SC-05078-76
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TOP SECRET

REPORT

ON

INQUIRY INTO

CIA-RELATED

ELECTRONIC SURVEILLANCE

ACTIVITIES

[illegible] INTELLIGENCE SOURCES AND METHODS INVOLVED

TOP SECRET

CLASSIFIED BY Robert L. Keuch
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PREFACE

Most of the information contained in this Report was obtained from personnel employed by the various intelligence agencies under investigation. Predictably, their attitudes ranged from circumspection to wariness.

One typically had to ask the right question to elicit the right answer or document. It is likely, therefore, that we had insufficient information on occasion to frame the "magic" question. One also had to ascertain the specific person or division to whom the right question should be addressed, since compartmentalization of intelligence-gathering often results in one hand not knowing what the other is doing.

The latter was particularly true of the offices of general counsel with which we dealt. They were not always consulted beforehand concerning the legality of borderline operations. Indeed, they were not fully aware, until our inquiry, of certain questionable operations engaged in by their respective agencies [redacted]. In addition, the offices of general counsel evinced a lack of legal expertise in the field of electronic surveillance and a general uncertainty and inexperience in the area of Federal criminal law. It is possible, therefore, that some exculpatory as well as inculpatory facts and documents were not revealed because general counsel did not perceive their relevance or significance.

The degree of overall cooperation with our inquiry varied among the agencies under scrutiny. NSA and DEA, for instance, were generally cooperative. Personnel from both DEA and NSA who had been directly involved in questionable operations readily submitted to interview and cooperated (however guardedly), despite Miranda warnings. The CIA, on the other hand, elected to inform us of the details of questionable CIA activities through CIA personnel who would not be given Miranda warnings, i.e., CIA employees who had not been involved in the questionable operations. Consequently, our briefings on CIA activities were conducted by CIA personnel with only second-hand knowledge gleaned principally from written records. Subsequently, however, several of the CIA personnel directly involved in questionable operations did submit to interview.

Compliance with requests for documents and/or written reports also varied in degree of promptness. NSA and DEA were reasonably prompt. Initially, the CIA was dilatory and the FBI tardy, but both improved as the inquiry progressed. Materials gathered by the Senate Select Committee were not made available for our review until March 2, 1976.

The foregoing impediments, while inconvenient, did not fundamentally alter the final product of our effort to obtain the detailed overview reflected in this Report. Such obstructions might become intolerable, however, in the prosecutive pursuit of specific cases.

Dougald D. McMillan

June 30, 1976

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I. FINDINGS OF THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES

The Report to the President by the Commission on CIA Activities Within the United States (hereinafter referred to as the Rockefeller Commission Report or "RCR") contains various findings with respect to CIA electronic surveillance activities. These findings are set forth below, followed by comments based upon results of the inquiry conducted by the Justice Department Task Force.

A. OFFICE OF SECURITY - Telephone Taps and Bugs

Commission Findings

The Office of Security conducted 32 domestic wiretaps (the last in 1965), and engaged in 32 instances of bugging (the last in 1968). None of these was conducted pursuant to a judicial warrant, and only one was with the written approval of the Attorney General. (RCR 30; 167-168)

The Commission found two cases in which the telephones of three newsmen were tapped in an effort to identify their sources of sensitive information. These occurred in 1959 and 1962. The latter was apparently conducted with the knowledge and consent of the Attorney General. (RCR 164)

Some of these activities were clearly illegal at the time they were conducted. Others might have been lawful at the time, but would be prohibited under current legal standards. (RCR 160)

Comment

The analysis of available information (Tab A1) indicates a total of 36 (possibly 38) rather than 32 telephone taps by the Office of Security, and 35 (possibly 38) mike-and-wire operations instead of the 32 instances of "bugging" reported by the Rockefeller Commission. In addition, both the last known telephone tap and mike-and-wire operation were conducted in October, 1971, rather than 1965 and 1968, respectively. These differences appear to be academic, however, since the five-year statute of limitations (18 U.S.C. 3282) has expired as to all the interceptions except those in October, 1971, which were consensual.

With respect to CIA electronic surveillance of newsmen, an examination of available files indicates that in 1959 a foreign newspaper correspondent and two U.S. writers were the subject of telephone taps. The foreign newspaper correspondent was also the subject of a mike-and-wire operation. In 1963, two U.S. newspaper reporters were the subject of a CIA telephone tap. (Tab A2) Obviously, the statute of limitations has long barred any possible prosecution for substantive offenses based upon these interceptions.

B. COUNTERINTELLIGENCE STAFF, DEPUTY DIRECTOR OF PLANS - Collection of Information On American Dissidents, etc.

Commission Findings

The Commission found no evidence that any of the agents or CIA officers involved with any of the dissident operations (CHAOS) employed or directed the domestic use of any electronic surveillance or wiretaps against any dissident group or individual. Operation CHAOS, however, received materials from an international communications activity of another agency of the government. These communications passed between the United States and foreign countries. None was purely domestic. (RCR 24; 141-142)

Comment

Investigation has developed nothing to contradict the Commission's finding that there is no evidence CIA employed or directed the domestic use of any electronic surveillance or wiretaps against any dissident group or individual in Operation CHAOS. (Tab B1) The other government agency referred to by the Commission as having furnished Operation CHAOS with international communications materials has been identified as the National Security Agency. (The electronic surveillance activities of NSA are discussed in II (B), infra.)

C. DIRECTORATE OF OPERATIONS - Telephone Toll Records Reflecting Contacts Between the United States and Hostile Countries.

Commission Findings

During 1972 and 1973, the Directorate of Operations obtained and transmitted to other components of CIA certain information about telephone calls between the Western Hemisphere (including the United States) and two other foreign countries. Some of the calls involved American citizens within the United States. The information obtained by the Directorate of Operations was limited to the names, telephone numbers and locations of the caller and the recipient. The contents of the call were not indicated. Shortly after the program commenced, the Office of the General Counsel issued a brief memorandum stating that receipt of this information did not appear to violate applicable statutory provisions.

Collection of this material was terminated in May 1973.

The Commission was unable to discover any specific purpose for the collection of telephone toll call information, or any use of that information by the CIA. In the absence of a valid purpose, such collection is improper. (RCR 213-214)

Comment

A review of CIA files revealed that from September, 1971 to the Spring of 1972, [redacted] obtained telephone toll records from AT&T reflecting some 270 telephone calls between the United States and Red China.

The legitimacy of this source of intelligence was confirmed in February 1972, by the Office of General Counsel, CIA. (Tab C1) The opinion of the OGC cites United States v. Covella, 410 F.2d 536, c.d. 396 U.S. 879 (1969), and appears to be well reasoned and soundly based.

D. DIRECTORATE OF OPERATIONS - Electronic Surveillance for Narcotics Inteligence (Brandy Operation)

Commission Findings

Beginning in the Fall of 1973 the Directorate of Operations, at the request of NSA, monitored telephone conversations between the United States and Latin America for a period of three (or six) months in an effort to identify narcotics traffickers. This was immediately terminated upon the issuance of an opinion by the CIA General Counsel that it was illegal. (RCR 37; 222-224)

Comment

Examination of CIA files and the interview of various CIA officials established that from October, 1972 through January, 1973 (rather than the "fall of 1973"), [redacted], the CIA intercepted high frequency commercial radio telephone communications between the United States and Latin America for the purpose of gathering foreign narcotics intelligence. (Tab D)

The CIA undertook this narcotics intelligence collection effort at the request of NSA which had previously accepted tasking requests from BNDD to gather narcotics intelligence from international communications. [redacted] furnished NSA with transcripts of the intercepted calls which were selected on the basis of a "Watch List" of names and telephone numbers provided by NSA. NSA distributed the intelligence to BNDD. [redacted]

This electronic surveillance activity presents prima facie questions of criminality and is well within the limitations period. (See "Possible Violations", V, infra.)

[redacted]

Investigation has confirmed the Rockefeller Commission's findings that the [redacted] was conducted without the knowledge of the "CIA component with responsibility for narcotics intelligence collection." (RCR 222). This CIA component was known successively as the "Narcotics Coordinator" and "NARCOG" which are also discussed herein. (See II(A)(1), infra.)

E. DIRECTORATE OF SCIENCE AND TECHNOLOGY - Interception of Domestic Communications In Testing Electronic Equipment

Commission Findings

In the process of testing monitoring equipment for use overseas, the CIA has overheard conversations between Americans. The names of the speakers were not identified; the contents of the conversations were not disseminated. All recordings were destroyed when testing was concluded.

The acquisition of communications incidental to the testing of interception equipment appears to be prohibited by 18 U.S.C. 2510 et seq. (RCR 37; 64; 228)

Comment

[redacted]

[redacted]

The five-year statute of limitations would bar prosecution for possible substantive offenses involved in this project.

[redacted]

[redacted]

[redacted]

The limitations period for prosecuting possible substantive offenses related to this activity expired in 1974.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Consequently, there is no basis for prosecutive action.

[redacted]

[redacted]

[redacted]

The limitations period regarding any possible prosecution arising from this activity will expire in May, 1976. See "Possible Violations" below.

[redacted]

[redacted]

F. Office of Security - Assistance to Washington, D.C. Metropolitan Police Department and the Secret Service

Commission Findings

The CIA has on at least one occasion provided some technical assistance in an actual police operation being carried out by the Metropolitan Police Department. In late 1968 or early 1969, CIA was asked to provde the Department with transmitters which could be planted in several lamps to be placed in the apartment of a police informer who frequently met with members of dissident groups. CIA agreed to provide the requested equipment. The lamps were provided to CIA and the transmitter devices were installed in the lamps by personnel from the Office of Security. The lamps were then placed back in the police informer's apartment by the police. The police informer was aware that the apartment was being bugged and consented to the operation. (RCR 296)

Comment

Pursuant to the request of AAG Richard Thornburgh on August 19, 1975, the FBI is currently conducting an investigation of alleged bugging activities involving the Washington Metropolitan Police Department (MPD). This investigation is being monitored by AUSA Donald E. Campbell, Deputy Chief, Major Crimes Division, U.S. Attorney's Office, Washington, D.C., and James Robinson, General Crimes Section, Criminal Division, U.S. Department of Justice.

1. Washington Metropolitan Police Department

Records obtained from the Rockefeller Commission files reflect that in September, 1968, the CIA loaned "lamps with transmitters" to [redacted]

of the Washington Metropolitan Police Department, and that the lamps were not returned to CIA. (Tab A3)

2. United States Secret Service

The Rockefeller Commission records also reflect that the CIA furnished the following equipment to the Secret Service:

(1) Receiver R5-111-1B-170, loaned to [redacted] USSS, on 27 July 73, and not returned.

