accepted the notion that the control of intelligence activities was the exclusive prerogative of the Chief Executive and his surrogates. The exercise of this power was not questioned or even inquired into by outsiders. Indeed, at times the power was seen as flowing not from the law, but as inherent in the Presidency. Whatever the theory, the fact was that intelligence activities were essentially exempted from the normal system of checks and balances.

Such Executive power, not founded in law or checked by Congress or the courts, contained the seeds of abuse and its growth was to be expected.

(*b*) *Excessive Secrecy.*—Abuse thrives on secrecy. Obviously, public disclosure of matters such as the names of intelligence agents or the technological details of collection methods is inappropriate. But in the field of intelligence, secrecy has been extended to inhibit review of the basic programs and practices themselves.

Those within the Executive branch and the Congress who would exercise their responsibilities wisely must be fully informed. The American public, as well, should know enough about intelligence activities to be able to apply its good sense to the underlying issues of policy and morality.

Knowledge is the key to control. Secrecy should no longer be allowed to shield the existence of constitutional, legal and moral problems from the scrutiny of all three branches of government or from the American people themselves.

(*c*) *Avoidance of the Rule of Law.*—Lawlessness by Government breeds corrosive cynicism among the people and erodes the trust upon which government depends.

Here, there is no sovereign who stands above the law. Each of us, from presidents to the most disadvantaged citizen, must obey the law.

As intelligence operations developed, however, rationalizations were fashioned to immunize them from the restraints of the Bill of Rights and the specific prohibitions of the criminal code. The experience of our investigation leads us to conclude that such rationalizations are a dangerous delusion.

B. Principles Applied in Framing Recommendations and The Scope of the Recommendations.

Although our recommendations are numerous and detailed, they flow naturally from our basic conclusion. Excessive intelligence activity which undermines individual rights must end. The system for controlling intelligence must be brought back within the constitutional scheme.

Some of our proposals are stark and simple. Because certain domestic intelligence activities were clearly wrong, the obvious solution is to prohibit them altogether. Thus, we would ban tactics such as those used

in the FBI's COINTELPRO. But other activities present more complex problems. We see a clear need to safeguard the constitutional rights of speech, assembly, and privacy. At the same time, we do not want to prohibit or unduly restrict necessary and proper intelligence activity.

In seeking to accommodate those sometimes conflicting interests we have been guided by the earlier efforts of those who originally shaped our nation as a republic under law.

The Constitutional amendments protecting speech and assembly and individual privacy seek to preserve values at the core of our heritage and vital to our future. The Bill of Rights, and the Supreme Court's decisions interpreting it suggest three principles which we have followed:

(1) Governmental action which directly infringes the rights of free speech and association must be prohibited. The First Amendment recognizes that even if useful to a proper end, certain governmental actions are simply too dangerous to permit at all. It commands that "Congress shall make *no* law" abridging freedom of speech or assembly.

(2) The Supreme Court, in interpreting that command, has required that any governmental action which has a collateral (rather than direct) impact upon the rights of speech and assembly is permissible only if it meets two tests. First, the action must be undertaken only to fulfill a compelling governmental need, and second, the government must use the least restrictive means to meet that need. The effect upon protected interests must be minimized.[2]

(3) Procedural safeguards—"auxiliary precautions" as they were characterized in the Federalist Papers [3]—must be adopted along with substantive restraints. For example, while the Fourth Amendment prohibits only "unreasonable" searches and seizures, it requires a procedural check for reasonableness—the obtaining of a judicial warrant upon probable cause from a neutral magistrate. Our proposed procedural checks range from judicial review of intelligence activity before or after the fact, to formal and high level Executive branch approval, to greater disclosure and more effective Congressional oversight.

The Committee believes that its recommendations should be embodied in a comprehensive legislative charter defining and controlling the domestic security activities of the Federal Government. Accordingly, Part i of the recommendations provides that intelligence agencies must be made subject to the rule of law. In addition, Part i makes clear that no theory, of "inherent constitutional authority" or otherwise, can justify the violation of any statute.

Starting from the conclusion, based upon our record, that the Constitution and our fundamental values require a substantial curtailment

[2] *De Gregory* v. *New Hampshire*, 383 U.S. 825, 829 (1966); *NAACP* v. *Alabama*, 377 U.S. 288 (1964); *Gibson* v. *Florida Legislative Investigation Commission*, 372 U.S. 539, 546 (1962); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

[3] Madison, Federalist No. 51. Madison made the point with grace:

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

of the scope of domestic surveillance, we deal after Part i with five basic questions:

1. Which agencies should conduct domestic security investigations?

The FBI should be primarily responsible for such investigations. Under the minimization principle, and to facilitate the control of domestic intelligence operations, only one agency should be involved in investigative activities which, even when limited as we propose, could give rise to abuse. Accordingly, Part ii of these recommendations reflects the Committee's position that foreign intelligence agencies (the CIA, NSA, and the military agencies) should be precluded from domestic security activity in the United States. Moreover, they should only become involved in matters involving the rights of Americans abroad where it is impractical to use the FBI, or where in the course of their lawful foreign intelligence operations [4] they inadvertently collect information relevant to domestic security investigations. In Part iii the Committee recommends that non-intelligence agencies such as the Internal Revenue Service and the Post Office be required, in the course of any incidental involvement in domestic security investigations, to protect the privacy which citizens expect of first class mail and tax records entrusted to those agencies.

2. When should an American be the subject of an investigation at all; and when can particularly intrusive covert techniques, such as electronic surveillance or informants, be used?

In Part iv, which deals with the FBI, the Committee's recommendations seek to prevent the excessively broad, ill-defined and open ended investigations shown to have been conducted over the past four decades. We attempt to change the focus of investigations from constitutionally protected advocacy and association to dangerous conduct. Part iv also sets forth specific substantive standards for, and procedural controls on, particular intrusive techniques.

3. Who should be accountable within the Executive branch for ensuring that intelligence agencies comply with the law and for the investigation of alleged abuses by employees of those agencies?

In Parts v and vi, the Committee recommends that these responsibilities fall initially upon the agency heads, their general counsel and inspectors general, but ultimately upon the Attorney General. The information necessary for control must be made available to those responsible for control, oversight and review; and their responsibilities must be made clear, formal, and fixed.

4. What is the appropriate role of the courts?

In Part vii, the Committee recommends the enactment of a comprehensive civil remedy providing the courts with jurisdiction to entertain legitimate complaints by citizens injured by unconstitutional or illegal activities of intelligence agencies. Part viii suggests that criminal penalties should attach in cases of gross abuse. In addition, Part iv provides for judicial warrants before certain intrusive techniques can be used.

5. What is the appropriate role of Congress:

In Part xii the Committee reiterates its position that the Senate create a permanent intelligence oversight committee.

The recommendations deal with numerous other issues such as the proposed repeal or amendment of the Smith Act, the proposed mod-

[4] Directed primarily at foreigners abroad.

ernization of the Espionage Act to cover modern forms of espionage seriously detrimental to the national interest, the use of the GAO to assist Congressional oversight of the intelligence community, and remedial measures for past victims of improper intelligence activity.

Scope of Recommendations.—The scope of our recommendations coincides with the scope of our investigation. We examined the FBI, which has been responsible for most domestic security investigations, as well as foreign and military intelligence agencies, the IRS, and the Post Office, to the extent they became involved incidentally in domestic intelligence functions. While there are undoubtedly activities of other agencies which might legitimately be addressed in these recommendations, the Committee simply did not have the time or resources to conduct a broader investigation. Furthermore, the mandate of Senate Resolution 21 required that the Committee exclude from the coverage of its recommendations those activities of the federal government which are directed at organized crime and narcotics.

The Committee believes that American citizens should not lose their constitutional rights to be free from improper intrusion by their Government when they travel overseas. Accordingly, the Committee proposes recommendations which apply to protect the rights of Americans abroad as well as at home.

1. Activities Covered

The Domestic Intelligence Recommendations pertain to: the domestic security activities of the federal government;[5] and any activities of military or foreign intelligence agencies which affect the rights of Americans[6] and any intelligence activities of any non-intelligence agency working in concert with intelligence agencies, which affect those rights.

2. Activities Not Covered

The recommendations are not designed to control federal investigative activities directed at organized crime, narcotics, or other law enforcement investigations unrelated to domestic security activities.

3. Agencies Covered

The agencies whose activities are specifically covered by the recommendations are:

> (i) the Federal Bureau of Investigation; (ii) the Central Intelligence Agency; (iii) the National Security Agency and other intelligence agencies of the Department of De-

[5] "Domestic security activities" means federal governmental activities, directed against Americans or conducted within the United States or its territories, including enforcement of the criminal law, intended to (a) protect the United States from hostile foreign intelligence activity, including espionage; (b) protect the federal, state, and local governments from domestic violence or rioting; and (c) protect Americans and their government from terrorist activity. See Part xiii of the recommendations and conclusions for all the definitions used in the recommendations.

[6] "Americans" means U.S. citizens, resident aliens and unincorporated associations, composed primarily of U.S. citizens or resident aliens; and corporations, incorporated or having their principal place of business in the United States or having majority ownership by U.S. citizens, or resident aliens, including foreign subsidiaries of such corporations, provided, however, Americans does not include corporations directed by foreign governments or organizations.

fense; (iv) the Internal Revenue Service; and (v) the United States Postal Service.

While it might be appropriate to provide similar detailed treatment to the activities of other agencies, such as the Secret Service, Customs Service, and Alcohol, Tobacco, and Firearms Division (Treasury Department), the Committee did not study these agencies intensively. A permanent oversight committee should investigate and study the intelligence functions of those agencies and the effect of their activities on the rights of Americans.

4. Indirect Prohibitions

Except as specifically provided herein, these Recommendations are intended to prohibit any agency from doing indirectly that which it would be prohibited from doing directly. Specifically, no agency covered by these Recommendations should request or induce any other agency, or any person, whether the agency or person is American or foreign, to engage in any activity which the requesting or inducing agency is prohibited from doing itself.

5. Individuals and Groups Not Covered

Except as specifically provided herein, these Recommendations do not apply to investigation of foreigners [7] who are officers or employees of a foreign power, or foreigners who, pursuant to the direction of a foreign power, are engaged in or about to engage in "hostile foreign intelligence activity" or "terrorist activity".[8]

6. Geographic Scope

These Recommendations apply to intelligence activities which affect the rights of Americans whether at home or abroad, including all domestic security activities within the United States.

7. Legislative Enactment of Recommendations

Most of these Recommendations are designed to be implemented in the form of legislation and others in the form of regulations pursuant to statute. (Recommendations 85 and 90 are not proposed to be implemented by statute.

C. Recommendations

Pursuant to the requirement of Senate Resolution 21, these recommendations set forth the new congressional legislation [the Committee] deems necessary to "safeguard the rights of American citizens." [9] We believe these recommendations are the appropriate conclusion to a traumatic year of disclosures of abuses. We hope they will prevent such abuses in the future.

i. Intelligence Agencies Are Subject to the Rule of Law

Establishing a legal framework for agencies engaged in domestic security investigation is the most fundamental reform needed to end the long history of violating and ignoring the law set forth in Finding A. The legal framework can be created by a two-stage process of enabling legislation and administrative regulations promulgated to implement the legislation.

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[7] "Foreigners" means persons and organizations who are not Americans as defined above.

[8] These terms, which cover the two areas in which the Committee recommends authorizing preventive intelligence investigations, are defined on pp. 340–341.

[9] S. Res. 21, Sec. 5; 2(12).

However, the Committee proposes that the Congress, in developing this mix of legislative and administrative charters, make clear to the Executive branch that it will not condone, and does not accept, any theory of inherent or implied authority to violate the Constitution, the proposed new charters, or any other statutes. We do not believe the Executive has, or should have, the inherent constitutional authority to violate the law or infringe the legal rights of Americans, whether it be a warrantless break-in into the home or office of an American, warrantless electronic surveillance, or a President's authorization to the FBI to create a massive domestic security program based upon secret oral directives. Certainly, there would be no such authority after Congress has, as we propose it should, covered the field by enactment of a comprehensive legislative charter.[10] Therefore statutes enacted pursuant to these recommendations should provide the exclusive legal authority for domestic security activities.

Recommendation 1.—There is no inherent constitutional authority for the President or any intelligence agency to violate the law.

Recommendation 2.—It is the intent of the Committee that statutes implementing these recommendations provide the exclusive legal authority for federal domestic security activities.

(*a*) No intelligence agency may engage in such activities unless authorized by statute, nor may it permit its employees, informants, or other covert human sources [11] to engage in such activities on its behalf.

(*b*) No executive directive or order may be issued which would conflict with such statutes.

Recommendation 3.—In authorizing intelligence agencies to engage in certain activities, it is not intended that such authority empower agencies, their informants, or covert human sources to violate any prohibition enacted pursuant to these Recomendations or contained in the Constitution or in any other law.

ii. United States Foreign and Military Agencies Should Be Precluded from Domestic Security Activities

Part iv of these Recommendations centralizes domestic security investigations within the FBI. Past abuses also make it necessary that the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, and the military departments be precluded expressly, except as specifically provided herein, from investigative activity which is conducted within the United States. Their activities abroad should also be controlled as provided herein to minimize their impact on the rights of Americans.

a. Central Intelligence Agency

The CIA is responsible for foreign intelligence and counterintelligence. These recommendations minimize the impact of CIA operations on Americans. They do not affect CIA investigations of foreigners outside of the United States. The main thrust is to prohibit past actions revealed as excessive, and to transfer to the FBI other activities which might involve the CIA in internal security or law enforce-

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[10] See, *e.g.*, *Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U.S. 579 (1952).

[11] "Covert human sources" means undercover agents or informants who are paid or otherwise controlled by an agency.

ment matters. Those limited activities which the CIA retains are placed under tighter controls.

The Committee's recommendations on CIA domestic activities are similar to Executive Order 11905. They go beyond the Executive Order, however, in that they recommend that the main safeguards be made law. And, in addition, the Committee proposes tighter standards to preclude repetition of some past abuses.

General Provisions

The first two Recommendations pertaining to the CIA provide the context for more specific proposals. In Recommendation 4, the Committee endorses the prohibitions of the 1947 Act upon exercise by the CIA of subpoena, police or law enforcement powers or internal security functions. The Committee intends that Congress supplement, rather than supplant or derogate from the more general restrictions of the 1947 Act.

Recommendation 5 clarifies the role of the Director of Central Intelligence in the protection of intelligence sources and methods. He should be charged with "coordinating" the protection of sources and methods—that is, the development of procedures for the protection of sources and methods.[12] (Primary responsibility for investigations of security leaks should reside in the FBI.) Recommendation 5 also makes clear that the Director's responsibility for protecting sources and methods does not permit violations of law. The effect of the new Executive Order is substantially the same as Recommendation 5.

