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UNITED STATES GOVERNMENT

Memorandum

TO : Mr. J. B. Adams

FROM : Legal Counsel *JAM*

SUBJECT: SENSTUDY 75

- 1 - Mr. Mintz - Encs. (2)
- 1 - Mr. Adams - Encs. (2)
- 1 - Mr. Bassett - Encs. (2)

DATE: 12/5/75

- 1 - Mr. Wannall - Encs. (2)
- 1 - Mr. Cregar - Encs. (2)
- 1 - Mr. Hotis - Encs. (2)
- 1 - Mr. Daly - Encs. (2)

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On 12/4/75, a meeting was held with the following representatives of captioned Committee: Chief Counsel F.A.O. Schwartz; Assistant Counsel Paul Michel; Staff Member Mark Gitenstein; Staff Director of the Domestic Task Force John T. Elliff; and Staff Member John Bayley. Representing the Bureau at this meeting were Deputy Associate Director James B. Adams, Assistant Director John A. Mintz, Inspector John B. Hotis, and SA Paul V. Daly.

The meeting discussed the forthcoming testimony on 12/9/75 of the Director before that Committee and Elliff furnished the Bureau two draft papers discussing the Bureau's investigative jurisdiction and issues the Committee Staff feels the Senate Select Committee must address from a legislative standpoint. Copies of these papers are attached.

The first paper which consists of six pages discusses in Part 1 what the Committee sees as problems arising out of the FBI's domestic intelligence investigations. This portion highlights the fact that these investigations may be overbroad in scope, collect irrelevant information, and continue the investigations beyond what the Committee sees as their normal investigative conclusion. This portion also addresses the investigative techniques used during these investigations and the resultant dissemination of information collected.

Under Part 2, the document discusses options available to the Committee. These options run the gamut from abolition of the Bureau's domestic intelligence functions to administrative oversight by the Attorney General or Congressional oversight or enacting legislation providing for domestic intelligence investigations with legislative limits imposed on such investigations. Included is the consideration of creating an independent Inspector General.

Enclosures (2)

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RE: SENSTUDY 75

The second position paper which was prepared by John T. Elliff begins by a six-page statement and analysis of the Bureau's current authority to conduct domestic intelligence investigations. He then lists four options for the Committee.

Option 1 is for Congress to pass legislation ratifying the existing FBI authority as set forth by Presidential directives and Executive Orders.

Option 2 suggests Congress might give serious consideration to creating a separate Security Intelligence Agency within the Department of Justice. In this Option, Elliff suggests that the FBI itself has considered this Option as part of the larger question of separating all FBI intelligence functions from law enforcement functions of the Bureau.

Option 3 considers the elimination of FBI domestic intelligence. In his analysis of this position, it might be possible for the Bureau to develop the necessary intelligence information through its normal criminal investigations and thus remove the necessity for domestic intelligence investigations as presently conducted.

Option 4 considers setting standards for domestic intelligence investigations. In this Option, Elliff states that the FBI should be authorized by statute to conduct domestic intelligence investigations only as Congress finds that regular criminal investigations would not provide information to anticipate or prevent the use of violence in violations of Federal law and that incidents of the use of violence in such violations are of a serious nature and threaten the security of the country.

For purposes of the Director's appearance on 12/9/75 before the Senate Select Committee, it is believed his response to questions concerning the aforementioned position papers should be that the Bureau has received copies and is reviewing the various proposals and that it would not be appropriate at this time for the Director to comment regarding the substance of the proposals.

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Legal Counsel to Mr. Adams
RE: SENSTUDY 75

Elloff indicated during this meeting that the Director during his appearance may anticipate being asked a question by one of the Senators relating to his statement before the American Bar Association in Montreal concerning the necessity for the sacrifice of certain individual rights at the expense of investigations. He also anticipated the Director might be asked a question concerning his position on COINTELPRO. Regarding the question concerning the Director's statement before the American Bar Association in Montreal, the Legal Counsel Division will draft a proposed response. Concerning COINTELPRO, a response has been prepared and will be put together with the briefing material for the Director.

This memorandum in general highlights the Options presented in the attached papers. A more detailed analysis should be prepared by the Intelligence Division and existing documents addressing these proposals should be made available for the Director's briefing book for his testimony.