(2) Clandestine Transmitter (Com'l), to [redacted] USSS, and returned. (The date the equipment was loaned is unknown).

According to a Metropolitan Police Department investigative report to Mayor Walter Washington on March 7, 1975, the only intercept utilized in connection with demonstration activities consisted of a recording device in the apartment of a special employee of the MPD in order to secure information regarding planned anti-war activities of an illegal nature. This consisted of one-party consent and was purportedly a legal installation. (Tab A4)

FBI investigative reports reflect that a special employee of the MPD from 1968-1972 was interviewed by FBI agents and stated that in 1968, she traveled to Chicago with a representative of the MPD to cover radical activities which were expected to occur in conjuction with the Democratic National Convention, and that her hotel room was subsequently monitored by electronic surveillance conducted by the Secret Service. She further acknowledged her role in electronic surveillances conducted by the MPD of her residences on [redacted] She indicated this monitoring was accomplished

with transmitters which were present in two lamps furnished to her by the MPD.

Secret Service personnel were interviewed and confirmed that the Secret Service had participated in the consensual electronic surveillance of the informant's hotel rooom in Chicago in 1968, and a residence occupied by her in the [redacted]

Prior to the May Day Demonstrations in 1971, the Secret Service is alleged to have participated with the MPD in the consensual electronic surveillance of the apartment of another MPD informant. This apartment was reportedly located at [redacted] and CIA is further alleged to have furnished some of the equipment utilized by the MPD in conducting this electronic surveillance.

Secret Service officials confirmed to the FBI that prior to the May Day Demonstrations in 1971, the MPD requested and obtained the assistance of the Secret Service in the consensual electronic surveillance of the above apartment. At the same time, the Secret Service also monitored, with the MPD, two listening devices in the apartment of the aforementioned female informant. The latter was also consensual.

A former MPD Intelligence Division officer confirmed that he participated in an electronic surveillance of the female informant's apartment "several weeks" after the bombing of the U.S. Capital in March, 1971.

The above surveillances were apparently conducted between March 17, 1971 and May 4, 1971.

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Departmental Attorney James Robinson will endeavor to ascertain any further involvement the CIA might have had in the above or related activities.

George Clarke, CIA Associate General Counsel, advised as follows:

> ... [T]hroughout the Office of Security's research pursuant to the Rockefeller Commission and Congressional investigations of the Agency, there have been no indications that the Office of Security has ever directly assisted and/or participated in any electronic surveillance activities with the Metropolitan Police Department.
>
> No assistance has been rendered or equipment loaned to the Metropolitan Police Department by Division D [CIA] in connection with electronic surveillance activities. (Tab A5)

However, Mr. Clarke furnished CIA memoranda reflecting loans of communications equipment to the Metropolitan Police Department and other police departments. (Tab A6)

Mr. Clarke also furnished CIA memoranda reflecting loans of communications equipment to the Secret Service (Tab A7), and further advised:

> The U.S. Secret Service (USSS), under the authority contained in Title 18, U.S. Code, Section 3056, as amended by Pl 90-331, regularly tasks the CIA to provide real-time communications intelligence close support to the USSS during the foreign travel of the President and other protectees designated by the USSS. The CIA, in response to such tasking, monitors, on the scene, those local, foreign military and internal security communications supporting elements responsible for the physical protection of visiting protectees. The results of this monitoring are immediately passed to the USSS on-scene. On occasion, local USSS communications may also be monitored by the CIA team. However, all such monitoring is at the specific request of the USSS.
>
> The majority of the Office of Security's assistance to the Secret Service has been related to counteraudio measures in connection with the protection of the President and/or Vice President. Since 1974 no electronic equipment, capable of intercepting oral communications, has been loaned to the U.S. Secret Service by the Office of Security....

The arrangement between the CIA and Secret Service was formalized by written agreement in 1971. (Tab A8)

In sum, the foregoing assistance to other agencies does not indicate prosecutable violations on the part of CIA personnel.

II. ADDITIONAL AREAS OF INQUIRY

A. Central Intelligence Agency

1. Narcotics Coordinator and NARCOG (Tab E)

In October, 1969, the President designated international narcotics control a concern of U.S. foreign policy and established the White House Task Force on Heroin Suppression. The Director of Central Intelligence (DCI), Richard Helms, was named to the membership of the Task Force and directed by the President to provide the Task Force with CIA assistance. Consequently, a CIA office of Narcotics Coordinator was established under the Deputy Directorate of Plans (now the Deputy Directorate of Operations).

The duties of the CIA Narcotics Coordinator [redacted] included the representation of CIA on the Working Group of the White House Task Force and narcotics liason with other agenices. Since the initial concern of the White House Task Force was narcotics trafficking in Turkey and Southeast Asia, the CIA provided the Task Force with narcotics intelligence reports and studies concerning both areas. Additionally, [redacted] advised, the Task Force was interested in the European connections between Latin American traffickers and Turkish opium suppliers, and the CIA contributed information in this regard.

With respect to the CIA's cooperation with other agenices, BNDD tasking memoranda to CIA reflect that during the time the White House Task Force was in existence, the CIA provided BNDD with assistance in training programs, loans of funds for overseas operations, intelligence reports on international narcotics traffickers, and other narcotics developments overseas. Some of this information was obtained as the

incidental by-product of national security electronic surveillances overseas, and some from overseas interceptions specifically conducted for international narcotics intelligence. CIA assures, however, that none of these electronic surveillance operations was conducted within the United States or from lands reserved for use by the United States; neither were any of the interceptions targeted against communications having one terminal in the United States.

In August, 1971, the President upgraded the priority of the international narcotics control effort by replacing the White House Task Force with the Cabinet Committee on International Narcotics Control (CCINC). The CIA Narcotics Coordinator was named chairman of the CCINC Working Group Intelligence Subcommittee. He was reportedly instructed by DCI Richard Helms to avoid involvement in domestic law enforcement activities and BNDD's domestic intelligence operations. CIA continued to provide BNDD (also a member of the Intelligence Subcommittee) with foreign narcotics intelligence and various support (e.g., training, "flash rolls") for its overseas operations.

The CIA Narcotics Coordinator furnished BNDD with reports of the following types:

1. FIRDB, TDFIRDB, TDFIR, etc. (Foreign Intelligence Reports): Collected by the Office of Operations from foreign field offices with description of the sources included in the reports.

2. OO Reports: Compiled by the Domestic Collection Division exclusively from interviews of people who had traveled to foreign countries.

3. Analytical Report: The only known report of this type was a study entitled "Cocaine Trafficking Network in Colombia."

4. Daily Reports (i.e., USIB National Intelligence Bulletin): Pertained primarily to geopolitical intelligence. It is not narcotics oriented.

5. Weekly Summary: Geopolitical bulletin. Not narcotics oriented.

6. Miscellaneous Reports: These included teletypes of specific information which may or may not have been COMINT, and also included Director of Operations Narcotics Control Reports (DONCS) which were sent directly to BNDD's Chief of Strategic Intelligence, [redacted]

There is no indication that the CIA Narcotics Coordinator furnished BNDD with any narcotics intelligence reports other than the foregoing.

CIA's Office of Narcotics Coordinator was reorganized on June 12, 1972, as the Narcotics Coordination Group, or NARCOG. The principal duties of NARCOG did not differ from those previously assigned the Narcotics Coordinator. NARCOG provided support to the CCINC and coordinated the CIA's narcotics intelligence programs. NARCOG also continued responding to BNDD/DEA's intelligence requirements by furnishing BNDD/DEA with the above described reports.

The first chief of NARCOG, [redacted] (6/19/72 - 7/19/74), was reportedly instructed by the DCI and the DDP to avoid involvement in domestic narcotics enforcement operations as well as foreign operations targeted against American citizens. When overseas CIA stations inadvertently acquired information concerning the narcotics trafficking activities of U.S. citizens, the local CIA official would reportedly surrender the information to his local

BNDD counterpart and take steps to insure that no further collection on the U.S. citizen occurred.

While much of the information provided the CCINC by CIA was obtained as a result of CIA's overseas national security electronic surveillance operations [redacted] and his two successors, [redacted] (Chief, 7/74 - 12/74), and [redacted] (Chief, 1/75 - present), advised that NARCOG neither conducted nor requested the conduct of electronic surveillance operations domestically or against any communications having one terminal in the United States. [redacted]

Inquiry has confirmed that NARCOG officials were keenly aware of the prohibition against involvement in domestic operations. During his tenure as NARCOG chief, [redacted] reportedly sought to insure against this sort of activity by renaming the CCINC Intelligence Subcommittee the Foreign Intelligence Subcommittee, and took steps to insure that U.S. citizens' names were excluded from the MINT Register, an inter-agency listing of individuals involved in illicit foreign narcotics trafficking.

2. LPMEDLEY (Tab G)

On August 18, 1966, Dr. Louis Tordella, Deputy Director, NSA, met with Thomas Karamessines, then Acting Deputy Director of Plans, CIA, and requested CIA's assistance in setting up a small cover office in downtown Manhattan. Dr. Tordella explained that NSA needed the office so that NSA employees could copy international telegraphic communications received from

commercial carriers (SHAMROCK). The copying process, previously performed in Washington, D.C., had to be shifted to New York because of technical problems. CIA accepted NSA's requirement and assigned the project the cryptonym LPMEDLEY. Beginning on November 1, 1966, and continuing through August 31, 1973, the CIA provided NSA with space in a commercial buidling in lower Manhattan and a front for the NSA operation. The CIA was reimbursed by NSA for expenditures incurred in this project.

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[redacted]

[redacted]

[redacted]

HANDLE VIA COMINT CHANNELS

5. Overseas Intercepts (Tab J)

The overseas electronic surveillance operations of CIA provided a source of information to various government agencies concerning such matters as the influence and participation of foreign governments in domestic militant movements, and the international narcotics control effort.

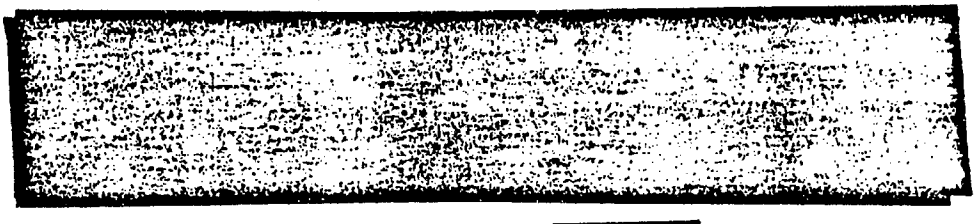
With respect to the support of U.S. dissidents by foreign governments, CIA stations were instructed to provide CIA headquarters with pertinent information. [redacted]

In its endeavor to provide BNDD/DEA with valuable international narcotics intelligence, the CIA conducted foreign communications intercept operations against specific targets overseas. These operations could have been initiated pursuant to requests from CIA Headquarters or from several different governmental entities including BNDD/DEA Headquarters and BNDD/DEA District or Regional offices. With respect to the tasking of CIA by BNDD/-DEA foreign field offices, CIA officials advised that the CIA field stations would not undertake any such electronic surveillance activities without

first obtaining authorization from CIA Headquarters.