Recommendation 4—To supplement the prohibitions in the 1947 National Security Act against the CIA exercising "police, subpoena, law enforcement powers or internal security functions," the CIA should be prohibited from conducting domestic security activities within the United States, except as specifically permitted by these recommendations.

Recommendation 5—The Director of Central Intelligence should be made responsible for "coordinating" the protection of sources and methods of the intelligence community. As head of the CIA, the Director should also be responsible in the first instance for the security of CIA facilities, personnel, operations, and information. Neither function, however, authorizes the Director of Central Intelligence to violate any federal or state law, or to take any action which is otherwise inconsistent with statutes implementing these recommendations.

CIA Activities Within the United States

1. *Wiretapping, Mail Opening and Unauthorized Entry.*—The Committee's recommendations on CIA domestic activities apply primarily to actions directed at Americans. However, in Recommendation 6 the Committee recommends that the most intrusive and dangerous investi-

[12] As noted in the Report on CHAOS, former Directors have had differing interpretations of the mandate of the 1947 Act to the Director of Central Intelligence to protect intelligence sources and methods. The Committee agrees with former Director William Colby that the 1947 Act only authorizes the Director to perform a "coordinating" and not an "operational" role.

gative techniques (electronic surveillance;[13] mail opening; or unauthorized entry[14]) should be used in the United States only by the FBI and only pursuant to the judicial warrant procedures described in Recommendations 53, 54 and 55.

This approach is similar to the Executive order except that the Order permits the CIA to open mail in the United States pursuant to applicable statutes and regulations (i.e., with a warrant). The Committee's recommendations (see Parts iii and iv), places all three techniques—mail opening, electronic surveillance and unauthorized entry—under judicial warrant procedures and centralizes their use within the FBI under Attorney General supervision. The Committee sees no justification for distinguishing among these techniques, all of which represent an exercise of domestic police powers[15] which is inappropriate for a U.S. foreign intelligence agency within the United States and which inherently involve special dangers to civil liberties and personal privacy.

2. *Other Covert Techniques.*—The use of other covert techniques[16] by the CIA within the United States is sharply restricted by Recommendation 7 to specific situations.

The Committee would permit the CIA to conduct physical surveillance of persons on the premises of its own installations and facilities. Outside of its premises, the Committee would permit the CIA to conduct limited physical surveillance and confidential inquiries of its own employees[17] as part of a preliminary security investigation.

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[13] The activity completely prohibited to CIA includes only the interception of communications restricted under the 1968 Safe Streets Act, and would not limit the use of body recorders, or telephone taps or other electronic surveillance where one party to the communication has given his consent. For example, electronic coverage of a case officer's meeting with his agent would not be included. The prohibition also is not intended to cover the testing of equipment in the United States, when done with the written approval of the Attorney General and under procedures he has approved to minimize interception of private communications and to prevent improper dissemination or use of the communications which are unavoidably intercepted in the testing process. Nor does the prohibition preclude the use of countermeasures to detect electronic surveillance mounted against the CIA, when conducted under general procedures and safeguards approved in writing by the CIA General Counsel.

[14] "Unauthorized entry" means entry unauthorized by the target.

[15] As part of the CIA's responsibility for its own security, however, appropriate personnel should be permitted to carry firearms within the United States not only for courier protection of documents, but also to protect the Director and Deputy Director and defectors and to guard CIA installations.

[16] "Covert techniques" means the collection of information including collection from records sources not readily available to a private person (except state or local law enforcement files) in such a manner as not to be detected by the subject. Covert techniques do not include a check of CIA or other federal agency or state and local police records, or a check of credit bureaus for the limited purpose of obtaining non-financial biographical data, i.e., date and place of birth, to facilitate such name checks, and the subject's place of employment. Nor do "covert techniques" include interviews with persons knowledgeable about the subject conducted on a confidential basis to avoid disclosure of the inquiry to others or to the subject, if he is not yet aware of CIA interest in a prospective relationship, provided the interview does not involve the provision of information from medical, financial, educational, phone or other confidential records.

[17] For purposes of this section employees includes those employees or contractors who work regularly at CIA facilities and have comparable access or freedom of movement at CIA facilities as employees of CIA.

Although the Committee generally centralizes such investigations within the FBI, it would be too burdensome to require the Bureau to investigate every allegation that an employee has personal difficulties, which could make him a security risk, or allegations of suspicious behavior suggesting the disclosure of information. Before involving the FBI, the CIA could conduct a preliminary inquiry, which usually consists of nothing more than interviews with the subject's office colleagues, or his family, neighbors or associates, and perhaps confrontation of the subject himself. In some situations, however, limited physical surveillance might enable the CIA to resolve the allegation or to determine that there was a serious security breach involved.

Unlike the Executive Order, however, the Committee recommendations limit this authority to present CIA employees who are subject to summary dismissal. The only remedy available to the Government for security problems with past employees is criminal prosecution or other legal action. All security leak investigations for proposed criminal prosecution should be centralized in the FBI. Authorizing the use of any covert technique against contractors and their employees, let alone former employees of CIA contractors, as the Executive Order does, would authorize CIA surveillance of too large a number of Americans. The CIA can withdraw security clearances until satisfied by the contractor that a security risk has been remedied and, in serious cases, any investigations could be handled by the FBI.

The recommendation on the use of covert techniques within the United States also precludes the use of covert human sources such as undercover agents and informants,[18] with one exception expressly stated to be limited to "exceptional" cases. The Committee would authorize the CIA to place an agent in a domestic group, but only for the purpose of establishing credible cover to be used in a foreign intelligence mission abroad and only when the Director of Central Intelligence finds it to be "essential" to collection of information "vital" to the United States and the Attorney General finds that the operation will be conducted under procedures designed to prevent misuse.[19]

Apart from this limited exception, the CIA could not infiltrate groups within the United States for any purpose, including, as was done in the past, the purported protection of intelligence sources and methods or the general security of the CIA's facilities and personnel. (The Executive Order prohibits infiltration of groups within the United States "for purposes of reporting on or influencing its activities or members," but does not explicitly prohibit infiltration to protect intelligence sources and methods or the physical security of the agency.)

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[18] Recommendation 7(c) does permit background and other security investigations conducted with government credentials which do not reveal CIA involvement and, in extremely sensitive cases commercial or other private identification to avoid disclosure of any government connection.

It would also permit CIA investigators to check the effectiveness of cover operations, without revealing their affiliation, by means of inquiries at the vicinity of particularly sensitive CIA projects. If in the course of such inquiries, unidentified CIA employees or contractors' employees are observed to be endangering the project's cover, they may be the subject of limited physical

3. *Collection of Information.*—In addition to limiting the use of particular covert techniques, the Committee limits, in Recommendation 8, the situations in which the CIA may intentionally collect, by any means, information within the United States concerning Americans. The recommendation permits the CIA to collect information within the United States about Americans only with respect to persons working for the CIA or having some other significant affiliation or contact with CIA. The CIA should not be in the business of investigating Americans as intelligence or counterintelligence targets within the United States—a responsibility which should be centralized in the FBI and performed only under the circumstances proposed as lawful in Part iv.

The Executive Order only restricts CIA collection of information about Americans if the information concerns "the *domestic activities* of United States citizens." Unlike the Committee, the Order does not restrict CIA collection of information about foreign travel or wholly lawful international contacts and communication of Americans. As the Committee has learned from its study of the CIA's CHAOS operation, in the process of gathering information about the international travel and contacts of Americans, the CIA acquired within the United States a great deal of additional information about the domestic activities of Americans.

The Executive Order also permits collection within the United States of information about the domestic activities of Americans in several other instances not permitted under the Committee recommendations:

(*a*) Collection of "foreign intelligence or counterintelligence" about the domestic activity of commercial organizations. (The Committee's restrictions on the collection of information apply to investigations of organizations as well as individuals.);

(*b*) Collection of information concerning the identity of persons in contact with CIA employees or with foreigners who are subjects of a counterintelligence inquiry. (Within the United States, the Commit-

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surveillance at that time for the sole purpose of ascertaining their identity so that they may be subsequently contacted.

[19] Such action poses serious danger of misuse. The preparation may involve the agent reporting on his associates so that the CIA can assess his credentials and his observation and reporting ability. This could become an opportunity to collect domestic intelligence on the infiltrated group even when an investigation of that group could not otherwise be commenced under the applicable standards. Obviously, without restrictions the intelligence community could use this technique to conduct domestic spying, arguing that the agents were not being "targeted" against the group but were merely preparing for an overseas operation.

This was done, for example, in the use by Operation CHAOS of agents being provided with radical credentials for use in "Project 2," a foreign intelligence operation abroad. (See the CHAOS Report and the Rockefeller Commission Report.)

One alternative would be to let the FBI handle the agent while he is preparing for overseas assignment. On balance, however, that seems less desirable. The temptation to use the agent to collect domestic intelligence might be stronger for the agency with domestic security responsibilities than it would for the area division of the CIA concerned with foreign intelligence. Also, improper use of the agent to collect such information would be more readily identifiable in the context of the foreign intelligence operation run by the CIA than it would in the context of an agent operation run by the Intelligence Division of the FBI.

tee would require any investigations to collect such information to be conducted by the FBI, *and* only if authorized under Part iv, and subject to its procedural controls.);

(*c*) Collection of "foreign intelligence" from a cooperating source within the United States about the domestic activities of Americans. "Foreign intelligence," is an exceedingly broad and vague standard. The use of such a standard raises the prospect of another Project CHAOS. (The Committee would prohibit such collection by the CIA within the United States, except with respect to persons presently or prospectively affiliated with CIA.);

(*d*) Collection of information about Americans "reasonably believed" to be acting on behalf of a foreign power or engaging in international terrorist or narcotic activities. (The Committee would require investigations to collect such information within the United States, to be conducted by the FBI, and only if authorized under Part iv.);

(*e*) Collection of information concerning persons considered by the CIA to pose a clear threat to intelligence agency facilities or personnel, provided such information is retained only by the "threatened" agency and that proper coordination is established with the FBI. (This was the basis for the Office of Security's RESISTANCE program investigating dissent throughout the country.) (The Committee would require any such "threat" collection outside the CIA be conducted by the FBI, *and* only if authorized by Part iv, or by local law enforcement.)

Recommendation 6.—The CIA should not conduct electronic surveillance, unauthorized entry, or mail opening within the United States for any purpose.

Recommendation 7.—The CIA should not employ physical surveillance, infiltration of groups or any other covert techniques against Americans within the United States except:

(*a*) Physical surveillance of persons on the grounds of CIA installations;

(*b*) Physical surveillance during a preliminary investigation of allegations an employee is a security risk for a limited period outside of CIA installations. Such surveillance should be conducted only upon written authorization of the Director of Central Intelligence and should be limited to the subject of the investigation and, only to the extent necessary to identify them, to persons with whom the subject has contact;

(*c*) Confidential inquiries, during a preliminary investigation of allegations an employee is a security risk, of outside sources concerning medical or financial information about the subject which is relevant to those allegations;[19a]

(*d*) The use of identification which does not reveal CIA or government affiliation, in background and other security investigations permitted the CIA by these recommendations, and the conduct of checks, which do not reveal CIA or government affiliation for the purpose of judging the effectiveness of cover operations, upon the written authorization of the Director of Central Intelligence;

[19a] Any further investigations conducted in connection with (b) or (c) should be conducted by the FBI, and only if authorized by Part iv.

(*e*) In exceptional cases, the placement or recruitment of agents within an unwitting domestic group solely for the purpose of preparing them for assignments abroad and only for as long as is necessary to accomplish that purpose. This should take place only if the Director of Central Intelligence makes a written finding that it is essential for foreign intelligence collection of vital importance to the United States, and the Attorney General makes a written finding that the operation will be conducted under procedures designed to prevent misuse of the undisclosed participation or of any information obtained therefrom.[20] In the case of any such action, no information received by CIA from the agent as a result of his position in the group should be disseminated outside the CIA unless it indicates felonious criminal conduct or threat of death or serious bodily harm, in which case dissemination should be permitted to an appropriate official agency if approved by the Attorney General.

Recommendation 8.—The CIA should not collect[21] information within the United States concerning Americans except:

(*a*) Information concerning CIA employees,[22] CIA contractors and their employees, or applicants for such employment or contracting;

(*b*) Information concerning individuals or organizations providing, or offering to provide,[23] assistance to the CIA;

(*c*) Information concerning individuals or organizations being considered by the CIA as potential sources of information or assistance;[24]

(*d*) Visitors to CIA facilities;[25]

(*e*) Persons otherwise in the immediate vicinity of sensitive CIA sites;[26] or

(*f*) Persons who give their informed written consent to such collection.

In (a), (b) and (c) above, information should be collected only if necessary for the purpose of determining the person's fitness for employment, contracting or assistance. If, in the course of such collection, information is obtained which indicates criminal activity, it should be transmitted to the FBI or other appropriate agency. When an American's relationship with the CIA is prospective, information should only be collected if there is a bona fide expectation the person might be used by the CIA.

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[20] In addition, the FBI should be notified of such insertions.

[21] "Collect" means to gather or initiate the acquisition of information, or to request it from another agency. It does not include dissemination of information to CIA by another agency acting on its own initiative.

[22] "Employees," as used in this recommendation, would include members of the employee's immediate family or prospective spouse.

[23] In the case of persons unknown to the CIA who volunteer to provide information or otherwise request contact with CIA personnel, the agency may conduct a name check before arranging a meeting.

[24] The CIA may only conduct a name check and confidential interviews of persons who know the subject, if the subject is unaware of CIA interest in him.

[25] The CIA may only collect information by means of a name check.

[26] The CIA may make a name check and determine the place of employment of persons residing or working in the immediate vicinity of sensitive sites, such as persons residing adjacent to premises used for safe houses or defector resettlement, or such as proprietors of businesses in premises adjacent to CIA offices in commercial areas.

CIA Activities Outside of the United States

The Committee would permit a wider range of CIA activities against Americans abroad than it would permit the CIA to undertake within the United States, but it would not permit the CIA to investigate abroad the lawful activities of Americans to any greater degree than the FBI could investigate such activities at home.

Abroad, the FBI is not in a position to protect the CIA from serious threats to its facilities or personnel, or to investigate all serious security violations. To the extent it is impractical to rely on local law enforcement authorities, the CIA should be free to preserve its security by specified appropriate investigations which may involve Americans, including surveillance of persons other than its own employees.