RECOMMENDATIONS:

(1) That the Director respond to questions concerning the attached position papers as set forth above.

Done.

(2) That the Legal Counsel Division draft a proposed response concerning the Director's statement made in Montreal relating to the sacrifice of certain individual rights.

Done.

(3) That the Intelligence Division make a detailed review of the various Options set forth in the two attached position papers. (FOR SUBSEQUENT STAFF CONFERENCE AFTER 12/19)

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Issues and Options for Discussion with
Former Attorneys General Rogers, Katzenbach, and Clark

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I. Background

In the past few weeks the staff has presented the Committee with evidence suggesting the following about the FBI's internal security intelligence program:

- A. The program is massive, involving the collection of information on the activities of thousands of innocent, law-abiding American citizens.
- B. These individuals were not alleged espionage agents, but citizens who fall within the FBI's vague definitions of "subversion" and "extremism" -- purely homegrown "threats to the national security".
- C. That FBI policy on "subversive" and "extremist" investigations was vague and subject to the following abuses:
 1. overbreadth in scope in that groups were investigated whose threats to the national security were tenuous, if not non-existent.
 2. collection of information on the personal life and political views of subjects unrelated to the national security.
 3. the continuance of investigations well after it should have become obvious that there was no legitimate predicate.
- D. Particularly invasive collection techniques were used, including electronic surveillance, mail opening, and surreptitious entries. Although these have been terminated, the predominant and perhaps most insidious continues today through the FBI's huge informant/confidential source network.
- E. Information collected in the course of these investigations is disseminated regularly throughout the federal government and to local law enforcement.
- F. Until 1971, information collected through these investigations was disseminated as part of the COINTELPRO program to the subjects' friends, relatives, employers, and others in an effort to discredit or "neutralize" alleged "subversives" or "extremists".

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- G. The FBI's internal security intelligence program was used by Presidents from Franklin Roosevelt to Richard Nixon to serve their political interests, usually by collecting information on critics or political opponents.
- H. The program was conceived and implemented in secrecy, and although parts of the program were shared with outside authorities from time to time, until now no President, Attorney General, or Congressional committee has been exposed to the entire program in detail.
- I. The program is not authorized by statute but is founded on a series of secret or ambiguous Presidential orders, which in turn are based upon a questionable assertion of "inherent constitutional authority".
- J. The program continues today, albeit on a much more limited basis than in the late 1960's and early 1970's, and the basic machinery for the program -- the huge informant/confidential source network -- is still operating.
- K. There is no statute or internal Bureau or Justice Department policy prohibiting a new Director, Attorney General, or President from ordering the Bureau to expand the program to its earlier dimensions.

II. Issues and Options

Among the issues and options which might be discussed with former Attorneys General in response to what the Committee has learned are the following:

- A. Abolition. Elimination of the FBI internal security intelligence program as Attorney General Harlan Stone ordered in 1924 when confronted with abuses growing out of the FBI's first internal security intelligence program, such as the infamous Palmer raids.

In weighing this option, the Committee should consider the following issues:

- 1. Whether there are not some functions (e.g., protecting the President, preventing or at least predicting violence by terrorist organizations, or predicting civil disorders) which require intelligence collection.

2. Whether FBI intelligence reports are valuable in that respect, especially in light of a recent GAO report suggesting that such reports are rarely useful in predicting violent activity.
 3. Whether such information, assuming it is valuable, could not be obtained through more traditional criminal investigations.
 4. Whether the value of the information, marginal or otherwise, justifies the risk to civil liberties inherent in such intelligence collection.
 5. Whether, given the way in which limited and ambiguous grants of authority have been expanded into major authorizations, any statute short of a total prohibition of all non-law enforcement intelligence activities in the domestic sector will be adequate to prevent the recurrences of the kinds of abuses uncovered by this Committee. (Or, conversely, whether it is possible to draft a law authorizing a limited civil disturbance and counter-terrorist intelligence mission that will not eventually evolve, like the National Security Act of 1947, into a charter for unanticipated and unwanted covert activities.)
 6. Whether it would be sufficient to restrict the FBI to criminal investigations without also (a) placing limits upon the length of investigations, (b) the kinds of information which can be collected and disseminated on the subject irrelevant to the alleged criminal act, (c) the utilization of warrantless electronic surveillance and other particularly invasive collection techniques, and (d) the utilization of a huge informant/confidential source network without judicial or Justice Department supervision.
- B. Authorizing Statute. Recognition of the value of internal security intelligence, but placing limits upon the program designed to minimize the infringement upon civil liberties, an option being actively considered by the present Attorney General.