Although the CIA provided BNDD/DEA with information obtained from overseas electronic surveillances, the CIA took precautions to insure that the method of collection and the source of the information would not be revealed. In some cases, however, the recipients of the information were BNDD/DEA officials directly involved in the CIA overseas operation and the obfuscation of source was not possible. In such event, the CIA station would ask the BNDD/DEA officer not to reveal the source if he passed the information on to BNDD/DEA Headquarters. Thus, when BNDD/DEA Headquarters received communications intercept information from CIA Headquarters, the source usually would not be identified as an overseas interception. At times, however, the nature of the information made it apparent to the consumer that it was obtained as a result of electronic surveillance.

The CIA used electronic surveillance as a method of collecting narcotics intelligence overseas, and because CIA provided such information to BNDD/DEA, several narcotics investigations and/or prosecutions had to be terminated. In these instances, the CIA and the Department of Justice were fearful that the confidentiality of CIA's overseas collection methods and sources would be in jeopardy should discovery proceedings require disclosure of the CIA's electronic surveillance activities. The following investigations and cases were affected by this concern:



[redacted]

[redacted]

Frank Matthews: [redacted] Matthews and others were indicted in the Eastern District of New York on domestic narcotics distribution charges only, and nine others were severed from the indictment. (Tab J4)

Gustavo Guerra - Montenegro: In 1972, an indictment which had been returned in the Southern District of California charging Guerra and six others with narcotics trafficking was dismissed. [redacted]

[redacted]

[redacted]

[redacted]

Rafael Alarcon: [redacted]

The DEA investigation resulted in his indictment in the Eastern District of New York and the Southern District of New York. He was eventually extradited from S.A. to the U.S., [redacted] and pled guilty to a reduced charge.

[redacted]

According to Associate CIA General Counsel John Greaney, the foregoing disposition of the [redacted] was approved by Henry S. Dogin, DAAG, Criminal Division. The chronology of CIA electronic surveillance coverage [redacted] which was furnished to AAG Henry Petersen, DAAG Dogin, et al., in November, 1974, indicates that telephone communications between [redacted] United States had been intercepted. (Tab J4)

(Note: This Report does not purport to deal with possible difficulties arising under 18 U.S.C. §3504 in closed narcotics cases. That is the subject of a 2/5/76 Memorandum of Study conducted by Phillip T. White, Chief, Legislation and Special Projects.)

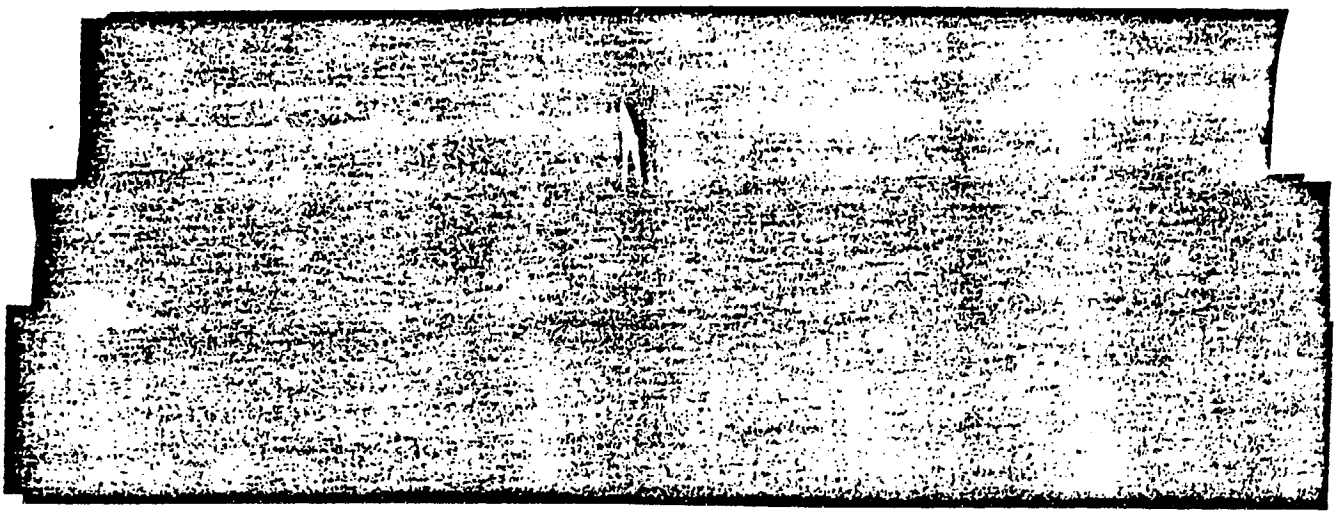
6. CIA-BNDD Miami Operation (DEACON I) (Tab K)

In October, 1972, during a meeting with BNDD Director Ingersoll, DCI Richard Helms offered to recruit a former CIA contract employee to work for BNDD in Miami on its BUNCION narcotics intelligence project. The employee thereafter became a "staff agent" for BNDD but retained his CIA cover. The CIA has advised that "... the Agency did not control or participate in the formulation of duties assigned the agent by BNDD." DEA advised that although the CIA paid the agent, the funds were actually received from BNDD, but paid

by CIA to avoid having DOJ records reflect the payment. DEA advised that BNDD used the agent as a live source for information concerning Latin American narcotics traffickers and their organized crime connections in Miami.

This project utilized agents in addition to the ex-CIA contract employee and may be generally described as a narcotics intelligence collection program targeted at Latin America. It was first designated BUNCIN, and later, with the formation of DEA, became known as DEACON I. According to DEA, the former CIA contract employee reported to a BNDD official in Miami who reportedly was also an ex-employee of the CIA.

CIA advised that the Agency's involvement in the project was part of a program established to recruit agents for BNDD and which was terminated in the fall of 1973. In addition, CIA advised - and DEA concurred - that there is no indication that any communications were intercepted during the course of the above activities.



8. Procurement of Private Parties to Intercept Communications (Tab M)

An inquiry was made to determine whether the CIA has procured private individuals, parties, or corporations to intercept communications having one or both terminals in the United States since June 19, 1968, the date Title III was enacted. The CIA advised that the "... appropriate components of CIA discovered no record of interceptions..." relative to this inquiry.

(B) National Security Agency

1. MINARET (Tab N)

MINARET was a cryptonym applied by NSA to a project chartered on July 1, 1969 in which NSA analysts selected from two primary foreign intelligence sources certain by-product intelligence involving several areas of interest. The primary sources were: (1) NSA's interception of international commercial carrier (ILC) voice and non-voice communications [redacted] and (2) copies (or tapes) of international messages furnished to NSA by U.S. commercial communications carriers in the "Shamrock" operation.

The by-product intelligence was initially sought in the following areas of activity:

1. Foreign governments, organizations and individuals attempting to influence, coordinate, or control U.S. organizations and individuals who might incite or foment civil disturbances, or otherwise undermine national security.

2. U.S. organizations or individuals engaged in activities which might result in civil disturbances or otherwise subvert the national security.

3. Communications from, to, or concerning groups and individuals [redacted]

4. Communications which indicated foreign contacts or connections with various assassins, [redacted]

5. Military deserters involved in the anti-war movement.

In mid-1970 the scope of MINARET was enlarged to include the selection of intelligence concerning international narcotics trafficking, particularly the illegal importation of dangerous drugs and narcotics into the United

States. From September 4, 1970 until June 1973, this included the interception of high frequency radio-telephone (commercially) voice communications between the United States and several South American cities. [redacted]

The purpose of the MINARET project was to provide by-product intelligence to various Federal departments and agencies in response to their requests or requirements. In responding to such requirements, however, NSA purportedly relied upon implicit assurances of requesting agencies that their need for the intelligence was legitimate. In addition, NSA dealt only with "foreign communications", i.e., communications having at least one terminal on foreign soil.

The MINARET charter also provided that appropriate measures would be taken, in disseminating intercepted communications, to insure that NSA could not be identified as the source of the intelligence.

Closely associated with the MINARET project are the "Watch Lists" and [redacted] furnished NSA by such consumer agencies as the FBI, Secret Service, ACSI, DIA, CIA and BNDD. [redacted]

[redacted]

The Watch Lists [redacted] were used by NSA analysts in processing ILC voice communications and "drop copy" messages obtained in the Shamrock Operation.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

In late 1971, when the DCI was designated by the President to assume the role of intelligence coordinator for the President's Cabinet Committee on International Narcotics Control (CCINC), it appears that the CIA, FBI and BNDD were authorized to levy drug-related intelligence requirements on

NSA. Later, in 1972, when NSA began collecting intelligence on terrorists and terrorist-related matters, the FBI, Secret Service and CIA were designated as tasking and consumer agencies.

It should be noted that the objectives of [redacted] at least in general terms, were probably approved by two successive Attorneys General and a Secretary of Defense. (See F(3), infra.)

With respect to the CIA's involvement in drug-related intelligence gathering, it is noted that from October 1972 to January 1973, at NSA's request, CIA engaged in the interception of high frequency radio transmissions of commercial voice communications between the U.S. and South America from a monitoring station in [redacted] was terminated on January 29, 1973 when the General Counsel of CIA advised it was unlawful. (See summary of [redacted] I(D), supra.)

It cannot be precisely stated when the [redacted] project terminated since the termination occurred in phases, but the narcotics phase apparently ended in May 1973 when, after discussions with CIA General Counsel, NSA discontinued this phase of [redacted] NSA's assistance to the FBI and Secret Service through [redacted] continued until October, 1973, when Attorney General Richardson instructed the directors of those agencies to stop requesting information obtained by NSA through electronic surveillance. On the same date, the Attorney General directed the Director NSA not to respond to requests from these agencies or "any agency to monitor in connection with a matter that can only be considred one of domestic intelligence".

Our investigation reveals that in November 1973, NSA excised the names of all U.S. citizens from the Watch List [redacted]

3. SHAMROCK (Tab P)

SHAMROCK is the code name of an operation initiated by U.S. military intelligence officers in 1945 in which United States international communications carriers agreed to furnish them with copies of diplomatic messages received or routed over commercial circuits. NSA inherited this activity when it was created in 1952 to direct the national communications intelligence effort.