The Committee gives to the FBI the sole responsibility within the United States for authorized domestic security investigations of Americans. However, when such an investigation has overseas aspects, the FBI looks to the CIA as the overseas operational arm of the intelligence community. The recommendations would authorize the CIA to target Americans abroad as part of an authorized investigation initiated by the FBI.

The Committee does not recommend permitting the CIA itself to initiate such investigations of Americans overseas.[27] Present communications permit rapid consultation with the Department of Justice. Moreover, the lesson of CHAOS is that an American's activities abroad may be ambiguous, such as contact with persons who may be acting on behalf of hostile foreign powers at an international conference on disarmament. The question is who shall determine there is sufficient information to justify making an American citizen a target of his government's intelligence apparatus?

The limitations contained in Recommendation 9 only pertain to the CIA initiating investigations or otherwise intentionally collecting information on Americans abroad. The CIA would not be prohibited from accepting and passing on information on the illegal activities of Americans which the CIA acquires incidentally in the course of its other activities abroad.

The Committee believes that judgments should be centralized within the Justice Department to promote consistent, carefully controlled application of the appropriate standards and protection of Constitutional rights. This is the same position taken by Director Colby in setting current CIA policy for mounting operations against Americans abroad. In March 1974, Director Colby formally terminated the CHAOS program and promulgated new guidelines for future activity abroad involving Americans, which, in effect, transferred such responsibilities to the Department of Justice.[28]

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[27] The counterintelligence component of the CIA would be able to call to the attention of the FBI any patterns of significance which the CIA thought warranted opening an investigation of an American.

[28] The guidelines state:

A. "Whenever information is uncovered as a byproduct result of CIA foreign targeted intelligence or counterintelligence operations abroad which makes Americans suspect for security or counterintelligence reasons . . . such information will be reported to the FBI . . . specific CIA operations will not be mounted against such individuals; CIA responsibilities thereafter will be restricted to

The Committee is somewhat more restrictive than the Executive Order with respect to collection of information on Americans. As mentioned earlier, the Order only restricts CIA collection of information about the "domestic activities" of Americans and does not prohibit the collection of information regarding the lawful travel or international contacts of American citizens. This creates a particularly significant problem with respect to CIA activities directed against Americans abroad.

The Order permits the CIA wider latitude abroad than do the Committee's Recommendations in two other important respects. The Order permits collection of information if the American is reasonably believed to be acting on behalf of a foreign power. That exemption on its face would include Americans working for a foreign country on business or legal matters or otherwise engaged in wholly lawful activities in compliance with applicable registration or other regulatory statutes. More importantly, the Order permits the CIA to collect "foreign intelligence" or "counterintelligence" information abroad about the *domestic activities* of Americans. The Order then broadly defines "foreign intelligence" as information about the intentions or activities of a foreign country or person, or information about areas outside the United States. This would authorize the CIA to collect, abroad, for example, information about the domestic activities of American businessmen which provided intelligence about business transactions of foreign persons.

The CIA does not at present specifically collect intelligence on the economic activities of Americans overseas. The Committee suggests that appropriate oversight committees examine the question of the overseas collection of economic intelligence.

Use of Covert Techniques Against Americans Abroad

Recommendation 11 requires the use of all covert techniques be governed by the same standards, procedures, and approvals required for their use by the Justice Department against Americans within the United States. Thus, in the case of electronic surveillance, unauthorized entry, or mail opening, a judicial warrant would be required. As a matter of sound Constitutional principle, the Fourth Amendment protections enjoyed by Americans at home should also apply to protect them against their Government abroad. It would be just as offensive to have a CIA agent burglarize an American's apartment in Rome as it would be for the FBI to do so in New York.

Requirements that a warrant be obtained in the United States would not present an excessive burden. Electronic surveillance and unauthorized entries are not presently conducted against Americans abroad without prior consultation and approval from CIA Headquarters in

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reporting any further intelligence or counterintelligence aspects to the specific case which comes to CIA's attention as a byproduct of its continuing foreign targeted operational activity. If the FBI, on the basis of the receipt of the CIA information, however, specifically requests further information on terrorist or counterintelligence matters relating to the private American citizens . . . CIA may respond to written requests by the FBI for clandestine collection abroad by CIA of information on foreign terrorist or counterintelligence matters involving American citizens."

Langley, Virginia. Moreover, the present Deputy Director of CIA for Operations has testified that bona fide counterintelligence investigations are lengthy and time consuming and prior review within the United States, including consultation with the Justice Department, would not be a serious problem.[29] Indeed electronic surveillance of Americans abroad under present administration policy also requires approval by the Attorney General.

The Committee reinforces the general restrictions upon overseas targeting of Americans by recommending that the CIA be prohibited from requesting a friendly foreign intelligence service or other person from undertaking activities against Americans which the CIA itself may not do. This would not require that a foreign government's use of covert techniques be conducted under the same procedures, e.g., warrants, required by those Recommendations for the CIA and the FBI. It would mean that the CIA cannot ask a foreign intelligence service to bug the apartment of an American unless the circumstances would permit the United States Government to obtain a judicial warrant from a Federal Court in this country to conduct such surveillance of the American abroad.

The Committee places greater restrictions upon the CIA's use of covert techniques against Americans abroad than does the Executive Order. For example, the Order permits the CIA to conduct electronic surveillance and unauthorized entries under "procedures approved by the Attorney General consistent with the law." No judicial warrant procedure is required. In addition, the Order's restriction on CIA's opening mail of Americans is limited to mail "in the United States postal channels." In other words, under the Order the CIA is not prevented from intercepting abroad and opening a letter mailed by an American to his family, or sent to him from the United States.

The Order also contains no restrictions on the CIA infiltrating a group abroad, even if it were one composed entirely of Americans engaged in wholly lawful activities such as a political club of American students in Paris. Furthermore, the Order permits the CIA to conduct physical surveillance abroad of any American "reasonably believed to be" engaged in "activities threatening to the national security." On its face this language appears overly permissive and might be read to authorize a repetition of the CHAOS program in which Americans were targeted for surveillance because of their participation in international conferences critical of the U.S. role in Vietnam.

Recommendation 9.—The CIA should not collect information abroad concerning Americans except:

(*a*) Information concerning Americans which it is permitted to collect within the United States;[30]

(*b*) At the request of the Justice Department as part of criminal investigations or an investigation of an American for suspected ter-

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[29] William Nelson testimony, 1/28/76, pp. 33–34. Mr. Nelson was not addressing procedures to obtain a judicial warrant; but the time required for an *ex parte* application on an expedited basis to a Federal Court in Washington, D.C., would not be excessive for the investigative time frames which Nelson described.

Furthermore, the present wiretap statute authorizes electronic surveillance (for 48 hours) on an emergency basis prior to judicial authorization.

[30] Recommendation 8, p. 303.

rorist,[30a] or hostile foreign intelligence [30b] activities or security leak or security risk investigations which the FBI has opened pursuant to Part iv of those recommendations and which is conducted consistently with recommendations contained in Part iv.[31]

Recommendation 10.—The CIA should be able to transmit to the FBI or other appropriate agencies information concerning Americans acquired as the incidental byproduct of otherwise permissible foreign intelligence and counterintelligence operations,[32] whenever such information indicates any activity in violation of American law.

Recommendation 11.—The CIA may employ covert techniques abroad against Americans:

(*a*) Under circumstances in which the CIA could use such covert techniques against Americans within the United States; [33] or

(*b*) When collecting information as part of Justice Department investigation, in which case the CIA may use a particular covert techniques under the standards and procedures and approvals applicable to its use against Americans within the United States by the FBI (See Part iv); or

(*c*) To the extent necessary to identify persons known or suspected to be Americans who come in contact with foreigners the CIA is investigating.

CIA Human Experiments and Drug Use

Recommendation 12 tracks similar restrictions in the Executive Order but proposes an additional safeguard—giving the National Commission on Biomedical Ethics and Human Standards jurisdiction to review any testing on Americans.

[30a] "Terrorist activities" means acts, or conspiracies, which: (a) are violent or dangerous to human life; and (b) violate federal or state criminal statutes concerning assassination, murder, arson, bombing, hijacking, or kidnaping; and (c) appear intended to, or are likely to have the effect of:

(1) Substantially disrupting federal, state or local government; or

(2) Substantially disrupting interstate or foreign commerce between the United States and another country; or

(3) Directly interfering with the exercise by Americans, of Constitutional rights protected by the Civil Rights Act of 1968, or by foreigners, of their rights under the laws or treaties of the United States.

[30b] "Hostile foreign intelligence activities" means acts, or conspiracies, by Americans or foreigners, who are officers, employees, or conscious agents of a foreign power, or who, pursuant to the direction of a foreign power, engage in clandestine intelligence activity, or engage in espionage, sabotage or similar conduct in violation of federal criminal statutes. (The term "clandestine intelligence activity" is included in this definition at the suggestion of officials of the Department of Justice. Certain activities engaged in by conscious agents of foreign powers, such as some forms of industrial, technological, or economic espionage, are not now prohibited by federal statutes. It would be preferable to amend the espionage laws to cover such activity and eliminate this term. As a matter of principle, intelligence agencies should not investigate activities of Americans which are not violations of federal criminal statutes. Therefore, the Committee recommends (in Recommendation 94) that Congress immediately consider enacting such statutes and then eliminating this term.)

[31] If the CIA believes that an investigation of an American should be opened but the FBI declines to do so, the CIA should be able to appeal to the Attorney General or to the appropriate committee of the National Security Council.

[32] Such information would include material volunteered by a foreign intelligence service independent of any request by the CIA.

[33] See Recommendation 7, p. 302.

Recommendation 12—The CIA should not use in experimentation on human subjects, any drug, device or procedure which is designed or intended to harm, or is reasonably likely to harm, the physical or mental health of the human subject, except with the informed written consent, witnessed by a disinterested third party, of each human subject, and in accordance with the guidelines issued by the National Commission for the Protection of Human Subjects for Biomedical and Behavioral Research The jurisdiction of the Commission should be amended to include the Central Intelligence Agency and other intelligence agencies of the United States Government.

Review and Certification

Recommendation 13 ensures careful monitoring of those CIA activities authorized in the recommendations which are directed at Americans.

Recommendation 13—Any CIA activity engaged in pursuant to Recommendations 7, 8, 9, 10, or 11 should be subject to periodic review and certification of compliance with the Constitution, applicable statutes, agency regulations and executive orders by:

(*a*) The Inspector General of the CIA;

(*b*) The General Counsel of the CIA in coordination with the Director of Central Intelligence;

(*c*) The Attorney General; and

(*d*) The oversight committee recommended in Part xii.

All such certifications should be available for review by congressional oversight committees.

b. National Security Agency

The recommendations contained in this section suggest controls on the electronic surveillance activities of the National Security Agency insofar as they involve, or could involve, Americans. There is no statute which either authorizes or specifically restricts such activities. NSA was created by executive order in 1952, and its functions are described in directives of the National Security Council.

While, in practice, NSA's collection activities are complex and sophisticated, the process by which it produces foreign intelligence can be reduced to a few easily understood principles. NSA intercepts messages passing over international lines of communication, some of which have one terminal within the United States. Traveling over these lines of communication, especially those with one terminal in the United States, are the messages of Americans, most of which are irrelevant to NSA's foreign intelligence mission. NSA often has no means of excluding such messages, however, from others it intercepts which might be of foreign intelligence value. It does have, however, the capability to select particular messages from those it intercepts which are of foreign intelligence value. Most international communications of Americans are not selected, since they do not meet foreign intelligence criteria. Having selected messages of possible intelligence value, NSA monitors (reads) them, and uses the information it obtains as the basis for reports which it furnishes the intelligence agencies.

Having this process in mind, one will more readily understand the recommendations of the Committee insofar as NSA's handling of the messages of Americans is concerned. The Committee recommends first that NSA monitor only foreign communications. It should not monitor

domestic communications, even for foreign intelligence purposes. Second, the Committee recommends that NSA should not select messages for monitoring, from those foreign communications it has intercepted, because the message is to or from or refers to a particular American, unless the Department of Justice has first obtained a search warrant, or the particular American has consented. Third, the Committee recommends that NSA be required to make every practicable effort to eliminate or minimize the extent to which the communications of Americans are intercepted, selected, or monitored. Fourth, for those communications of Americans which are nevertheless incidentally selected and monitored, the Committee recommends that NSA be prohibited from disseminating such communication, or information derived therefrom, which identifies an American, unless the communication indicates evidence of hostile foreign intelligence or terrorist activity, or felonious criminal conduct, or contains a threat of death or serious bodily harm. In these cases, the Committee recommends that the Attorney General approve any such dissemination as being consistent with these policies.

In summary, the Committee's recommendations reflect its belief that NSA should have no greater latitude to monitor the communications of Americans than any other intelligence agency. To the extent that other agencies are required to obtain a warrant before monitoring the communications of Americans, NSA should be required to obtain a warrant.[34]

Recommendation 14.—NSA should not engage in domestic security activities. Its functions should be limited in a precisely drawn legislative charter to the collection of foreign intelligence from foreign communications.[35]

Recommendation 15.—NSA should take all practicable measures consistent with its foreign intelligence mission to eliminate or minimize the interception, selection, and monitoring of communications of Americans from the foreign communications.[36]

Recommendation 16.—NSA should not be permitted to select for monitoring any communication to, from, or about an American without his consent, except for the purpose of obtaining information about hostile foreign intelligence or terrorist activities, and then only if a warrant approving such monitoring is obtained in accordance with procedures similar [37] to those contained in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

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[34] None of the Committee's recommendations pertaining to NSA should be construed as inhibiting or preventing NSA from protecting U.S. communications against interception or monitoring by foreign intelligence services.

[35] "Foreign communications," as used in this section, refers to a communication between or among two or more parties in which at least one party is outside the United States, or a communication transmitted between points within the United States only if transmitted over a facility which is under the control of, or exclusively used by, a foreign government.

[36] In order to ensure that this recommendation is implemented, both the Attorney General and the appropriate oversight committees of the Congress should be continuously apprised of, and periodically review, the measures taken by NSA pursuant to this recommendation.

[37] The Committee believes that in the case of interceptions authorized to obtain information about hostile foreign intelligence, there should be a presumption that notice to the subject of such intercepts, which would ordinarily be required under Title III (18 U.S.C. 2518(8)(d)), is not required, unless there is evidence of gross abuse.

(This recommendation would eliminate the possibility that NSA would re-establish its "watch lists" of the late 1960s and early 1970s. In that case, the names of Americans were submitted to NSA by other federal agencies and were used as a basis for selecting and monitoring, without a warrant, the international communications of those Americans.)