In weighing this option, the Committee should consider many of the issues set out under the first option and, in addition:

1. Whether meaningful and stringent guidelines can be written which do not so hamper the administration of an internal security intelligence program as to make the product not just marginal, as GAO suggests, but worthless.*
 2. In light of the possibility that the present Attorney General may address this matter via internal Justice Department guidelines, whether this approach does not ignore the legal authority question which can only be resolved by statute.
 3. Whether or not Congress could draft a statutory version of the guidelines which could be flexible enough to meet an evolving threat and at the same time place meaningful restrictions upon the program.
 4. Even assuming there is no absence of legal authority, is it safe to leave these guidelines in the form of a departmental order which can be rescinded by the next Attorney General?
- C. Delegation of Authority to Attorney General. Simply ratifying the present program via enactment of a statutory charter which grants the FBI authority to conduct an internal security intelligence program subject to its own internal guidelines or departmental guidelines as proposed by the Attorney General.

In weighing this option, the Committee should consider many of the issues set out above and:

1. Whether such a statute would not be an unconstitutional delegation of powers to the Executive Branch.
2. Whether enactment of such a statute would not represent a failure by the Congress to confront the issues raised above.

*A preliminary staff analysis of the Attorney General's draft guidelines suggests that, despite months of conscientious and painstaking work by a departmental task force, the guidelines are not adequate. This analysis, which will be presented when Attorney General Levi testifies on December 10, indicates that several of the more questionable FBI investigations (e.g., of Dr. King and the women's liberation movement) would still be permissible under these proposed guidelines.

- D. Legislative Inaction. Enact no new statute affecting the FBI's legal authority or the internal security intelligence program.

In weighing this option, the Committee should consider many of the issues set out above and, in addition:

1. Whether this failure to act might not leave the status of the program in doubt and subject to court challenge.
2. Whether this failure to act after full disclosure by the Bureau might not be taken by the FBI and the courts as a ratification of the program.

- E. Administrative Oversight by the Attorney General. The Justice Department should be required to exercise greater administrative oversight over the FBI's internal security intelligence program by Attorney General Levi, regardless of whatever other options Congress accepts.

In weighing this option, the Committee should consider the following issues:

1. Whether it is practical for the Attorney General or his staff to review thousands of such investigations each year.
2. Whether the Attorney General or his staff should review all or just the so-called "full" investigations.
3. Whether, to facilitate the conduct of such reviews, the Attorney General or his staff should be given "complete" access to Bureau files, including information regarding the identity and reliability of informants and confidential sources.
4. Whether it is possible to develop a staff of career attorneys within the Department with both the access and independence essential to the conduct of searching reviews.
5. Whether the Attorney General or his staff should not also be required to review various informant and so-called "intensification" programs, and the establishment of specialized indices (which have a significant impact upon which cases are opened) instead of just reviewing individual investigations in a vacuum as provided by the Attorney General's draft guidelines.

- F. An Inspector General. In addition to the above options, an independent Inspector General should be created to investigate improprieties by the FBI. This option is advanced by those concerned about the inadequacy of the FBI's investigation of the disappearance of former Director Hoover's personal files, its limited inquiry into the so-called Atlantic City convention case, and the absence of any internal investigation of the abuses in the King case.

In weighing this option, the Committee should consider the following issues:

1. Whether it is possible to maintain the independence of an Inspector General within the Department of Justice when both the Inspector General and the Director of the FBI will be responsible to the same official, the Attorney General.
 2. Whether the Inspector General should have "complete" access to Bureau files, including information pertaining to the identity and reliability of informants and confidential sources.
 3. Whether an Inspector General with access to extremely sensitive information might not become a serious threat to the independence of the Bureau from political influence and to the civil liberties of American citizens.
- G. Congressional Oversight. In addition to the above options, the creation of an oversight committee(s) in the Congress, to which the Bureau would be required to report and which would have the power to investigate abuses.