A review of the circumstances surrounding the inception of SHAMROCK in 1945 reveals that it was an outgrowth of the World War II "censorship" program and was conducted initially under the aegis of the Assistant Chief of Staff for Intelligence, General Hoyt Vandenberg. There was a general reluctance on the part of the carriers (based on advise of their house counsel) to engage in such activity unless certain conditions were met, including the personal assurance of the Attorney General that the companies would be protected "in case of suit". Although the first expression of such assurance apparently occurred on April 20, 1949, it appears that the carriers had begun cooperating with the military in mid-1945 based upon the representations of General Vandenberg and lower-echelon intelligence officers that such intelligence was a matter of vital importance to the national security.

Investigation reveals that in December, 1947, Secretary of Defense James Forrestal met with officials of RCA, ITT, and Western Union International and said he was speaking for President Truman in commending them for their cooperation in SHAMROCK. He further requested their continued

assistance because the intelligence constituted a matter of great importance to the national security.

On May 18, 1949, Secretary of Defense Louis Johnson met with officials of the same companies and stated that President Truman, Attorney General Tom Clark, and he, endorsed the Forrestal statement and would provide them with a guarantee against any criminal action which might arise from their assistance. According to former Secretary of Defense Melvin Laird, NSA's SHAMROCK operation was tacitly endorsed by him during his term of office (1969-1973).

When NSA assumed responsibility for the SHAMROCK operation in 1952, varying practices and procedures (which would later change) had already been established between the military and the commercial carriers which permitted NSA employees access to all diplomatic messages transmitted, routed or received by the RCA, ITT and Western Union offices located in New York City and Washington, D.C., as well as the RCA and ITT offices in San Francisco. RCA provided NSA employees with duplicates (drop copies) of <u>all</u> international messages, thus requiring the NSA employees to visually screen and select-out diplomatic messages for microfilming on NSA-owned machines located on the RCA premises. [redacted] Investigation shows that NSA employees were also given access to all perforated paper tape copies of international messages transmitted by RCA, and until 1965, were

receiving parcels from the New York City ITT office which were believed to contain perforated paper tapes transmitted or received by the ITT office [redacted]

Although SHAMROCK is commonly referred to as a "drop copy" operation, this characterization is somewhat misleading since it applies only to that part of the overall operation in which NSA employees were given access to duplicate copies of international messages which were prepared for accounting purposes. When RCA began using more sophisticated equipment in 1960, the "drop copy" operation became minimal. Investigation reveals that beginning in 1960, the visual screening and selecting-out process accomplished by NSA employees at RCA was terminated, and all international message traffic was simply photographed by NSA employees and forwarded to NSA headquarters for screening and selecting-out.

A similar situation with respect to RCA and ITT obtained after 1965 when they switched to the magnetic tape process. It has been estimated by NSA that during the period 1960-1965, before the magnetic tape process began, 97% of the messages received at NSA were discarded because they failed to meet NSA's criteria [redacted]

[redacted]

[redacted]

Although NSA purportedly adhered to the practice of discarding all international messages obtained from commercial carriers which were not [redacted] (and purportedly has steadfastly followed a practice of discarding all messages of a personal nature at the earliest possible moment of discovery), there came a time in the late 1960s, probably 1967, when unbeknown to RCA and ITT, (Western Union participation ended in 1969), NSA selected-out international messages containing the names of persons on the Watch Lists. This continued until October 1973 when Attorney General Richardson terminated the practice by which NSA responded to specific requests from governmental agencies. The SHAMROCK operation was terminated in May, 1975.

[redacted]

Investigation also indicates an FBI involvement in the SHAMROCK operation from 1963 to 1973. During this time, the FBI obtained copies of international cable traffic from RCA and ITT in New York City and Washington, D.C. [redacted] Until 1973,

NSA received a daily package of such communications from the FBI Field office in Washington, D.C. These packages contained what are believed to have been "drop copy" messages of [redacted] It is estimated that 95% of these messages were discarded by NSA because they did not fit any of NSA's intelligence criteria. (See II(C), infra.)

[redacted]

[redacted]

[redacted]

[redacted]

TOP SECRET [redacted]
HANDLE VIA COMINT CHANNELS

[redacted]

C. Federal Bureau of Investigation (Tab R)

In July, 1975, the national press publicized the intelligence-gathering operations of NSA and the FBI known, respectively, as SHAMROCK and the "Drop Copy Operation". (See II(B), infra.) The FBI immediately furnished the Attorney General with summaries of background information (Tab R1), and provided the writer, et al., with a partial briefing on October 20, 1975. On October 30, 1975, the FBI was requested to provide the Criminal Division with a detailed written report on its involvement in the operation. The report was received on February 24, 1976. (Tab R2)

(Note: This Report does not purport to cover the electronic surveillance activities of the FBI. Inquiry into the FBI "Drop Copy Operation" was prompted by its collateral relationship with NSA's SHAMROCK.)

D. Department of State

The attorneys for the Government in the case of Morton Halperin, et al., v. Henry A. Kissinger, et al., C.A. No. 1187-73, DDC, advised that in 1969 and 1970-71, [redacted] was the subject of electronic surveillances authorized by the Attorney General.

An inquiry was made to ascertain whether the Department of State had conducted any warrantless electronic surveillances since 1969, i.e., since the enactment of Title III. Maurice Leigh, Legal Advisor, Department of State, responded on December 31, 1975 that no warrantless electronic surveillances of U.S. citizens were conducted by his Department during that period. (Tab S)

III. PURPORTED SOURCES OF AUTHORITY FOR INTERCEPTING COMMUNICATIONS

No court orders were obtained to conduct any of the interceptions involved in this inquiry. Justification must be found, it at all, in specific legislation or under the Presidential power to protect the national security or obtain foreign intelligence information deemed essential to the security of the United States. 18 U.S.C. §2511(3).

A. THE PRESIDENTIAL POWER

1. Legislative History

Nothing contained in the criminal prohibitions of 18 U.S.C. §2511(1) or 47 U.S.C. §§501, 605, ". . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts 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 foreign intelligence." 18 U.S.C. §2511(3).

The legislative history of Section 2511(3) expressly reflects that nothing contained in the Federal criminal prohibitions "... is intended to limit the power of the President to obtain information by whatever means to protect the United States from the acts of a foreign power, including actual or potential attack or foreign intelligence activities, or any other danger to the structure or existence of the Government. Where foreign affairs and internal security are involved, the proposed system of court ordered electronic surveillance envisioned for the administration of domestic criminal legislation is not intended necessarily to be applicable...

"It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for the acquisition of counter-intelligence against the hostile action of foreign powers. Nothing in the proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake." 1968 United States Code Cong. and Adm. News 2156-57, 2182.

2. Presidential Directives (Historical)

Prior to the enactment of 18 U.S.C. §2511(3) in June, 1968, Presidents of the United States since Franklin Roosevelt had authorized Attorneys General to approve investigations to secure information by listening devices directed to the conversation of persons suspected of subversive activities. Zweibon v. Mitchell, 516 F.2d 594, 673-679 App. A (D.C. Cir. 1975).

Although this practice has never received express Supreme Court aproval, the Court in United States v. United States District Court,

maintaining intelligence on subversive forces and should not be subject to traditional warrant requirements which were established to govern the investigation of criminal activity rather than ongoing intelligence gathering. 407 U.S. 318-319.

The Court rejected these contentions and held that 18 U.S.C. §2511(3) is not a congressionally prescribed exception to the general warrant requirement, but a congressional disclaimer and expression of neutrality which makes no attempt to define or delineate the powers of the President to meet domestic threats to the national security.

While recognizing the Constitutional basis of the President's domestic security role, the Court ruled that the President's power to authorize domestic security electronic surveillances must be exercised in a manner compatible with the Fourth Amendment which requires an appropriate prior warrant procedure; the prior express approval of the Attorney General is not sufficient.

The Keith case was decided on June 19, 1972. It is a watershed in the development of the applicable law.

Although the Court studiously avoided expressing any opinion concerning the issues which might be involved in the activities of foreign powers or their agents, the decision obviously narrowed the scope of Presidentially-authorized domestic security electronic surveillances previously considered permissible by the Attorney General and Federal intelligence officials.

(Presidential authorization to conduct electronic surveillances solely for the purpose of gathering foreign intelligence information was subsequently upheld by Federal Courts of Appeal, e.g., United States v. Butenko, 494 F.2d 593 (3 Cir. 1974); United States v. Brown, 494 F.2d 418 (5 Cir. 1973)).

The existence of criminal willfulness, could turn on whether an electronic surveillance occurred pre-Keith or post-Keith where the surveillance was purportedly under Presidential auspices. The significance of Keith is most apparent where a Federal agency, acting without a warrant but under the purported direction of the President (or his designee, the Attorney General, or alter ego, the National Security Council), intercepts communications having at least one terminal in the United States which communications do not directly relate to national security. Prior to Keith, Presidential authorization was probably sufficient per se to demonstrate good faith on the part of those conducting the interceptions. Since Keith, a finding of good faith in such warrantless surveillances might be more difficult. Zweibon v. Mitchell, 516 F.2d 594, 671n.279 (D.C. Cir. 1975).

4. Presidential Authorization

The fundamental question in the instant inquiry is whether Presidential authorization, or its equivalent, was given in the aforementioned areas of questionable activity.

Preliminarily, it can be stated that no direct Presidential authorization for any of the interceptions has been found. Rather, the agencies rely variously upon National Security Council Intelligence Directives (NSCIDs), memoranda of conferences with the President, briefings of Attorneys General, instructions from White House staffers, Presi speeches and press releases, and interpretations of Presidential programs and priorities. These are discussed below under appropriate captions.

B. NARCOTICS INTELLIGENCE-GATHERING: PRESIDENTIAL DIRECTION

1. Presidential Message to Congress

On July 14, 1969, the President sent the Comprehensive Drug Abuse Prevention and Control Act to Congress. In an accompanying message (Tab T1), the President stated in pertinent part:

> ... [A] new urgency and concerted national policy are needed at the Federal level to begin to cope with this growing menace to the general welfare of the United States .... Effective control of illicit drugs requires the cooperation of many agencies of the Federal local and State governments .... I have directed the Secretary of State and the Attorney General to explore new avenues of cooperation with foreign governments to stop the production of this contraband at its sources .... Our efforts to eliminate these drugs at their point of origin will be coupled with new efforts to intercept them at their point of illegal entry into the United States .... In the early days of this Administration I requested that the Attorney General form an interdepartmental Task Force to conduct a comprehensive study of the unlawful trafficking in narcotics and dangerous drugs .... this Task Force has completed its study and has a recommended plan of action, for immediate and long-term implementation, designed to substantially reduce the illicit trafficking in narcotics, marihuana and dangerous drugs across United States borders. To implement the recommended plan, I have directed the Attorney General to organize and place into immediate operation an "action task force" to undertake a frontal attack on the problem ....