Recommendation 17.—Any personally identifiable information about an American which NSA incidentally acquires, other than pursuant to a warrant, should not be disseminated without the consent of the American, but should be destroyed as promptly as possible, unless it indicates:

(*a*) Hostile foreign intelligence or terrorist activities; or

(*b*) Felonious criminal conduct for which a warrant might be obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968; or

(*c*) A threat of death or serious bodily harm.

If dissemination is permitted, by (*a*), (*b*) and (*c*) above, it must only be made to an appropriate official and after approval by the Attorney General.

(This recommendation is consistent with NSA's policy prior to the Executive Order.[38] NSA's practice prior to the Executive Order was not to disseminate material containing personally identifiable information about Americans.)

Recommendation 18.—NSA should not request from any commercial carrier any communication which it could not otherwise obtain pursuant to these recommendations.

(This recommendation is to ensure that NSA will not resume an operation such as SHAMROCK, disclosed during the Committee's hearings, whereby NSA received for almost 30 years copies of most international telegrams transmitted by certain international telegraph companies in the United States.)

Recommendation 19.—The Office of Security at NSA should be permitted to collect background information on present or prospective employees or contractors of NSA, solely for the purpose of determining their fitness for employment. With respect to security risks or the security of its installations, NSA should be permitted to conduct physical surveillances, consistent with such surveillances as the CIA is permitted to conduct, in similar circumstances, by these recommendations.

c. Military Service and Defense Department Investigative Agencies

This section of the Committee's recommendations pertains to the controls upon the intelligence activities of the military services and Department of Defense insofar as they involve Americans who are not members of or affiliated with the armed forces.

In general, the restrictions seek to limit military investigations to activities in the civilian community which are necessary and pertinent to the military mission, and which cannot feasibly be accomplished by civilian agencies. In overseas locations where civilian agencies do not

[38] The Executive Order places no such restriction on the dissemination of information by NSA. Under the Executive Order, NSA is not required to delete names or destroy messages which are personally identifiable to Americans. As long as these messages fall within the categories established by the Order, the names of Americans *could* be transmitted to other intelligence agencies of the Government.

perform investigative activities to assist the military mission, military intelligence is given more latitude. Specifically, the Committee recommends that military intelligence be limited within the United States to conducting investigations of violations of the Uniform Code of Military Justice; investigations for security clearances of Department of Defense employees and contractors; and investigations immediately before and during the deployment of armed forces in connection with civil disturbances. None of these investigations should involve the use of any covert technique employed against American civilians. In overseas locations, the Committee recommends that military intelligence have additional authority to conduct investigations of terrorist activity and hostile foreign intelligence activity. In these cases, covert techniques directed at Americans may be employed if consistent with the Committee's restrictions upon the use of such techniques in the United States in Part iv.

Recommendation 20.—Except as specifically provided herein, the Department of Defense should not engage in domestic security activities. Its functions, as they relate to the activities of the foreign intelligence community, should be limited in a precisely drawn legislative charter to the conduct of foreign intelligence and foreign counterintelligence activities and tactical military intelligence activities abroad, and production, analysis, and dissemination of departmental intelligence.

Recommendation 21.—In addition to its foreign intelligence responsibility, the Department of Defense has a responsibility to investigate its personnel in order to protect the security of its installations and property, to ensure order and discipline within its ranks, and to conduct other limited investigations once dispatched by the President to suppress a civil disorder. A legislative charter should define precisely—in a manner which is not inconsistent with these recommendations—the authorized scope and purpose of any investigations undertaken by the Department of Defense to satisfy these responsibilities.

Recommendation 22.—No agency of the Department of Defense should conduct investigations of violations of criminal law or otherwise perform any law enforcement or domestic security functions within the United States, except on military bases or concerning military personnel, to enforce the Uniform Code of Military Justice.

Control of Civil Disturbance Intelligence

The Department of the Army has executive responsibility for rendering assistance in connection with civil disturbances. In the late 1960s, it instituted a nationwide collection program in which Army investigators were dispatched to collect information on the political activities of Americans. This was done on the theory that such information was necessary to prepare the Army in the event that its troops were sent to the scene of civil disturbances. The Committee believes that the Army's potential role in civil disturbances does not justify such an intelligence effort directed against American civilians.

Recommendation 23.—The Department of Defense should not be permitted to conduct investigations of Americans on the theory that the information derived therefrom might be useful in potential civil disorders. The Army should be permitted to gather information about geography, logistical matters, or the identity of local officials which is

necessary to the positioning, support, and use of troops in an area where troops are likely to be deployed by the President in connection with a civil disturbance. The Army should be permitted to investigate Americans involved in such disturbances after troops have been deployed to the site of a civil disorder, (i) to the extent necessary to fulfill the military mission, and (ii) to the extent the information cannot be obtained from the FBI. (The FBI's responsibility in connection with civil disorders and its assistance to the Army is described in Part iv.)

Recommendation 24.—Appropriate agencies of the Department of Defense should be permitted to collect background information on their present or prospective employees or contractors. With respect to security risks or the security of its installations, the Department of Defense should be permitted to conduct physical surveillance consistent with such surveillances as the CIA is permitted to conduct, in similar circumstances, by these recommendations.

Prohibitions and Limitations of Covert Techniques

During the Army's civil disturbance collection program of the late 1960s, Army intelligence agents employed a variety of covert techniques to gather information about civilian political activities. These included covert penetrations of private meetings and organizations, use of informants, monitoring amateur radio broadcasts, and posing as newsmen. This provision is designed to prevent the use of such covert techniques against American civilians. The Committee believes that none of the legitimate investigative tasks of the military within the United States justified the use of such techniques against unaffiliated Americans.

Recommendation 25.—Except as provided in 27 below, the Department of Defense should not direct any covert technique (e.g., electronic surveillance, informants, etc.) at American civilians.

Limited Investigations Abroad

The military services currently conduct preventive intelligence investigations within the United States where members of their respective services are agents of, or are collaborating with, a hostile foreign intelligence service. These investigations are coordinated with, and under the ultimate control of, the FBI. The Committee's recommendations are not intended to prevent the military services from continuing to assist the FBI with such investigations involving members of the armed forces. They are intended, however, to place responsibility for these investigations, insofar as they take place within the United States, in the FBI, and not in the military services themselves. The military services, on the other hand, are given additional responsibility to conduct investigations of Americans who are suspected of engaging in terrorist activity or hostile foreign intelligence activity in overseas locations.

Recommendation 26.—The Department of Defense should be permitted to conduct abroad preventive intelligence investigations of unaffiliated Americans, as described in Part iv below, provided such investigations are first approved by the FBI. Such investigations by the Department of Defense, including the use of covert techniques,

should ordinarily be conducted in a manner consistent with the recommendations pertaining to the FBI, contained in Part iv; however, in overseas locations, where U.S. military forces constitute the governing power, or where U.S. military forces are engaged in hostilities, circumstances may require greater latitude to conduct such investigations.

iii. Non-Intelligence Agencies Should Be Barred From Domestic Security Activity

a. Internal Revenue Service

The Committee's review of intelligence collection and investigative activity by IRS' Intelligence Division and of the practice of furnishing information in IRS files to the intelligence agencies demonstrates that reforms are necessary and appropriate. The primary objective of reform is to prevent IRS from becoming an instrumentality of the intelligence agencies, beyond the scope of what IRS, as the Federal tax collector, should be doing. Recommendations 27 through 29 are designed to achieve this objective by providing that IRS collection of intelligence and its conduct of investigations are to be confined strictly to tax matters. Moreover, programs of tax investigation, in which targets are selected partly because of indications of tax violations and partly because of reasons relating to domestic security, are prohibited where they would erode constitutional rights. Where otherwise appropriate, such programs must be conducted under special safeguards to prevent any adverse effect on the exercise of those rights.

These recommendations should prevent a recurrence of the excesses associated with the Special Services Staff and the Intelligence Gathering and Retrieval System.

Targeting of Persons or Groups for Investigations or Intelligence-Gathering by IRS [39]

Recommendation 27.—The IRS should not, on behalf of any intelligence agency or for its own use, collect any information about the activities of Americans except for the purposes of enforcing the tax laws.

Recommendation 28.—IRS should not select any person or group for tax investigation on the basis of political activity or for any other reason not relevant to enforcement of the tax laws.

Recommendation 29.—Any program of intelligence investigation relating to domestic security in which targets are selected by both tax and non-tax criteria should only be initiated:

(*a*) Upon the written request of the Attorney General or the Secretary of the Treasury, specifying the nature of the requested program and the need therefore; and

(*b*) After the written certification by the Commissioner of the IRS that procedures have been developed which are sufficient to prevent the infringement of the constitutional rights of Americans; and

(*c*) With congressional oversight committees being kept continually advised of the nature and extent of such programs.

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[39] Based upon its study of the IRS, the Committee believes these recommendations might properly be applied beyond the general domestic security scope of the recommendations.

Disclosure Procedures

The Committee's review of disclosure of tax information by IRS to the FBI and the CIA showed three principal abuses by those intelligence agencies: (1) the by-passing of disclosure procedures mandated by law, resulting in the agencies obtaining access to tax returns and tax-related information through improper channels, and, sometimes, without a proper basis; (2) the failure to state the reasons justifying the need for the information and the uses contemplated so that IRS could determine if the request met the applicable criteria for disclosure; and (3) the improper use of tax returns and information, particularly by the FBI in COINTELPRO. Recommendations 30 through 35 are designed to prevent these abuses from occurring again.

While general problems of disclosure are being studied by several different congressional committees with jurisdiction over IRS, these recommendations reflect this Committee's focus on disclosure problems seen in the interaction between IRS and the intelligence agencies.

Recommendation 30.—No intelligence agency should request [40] from the Internal Revenue Service tax returns or tax-related information except under the statutes and regulations controlling such disclosures. In addition, the existing procedures under which tax returns and tax-related information are released by the IRS should be strengthened, as suggested in the following five recommendations.

Recommendation 31.—All requests from an intelligence agency to the IRS for tax returns and tax-related information should be in writing, and signed by the head of the intelligence agency making the request, or his designee. Copies of such requests should be filed with the Attorney General. Each request should include a clear statement of:

(*a*) The purpose for which disclosure is sought;

(*b*) Facts sufficient to establish that the requested information is needed by the requesting agency for the performance of an authorized and lawful function;

(*c*) The uses which the requesting agency intends to make of the information;

(*d*) The extent of the disclosures sought;

(*e*) Agreement by the requesting agency not to use the documents or information for any purpose other than that stated in the request; and

(*f*) Agreement by the requesting agency that the information will not be disclosed to any other agency or person except in accordance with the law.

Recommendation 32.—IRS should not release tax returns or tax-related information to any intelligence agency unless it has received a request satisfying the requirements of Recommendation 31, and the Commissioner of Internal Revenue has approved the request in writing.

Recommendation 33.—IRS should maintain a record of all such requests and responses thereto for a period of twenty years.

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[40] "Request" as used in the recommendations concerning the Internal Revenue Service should not include circumstances in which the agency is acting with the informed written consent of the taxpayer.

Recommendation 34.—No intelligence agency should use the information supplied to it by the IRS pursuant to a request of the agency except as stated in a proper request for disclosure.

Recommendation 35.—All requests for information sought by the FBI should be filed by the Department of Justice. Such requests should be signed by the Attorney General or his designee, following a determination by the Department that the request is proper under the applicable statutes and regulations.

b. Post Office (U.S. Postal Service)

These recommendations are designed to tighten the existing restrictions regarding requests by intelligence agencies for both inspection of the exteriors of mail ("mail cover") and inspection of the contents of first class mail ("mail opening"). As to mail cover, the Committee's recommendation is to centralize the review and approval of all requests by requiring that only the Attorney General may authorize mail cover, and to eliminate unjustified mail covers by requiring that the mail cover be found "necessary" to a domestic security investigation. With respect to mail opening, the recommendations provide that it can only be done pursuant to court warrant.

Recommendation 36.—The Post Office should not permit the FBI or any intelligence agency to inspect markings or addresses on first class mail, nor should the Post Office itself inspect markings or addresses on behalf of the FBI or any intelligence agency, on first class mail, except upon the written approval of the Attorney General or his designee. Where one of the correspondents is an American, the Attorney General or his designee should only approve such inspection for domestic security purposes upon a written finding that it is necessary to a criminal investigation or a preventive intelligence investigation of terrorist activity or hostile foreign intelligence activity.

Upon such a request, the Post Office may temporarily remove from circulation such correspondence for the purpose of such inspection of its exterior as is related to the investigation.

Recommendation 37.—The Post Office should not transfer the custody of any first class mail to any agency except the Department of Justice. Such mail should not be transferred or opened except upon a judicial search warrant.

(*a*) In the case of mail where one of the correspondents is an American, the judge must find that there is probable cause to believe that the mail contains evidence of a crime.[41]

(*b*) In the case of mail where both parties are foreigners:

(1) The judge must find that there is probable cause to believe that both parties to such correspondence are foreigners, and one of the correspondents is an officer, employee or conscious agent of a foreign power; and

(2) The Attorney General must certify that the mail opening is likely to reveal information necessary either (i) to the protection of the nation against actual or potential attack or other hostile acts of force of a foreign power; (ii) to obtain foreign intelligence information deemed essential to the security of the United States; or (iii) to

[41] See recommendation 94 for the Committee's recommendation that Congress consider amending the Espionage Act so as to cover modern forms of espionage not now criminal.

protect national security information against hostile foreign intelligence activity.

iv. Federal Domestic Security Activities Should Be Limited and Controlled to Prevent Abuses Without Hampering Criminal Investigations or Investigations of Foreign Espionage

The recommendations contained in this part are designed to accomplish two principal objectives: (1) prohibit improper intelligence activities and (2) define the limited domestic security investigations which should be permitted. As suggested earlier, the ultimate goal is a statutory mandate for the federal government's domestic security function that will ensure that the FBI, as the primary domestic security investigative agency, concentrates upon criminal conduct as opposed to political rhetoric or association. Our recommendations would vastly curtail the scope of domestic security investigations as they have been conducted, by prohibiting inquiries initiated because the Bureau regards a group as falling within a vaguely defined category such as "subversive," "New Left," "Black Nationalist Hate Groups," or "White Hate Groups." The recommendations also ban investigations based merely upon the fact that a person or group is associating with others who are being investigated (e.g., the Bureau's investigation of the Southern Christian Leadership Conference because of alleged "Communist infiltration").

The simplest way to eliminate investigations of peaceful speech and association would be to limit the FBI to traditional investigations of crimes which have been committed (including the crimes of attempt and conspiracy). The Committee found, however, that there are circumstances where the FBI should have authority to conduct limited "intelligence investigations" of threatened conduct (terrorism and foreign espionage) which is generally covered by the criminal law, where the conduct has not yet reached the stage of a prosecuteable act.