In weighing this option, the Committee should consider the kinds of problems posed by the Justice Department oversight and Inspector General options discussed above to the independence of the FBI and the confidentiality of its files.

- H. Public Reporting and Disclosure to Subjects. In addition to the above options, the requirement that the FBI make frequent public reports on the details of its internal security intelligence programs and policies and reveal the details of improper intelligence investigations to the subjects of those investigations.

In weighing this option, the Committee should consider the following issues:

1. Whether it is possible to reveal the essence of some programs and policies and the details of some investigations without jeopardizing the effectiveness of legitimate programs.
2. Whether such disclosure might not increase the number of law suits filed against the FBI alleging illegal activities.

December 4, 1975.

FBI LEGISLATION - PROPOSED OPTIONS

In preparation for the testimony of FBI Director Kelley and Attorney General Levi on December 9 and 10, the Domestic Intelligence Task Force is pulling together various proposals for legislation dealing with FBI intelligence. This paper sets forth some of the basic options.

A: Current Statutes and Executive Orders

The basic statute governing the FBI is 18 U.S.C. 533, which reads as follows:

The Attorney General may appoint officials:
(1) to detect and prosecute crimes against the United States, (2) to assist in the protection of the person of the President, and (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

Clauses (2) and (3) are a possible statutory basis for intelligence investigations going beyond the investigation of specific federal crimes. Under (2), the FBI may "assist" the Secret Service in the protection of the President by providing

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intelligence on persons or groups who may endanger the President's safety. A formal agreement between the FBI and the Secret Service sets forth the types of intelligence information provided by the Bureau. However, this agreement states that:

The FBI will not conduct investigation of individuals or groups solely for the purpose of establishing whether they constitute a threat to the safety of the President and certain other persons unless there is an indication of a violation of Title 18, U. S. Code, Section 1751, or other statute over which the FBI has jurisdiction. (Tab A)

Clause (3) recognizes that the Attorney General may direct the FBI to conduct investigations, other than criminal investigations, regarding certain undefined "official matters under the control of the Department of Justice." This is a possible statutory basis for at least two broad areas of FBI intelligence investigations -- civil disturbance intelligence and intelligence for the Federal Employee Security Program.

The most recent legal advice to the FBI from the Justice Department on the gathering and reporting of data regarding civil disturbances notes that on April 1, 1969, the President designated the Attorney General as chief civilian officer to coordinate the government's response to civil disturbances. The FBI is instructed to gather and report on "all significant incidents of civil unrest" and on "all disturbances where there are indications that extremist organizations . . . are believed to be involved in efforts to instigate or exploit them." The

FBI is specifically advised to make reports "even when no specific violation of federal law is indicated." On the other hand, the FBI is instructed not to report "every relatively insignificant incident of a strictly local nature coming to its attention." (Tab B)

The Justice Department has given the following recent instructions to the FBI regarding intelligence for the Federal Employee Security Program. Executive Order 10450, as amended by Executive Order 11785, is interpreted as requiring an FBI investigation of organizations "with a potential" of violating federal or state statutes prohibiting unlawful advocacy of violence or the commission of any unlawful act of violence. The FBI is advised that "it is not possible to set definite parameters covering the initiation of investigations of potential organizations falling within the Order." The FBI is instructed to apply "the same yardstick" to investigations of individuals who are affiliated with such organizations. The FBI is specifically advised that "it is not necessary that a crime occur before the investigation is initiated." (Tab C)

Clause (3) also recognizes that the Attorney General may direct the FBI to conduct investigations, other than criminal investigations, regarding certain undefined "official matters under the control of the Department of State." This is a possible statutory basis for FBI intelligence investigation of foreign intelligence activities within the United States or to

collect positive foreign intelligence. The best example is the Attorney General's authorization of warrantless FBI electronic surveillance for foreign intelligence purposes. However, there is apparently no instruction from the Justice Department to the FBI directing the Bureau to initiate investigations of individuals or organizations which have a marked potential for use by a foreign intelligence service, but about which there is no information indicating intelligence activity. (See Staff Report, "Counterintelligence/Counterespionage: The Law and the Philosophy", October 14, 1975.)