2. White House Task Force on Narcotics Control

According to CIA memoranda (Tab T2), the CIA "first became involved in the narcotic control problem on 24 October 1969 when the President announced a decision to make narcotics a matter of foreign policy. A White House Task Force on Narcotics Control was established with the DCI as a member and the Agency was asked to contribute to the maximum extent

possible in the collection of foreign intelligence related to traffic in opium and heroin." (Emphasis added.)

The White House Task Force included representatives from the White House Staff, CIA, State Department, Treasury, BNDD, and the Department of Defense. The purpose of the Task Force was to plan actions abroad to reduce opium production and to suppress trafficking in narcotics. (Tab T3)

According to other CIA memoranda (Tab T4), the President instructed the Director of Central Intelligence to "do whatever he could to help" when he designated him a member of the Task Force.

3. Cabinet Committee on International Narcotics Control

The President sent a memorandum to the Secretary of State on August 17, 1971, (Tab T5), directing the establishment of a Cabinet Committee on International Narcotics Control (CCINC) composed of the Secretaries of State, Defense, and Treasury, the Attorney General, Director of Central Intelligence, and the Ambassador to the United Nations. The President stated that drug abuse had grown to crisis proportions and it was "imperative that the illicit flow of narcotics and dangerous drugs into this country be stopped as soon as possible."

The CCINC was assigned responsibility for the "formulation and coordination of all policies of the Federal Government relating to the goal of curtailing and eventually eliminating the flow of illegal narcotics and dangerous drugs into the United States from abroad. To the maximum

extent permitted by law, Federal offices and Federal departments and agencies shall cooperate with the Cabinet Committee in carrying out its functions under this directive and shall comply with the policies, guidelines, standards, and procedures prescribed by the Cabinet Committee. ... More specifically, the Cabinet Committee shall . . . (2) assure that all diplomatic, intelligence, and Federal law enforcement programs and activities of international scope are properly coordinated . . . and (5) "report to the President, from time to time, concerning the foregoing." (Emphasis added.)

The Presidential memorandum also directed that the CCINC be supported by a "Working Group to be composed of personnel from each of the concerned agencies . . ."

The CCINC was officially established on September 7, 1971. (Tab T5) Egil Krogh was designated its Executive Director and Chairman of the Working Group. The latter included representatives from State, Treasury, BNDD, NSC, Defense and CIA.

The CCINC appointed a Foreign Intelligence Subcommittee chaired by the CIA "narcotics coordinator" and including members from NSA, DIA, State, Treasury and the White House. (Tab T6) The mission of the Subcommittee was to "provide for a coordinated national effort in the collection, dissemination and finished production of national foreign intelligence on narcotics and dangerous drugs." The functions of the Subcommittee included the forwarding of intelligence "collection requirements as necessary to appropriate departments and agencies.",

The "Terms of Reference" for the Intelligence Subcommittee define "national foreign intelligence" as follows:

> Foreign intelligence includes domestic intelligence that directly relates to foreign intelligence targets. National intelligence is that intelligence which is required for the formulation of national policy or narcotics and dangerous drugs. (Tab T6)

A CCINC Coordinating Subcommittee was also created to "support the President in fulfilling his responsiblity" under Section 481 of the Foreign Assistance Act of 1961 which provides:

> The President shall suspend sales under the Foreign Military Sales Act... with respect to any country when the President determines that the government of such country has failed to take adequate steps to prevent narcotics drugs and other controlled substances... from ... entering the United States unlawfully... (Tab T7)

In determining whether there was a prima facie case for questioning a country's performance, the Coordinating Subcommittee was to ascertain, inter alia, if there was (1) evidence of substantial violations of treaty obligations or bilateral agreements relating to control of the production, processing or trafficking in narcotics drugs; (2) "hard evidence" that government officials were involved in illicit drug production, processing, smuggling or trafficking; and (3) whether a country had declined or failed to take adequate steps to improve the effectiveness of its narcotics enforcement capability and to correct other narcotics control deficiencies. (Tab T7)

Minutes and memoranda of CCINC meetings and activities reflect the following:—

August 17, 1971

Establishment of the Cabinet Committee actually amounts to a shift of overall authority away from Justice to the White House and State....

* * *

A Presidential Directive would designate the Cabinet officers to serve on the Committee and mandate its establishment and functions. Also, it would designate me [Krogh] as Executive Director of the Committee. This is important to give the Director [Krogh] credibility and clout.... (Tab T8)

September 20, 1971

... Mr. Krogh also explained that ways had to be found to make our narcotics suppression effort consistent with the requirements of national security.... (Tab T9)

October 7, 1971

Secretary Rogers stated that he believed the Committee's primary task should be to exert pressure from the top during the next year to insure that the United States Government takes whatever steps are necessary to reduce the supply of illicit narcotics available to American users. He reiterated to the Committee that achieving real progress in this battle is one of the President's highest priorities.

* * *

Attorney General Mitchell raised the problem of narcotics smuggling through Latin America. This area, particularly Panama and Paraguay is an increasingly

important transit point for heroin destined for the United States. Mr. Krogh agreed that the Cabinet Committee should address itself to the Latin American problem on a priority basis. (Tab T10)

December 29, 1971

The Committee agreed with Mr. Krogh's suggestion that the highest supply side priority should be on domestic law enforcement and interdiction at the United States border.

Internationally, the greatest emphases should be on gathering intelligence and on strengthening foreign narcotics law enforcement.

* * *

To increase our intelligence gathering capacity, Mr. Krogh asked for increased assistance from the Central Intelligence Agency. General Cushman responded that the CIA is pleased to act as intelligence coordinator overseas and would attempt to assist the narcotics control effort in whatever way it can. General Cushman did caution, though, that a coordinated interagency effort is required since neither the CIA nor any other narcotics intelligence gathering organization possesses the assets or expertise required to do the job by itself.

General Cushman made it clear that to expand its efforts the CIA needed some increase in financial and personnel support and, most importantly, required additional coverage for its overseas personnel. Mr. Gross volunteered to assist on the latter problem. (Tab T11)

March 10, 1972

Mr. Gross asserted that the Cabinet Committee's December 16, 1971, decision to put first priority on intelligence and law enforcement had been interpreted in some quarters as meaning there was no longer any interest in crop substitution, treatment, education or research overseas. The Working Group agreed that this extreme interpretation was incorrect. Other facets of the international drug control effort will continue to receive support where appropriate despite the Cabinet Committee's decision to emphasize intelligence and law enforcement.

* * *

Mr. Ludlum reported on the intelligence review being undertaken at Mr. Krogh's request by his Subcommittee. The Critical Collection Problems Committee of the United States Intelligence Board has been asked by Mr. Ludlum to conduct an inventory of United States overseas narcotics intelligence assets and to make recommendations on a wide range of organizational problems.

* * *

A number of initiatives in the intelligence field have already been taken. The Subcommittee authorized the creation of an ad noc group to accelerate the collection of high-priority drug intelligence on major European trafficking networks.

The Subcommittee is also analyzing the desirability of a national narcotics operations and intelligence center.

A Treasury sponsored effort to strengthen the intelligence gathering and exchange capability of Interpol ahs also been approved. (Tab T12)

March 20, 1972
[Attended by the President]

The President opened the meeting by reiterating his deep commitment to finding a solution to the drug problem and his interest in the activities being conducted by the Cabinet Committee.

Secretary Rogers reported that the Cabinet Committee and its constituent organizations have launched the most comprehensive attack ever made against the international drug traffic. The Secretary congratulated those present on the results to date.

Mr. Krogh then briefed the President on the details of our international narcotics control program. Its objective is to reduce and eventually eliminate the flow of hard narcotics entering the United States from abroad.... Present priorities for achieving this objective are the following...:

2. Improved overseas law enforcement and intelligence.

* * *

The problem of narcotics intelligence was next discussed.

Mr. Krogh described intelligence as being the most important, but currently weakest, element of our international drug control program. We have yet to penetrate the upper echelons of major overseas syndicates, have comparatively little hard intelligence on officials collusion, and need more precise information on specific narcotics shipments.

There was general agreement that some mechanism should be developed to ensure better coordination, collection, analysis, and dissemination of narcotics intelligence.

* * *

In the President's opinion, if a nation resigns itself to living with drugs, it risks destruction of all accepted values.

The President restated his conviction that the best approach to the drug problem is to offer assistance and treatment to the addict combined with the strictest possible enforcement directed against suppliers and trafficers. (Tab T13)

August 30, 1972

... Next discussed were procedures for use in conducting investigations required by Section 481 of the Foreign Assistance Act and related statutes which require the President to cut off aid to countries not cooperating on narcotics control.

* * *

Mr. Gross then described his recent mission to Paraguay where he discussed the extradition of Auguste Ricord with President Stroessner. Mr. Gross' success was applauded by members of the Committee.

Mr. Krogh cautioned that our public comments on the United States role in the Ricord matter should be guarded lest the decision favoring extradition be reversed or our relations with Paraguay subjected to further unnecessary strain. He also asked that appropriate steps be taken to prevent Ricord from being released on bail once he is in United States custody. Director Ingersoll replied that efforts were already underway to try to prevent bail from being set.

Once Ricord arrives in the United States, it in unclear how quickly he can be brought to trial. The Attorney General agreed to look into the possibility of expediting judicial consideration of the case. (Tab T14)

November 27, 1973
[Attended by the President]

> The President opened the meeting by citing the Administrations record of progress in combatting heroin abuse and emphasized the continuing priority which he intends the drug control program to have.
>
> The President expressed his pleasure with the successes our drug enforcement efforts have had, both at home and abroad....
>
> * *
>
> ... He asked the Cabinet to give new impetus to the attack on newly emerging problem areas and to do an even better job in combatting the old....
>
> * * *
>
> The President emphasized that he wanted to continue his personal involvement in drug control as appropriate and instructed Mr. Laird to assume personal responsibility for overseeing the operation of the federal anti-drug effort.... (Tab T15)

In a telephone interview on April 13, 1976, Egil Krogh advised that in 1971, a White House meeting of high-level presidential advisers was opened to ABC-TV News during which President Nixon was briefed by DCI Richard Helms and BNDD Director John Ingersoll on the problem of narcotics (particularly heroin) smuggling into the United States. An ABC-TV News Documentary containing excerpts from the White House meeting was produced and later published in the paperback, A. WESTIN, HEROES AND HEROIN (1972). (Tab T15a) Krogh advised that the President was very interested in appropriately utilizing all CIA assets abroad to assist the effort to interdict narcotics destined for the United States. Krogh also vaguely recalled hearing of intercepted radio-telephone communications containing narcotics intelligence but was unaware of the mechanics or specific agencies involved in such interceptions.