The Committee, however, found that abuses were frequently associated even with such intelligence investigations. This led us also to recommend: precise limitations upon the use of covert techniques (Recommendations 51 to 60); restrictions upon maintenance and dissemination of information gathered in such investigations (Recommendations 64 to 68); and a statutory requirement that the Attorney General monitor these investigations and terminate them as soon as practical (Recommendation 69).

a. Centralize Supervision, Investigative Responsibility, and the Use of Covert Techniques

Investigations should be centralized within the Department of Justice. It is the Committee's judgment that if former Attorneys General had been held accountable by the Congress for ensuring compliance by the FBI and the intelligence agencies with laws designed to protect the rights of Americans, the Department of Justice would have been more likely to discover and enjoin improper activities. Furthermore, centralizing domestic security investigations within the FBI will facilitate the Attorney General's supervision of them.

Recommendation 38.—All domestic security investigative activity, including the use of covert techniques, should be centralized within the Federal Bureau of Investigation, except those investigations by the

Secret Service designed to protect the life of the President or other Secret Service protectees. Such investigations and the use of covert techniques in those investigations should be centralized within the Secret Service.

Recommendation 39.—All domestic security activities of the federal government and all other intelligence agency activities covered by the Domestic Intelligence Recommendations should be subject to Justice Department oversight to assure compliance with the Constitution and laws of the United States.

b. Prohibitions

The Committee recommends a set of prohibitions, in addition to its later recommendations limiting the scope of and procedural controls for domestic security investigations.

The following prohibitions cover abuses ranging from the political use of the sensitive information maintained by the Bureau to the excesses of COINTELPRO. They are intended to cover activities engaged in, by, or on behalf of, the FBI. For example, in prohibiting Bureau interference in lawful speech, publication, assembly, organization, or association of Americans, the Committee intends to prohibit a Bureau agent from mailing fake letters to factionalize a group as well as to prohibit an informant from manipulating or influencing the peaceful activities of a group on behalf of the FBI.

Subsequent recommendations limit the kinds of investigations which can be opened and provide controls for those investigations. Specifically, the Committee limits FBI authority to collect information on Americans to enumerated circumstances; limits authority to maintain information on political beliefs, political assocations, or private lives of Americans; requires judicial warrants for the most intrusive covert collection techniques (electronic surveillance, mail opening, and surreptitious entry); and proposes new restrictions upon the use of other covert techniques, particularly informants.

Recommendation 40.—The FBI should be prohibited from engaging on its own or through informants or others, in any of the following activities directed at Americans:

(*a*) Disseminating any information to the White House, any other federal official, the news media, or any other person for a political or other improper purpose, such as discrediting an opponent of the administration or a critic of an intelligence or investigative agency.

(*b*) Interfering with lawful speech, publication, assembly, organizational activity, or association of Americans.

(*c*) Harassing individuals through unnecessary overt investigative techniques [42] such as interviews or obvious physical surveillance for the purpose of intimidation.

Recommendation 41.—The Bureau should be prohibited from maintaining information on the political beliefs, political associations, or private lives of Americans except that which is clearly necessary for domestic security investigations as described in Part c.[43]

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[42] "Overt investigative techniques" means the collection of information readily available from public sources or to a private person (including interviews of the subject or his friends or associates).

[43] Thus, the Bureau would have an obligation to review any such information before it is placed in files and to review the files, thereafter, to remove it if no longer needed. This obligation does not extend to files sealed under Recommendation 65.

c. Authorized Scope of Domestic Security Investigations

The Committee sought three objectives in defining the appropriate jurisdiction of the FBI. First, we sought to carefully limit any investigations other than traditional criminal investigations to five defined areas: preventive intelligence investigations (in two areas closely related to serious criminal activity—terrorist and hostile foreign intelligence activities), civil disorders assistance, background investigations, security risk investigations, and security leak investigations.

Second, we sought substantially to narrow, and to impose special restrictions on the conduct of, those investigations which involved the most flagrant abuses in the past: preventive intelligence investigations and civil disorders assistance. Third, we sought to provide a clear statutory foundation for those investigations which the Committee believes are appropriate to fill the vacuum in FBI legal authority.

Achieving the first and second objectives will have the most significant impact upon the FBI's domestic intelligence program and indeed, could eliminate almost half its workload. Recommendations 44 through 46 impose two types of restrictions upon the conduct of intelligence investigations and civil disorders assistance. First, the scope of intelligence investigations is limited to terrorist activities or espionage and the scope of civil disorders assistance is limited to civil disorders which may require federal troops. Second, the Committee suggests that the threshold for initiation of a full intelligence investigation be "reasonable suspicion." [44] Preliminary intelligence investigations—limited in scope, duration, and investigative technique—could be opened upon a "specific allegation or specific or substantiated information." A written finding by the Attorney General of a likely need for federal troops is required for civil disorders assistance.

The Committee's approach to FBI domestic security investigations is basically the same as that adopted by the Attorney General's guidelines for domestic security investigations. Both are cautious about any departures from former Attorney General Stone's maxim that the FBI should only conduct criminal investigations. For example, neither the Committee nor the Attorney General would condone investigations which are totally unrelated to criminal statutes (e.g., the FBI's 1970 investigation of all black student unions).

However, the Committee views its recommendations as a somewhat more limited departure from former Attorney General Stone's line than the present Attorney General's guidelines. First, the Committee would only permit intelligence investigations with respect to hostile foreign intelligence activity and terrorism. The Attorney General's guidelines have been read by FBI officials as authorizing intelligence investigations of "subversives" (individuals who may attempt to overthrow the government in the indefinite future). While the Justice Department, under its current leadership, might not adopt such an interpretation, a different Attorney General might. Second, the guidelines on their face appear to permit investigating essentially local civil disobedience (e.g., "use of force" to interfere with state or local government which could be construed too broadly).

[44] "Reasonable suspicion" is based upon the Supreme Court's decision in the case of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and means specific and articulable facts which taken together with rational inferences from those facts, give rise to a reasonable suspicion that specified activity has occurred, is occurring, or is about to occur.

There are two reasons why the Committee would prohibit intelligence investigations of "subversives" or local civil disobedience. First, those investigations inherently risk abuse because they inevitably require surveillance of lawful speech and association rather than criminal conduct. The Committee's examination of forty years of investigations into "subversion" has found the term to be so vague as to constitute a license to investigate almost any activity of practically any group that actively opposes the policies of the administration in power.

A second reason for prohibiting intelligence investigations of "subversion" and local civil disobedience is that both can be adequately handled by less intrusive methods without unnecessarily straining limited Bureau resources. Any real threats to our form of government can be best identified through intelligence investigations focused on persons who may soon commit illegal violent acts. Local civil disobedience can be best handled by local police. Indeed, recent studies by the General Accounting Office suggest that FBI investigations in these areas result in very few prosecutions and little information of help to authorities in preventing violence.

The FBI now expends more money in its domestic security program than it does in its organized crime program, and, indeed, twice the amount on "internal security" informant operations as on organized crime informant coverage. "Subversive investigations" and "civil disorders assistance" represent almost half the caseload of the FBI domestic security program. The national interest would be better served if Bureau resources were directed at terrorism, hostile foreign intelligence activity, or organized crime, all more serious and pressing threats to the nation than "subversives" or local civil disobedience.

For similar reasons, the Committee, like the Attorney General's guidelines, requires "reasonable suspicion" for preventive intelligence investigations which extend beyond a preliminary stage. Investigations of terrorism and hostile foreign intelligence activity which are not limited in time and scope could lead to the same abuses found in intelligence investigations of subversion or local civil disobedience. However, an equally important reason for this standard is that it should increase the efficiency of Bureau investigations. The General Accounting Office found that when the FBI initiated its investigations on "soft evidence"—evidence which probably would not meet this "reasonable suspicion" standard—it usually wasted its time on an innocent target. When it initiated its investigation on harder evidence, its ability to detect imminent violence improved significantly.

The Committee's recommendations limit preventive intelligence investigations to situations where information indicates that the prohibited activity will "soon" occur, whereas the guidelines do not require that the activity be imminent. This limit is essential to prevent a return to sweeping, endless investigations of remote and speculative "threats." The Committee's intent is that, to open or continue a full investigation, there should be a substantial indication of terrorism or hostile foreign intelligence activity in the near future.

The Committee's restrictions are intended to eliminate unnecessary investigations and to provide additional protections for constitutional rights. Shifting the focus of Bureau manpower in domestic security investigations from lawful speech and association to criminal conduct

by terrorists and foreign spies provides further protection for constitutional rights of Americans as well as serving the nation's interest in security.

1. Investigations of Committed or Imminent Offenses

Recommendation 42.—The FBI should be permitted to investigate a committed act which may violate a federal criminal statute pertaining to the domestic security to determine the identity of the perpetrator or to determine whether the act violates such a statute.

Recommendation 43.—The FBI should be permitted to investigate an American or foreigner to obtain evidence of criminal activity where there is "reasonable suspicion" that the American or foreigner has committed, is committing, or is about to commit a specific act which violates a federal statute pertaining to the domestic security.[45]

2. Preventive Intelligence Investigations

Recommendation 44.—The FBI should be permitted to conduct a preliminary preventive intelligence investigation of an American or foreigner where it has a specific allegation or specific or substantiated information that the American or foreigner will soon engage in terrorist activity or hostile foreign intelligence activity. Such a preliminary investigation should not continue longer than thirty days from receipt of the information unless the Attorney General or his designee finds that the information and any corroboration which has been obtained warrants investigation for an additional period which may not exceed sixty days. If, at the outset or at any time during the course of a preliminary investigation the Bureau establishes "reasonable suspicion" that an American or foreigner will soon engage in terrorist activity or hostile foreign intelligence activity, it may conduct a full preventive intelligence investigation. Such full investigation should not continue longer than one year except upon a finding of compelling circumstances by the Attorney General or his designee.

In no event should the FBI open a preliminary or full preventive intelligence investigation based upon information that an American is advocating political ideas or engaging in lawful political activities or is associating with others for the purpose of petitioning the government for redress of grievances or other such constitutionally protected purpose.

The second paragraph of Recommendation 44 will serve as an important safeguard if enacted into any statute authorizing preventive intelligence investigations. It would supplement the protection that would be afforded by limiting the FBI's intelligence investigations to terrorist and hostile foreign intelligence activities. It re-emphasizes the Committee's intent that the investigations of peaceful protest groups and other lawful associations should not recur. It serves as a further reminder that advocacy of political ideas is not to be the basis for governmental surveillance. At the same time Recommendation 44 permits the initiation of investigations where the Bureau possesses information consisting of a "specific allegation or specific or substantiated informa-

[45] This includes conspiracy to violate a federal statute pertaining to the domestic security. The Committee, however, recommends repeal or amendment of the Smith Act to make clear that "conspiracy" to engage in political advocacy cannot be investigated. (See Recommendation 93.)

tion that [an] American or foreigner will soon engage in terrorist activity or hostile foreign intelligence activity."

This recommendation has been among the most difficult of the domestic intelligence recommendations to draft. It was difficult because it represents the Committee's effort to draw the fine line between legitimate investigations of conduct and illegitimate investigations of advocacy and association. Originally the Committee was of the view that a threshold of "reasonable suspicion" should apply to initiating even limited preliminary intelligence investigations of terrorist or hostile foreign intelligence activities. However, the Committee was persuaded by the Department of Justice that, having narrowly defined terrorist and hostile foreign intelligence activities, a "reasonable suspicion" threshold might be unworkable at the preliminary stage. Such a threshold might prohibit the FBI from investigating an allegation of extremely dangerous activity made by an anonymous source or a source of unknown reliability. The "reasonable suspicion" standard requires that the investigator have confidence in the reliability of the individual providing the information and some corroboration of the information.

However, the Committee is cautious in proposing a standard of "specific allegation or specific or substantiated information" because it permits initiation of a preliminary investigation which includes the use of physical surveillance and a survey of, but not targeting of, existing confidential human sources. The Committee encourages the Attorney General to work with the Congress to improve upon the language we recommend in Recommendation 44 before including it in any legislative charter. If adopted, both the Attorney General and the appropriate oversight committees should periodically conduct a careful review of the application of the standard by the FBI.

The ultimate goal which Congress should seek in enacting such legislation is the development of a standard for the initiation of intelligence investigations which permits investigations of credible allegations of conduct which if uninterrupted will soon result in terrorist activities or hostile foreign intelligence activities as we define them. It must not permit investigations of consitutionally protected activities as the Committee described them in the last paragraph of Recommendation 44. The following are examples of the Committee's intent.

Recommendation 44 would prohibit the initiation of an investigation based upon "mere advocacy:"

—An investigation could not be initiated, for example, when the Bureau receives an allegation that a member of a dissident group has made statements at the group's meeting that "America needs a Marxist-Leninist government and needs to get rid of the fat cat capitalist pigs."

The Committee has found serious abuses in past FBI investigations of groups. In the conduct of these investigations, the FBI often failed to distinguish between members who were engaged in criminal activity and those who were exercising their constitutional rights of association. The Committee's recommendations would only permit investigation of a group in two situations: first, where the FBI receives information that the avowed purpose of the group is "soon to engage in terrorist activity or hostile foreign intelligence activity"; or second, where the FBI has information that unidentified members of a group are

"soon to engage in terrorist activity or hostile foreign intelligence activity". In both cases the FBI may focus on the group to determine the identity of those members who plan soon to engage in such activity. However, in both cases the FBI should minimize the collection of information about law-abiding members of the group or any lawful activities of the group.

—Where the FBI has information that certain chapters of a political organization had "action squads," the purpose of which was to commit terrrorist acts, the FBI could investigate all members of a particular "action squad" where it had an allegation that this "action squad" planned to assassinate, for example, Members of Congress.

—An investigation could be initiated based upon specific information obtained by the FBI that unidentified members of a Washington, D.C., group are planning to assassinate Members of Congress.

The Committee's recommendations would not permit investigation of mere association:

—The FBI could not investigate an allegation that a member of the Klan has lunch regularly with the mayor of a southern community.

—The FBI could not investigate the allegation that a U.S. Senator attended a cocktail party at a foreign embassy where a foreign intelligence agent was present.

However, when additional facts are added indicating conduct which might constitute terrorist activity or hostile foreign intelligence activity, investigation might be authorized:

—The FBI could initiate an investigation of a dynamite dealer who met with a member of the "action squad" described above.

—Likewise, the FBI could initiate an investigation of a member of the National Security Council staff who met clandestinely with a known foreign intelligence agent in an obscure Paris restaurant.