In his testimony before the Committee, Deputy Associate FBI Director James Adams made no reference to clauses (2) and (3) as a possible legal basis for FBI intelligence investigations going beyond the investigation of specific federal crimes. Instead, he placed sole reliance on a series of Presidential directives extending from 1936 until the 1960's which the FBI interprets as authorizing it to engage in "domestic security intelligence investigations". The Attorney General has codified these directives in a Justice Department regulation instructing the FBI to:

Carry out the Presidential directive of September 6, 1939, as reaffirmed by Presidential directives of January 8, 1943, July 24, 1950, and December 15, 1953, designating the [FBI] to take charge of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters. 28 C.F.R., Section 0.85(d).

The FBI also cites directives of President Kennedy on June 9, 1962, and Attorney General Kennedy on March 5, 1964, which are the latest charter for the Interdepartmental Intelligence Conference, composed of the FBI Director and the chiefs of the military intelligence agencies. This group is authorized to coordinate "all investigation of domestic espionage, counter-espionage, sabotage, subversion, and other related intelligence matters affecting internal security." (Tab D)

The theory behind the FBI's position is that the President has inherent constitutional powers, at least in the absence of contrary legislation, to authorize FBI intelligence activities. The only judicial support for this theory is language in the Supreme Court's opinion in the Keith case, which declared warrantless wiretapping of domestic groups unconstitutional.

The Court acknowledged the importance of "national security in its domestic implications . . . especially at a time of worldwide ferment and when civil disorders in this country are more prevalent than in the less turbulent periods of our history." Under such circumstances, the Court stated, the President has a "fundamental duty" under the Constitution to "preserve, protect and defend the Constitution of the United States." The Court added, "Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means." Hence, the Court appeared to

recognize that the President's "domestic security role" has a "constitutional basis"; that the President through the Attorney General may need "to obtain intelligence information about those who plot unlawful acts against the Government"; and that "threats and acts of sabotage against the Government exist in sufficient number to justify investigative powers with respect to them." The Court applied the general principle that "unless the Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered." Nevertheless, the central holding of the Keith decision was that this power may not be exercised in such a way as to infringe constitutional rights. 407 U.S. 297 (1972).

Even though the President may have the authority under the Constitution to direct the FBI to conduct intelligence investigations in the absence of legislation, Congress has the ultimate authority to substitute statutory authorization in place of the Presidential directives. As Justice Robert Jackson declared in the Steel Seizure Case, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . ." 343 U.S. 579, 637.

B. Option One -- Ratifying Existing Powers

The first option for Congress is legislation ratifying the existing authority granted to the FBI by current Presidential directives and orders. Such legislation would be cast in extremely general terms. Its main advantage is that it would provide a basis for Congressional oversight. It could also reinforce the Attorney General's role as the immediate supervisor of FBI intelligence activities. The statute would authorize the Attorney General to direct the FBI:

1. to conduct investigations of domestic espionage, counterespionage, sabotage, and subversive activities;
2. to gather and report information on civil disturbances;
3. to conduct investigations of other related intelligence matters affecting internal security; and
4. to conduct investigations of official matters relating to the Department of State.

In addition, the statute would require the Attorney General to report annually to the appropriate Congressional committees on the volume and type of investigations and reports, the investigative techniques used, and the policies and procedures adopted by the Justice Department and the FBI.

The weaknesses of this approach are obvious. Congress would have legislated a wholesale delegation of power without

standards or limitations other than the supervision of the Attorney General and oversight by Congress. In view of the Select Committee's findings as to the vast overbreadth of FBI domestic intelligence investigations and the abuses committed in the name of "counterintelligence", Congress would in effect be permitting future expansion of FBI operations to match past policies.

C. Option Two -- A Separate Security Intelligence Agency

Congress might give serious consideration to legislation creating a separate Security Intelligence Agency within the Justice Department. It would perform the functions of the present Counterintelligence Branch of the FBI Intelligence Division; dealing with foreign intelligence and counterintelligence/counterespionage. The FBI itself has considered this option as part of the larger question of separating all FBI intelligence functions from the law enforcement functions of the Bureau. (Tab E)

A separate agency would be justified only if it was authorized to conduct investigations of a wider scope and using different techniques than would otherwise be permitted. In other words, Congress could decide that foreign counterintelligence investigations should go beyond investigation of specific crimes, that techniques such as electronic surveillance should be used without a warrant or with a special type of warrant,