In a March 28, 1971 memorandum to the CIA Narcotics Coordinator (Tab T5a), CCINC Executive Director Egil Krogh stated that CIA station chiefs needed to be reminded that their role in narcotics intelligence collection overseas was an active role: "They are not simply to support whatever initiatives BNDD already has underway. They should also be instructed that headquarters wants them (1) to penetrate the major hard drug collection, refining and distribution networks, and (2) to discover which foreign government and police officials are protecting or assisting the traffickers."

4. Office of National Narcotics Intelligence

On July 27, 1972, the President issued Executive Order 11676 "[P]roviding for the Establishment of an Office of National Narcotics Intelligence Within the Department of Justice". The Order states in pertinent part:

> This Administration is determined to eradicate the menace of drug abuse in America.... I have now determined that a National Narcotics Intelligence System is a necessary next step in our campaign against illegal drug traffic... The Director shall call upon other agencies of the Government to provide him with information, and such agencies shall, to the extent permitted by law, provide the Director with all information that is pertinent to the development and maintenance of a National Narcotics Intelligence System.... Each department and agency of the Federal Government shall, upon request and to the extent permitted by law, assist the Director of the Office of National Narcotics Intelligence in the performance of functions assigned to him by or pursuant to this order, and the Director may, in carrying out those functions, utilize the services of any other agencies, Federal or State, or may be available and appropriate. (Tab T16)

On December 6, 1972, the Attorney General sent a memorandum to the various department and agencies, including the NSA, prescribing the role and mission of the ONNI pursuant to the above Order. (Tab T17) The

Attorney General stated that "[g]iven the urgency of the narcotics problem and the priority placed by the President upon the establishment of a National Narcotics Intelligence System to combat it, it is essential that the responsible departments and agencies involved join forces in an integrated program of action..."

5. International Narcotics Control Conference

On September 18, 1972, in remarks to the International Narcotics Control Conference the President said in pertinent part:

> [W]inning the battle against drug abuse is one of the most important, the most urgent national priorities confronting the United States today .... [L]ooking back over the three years since I declared total war on drug abuse and labeled it America's public enemy number one, I think the depth of our national commitment is clear .... From an organizational standpoint, we have mobilized to meet this problem on all fronts .... I have named a Cabinet Committee on International Narcotics Control which coordinates our world-wide campaign to cut off the sources of supply .... Here we are attacking the problem therefore on all fronts in the most effective way we can through our various government agencies .... I also have assumed some personal responsibilities. I have been deliberately cracking the whip, as many of you in this room know, in my personal supervision of this program and I have to admit that we have knocked some bureaucratic heads together because of my directive, which I gave in the East Room two years ago, that government agencies should quit fighting each other about this problem and start fighting the problem .... Nor will this effort stop at our own borders. The men and women who operate the global heroin trade are a menace not to Americans alone, but to all mankind .... They must be permitted not a single hiding place or refuge from justice anywhere in the world and that is why we have established an aggressive international narcotics control program in cooperation with the governments in more than 50 countries around the world. That is why I have

ordered the Central Intelligence Agency, early in this Administration, to mobilize its full resources to fight the international drug trade, a task, incidentally, in which it has performed superbly.... The key priority here is the target on the traffickers wherever they are, to immobilize and destroy them through our law enforcement and intelligence efforts and I commend all of you on the fine initial progress which has been made in these programs... Any government whose leaders participate in or protect the activities of those who contribute to our drug problem should know that the President of the United States is required by statute to suspend all American economic and military assistance to such a regime.... I consider keeping dangerous drugs out of the United States just as important as keeping armed enemy forces from landing in the United States. Dangerous drugs which come into the United States can endanger the lives of young Americans just as much as would an invading army landing in the United States. Every government which wants to move against narcotics should know that it can count on this country for our wholehearted support and assistance in doing so.... We are living in an age, as we all know, in the era of diplomacy, when there are times that a great nation must engage in what is called a limited war. I have rejected that principle in declaring total war against dangerous drugs.... We are going to fight this evil with every weapon at our command..." (Tab T18) (Emphasis added.)

6. Pronouncements by President Ford

In a September, 1975, White Paper on Drug Abuse the Domestic Council Drug Task Force quoted President Ford as having recently stated:

> All nations of the world--friend and adversary alike--must understand that America considers the illicit export of opium to this country a threat to our national security * * * Secretary Kissinger and I intend to make sure that they do [understand]. (Tab T19) (Emphasis added.)

A CIA memorandum of September 8, 1975, states:

> ... [T]he President, in compliance with the amendments to the Foreign Assistance Act of 1961... has determined that the Agency should engage in the collection of narcotics intelligence abroad. In a paper entitled "Findings Pursuant to Section 662 of the Foreign Assistance Act of 1961, as Amended, Concerning Operations Abroad to Help Implement Foreign Policy and Protect National Security," the President, in January 1975, found that the world-wide activity to "covertly influence foreign personalities to assist in programs aimed at... international narcotics traffic... directed against the United States" is important to the national security of the United States. (Tab T20) (Emphasis added.)

C. GENERAL INTELLIGENCE GATHERING: PRESIDENTIAL DIRECTION

On November 5, 1971, the President sent a memorandum (reportedly prepared by James Schlesinger, then of OMB) to the intelligence principals of the U.S. Government (Tab U1) establishing goals for the intelligence community and directing organizational and management changes to attain them. One of the listed objectives was that "... more efficient use of resources by the [intelligence] community in the collection of intelligence information be achieved. Utilization of the means available must be in consonance with approved requirements of U.S. security and national interests." (Emphasis added.)

To achieve the objectives, the President directed, inter alia, that the Director of Central Intelligence (DCI) assume overall leadership of the intelligence community; that intelligence collection programs financed and managed by the Department of Defense [which includes NSA] must come under more effective management and coordination with other intelligence programs; and that NSCIDs and DCIDs (Director of Central Intelligence Directives) be rewritten to reflect the changes ordered.

The President "reconstituted" the United States Intelligence Board (USIB) under the chairmanship of the DCI and added to its membership a representative of the Secretary of the Treasury. The USIB was charged with advising and assisting the DCI with respect to the "production of national intelligence requirements and priorities, the supervision of the dissemination and security of intelligence material, and the protection of intelligence sources and methods."

The President further established a National Security Council Intelligence Committee (NSCIC) to give direction and guidance on national substantive intelligence needs, and also directed the Department of Defense to establish a "unified National Cryptologic Command under Director, NSA for the conduct of USG communications intelligence and electronic intelligence activities."

In conclusion, the President stated that while his directed changes were limited, he fully expected "further changes in the intelligence community consistent with maximum practicable attainment of my objectives" and that other "changes in the consumer-producer relationship may be needed to achieve a more effective reconciliation of the demands from consumers with the limited resources available for intelligence production."

The principal items in the foregoing memorandum were made public in a contemporaneous White House press release. (Tab U2) On the same date, the President sent a letter to the DCI (Tab U3) in which he designated, as a top priority, the production of "national intelligence required by the President and other national consumers". The President also enumerated the following goals: (1) a more efficient use of resources in the collection of intelligence information; (2) a more effective assignment of functions within the intelligence community; and (3) improvement in the quality and scope of the substantive product.

The President's directives were incorporated in NSCIDs effective February 17, 1972.

On October 9, 1974, in a memorandum to the DCI, President Ford affirmed

"the responsibilities and authority charged to you as leader of the Intelligence Community in the Presidential memorandum of November 5, 1971... I shall expect that the heads of the departments having foreign intelligence responsibilities will cooperate with you and provide you with every assistance in fulfilling your responsibilities."

D. NARCOTICS INTELLIGENCE GATHERING: LEGISLATIVE DIRECTION

The Federal Narcotics and Drug Abuse Law Enforcement Reorganization Act of 1973 (5 U.S.C. §§901 et seq.) contains Congressional findings and declarations of policy (Tab V) which acknowledge both the need for sharing narcotics intelligence and the fact that the Director of Central Intelligence (CIA) and Secretary of Defense (NSA) have functions related to the trafficking in narcotics and dangerous drugs:

> Sec. 3.(a) The Congress hereby finds and declares... (3) that overlapping jurisdictions, failure to share intelligence and other information, general lack of communication and cooperation... among law enforcement agencies have resulted from the diffusion of efforts within the Federal government against trafficking in narcotics and dangerous drugs;
>
> * * *
>
> Sec. 10.(a) The President, after consultation with the Attorney General, shall direct the Director of the Central Intelligence with respect to all of the Director's functions related to trafficking in narcotics and dangerous drugs;
>
> Sec. 11.(a) The President, after consultation with the Attorney General, shall direct the Secretary of Defense with respect to all of the Secretary's functions related to trafficking in narcotics and dangerous drugs.

E. CIA: LEGISLATIVE AND PRESIDENTIAL AUTHORIZATION

1. National Security Council

Congress established the National Security Council in 1947 to advise the President with respect to the integration of domestic, foreign, and military policies relating to national security. Its membership includes the President (as presiding officer), the Vice President, the Secretaries of State and Defense, et al. 50 U.S.C. §402.

2. Central Intelligence Agency

The Central Intelligence Agency (CIA) and the position of Director of Central Intelligence (DCI) were also established by the National Security Act of 1947 (50 U.S.C. §401, et seq.) to operate under the direction of the National Security Council for the purpose of "coordinating the intelligence activities of the several Governmental departments and agencies in the interests of national security."

The statutory responsibilities of the Central Intelligence Agency include the duty to advise the National Security Council and make recommendations regarding national security intelligence activities, the coordination of such activities, the dissemination within the Government of intelligence relating to national security, and the performance of such other functions and duties as the National Security Council may direct. 50 U.S.C. §403(d).

3. NSCIDs

The statutory authority of the National Security Council to direct the activities of the CIA and the Director of Central Intelligence is

implemented by the issuance of National Security Council Intelligence Directives (NSCIDs). These NSCIDs are deemed by CIA to bear the imprimatur of the President who has the only "vote" on the Council.

The NSCIDs which prescribe the basic duties and responsibilities of the CIA and the Director of Central Intelligence during the time period here involved are NSCID 1 revised 3/4/64, and NSCID 1 effective 2/17/72, NSCID 5 revised 1/18/61, and NSCID 5 effective 2/17/72.