Investigations of contacts can become quite troublesome when the contact takes place within the context of political activities or association for the purpose of petitioning the government. Law-abiding American protest groups may share common goals with groups in other countries. The obvious example was the widespread opposition in the late 1960's, at home and abroad, to America's role in Vietnam.

Furthermore, Americans should be free to communicate about such issues with persons in other countries, to attend international conferences and to exchange views or information about planned protest activities with like-minded foreign groups. Such activity, in itself, would not be the basis for a preliminary investigation under these recommendations:

—The FBI could not open an investigation of an anti-war group because "known communists" were also in attendance at a group meeting even if it had reason to believe that the communists' instructions were to influence the group or that the group shared the goals of the Soviet Union on ending the war in Vietnam.

—The FBI could not open an investigation of an anti-war activist who attends an international peace conference in Oslo where foreign intelligence agents would be in attendance even if the FBI had reason to believe that they might attempt to recruit the activist. Of course, the CIA would not be prevented from surveillance of the foreign agent's activities.

However, if the Bureau had additional information suggesting that the activities of the Americans in the above hypothetical cases were

more than mere association to petition for redress of grievances, an investigation would be legitimate.

—Where the FBI had received information that the anti-war activist traveling to Oslo intended to meet with a person he knew to be a foreign intelligence agent to receive instructions to conduct espionage on behalf of a hostile foreign country, the FBI could open a preliminary investigation of the activist.

The Committee cautions the Department of Justice and FBI that in opening investigations of conduct occurring in the context of political activities, it should endeavor to ensure that the allegation prompting the investigation is from a reliable source.

Certainly, however, where the FBI has received a specific allegation or specific or substantiated information that an American or foreigner will soon engage in hostile foreign intelligence activity or terrorist activity, it may conduct an investigation. For example, it could do so:

—Where the FBI receives information that an American has been recruited by a hostile intelligence service;

—Where the FBI receives information that an atomic scientist has had a number of clandestine meetings with a hostile foreign intelligence agent.

Recommendation 45.—The FBI should be permitted to collect information to assist federal, state, and local officials in connection with a civil disorder either—

(i) After the Attorney General finds in writing that there is a clear and immediate threat of domestic violence or rioting which is likely to require implementation of 10 U.S.C. 332 or 333 (the use of federal troops for the enforcement of federal law or federal court orders), or likely to result in a request by the governor or legislature of a state pursuant to 10 U.S.C. 331 for the use of federal militia or other federal armed forces as a countermeasure; [45a] or

(ii) After such troops have been introduced.

Recommendation 46.—FBI assistance to federal, state, and local officials in connection with a civil disorder should be limited to collecting information necessary for

(1) the President in making decisions concerning the introduction of federal troops;

(2) military officials in positioning and supporting such troops; and

(3) state and local officials in coordinating their activities with such military officials.

4. Background Investigations

Recommendation 47.—The FBI should be permitted to participate in the federal government's program of background investigations of federal employees or employees of federal contractors. The authority to conduct such investigations should not, however, be used as the basis for conducting investigations of other persons. In addition, Congress should examine the standards of Executive Order 10450, which serves as the current authority for FBI background investigations, to determine whether additional legislation is necessary to:

(*a*) modify criteria based on political beliefs and associations unrelated to suitability for employment; such modification should make

[45a] This recommendation does not prevent the FBI from conducting criminal investigations or preventive intelligence investigations of terrorist acts in connection with a civil disorder.

those criteria consistent with judicial decisions regarding privacy of political association; [46] and

(*b*) restrict the dissemination of information from name checks [47] of information related to suitability for employment.

5. Security Risk Investigations

Recommendation 48.—Under regulations to be formulated by the Attorney General, the FBI should be permitted to investigate a specific allegation that an individual within the Executive branch with access to classified information is a security risk as described in Executive Order 10450. Such investigation should not continue longer than thirty days except upon written approval of the Attorney General or his designee.

6. Security Leak Investigations

Recommendation 49.—Under regulations to be formulated by the Attorney General, the FBI should be permitted to investigate a specific allegation of the improper disclosure of classified information by employees or contractors of the Executive branch.[48] Such investigation should not continue longer than thirty days except upon written approval of the Attorney General or his designee.

d. Authorized Investigative Techniques

The following recommendations contain the Committee's proposed controls on the use of investigative techniques in domestic security investigations which would be authorized herein. There are three types of investigative techniques: (1) overt techniques (e.g., interviews), (2) name checks (review of existing government files), and (3) covert techniques (which range, for example, from electronic surveillance and informants to the review of credit records).

The objective of these recommendations, like the Attorney General's domestic security guidelines, is to ensure that the more intrusive the technique, the more stringent the procedural checks that will be applied to it. Therefore, the recommendation would permit overt techniques and name checks in any of the investigative areas described above.

With respect to covert technique, the Committee decided upon procedures to apply to the use of a particular covert technique based upon three considerations: (1) its potential for abuse, (2) the practicability of applying the procedure to the technique, and (3) the facts and circumstances giving rise to the request for use of the technique (whether the facts warrant a full investigation or only a preliminary investigation). The most intrusive covert techniques (electronic surveillance, mail opening, and surreptitious entry) would be permissible only if a judicial warrant were obtained as required in Recommendations 51 through 54. FBI requests to target paid or controlled informants, to review tax returns, to use mail covers, or to use any other covert techniques in domestic security investigations would be subject to review

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[46] For example, *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Bates* v. *Little Rock*, 361 U.S. 516 (1960).

[47] See definition of "name checks" at p. 340.

[48] If Congress enacts a security leak criminal statute, this additional investigative authority would be unnecessary. Security leaks would be handled as traditional criminal investigations as described in Recommendations 42 and 43 above.

and in some cases to prior approval by the Attorney General's office, as described in Recommendations 55 through 62.[49]

The judicial warrant requirement the Committee recommends for electronic surveillance is similar in many respects to the Administration's bill, which is a welcome departure from past practice. The Committee, like the Administration, believes that there should be no electronic surveillance within the United States which is not subject to a judicial warrant procedure. Both would also authorize warrants for electronic surveillance of foreigners who are officers, agents, or employees of foreign powers, even though the government could not point to probable cause of criminal activity.

However, while the constitutional issue has not been resolved, the Committee does not believe that the President has inherent power to authorize the targeting of an American for electronic surveillance without a warrant, as suggested by the Administration bill. Certainly, if Congress requires a warrant for the targeting of an American for traditional electronic surveillance or for the most sophisticated NSA techniques, at home or abroad, then the dangerous doctrine of inherent Executive power to target an American for electronic surveillance can be put to rest at last.[49a] The Committee also would require that no American be targeted for electronic surveillance except upon a judicial finding of probable criminal activity. The Administration bill would permit electronic surveillance in the absence of probable crime if the American is engaged in (or aiding or abetting a person engaged in) "clandestine intelligence activity" (an undefined term) under the direction of a foreign power. Targeting an American for electronic surveillance in the absence of probable cause to believe he might commit a crime is unwise and unnecessary.

In Part X, the Committee recommends that Congress consider amending the Espionage Act to cover modern forms of industrial, technological, or economic espionage not now prohibited. At the same time, electronic surveillance targeted at an American should be authorized where there is probable cause to believe he is engaged in such activity. Thus, the Committee agrees with the Attorney General that such activity may subject an American to electronic surveillance. But, as a matter of principle, the Committee believes that an American ought not to be targeted for surveillance unless there is probable cause to believe he may violate the law. The Committee's record suggests that use of undefined terms, not tied to matters sufficiently serious to be the subject of criminal statutes, is a dangerous basis for intrusive investigations.

The paid and directed informant was a principal source of excesses revealed in our record. However, we do not propose the application of a judicial warrant procedure to informants. Instead, we propose a requirement of approval by the Attorney General based upon a probable cause standard. Because of the potential for abuse, however, we believe the warrant issue should be thoroughly reviewed after two years' experience.

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[49] Review of tax returns and mail covers would also be subject to the Post Office and IRS procedures described in earlier recommendations.

[49a] "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . ." (*Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952), Justice Jackson concurring.)

There are some differences between the Attorney General and the Committee on the use of informants.[50] The Attorney General would permit the FBI to make unrestricted use of existing informants in a preliminary intelligence investigation. The Committee recognizes the legitimacy of using existing informants for certain purposes—for example, to identify a new subject who has come to the attention of the Bureau. However, the Committee believes there should be certain restrictions for existing informants. Indeed, almost all of the informant abuses—overly broad reporting, the ghetto informant program, agents provocateur, etc.—involved existing informants.

The real issue is not the development of new informants, but the sustained direction of informants, new or old, at a new target. Therefore, the restrictions suggested in Recommendations 55 through 57 are designed to impose standards for the sustained targeting of informants against Americans.

The Committee requires that before an informant can be targeted in an intelligence investigation the Attorney General or his designee must make a finding that he has considered and rejected less intrusive techniques and that targeting the informant is necessary to the investigation. Furthermore, the Committee would require that the informant cannot be targeted for more than ninety days [51] in the intelligence investigation unless the Attorney General finds that there is "probable cause" that the American will soon engage in terrorist or hostile foreign intelligence activity, except that if the Attorney General finds compelling circumstances he may permit an additional sixty days.

Other than the restrictions upon the use of informants, the Committee would permit basically the same techniques in preliminary and full investigations as the Attorney General's guidelines, although the Committee would require somewhat closer supervision by the Attorney General or his designee. Interviews (including interviews of existing informant's), name checks (including checks of local police intelligence files), and physical surveillance and review of credit and telephone records would be permitted during the preliminary investigation. The Attorney General or his designee would have to review that investigation within one month. Under the guidelines, preliminary investigations do not require approval by the Attorney General or his designee and can continue for as long as ninety days with an additional ninety-day extension. The remainder of the covert techniques would be permitted in full intelligence investigations. Under the Attorney General's guidelines, the Attorney General or his designee only become involved in the termination of such investigations (at the end of one year), while the Committee's recommendations would require the Attorney General or his designee to authorize the initiation of the full investigation and the use of covert techniques in the investigation.

1. Overt Techniques and Name Checks

Recommendation 50.—Overt techniques and name checks should be permitted in all of the authorized domestic security investigations

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[50] The Attorney General is considering additional guidelines on informants.

[51] The period of ninety days begins when the informant is in place and capable of reporting.

described above, including preliminary and full preventive intelligence investigations.

2. Covert Techniques

a. Covert Techniques Covered

This section covers the standards and procedures for the use of the following covert techniques in authorized domestic security investigations:

(i) electronic surveillance;
(ii) search and seizure or surreptitious entry;
(iii) mail opening;
(iv) informants and other covert human sources;
(v) mail surveillance;
(vi) review of tax returns and tax-related information;
(vii) other covert techniques—including physical surveillance, photographic surveillance, use of body recorders and other consensual electronic surveillance, and use of sensitive records of state and local government, and other institutional records systems pertaining to credit, medical history, social welfare history, or telephone calls.[52]

b. Judicial Warrant Procedures (Electronic Surveillance, Mail Opening, Search and Seizure, and Surreptitious Entry)

The requirements for judicial warrants, set forth below, are not intended to cover NSA communication intercepts. Recommendations 14 through 18 contain the Committee's recommendations pertaining to NSA intercepts, the circumstances in which a judicial warrant is required and the standards applicable for the issuance of such a warrant.

Recommendation 51.—All non-consensual electronic surveillance, mail-opening, and unauthorized entries should be conducted only upon authority of a judicial warrant.

Recommendation 52.—All non-consensual electronic surveillance should be conducted pursuant to judicial warrants issued under authority of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

The Act should be amended to provide, with respect to electronic surveillance of foreigners in the United States, that a warrant may issue if

(*a*) There is probable cause that the target is an officer, employee, or conscious agent of a foreign power.

(*b*) The Attorney General has certified that the surveillance is likely to reveal information necessary to the protection of the nation against actual or potential attack or other hostile acts of force of a foreign power; to obtain foreign intelligence information deemed essential to the security of the United States; or to protect national security information against hostile foreign intelligence activity.

(*c*) With respect to any such electronic surveillance, the judge should adopt procedures to minimize the acquisition and retention of non-foreign intelligence information about Americans.

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[52] The Committee has not taken extensive testimony on these "other covert techniques" and therefore, aside from the general administrative procedures contained in c. below, makes no recommendations designed to treat these techniques fully.

(*d*) Such electronic surveillance should be exempt from the disclosure requirements of Title III of the 1968 Act as to foreigners generally and as to Americans if they are involved in hostile foreign intelligence activity.[53]

As noted earlier, the Committee believes that the espionage laws should be amended to include industrial espionage and other modern forms of espionage not presently covered and Title III should incorporate any such amendment. The Committee's recomendation is that both that change and the amendment of Title III to require warrants for all electronic surveillance be promptly made.

Recommendation 53.—Mail opening should be conducted only pursuant to a judicial warrant issued upon probable cause of criminal activity as described in Recommendation 37.

Recommendation 54.—Unauthorized entry should be conducted only upon judicial warrant issued on probable cause to believe that the place to be searched contains evidence of a crime, except unauthorized entry, including surreptitious entry, against foreigners who are officers, employees, or conscious agents of a foreign power should be permitted upon judicial warrant under the standards which apply to electronic surveillance described in Recommendation 52.

c. Administrative Procedures (Covert Human Sources, Mail Surveillance, Review of Tax Returns and Tax-Related Information, and Other Covert Techniques)

Recommendation 55.—Covert human sources may not be directed[54] at an American except:

(1) In the course of a criminal investigation if necessary to the investigation *provided* that covert human sources should not be directed at an American as a part of an investigation of a committed act unless there is reasonable suspicion to believe that the American is responsible for the act and then only for the purpose of identifying the perpetrators of the act.

(2) If the American is the target of a full preventive intelligence investigation and the Attorney General or his designee makes a written finding that[55] (i) he has considered and rejected less intrusive techniques; and (ii) he believes that covert human sources are necessary to obtain information for the investigation.

Recommendation 56.—Covert human sources which have been directed at an American in a full preventive intelligence investigation should not be used to collect information on the activities of the American for more than 90 days after the source is in place and capable of reporting, unless the Attorney General or his designee finds in writing

[53] Except where disclosure is called for in connection with the defense in the case of criminal prosecution.

[54] A "covert human source" is an undercover agent or informant who is paid or otherwise controlled by the agency. A cooperating citizen is not ordinarily a covert human source. A covert human source is "directed" at an American when the intelligence agency requests the covert human source to collect new information on the activities of that individual. A covert human source is not "directed" at a target if the intelligence agency merely asks him for information already in his possession, unless through repeated inquiries, or otherwise, the agency implicitly directs the informant against the target of the investigation.