NSCID 1, March 4, 1964

NSCID 1, revised March 4, 1964 (and in effect until February 17, 1972), directs that the Director of Central Intelligence "shall coordinate the foreign intelligence activities of the United States in accordance with existing law and applicable National Security Council directives".

The 1964 NSCID 1 further provides that the Director of Central Intelligence "shall act for the National Security Council to provide for detailed implementation of National Security Council Intelligence Directives by issuing with the concurrence of the U.S. Intelligence Board such supplementary Director of Central Intelligence Directions as may be required... Such directions shall, as applicable, be promulgated and implemented within the normal command channels of the departments and agencies concerned". (Paragraph 3a)

The contemplated DCI Directives include:

(1) General guidance and the establishment of specific priorities for the production of national and other intelligence and for collection and other activities in support thereof, including: (a) establishment of comprehensive National Intelligence Objectives generally applicable to foreign countries and areas;

(b) indentification from time to time, and on a current basis, of Priority National Intelligence Objectives with reference to specific countries and subjects; and (c) issuance of such comprehensive and priority objectives, for general intelligence guidance, and their formal transmission to the National Security Council.

(2) Establishment of policy, procedures and practices for the maintenance, by the individual components of the intelligence community, of a continuing interchange of intelligence, intelligence information, and other information with utility for intelligence purposes.

(3) Establishment of policy, procedures and practices for the production or procurement, by the individual components of the intelligence community within the limits of their capabilities, of such intelligence, intelligence information and other information with utility for intelligence purposes relating to the national security, as may be requested by one of the departments or agencies. (Paragraph 3g)

The 1964 NSCID 1 directs that the Director of Central Intelligence disseminate "national intelligence" (i.e., intelligence required for the formulation of national security policy and concerning more than one department or agency) to the President, members of the National Security Council, members of the USIB and, subject to existing statutes, to such other components of the Government as the NSC "may from time to time designate or the U.S. Intelligence Board may recommend." (Paragraph 4)

The DCI was also directed to "call upon the other departments and agencies as appropriate to ensure that on intelligence matters affecting the national security the intelligence community is supported by the full

knowledge and technical talent available in or to the Government." (Paragraph 6).

NSCID 1, February 17, 1972

NSCID 1 (and other NSCIDs) were revised on February 17, 1972, to conform with the directives of the President contained in a November 5, 1971 Presidential memorandum, infra.

The 1972 NSCID 1 charged the Director of Central Intelligence with, inter alia, the following duties and responsibilities:

3. The Director of Central Intelligence

a. The Director of Central Intelligence will discharge four major responsibilities:

(1) Planning, reviewing and evaluating all intelligence activities and the allocation of all intelligence resources.

(2) Producing national intelligence required by the President and other national consumers.

(3) Chairing and staffing all intelligence community advisory boards and committees.

(4) Establishing and reconciling intelligence requirements and priorities within budgetary constraints.

* * *

c. The Director of Central Intelligence shall act for the National Security Council to provide for detailed implementation of National Security Council Intelligence Directives by issuing, after appropriate

consultation, such supplementary Director of Central Intelligence, Directives as may be required. Such directives shall, as applicable, be promulgated and implemented within the normal command channels of the departments and agencies concerned.

* * *

g. Director of Central Intelligence Directives to be issued in accordance with the provisions of subparagraph c above shall include:

(1) General guidance and the establishment of specific priorities for the production of national and other intelligence and for collection and other activities in support thereof and their formal transmission to the National Security Council.

(2) Establishment of policy, procedures and practices for the maintenance, by the individual components of the intelligence community, of a continuing interchange of intelligence, intelligence information and other information, information with utility for intelligence purposes.

* * *

5. <u>The United States Intelligence Board (USIB)</u>

* * *

c. The Board shall be provided with a Secretariat staff, which should be under the direction of an Executive Secretary appointed by the Director of Central Intelligence. Subordinate committees and Working Groups should be established, as appropriate, by the Director of Central Intelligence.

* * *

6. National Intelligence

* * *

d. The Director of Central Intelligence shall disseminate national intelligence to the President, members of the National Security Council, as appropriate, members of the United States Intelligence Board and, subject to existing statutues, such other components of the Government as the National Security Council may from time to time designate or the United States Intelligence Board may recommend....

* * *

7. Protection of Intelligence and of Intelligence Sources and Methods.

The Director of Central Intelligence, with the advice of the members of the United States Intelligence Board, shall ensure the development of policies and procedures for the protection of intelligence and of intelligence sources and methods from unauthorized disclosure. Each department and agency shall remain responsible for the protection of intelligence and of intelligence sources and methods within its own organization....

* * *

8. Community Responsibilities

a. In implementation of, and in conformity with, approved National Security Council policy, the Director of Central Intelligence shall:

* * *

(2) Call upon the other departments and agencies, as appropriate, to ensure that on intelligence matters affecting the national security the intelligence community is supported by the full knowledge and technical talent available in

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or to the Government.

* * *

(5) Make arrangements with the departments and agencies for the assignment to, or exchange with, the Central Intelligence Agency of such experienced and qualified personnel as may be of advantage for advisory, operational or other purposes. In order to facilitate the performance of their respective intelligence missions, the departments and agencies concerned shall, by agreement, provide each other with such mutual assistance as may be within their capabilities and as may be required in the interests of the intelligence community for reasons of economy, efficiency or operational necessity. In this connection primary departmental interests shall be recognized and shall receive mutual cooperation and support.

* * *

(6) Be provided with all information required from all departments and agencies of the Executive Branch required for the exercise of his responsibilities.

b. Insofar as practicable, in fulfillment of their respective responsibilities for the production of intelligence, the several departments and agencies shall not duplicate the intelligence activities and research of other departments and agencies and shall make full use of existing capabilities of the other elements of the intelligence community.

[redacted]

[redacted]

in the CIA's statutory procurement power, i.e., 50 U.S.C. §403j, which authorizes the CIA, inter alia, to expend funds for radio equipment and devices, and contractual services otherwise provided by law or regulations when approved by the DCI. In addition, NSCID 1 charges the Director of Central Intelligence with the protection of intelligence and intelligence sources and methods.

5. CIA Narcotics Intelligence Gathering

In a memorandum of August 6, 1975 (Tab W), CIA General Counsel invokes two principal sources of CIA authority to collect narcotics intelligence: 50 U.S.C. §403(d), and NSCID 5.

Section 403(d)(3) charges CIA with the duty, under the direction of the National Security Council:

> ... to correlate and evaluate intelligence relating to national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities; Provided, that the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions.

CIA asserts that the above clause is clearly "self-executing regarding the correlation and evaluation tasks of the Agency's narcotics program. Although these tasks must comply with the 'direction of the National Security Council', if any, no further authorization is required regarding this part of the program; the statute is sufficient..."

CIA finds authority to conduct the non-correlation on non-evaluation tasks in a combination of Section 403(d)(4) and NSCID 5.

Since 1958, NSCID 5 has delegated primary responsibility to the CIA for U.S. clandestine activities abroad, including:

> 3a. The conduct of espionage outside the United States and its possessions [defined as "that intelligence activity which is directed toward the acquisition of information through clandestine means"] in order to meet the intelligence needs of all departments and agencies concerned in connection with the national security.

* * *

3c. Upon request and to the extent practicable, to assist other departments and agencies with their cover support needs. [The latter was changed to "cover and support" in the NSCID 5 effective 2/17/72].

Section 403(d)(4), Title 50, authorizes the CIA:

> To perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally.

CIA contends that NSCID 5 is clearly within the scope of Section 402(d)(4), and that the collection of foreign narcotics intelligence is, in turn, within the scope of NSCID 5.

CIA General Counsel further notes that in July, 1973, William E. Colby testified before the Senate Armed Services Committee on his nomination to become Director of Central Intelligence. In response to a question specifically addressed to whether CIA was then engaged in assisting U.S. law enforcement agencies in addition to the F.B.I., Mr. Colby replied:

> Answer. Yes. CIA disseminates its foreign intelligence reports to several agencies concerned with the matters covered in these reports such as the Drug Enforcement Administration, the Immigration and Naturalization Service, the Armed Services, the Customs Service, the Secret Service and others on a routine basis.

The CIA reports there was no congressional objection to the dissemination of such intelligence to law-enforcement agencies, and construes this as tacit approval by Congress of such dissemination.

F. NSA: LEGISLATIVE AND PRESIDENTIAL AUTHORIZATION

The National Security Agency was established under the authority and control of the Secretary of Defense by Presidential directive of November 4, 1952 pursuant to the provisions of Section 133, Title 10, United States Code. The organizational structure and functions of NSA are set forth in National Security Council Intelligence Directive No. 9, as revised 12/29/52 and superceded by National Security Council Directive No. 6 issued 2/17/72.

Prior to the establishment of NSA, Congress had enacted 18 U.S.C. §798 which prohibits disclosure to unauthorized persons of classified information including, inter alia, the nature or use of any code, cipher or cryptographic system of the United States or information concerning the communication intelligence activities of the United States.

The term "communication intelligence" is defined by Section 798 to include "all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients."

The statute describes "unauthorized person" as any person who, or agency which, is not authorized to receive the information by the President or the "head of a department or agency which is expressly designated by the President to engage in communication intelligence activities for the United States." (Emphasis added.)

By the enactment of 18 U.S.C. §798, Congress recognized the legitimacy and protected the product of communications intelligence activities of the United States, notwithstanding the prohibitions of 47 U.S.C. §605 enacted in 1934. Section 798 also confirms the Presidential power to designate an agency, i.e., the National Security Agency, to engage in communications intelligence activities for the United States.

The foregoing statutes, together with 18 U.S.C. §2511(3), clearly acknowledge the President's power to engage the National Security Agency in communications intelligence activities. The specific questions in the instant inquiry are whether Presidential authorization, or its equivalent, was given in each area of questionable NSA activity; and if so, whether NSA exceeded that authorization. The answers will turn largely on the operational definition of "communication intelligence activities," as opposed to the sweeping statutory definition in 18 U.S.C. §798(b).

1. Communications Intelligence

NSA operates pursuant to the definition of communications intelligence (COMINT) contained in National Security Council Intelligence Directive No. 6, i.e., intelligence information derived by other than the intended recipients from foreign communications passed by radio, wire or other electromagnetic means. This encompasses the processing of foreign encrypted communications (including the study of plain text), however transmitted, but does not include the interception and processing of unencrypted written communications. NSCID 6, Paragraph 1. [redacted])

2. NSCIDs

NSA takes the position that the President's constitutional and statutory authority to obtain communications intelligence is implemented through the directives (NSCIDs) of his alter ego, the National Security Council, and the subsidiary directives of the Director of Central Intelligence (DCIDs and supplemental CISRs).