[55] The written finding must be made prior to the time the covert human source is directed at an American, unless exigent circumstances make application impossible, in which case the application must be made as soon thereafter as possible.

either that there are "compelling circumstances" in which case they may be used for an additional 60 days, or that there is probable cause that the American will soon engage in terrorist activities or hostile foreign intelligence activities.

Recommendation 57.—All covert human sources used by the FBI should be reviewed by the Attorney General or his designee as soon as practicable, and should be terminated [56] unless the covert human source could be directed against an American in a criminal investigation or a full preventive intelligence investigation under these recommendations.

Recommendation 58.—Mail surveillance and the review of tax returns and tax-related information should be conducted consistently with the recommendations contained in Part iii. In addition to restrictions contained in Part iii, the review of tax returns and tax-related information, as well as review of medical or social history records, confidential records of private institutions and confidential records of Federal, state, and local government agencies other than intelligence or law enforcement agencies may not be used against an American except:

(1) In the course of a criminal investigation if necessary to the investigation;

(2) If the American is the target of a full preventive intelligence investigation and the Attorney General or his designee makes a written finding that [57] (i) he has considered and rejected less intrusive techniques; and (ii) he believes that the covert technique requested by the Bureau is necessary to obtain information necessary to the investigation.

Recommendation 59.—The use of physical surveillance and review of credit and telephone records and any records of governmental or private institutions other than those covered in Recommendation 58 should be permitted to be used against an American, if necessary, in the course of either a criminal investigation or a preliminary or full preventive intelligence investigation.

Recommendation 60.—Covert techniques should be permitted at the scene of a potential civil disorder in the course of preventive criminal intelligence and criminal investigations as described above. Non-warrant covert techniques may also be directed at an American during a civil disorder in which extensive acts of violence are occurring and Federal troops have been introduced. This additional authority to direct such covert techniques at Americans during a civil disorder should be limited to circumstances where Federal troops are actually in use and the technique is used only for the purpose of preventing further violence.

Recommendation 61.—Covert techniques should not be directed at an American in the course of a background investigation without the informed written consent of the American.

Recommendation 62.—If Congress enacts a statute attaching criminal sanctions to security leaks, covert techniques should be directed at Americans in the course of security leak investigations only if such

[56] Termination requires cessation of payment or any other form of direction or control.

[57] The written finding must be made prior to the time the technique is used against an American, unless exigent circumstances make application impossible, in which case the application must be made as soon thereafter as possible.

techniques are consistent with Recommendation 55(1), 58(1) or 59. With respect to security risks, Congress might consider authorizing covert techniques, other than those requiring a judicial warrant, to be directed at Americans in the course of security risk [58] investigations, *but* only upon a written finding of the Attorney General that (i) there is reasonable suspicion to believe that the individual is a security risk, (ii) he has considered and rejected less intrusive techniques, and (iii) he believes the technique requested is necessary to the investigation.

(*d*) *Incidental Overhears*

Recommendation 63.—Except as limited elsewhere in these recommendations or in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, information obtained incidentally through an authorized covert technique about an American or a foreigner who is not the target of the covert technique can be used as the basis for any authorized domestic security investigation.

e. Maintenance and Dissemination of Information

The following limitations should apply to the maintenance and dissemination of information collected as a result of domestic security investigations.

1. Relevance

Recommendation 64.—Information should not be maintained except where relevant to the purpose of an investigation.

2. Sealing or Purging

Recommendation 65.—Personally identifiable information on Americans obtained in the following kinds of investigations should be sealed or purged as follows (unless it appears on its face to be necessary for another authorized investigation):

(*a*) Preventive intelligence investigations of terrorist or hostile foreign intelligence activities—as soon as the investigation is terminated by the Attorney General or his designee pursuant to Recommendation 45 or 69.

(*b*) Civil disorder assistance—as soon as the assistance is terminated by the Attorney General or his designee pursuant to Recommendation 69, provided that where troops have been introduced such information need be sealed or purged only within a reasonable period after their withdrawal.

Recommendation 66.—Information previously gained by the FBI or any other intelligence agency through illegal techniques should be sealed or purged as soon as practicable.

3. Dissemination

Recommendation 67.—Personally identifiable information on Americans from domestic security investigations may be disseminated outside the Department of Justice as follows:

(*a*) Preventive intelligence investigations of terrorist activities—personally identifiable information on Americans from preventive criminal intelligence investigations of terrorist activities may be disseminated only to:

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[58] If Congress does not enact a security leak criminal statute, Congress might consider authorizing covert techniques in the same circumstances as security risk investigations either as an interim measure or as an alternative to such a statute.

(1) A foreign or domestic law enforcement agency which has jurisdiction over the criminal activity to which the information relates; or

(2) To a foreign intelligence or military agency of the United States, if necessary for an activity permitted by these recommendations; or

(3) To an appropriate federal official with authority to make personnel decisions about the subject of the information; or

(4) To a foreign intelligence or military agency of a cooperating foreign power if necessary for an activity permitted by these recommendations to similar agencies of the United States; or

(5) Where necessary to warn state or local officials of terrorist activity likely to occur within their jurisdiction; or

(6) Where necessary to warn any person of a threat to life or property from terrorist activity.

(*b*) Preventive intelligence investigations of hostile foreign intelligence activities—personally identifiable information on Americans from preventive criminal intelligence investigations of hostile intelligence activities may be disseminated only:

(1) To an appropriate federal official with authority to make personnel decisions about the subject of the information; or

(2) To the National Security Council or the Department of State upon request or where appropriate to their administration of U.S. foreign policy; or

(3) To a foreign intelligence or military agency of the United States, if relevant to an activity permitted by these recommendations; or

(4) To a foreign intelligence or military agency of a cooperating foreign power if relevant to an activity permitted by these recommendations to similar agencies of the United States.

(*c*) Civil disorders assistance—personally identifiable information on Americans involved in an actual or potential disorder, collected in the course of civil disorders assistance, should not be disseminated outside the Department of Justice except to military officials and appropriate state and local officials at the scene of a civil disorder where federal troops are present.[59]

(*d*) Background investigations—to the maximum extent feasible, the results of background investigations should be segregated within the FBI and only disseminated to officials outside the Department of Justice authorized to make personnel decisions with respect to the subject.

(*e*) All other authorized domestic security investigations—to governmental officials who are authorized to take action consistent with the purpose of an investigation or who have statutory duties which require the information.

4. Oversight Access

Recommendation 68.—Officers of the Executive branch, who are made responsible by these recommendations for overseeing intelligence activities, and appropriate congressional committees should

[59] Personally identifiable information on terrorist activity which pertains to a civil disorder could still be disseminated pursuant to (a) above.

have access to all information necessary for their functions. The committees should adopt procedures to protect the privacy of subjects of files maintained by the FBI and other agencies affected by the domestic intelligence recommendations.

f. Attorney General Oversight of the FBI, Including Termination of Investigations and Covert Techniques

Recommendation 69.—The Attorney General should:

(*a*) Establish a program of routine and periodic review of FBI domestic security investigations to ensure that the FBI is complying with all of the foregoing recommendations; and

(*b*) Assure, with respect to the following investigations of Americans, that:

(1) Preventive intelligence investigations of terrorist activity or hostile foreign intelligence activity are terminated within one year, except that the Attorney General or his designee may grant extensions upon a written finding of "compelling circumstances";

(2) Covert techniques are used in preventive intelligence investigations of terrorist activity or hostile foreign intelligence activity only so long as necessary and not beyond time limits established by the Attorney General except that the Attorney General or his designee may grant extensions upon a written finding of "compelling circumstances";

(3) Civil disorders assistance is terminated upon withdrawal of federal troops or, if troops were not introduced, within a reasonable time after the finding by the Attorney General that troops are likely to be requested, except that the Attorney General or his designee may grant extensions upon a written finding of "compelling circumstances."

v. The Responsibility and Authority of the Attorney General for Oversight of Federal Domestic Security Activities Must Be Clarified and General Counsels and Inspectors General of Intelligence Agencies Strengthened

The Committee's Recommendations give the Attorney General broad oversight responsibility for federal domestic security activities. As the chief legal officer of the United States, the Attorney General is the most appropriate official to be charged with ensuring that the intelligence agencies of the United States conduct their activities in accordance with the law. The Executive Order, however, places primary responsibility for oversight of the intelligence agencies with the newly created Oversight Board.

Both the Recommendations and the Order recognize the Attorney General's primary responsibility to detect, or prevent, violations of law by any employee of intelligence agencies. Both charge the head of intelligence agencies with the duty to report to the Attorney General information which relates to possible violations of law by any employee of the respective intelligence agencies. The Order also requires the Oversight Board to report periodically, at least quarterly, to the Attorney General on its findings and to report, in a timely manner, to the Attorney General, any activities that raise serious questions about legality.

a. Attorney General Responsibility and Relationship With Other Intelligence Agencies

These recommendations are intended to implement the Attorney General's responsibility to control and supervise all of the domestic security activities of the federal government and to oversee activities of any agency affected by the Domestic Intelligence Recommendations:

Recommendation 70.—The Attorney General should review the internal regulations of the FBI and other intelligence agencies engaging in domestic security activities to ensure that such internal regulations are proper and adequate to protect the constitutional rights of Americans.

Recommendation 71.—The Attorney General or his designee (such as the Office of Legal Counsel of the Department of Justice) should advise the General Counsels of intelligence agencies on interpretations of statutes and regulations adopted pursuant to these recommendations and on such other legal questions as are described in b. below.

Recommendation 72.—The Attorney General should have ultimate responsibility for the investigation of alleged violations of law relating to the Domestic Intelligence Recommendations.

Recommendation 73.—The Attorney General should be notified of possible alleged violations of law through the Office of Professional Responsibility (described in c. below) by agency heads, General Counsel, or Inspectors General of intelligence agencies as provided in B. below.

Recommendation 74.—The heads of all intelligence agencies affected by these recommendations are responsible for the prevention and detection of alleged violations of the law by, or on behalf of, their respective agencies and for the reporting to the Attorney General of all such alleged violations.[60] Each such agency head should also assure his agency's cooperation with the Attorney General in investigations of alleged violations.

b. General Counsel and Inspectors General of Intelligence

The Committee recommends that the FBI and each other intelligence agency should have a general counsel nominated by the President and confirmed by the Senate. There is no provision in the Executive Order making General Counsels of intelligence agencies subject to Senate confirmation. The Committee believes that the extraordinary responsibilities exercised by the General Counsel of these agencies make it very important that these officials are subject to examination by the Senate prior to their confirmation. The Committee further believes that making such positions subject to Presidential appointment and senatorial confirmation will increase the stature of the office and will protect the independence of judgment of the General Counsel.

The Committee Recommendations differ from the Executive Order in two other important respects. The Recommendations provide that the General Counsel should review all significant proposed agency activities to determine their legality. They also provide a mechanism

[60] This recommendation must be read along with recommendations contained in Part ii, limiting the authority of foreign intelligence and military agencies to investigate security leaks or security risks involving their employees and centralizing those investigations in the FBI.

whereby the Inspector General or General Counsel of an intelligence agency can, in extraordinary circumstances, and if requested by an employee of the Agency, provide information directly to the Attorney General or appropriate congressional oversight committees without informing the head of the agency.

The Committee Recommendations also go beyond the Executive Order in requiring agency heads to report to appropriate committees of the Congress and the Attorney General on the activities of the Office of the General Counsel and the Office of the Inspector General. The Committee believes that the reporting requirements will facilitate oversight of the intelligence agencies and of those important offices within them.

Recommendation 75.—To assist the Attorney General and the agency heads in the functions described in a. above, the FBI and each other intelligence agency should have a General Counsel, nominated by the President and confirmed by the Senate, and an Inspector General appointed by the agency head.

Recommendation 76.—Any individual having information on past, current, or proposed activities which appear to be illegal, improper, or in violation of agency policy should be required to report the matter immediately to the Agency head, General Counsel, or Inspector General. If the matter is not initially reported to the General Counsel, he should be notified by the Agency head or Inspector General. Each agency should regularly remind employees of their obligation to report such information.

Recommendation 77.—As provided in Recommendation 74, the heads of the FBI and of other intelligence agencies are responsible for reporting to the Attorney General alleged violations of law. When such reports are made, the appropriate congressional committees should be notified.[61]

Recommendation 78.—The General Counsel and Inspector General of the FBI and of each other intelligence agency should have unrestricted access to all information in the possession of the agency and should have the authority to review all of the agency's activities.[62] The Attorney General, or the Office of Professional Responsibility on his behalf, should have access to all information in the possession of an agency which, in the opinion of the Attorney General, is necessary for an investigation of illegal activity.

Recommendation 79.—The General Counsel of the FBI and of each other intelligence agency should review all significant proposed agency activities to determine their legality and constitutionality.

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[61] The Inspector General and General Counsel should have authority, in extraordinary circumstances, and if requested by an employee of the agency providing information, to pass the information directly to the Attorney General and to notify the appropriate congressional committees without informing the head of the agency. Furthermore, nothing herein should prohibit an employee from reporting on his own such information directly to the Attorney General or an appropriate congressional oversight committee.

[62] The head of the agency should be required to provide to the appropriate oversight committees of the Congress and the Executive branch and the Attorney General an immediate explanation, in writing, of any instance in which the Inspector General or the General Counsel has been denied access to information, has been instructed not to report on a particular activity or has been denied the authority to investigate a particular activity.

Recommendation 80.—The Director of the FBI and the heads of each other intelligence agency should be required to report, at least annually, to the appropriate committee of the Congress, on the activities of the General Counsel and the Office of the Inspector General.[63]

Recommendation 81.—The Director of the FBI and the heads of each other intelligence agency should be required to report, at least annually, to the Attorney General on all reports of activities which appear illegal, improper, outside the legislative charter, or in violation of agency regulations. Such reports should include the General Counsel's findings concerning these activities, a summary of the Inspector General's investigations of these activities, and the practices and procedures developed to discover activities that raise questions of legality or propriety.

c. Office of Professional Responsibility

Recommendation 82.—The Office of Professional Responsibility created by Attorney General Levi should be recognized in statute. The director of the office, appointed by the Attorney General, should report directly to the Attorney General or the Deputy Attorney General. The functions of the office should include:

(*a*) Serving as a central repository of reports and notifications provided the Attorney General; and

(*b*) Investigation, if requested by the Attorney General of alleged violations by intelligence agencies of statutes enacted or regulations promulgated pursuant to these recommendations.[64]

d. Director of the FBI and Assistant Directors of the FBI

Recommendation 83.—The Attorney General is responsible for all of the activities of the FBI, and the Director of the FBI is responsible to, and should be under the supervision and control of, the Attorney General.

Recommendation 84.—The Director of the FBI should be nominated by the President and confirmed by the Senate to serve at the pleasure of the President for a single term of not more than eight years.

Recommendation 85.—The Attorney General should consider exercising his power to appoint Assistant Directors of the FBI. A maximum term of years should be imposed on the tenure of the Assistant Director for the Intelligence Division.[64a]

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[63] The report should include: (a) a summary of all agency activities that raise questions of legality or propriety and the General Counsel's findings concerning these activities; (b) a summary of the Inspector General's investigations concerning any of these activities; (c) a summary of the practices and procedures developed to discover activities that raise questions of legality or propriety; (d) a summary of each component, program or issue survey, including the Inspector General's recommendations and the Director's decisions; and (e) a summary of all other matters handled by the Inspector General.

The report should also include discussion of: (a) major legal problems facing the Agency; (b) the need for additional statutes; and (c) any cases referred to the Department of Justice.

[64] The functions of the Office should not include: (a) exercise of routine supervision of FBI domestic security investigations; (b) making requests to other agencies to conduct investigations or direct covert techniques at Americans; or (c) involvement in any other supervisory functions which it might ultimately be required to investigate.

[64a] It is not proposed that this recommendation be enacted as a statute.

vi. Administrative Rulemaking and Increased Disclosure Should Be Required

a. Administrative Rulemaking

Recommendation 86.—The Attorney General should approve all administrative regulations required to implement statutes created pursuant to these recommendations.

Recommendation 87.—Such regulations, except for regulations concerning investigations of hostile foreign intelligence activity or other matters which are properly classified, should be issued pursuant to the Administrative Procedures Act and should be subject to the approval of the Attorney General.

Recommendation 88.—The effective date of regulations pertaining to the following matters should be delayed ninety days, during which time Congress would have the opportunity to review such regulations:[65]

(*a*) Any CIA activities against Americans, as permitted in ii.a. above;

(*b*) Military activities at the time of a civil disorder;

(*c*) The authorized scope of domestic security investigations, authorized investigative techniques, maintenance and dissemination of information by the FBI; and

(*d*) The termination of investigations and covert techniques as described in Part iv.

b. Disclosure

Recommendation 89.—Each year the FBI and other intelligence agencies affected by these recommendations should be required to seek annual statutory authorization for their programs.

Recommendation 90.—The Freedom of Information Act (5 U.S.C. 552(b)) and the Federal Privacy Act (5 U.S.C. 552(a)) provide important mechanisms by which individuals can gain access to information on intelligence activity directed against them. The Domestic Intelligence Recommendations assume that these statutes will continue to be vigorously enforced. In addition, the Department of Justice should notify all readily identifiable targets of past illegal surveillance techniques, and all COINTELPRO victims, and third parties who had received anonymous COINTELPRO communications, of the nature of the activities directed against them, or the source of the anonymous communication to them.[65a]

vii. Civil Remedies Should Be Expanded

Recommendation 91 expresses the Committee's concern for establishing a legislative scheme which will afford effective redress to people who are injured by improper federal intelligence activity. The recommended provisions for civil remedies are also intended to deter improper intelligence activity without restricting the sound exercise of discretion by intelligence officers at headquarters or in the field.

As the Committee's investigation has shown, many Americans have suffered injuries from domestic intelligence activity, ranging from deprivation of constitutional rights of privacy and free speech to the loss of a job or professional standing, break-up of a marriage, and impairment of physical or mental health. But the extent, if any, to

[65] This review procedure would be similar to the procedure followed with respect to the promulgation of the Federal Rules of Criminal and Civil Procedure.

[65a] It is not proposed that this recommendation be enacted as a statute.

which an injured citizen can seek relief—either monetary or injunctive—from the government or from an individual intelligence officer is far from clear under the present state of the law.

One major disparity in the current state of the law is that, under the Reconstruction era Civil Rights Act of 1871, the deprivation of constitutional rights by an officer or agent of a state government provides the basis for a suit to redress the injury incurred;[66] but there is no statute which extends the same remedies for identical injuries when they are caused by a federal officer.

In the landmark *Bivens* case, the Supreme Court held that a federal officer could be sued for money damages for violating a citizen's Fourth Amendment rights.[67] Whether monetary damages can be obtained for violation of other constitutional rights by federal officers remains unclear.

While we believe that any citizen with a substantial and specific claim to injury from intelligence activity should have standing to sue, the Committee is aware of the need for judicial protection against legal claims which amount to harassment or distraction of government officials, disruption of legitimate investigations, and wasteful expenditure of government resources. We also seek to ensure that the creation of a civil remedy for aggrieved persons does not impinge upon the proper exercise of discretion by federal officials.

Therefore, we recommend that where a government official—as opposed to the government itself—acted in good faith and with the reasonable belief that his conduct was lawful, he should have an affirmative defense to a suit for damages brought under the proposed statute. To tighten the system of accountability and control of domestic intelligence activity, the Committee proposes that this defense be structured to encourage intelligence officers to obtain written authorization for questionable activities and to seek legal advice about them.[68]

To avoid penalizing federal officers and agents for the exercise of discretion, the Committee believes that the government should indemnify their attorney fees and reasonable litigation costs when they are held not to be liable. To avoid burdening the taxpayers for the deliberate misconduct of intelligence officers and agents, we believe the government should be able to seek reimbursement from those who willfully and knowingly violate statutory charters or the Constitution.

Furthermore, we believe that the courts will be able to fashion discovery procedures, including inspection of material in chambers, and to issue orders as the interests of justice require, to allow plaintiffs with substantial claims to uncover enough factual material to argue their case, while protecting the secrecy of governmental information in which there is a legitimate security interest.

The Committee recommends that a legislative scheme of civil remedies for the victims of intelligence activity be established along the

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[66] 42 U.S.C. 1983.

[67] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[68] One means of structuring such a defense would be to create a rebuttable presumption that an individual defendant acted so as to avail himself of this defense when he proves that he acted in good faith reliance upon: (1) a written order or directive by a government officer empowered to authorize him to take action; or (2) a written assurance by an appropriate legal officer that his action is lawful.

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following lines to clarify the state of the law, to encourage the responsible execution of duties created by the statutes recommended herein to regulate intelligence agencies, and to provide relief for the victims of illegal intelligence activity.

Recommendation 91.—Congress should enact a comprehensive civil remedies statute which would accomplish the following: [69]

(a) Any American with a substantial and specific claim [70] to an actual or threatened injury by a violation of the Constitution by federal intelligence officers or agents [71] acting under color of law should have a federal cause of action against the government and the individual federal intelligence officer or agent responsible for the violation, without regard to the monetary amount in controversy. If actual injury is proven in court, the Committee believes that the injured person should be entitled to equitable relief, actual, general, and punitive damages, and recovery of the costs of litigation.[72] If threatened injury is proven in court, the Committee believes that equitable relief and recovery of the costs of litigation should be available.

(*b*) Any American with a substantial and specific claim to actual or threatened injury by violation of the statutory charter for intelligence activity (as proposed by these Domestic Intelligence Recommendations) should have a cause of action for relief as in (a) above.

(*c*) Because of the secrecy that surrounds intelligence programs, the Committee believes that a plaintiff should have two years from the date upon which he discovers, or reasonably should have discovered, the facts which give rise to a cause of action for relief from a constitutional or statutory violation.

(*d*) Whatever statutory provision may be made to permit an individual defendant to raise an affirmative defense that he acted within the scope of his official duties, in good faith, and with a reasonable belief that the action he took was lawful, the Committee believes that to ensure relief to persons injured by governmental intelligence activity, this defense should be available solely to individual defendants and should not extend to the government. Moreover, the defense should not be available to bar injunctions against individual defendants.

viii. Criminal Penalties Should Be Enacted

Recommendation 92.—The Committee believes that criminal penalties should apply, where appropriate, to willful and knowing

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[69] Due to the scope of the Committee's mandate, we have taken evidence only on constitutional violations by intelligence officers and agents. However, the anomalies and lack of clarity in the present state of the law (as discussed above) and the breadth of constitutional violations revealed by our record, suggest to us that a general civil remedy would be appropriate. Thus, we urge consideration of a statutory civil remedy for constitutional violations by any federal officer; and we encourage the appropriate committees of the Congress to take testimony on this subject.

[70] The requirement of a substantial and specific claim is intended to allow a judge to screen out frivolous claims where a plaintiff cannot allege specific facts which indicate that he was the target of illegal intelligence activity.

[71] "Federal intelligence officers or agents" should include a person who was an intelligence officer, employee, or agent at the time a cause of action arose. "Agent" should include anyone acting with actual, implied, or apparent authority.

[72] The right to recover "costs of litigation" is intended to include recovery of reasonable attorney fees as well as other litigation costs reasonably incurred.

violations of statutes enacted pursuant to the Domestic Intelligence Recommendations.

ix. The Smith Act and the Voorhis Act Should Either Be Repealed or Amended

Recommendation 93.—Congress should either repeal the Smith Act (18 U.S.C. 2385) and the Voorhis Act (18 U.S.C. 2386), which on their face appear to authorize investigation of "mere advocacy" of a political ideology, or amend those statutes so that domestic security investigations are only directed at conduct which might serve as the basis for a constitutional criminal prosecution, under Supreme Court decisions interpreting these and related statutes.[73]

x. The Espionage Statute Should be Modernized

As suggested in its definition of "hostile foreign intelligence activity" and its recommendations on warrants for electronic surveillance, the Committee agrees with the Attorney General that there may be serious deficiencies in the Federal Espionage Statute (18 U.S.C. 792 et seq.). The basic prohibitions of that statute have not been amended since 1917 and do not encompass certain forms of industrial, technological, or economic espionage. The Attorney General in a recent letter to Senator Kennedy (Reprinted on p. S3889 of the Congressional Record of March 23, 1976) describes some of the problem areas of the statute, including industrial espionage (e.g., a spy obtaining information on computer technology for a foreign power). The Committee took no testimony on this subject and, therefore, makes no specific proposal other than that the appropriate committees of the Congress explore the necessity for amendments to the statute.

Recommendation 94.—The appropriate committees of the Congress should review the Espionage Act of 1917 to determine whether it should be amended to cover modern forms of foreign espionage, including industrial, technological or economic espionage.

xi. Broader Access to Intelligence Agency Files Should be Provided to GAO, as an Investigative Arm of the Congress

Recommendation 95.—The appropriate congressional oversight committees of the Congress should, from time to time, request the Comptroller General of the United States to conduct audits and reviews of the intelligence activities of any department or agency of the United States affected by the Domestic Intelligence Recommendations. For such purpose, the Comptroller General, or any of his duly authorized representatives, should have access to, and the right to examine, all necessary materials of any such department or agency.

xii. Congressional Oversight Should Be Intensified

Recommendation 96.—The Committee reendorses the concept of vigorous Senate oversight to review the conduct of domestic security activities through a new permanent intelligence oversight committee.

xiii. Definitions

For the purposes of these recommendations:

A. "Americans" means U.S. citizens, resident aliens and unincorporated associations, composed primarily of U.S. citizens or res-

[73] E.g. *Yates* v. *United States*, 354 U.S. 298 (1957); *Noto* v. *United States*, 367 U.S. 290 (1961); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

ident aliens; and corporations, incorporated or having their principal place of business in the United States or having majority ownership by U.S. citizens, or resident aliens, including foreign subsidiaries of such corporations provided, however, "Americans" does not include corporations directed by foreign governments or organizations.

B. "Collect" means to gather or initiate the acquisition of information, or to request it from another agency.

C. A "covert human source" means undercover agents or informants who are paid or otherwise controlled by an agency.

D. "Covert techniques" means the collection of information, including collection from record sources not readily available to a private person (except state or local law enforcement files), in such a manner as not to be detected by the subject.

E. "Domestic security activities" means governmental activities against Americans or conducted within the United States or its territories, including enforcement of the criminal laws, intended to:

1. protect the United States from hostile foreign intelligence activity including espionage;

2. protect the federal, state, and local governments from domestic violence or rioting; and

3. protect Americans and their government from terrorists.

F. "Foreign communications," refers to a communication between, or among, two or more parties in which at least one party is outside the United States, *or* a communication transmitted between points within the United States if transmitted over a facility which is under the control of, or exclusively used by, a foreign government.

G. "Foreigners" means persons and organizations who are not Americans as defined above.

H. "Hostile foreign intelligence activities" means acts, or conspiracies, by Americans or foreigners, who are officers, employees, or conscious agents of a foreign power, or who, pursuant to the direction of a foreign power, engage in clandestine intelligence activity,[74] or engage in espionage, sabotage or similar conduct in violation of federal criminal statutes.

I. "Name checks" means the retrieval by an agency of information already in the possession of the federal government or in the possession of state or local law enforcement agencies.

J. "Overt investigative techniques" means the collection of information readily available from public sources, or available to a private person, including interviews of the subject or his friends or associates.

K. "Purged" means to destroy or transfer to the National Archieves all personally identifiable information (including references in any general name index).

[74] The term "clandestine intelligence activity" is included in this definition at the suggestion of officials of the Department of Justice. Certain activities engaged in by the conscious agents of foreign powers, such as some forms of industrial, technological, or economic espionage, are not now prohibited by federal statutes. *It would* be preferable to amend the espionage laws to cover such activity and eliminate this term. As a matter of principle, intelligence agencies should not investigate activities of Americans which are not federal criminal statutes. Therefore, the Committee recommends (in Recommendation ——) that Congress immediately consider enacting such statutes and then eliminating this term.

L. "Sealed" means to retain personally identifiable information and to retain entries in a general name index but to restrict access to the information and entries to circumstances of "compelling necessity."

M. "Reasonable suspicion" is based upon the Supreme Court's decision in the case of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and means specific and articulable facts which taken together with rational inferences from those facts, give rise to a reasonable suspicion that specified activity has occurred, is occurring, or is about to occur.

N. "Terrorist activities" means acts, or conspiracies, which: (a) are violent or dangerous to human life; and (b) violate federal or state criminal statutes concerning assassination, murder, arson, bombing, hijacking, or kidnapping; and (c) appear intended to, or are likely to have the effect of:

(1) Substantially disrupting federal, state or local government; or

(2) Substantially disrupting interstate or foreign commerce between the United States and another country; or

(3) Directly interfering with the exercise by Americans, of Constitutional rights protected by the Civil Rights Act of 1968, or by foreigners, of their rights under the laws or treaties of the United States.

O. "Unauthorized entry" means entry unauthorized by the target.