Congress established the National Security Council in 1947 and designated its membership to include the President (as presiding officer), the Vice President, Secretaries of State and Defense, et al. The primary function of the Council is to advise the President with respect to the integration of domestic, foreign, and military policies relating to national security. 50 U.S.C. §402.

It is a truism that the President has the only "vote" on the National Security Council. Consequently, the operational directives (NSCIDs) of the Council are regarded by NSA as bearing the imprimatur of the President.

(While the President does not attend every NSC meeting, the NSCIDs distributed to the field obviously do not reflect the President's attendance record nor the extent of his personal participation in the promulgation of any particular directive.)

NSCID 6, effective February 17, 1972, provides in pertinent part:

3. The Secretary of Defense

a. The Secretary of Defense is designated as Executive Agent of the Government for the conduct of SIGINT* activities in accordance with the provisions of this directive and for the direction, supervision, funding, maintenance and operation of the National Security Agency. The Director of the National Security Agency shall report to the Secretary of Defense and shall be the principal SIGINT adviser to the Secretary of Defense, the Director of Central Intelligence, and the Joint Chiefs of Staff. The Secretary of Defense may delegate in whole or part authority over the Director of the National Security Agency within the Office of the Secretary of Defense.

* * *

4. The National Security Agency

* * *

b. It shall be the duty of the Director of the National Security Agency to provide for the SIGINT mission of the United States, to establish an effective unified organization and control of all SIGINT collection and processing activities of the United States, and to produce SIGINT in accordance with objectives, requirements and priorities established by the Director of Central Intelligence Board. No other organization

*NSCID 6 defines SIGINT to include communications intelligence (COMINT).

shall engage in SIGINT activities except as provided for in this directive.

c. Except as provided in paragraphs 5 and 6 of this directive, [re unique responsibilities of CIA and FBI] the Director of the National Security Agency shall exercise full control over all SIGINT collection and processing activities, [redacted] The Director of the National Security Agency is authorized to issue direct to any operating elements engaged in SIGINT operations such instructions and assignments as are required. All instructions issued by the Director under the authority provided in this paragraph shall be mandatory, subject only to appeal to the Secretary of Defense.

* * *

e. The Armed Forces and other departments and agencies often require timely and effective SIGINT. The Director of the National Security Agency shall provide information requested, taking all necessary measures to facilitate its maximum utility. As determined by the Director of the National Security Agency or as directed by the Secretary of Defense, the Director of the National Security Agency shall provide such SIGINT [redacted]

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[redacted]

* * *

g. The intelligence components of individual departments and agencies may continue to conduct direct liaison with the National Security Agency in the interpretation and amplification of requirements and priorities within the framework of objectives, requirements and priorities established by the Director of Central Intelligence. (Emphasis added.)

The foregoing NSCID 6 superceded NSCID 6 dated September 15, 1958 and revised January 18, 1961 which, in turn, superceded NSCID 9 dated July 1, 1948 and revised December 29, 1952. There has been no fundamental change since September 15, 1958 in the definitions and duties set forth in pertinent part above. Paragraph 4b is a rephrasing of the old Paragraph 6; Paragraph 4e of old Paragraph 7c; and Paragraph 4c of the old 7a.

Prior to the issuance of NSCID 6 on September 15, 1958, its predecessor, NSCID 9, dated July 1, 1948, contained the following definitions:

[redacted]

"Communications Intellligence" is intelligence produced by the study of foreign communications. Intelligence based in whole or in part on Communications Intelligence sources shall be considered Communications Intelligence as pertains to the authority and responsibility of the United States Communications Intelligence Board.

"Communications Intelligence activities" comprise all processes involved in the collection, for intelligence purposes, of foreign communications, the production of information from such communications, the dissemination of that information, and the control of the protection of that information and the security of its sources.

[redacted]

3. The One-Terminal Rule

The foregoing definition of "foreign communications" is only slightly less sweeping that the definitions of "communications intelligence" in NSCID 6 and 18 U.S.C. §798. NSA purportedly operates, however, pursuant to a more restrictive self-imposed "one-terminal rule", i.e., NSA will not intentionally intercept a communication unless at least one terminal is outside the United States. According to Dr. Louis Tordello, former Deputy Director of NSA, this has been NSA's practice from its inception in 1952 [redacted]

To further confirm its good faith reliance on the one-terminal rule, NSA cites memoranda reflecting separate briefings of Attorney General John Mitchell and Secretary of Defense Melvin Laird on February 1, 1971, by Assistant NSA Director B.K. Buffham. (Tab X1) Mr. Buffham's memorandum

of February 3, 1971 reflects that Messrs. Mitchell and Laird read and approved the contents of the following January 26, 1971 memorandum from NSA Director Admiral Noel Gaylor:

26 January 1971

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL

SUBJECT: NSA Contribution to Domestic Intelligence

Consistent with our conversation today, these are the agreed ground rules on NSA contribution to intelligence bearing on domestic problems.

Character

To be consistent with accepted standards in respect to protection of individual constitutional rights and civil liberties.

Source

Telecommunications with at least one foreign terminal.

Scope

Intelligence bearing on:

(1) Criminal activity, including drugs.

(2) Foreign support or foreign basing of subversive activity.

(3) Presidential and related protection.

Procedures

Tasking by competent authority only.

Special procedures to protect source, to include:

(1) Compartmented reporting to F.B.I. or BNDD for criminal activity, to F.B.I. and CIA for foreign-related subversive activity, and to the Secret Service for Presidential protection.

(2) No indications of origin.

(3) No evidential or other public use under any circumstances.

(4) Screening at source (NSA) to insure compliance with the above criteria.

It is further understood that NSA will insure full availability of all relevant SIGINT material by competent and informed representation in the Justice working group. (Emphasis added.)

/s/ Noel Gaylor

Another memorandum from Admiral Gaylor attached to the above memorandum of January 26, 1971, stated that the latter was read "in presence of Secy. Laird and accepted by Attorney General Kleindienst 1 July 1972". (Tab X2)

Mr. Kleindienst had no independent recollection of the above but said he would not dispute Admiral Gaylor's representation. (Tab X3)

Mr. Laird stated he never saw or read Admiral Gaylor's memorandum but couldn't disagree with Buffham's comments, and that the memorandum contained nothing he did not generally know as early as 1964 when he served on the House Armed Forces Appropriations Subcommittee. (Tab X4)

Mr. Mitchell said he had no recollection of the briefing by Buffham but that his appointment book reflects a meeting with Buffham at 12:05 p.m. on February 1, 1971 for about five minutes. (Tab X5)

(In addition to the foregoing, NSA relies on other instructions and directions to support its intelligence gathering activities concerning narcotics traffic, militants, radicals, etc. These will be discussed, infra, under appropriate captions).

4. NSA Participation In Drafting 18 U.S.C. 2511(3)

Having operated under the "one-terminal rule" since 1952, NSA's General Counsel consulted in 1967 with officials of both the Justice Department and the Senate Subcommittee who were drafting Federal legislation prohibiting unauthorized interceptions of wire and oral communications (18 U.S.C. §§2510, et seq.). To assure that NSA's operations would not be affected by the legislation, NSA General Counsel participated in the drafting of 18 U.S.C. §2511(3) which was incorporated in the statute enacted on June 19, 1958. (Y 1)

On July 24, 1968, the General Counsel reported to NSA that the effect of the Presidential exception contained in 18 U.S.C. §2511(3) "... is to remove any doubt as to the legality of the SIGINT and COMSEC activities of the Executive Branch of the Government." He further stated that the language "... precludes an interpretation that the prohibitions against wiretapping or electronic surveillance techniques in other law applies to SIGINT and COMSEC activities of the Federal Government. Wiretapping and electronic surveillance techniques, are, therefore, legally recognized as means for the Federal Government to acquire foreign intelligence information and to monitor U.S. classified communications to assess their protection against exploitation by foreign intelligence activities." (Tab Y2)

NSA General Counsel sought, in his initially proposed draft of 18 U.S.C. §2511(3), to insure that no information obtained in the exercise of such Presidential powers "shall be received in evidence in any judicial or administrative proceeding." (Tab Y3) This proposal was

substantially diluted in the statute, as passed, and was essentially nullified by the enactment of 18 U.S.C. §3504 on October 15, 1970.

5. Propriety of Requirements

It should be noted that Paragraph 7c of the 1958 NSCID 6 provided:

> ... It is recognized that the Armed Forces and other departments and agencies being served require direct COMINT... support of various kinds.... Each member department or agency is responsible for stating to the Director, NSA its requirements for direct support. (Emphasis added.)

The rephrased Paragraph 4e of NSCID 6, effective 2/17/72, provides:

> The Armed Forces and other departments and agencies often require timely and effective SIGINT. The Director of the National Security Agency shall provide information requested... (Emphasis added.)

NSA interprets this language to require the implicit assurance of the departments or agency making requests to NSA that such requests are appropriate. NSA thus purportedly places the responsibility on the requesting agencies to frame their requirements to conform with the law.

Paragraph 4g of NSCID 6 (2/17/72) permits the intelligence components of individual departments and agencies to "continue to conduct direct liaison with the National Security Agency in the interpretation and amplification of requirements and priorities within the framework of objectives, requirements and priorities established by the Director of Central Intelligence."

Paragraph 4b (old paragraph 6a) of NSCID 6 (2/17/72) requires NSA to produce communications intelligence "in accordance with objectives, requirements and priorities established by the Director of Central Intelligence with the advice of the United States Intelligence Board..."

NSA notes that since 1962, the Criminal Division of the Department of Justice has sent hundreds of names of racketeers to NSA requesting information NSA might have, or subsequently obtain, concerning them. (Tab Z)

On July 5, 1973, the Assistant Secretary of Defense (Intelligence) requested an opinion from DOD General Counsel as to whether, inter alia, NSA was clearly operating within the law.

Assistant General Counsel Frank A. Bartimo responded by memorandum of July 10, 1973 (Tab AA1), in which he stated, in pertinent part:

[redacted]

On September 17, 1973, General Lew Allen, Jr., Director, NSA, wrote to DCI William Colby, et al., concerning "Watch List" procedures, stating that "as in the past, we at NSA will lack the wherewithal for verifying the appropriateness of the Watch List entries, and we will continue to rely upon you, as the requesting agency, for that assurance." (Tab AA2)

[redacted]

[redacted]

[redacted]

[redacted]

G. UNITED STATES INTELLIGENCE BOARD

Pursuant to the provisions of the National Security Act of 1947, the National Security Council (NSC) issued NSCID 9 on July 1, 1948 establishing, inter alia, the United States Communications Intelligence Board "to effect the authoritative coordination of Communications Intelligence activities of the Government and to advise the Director of Central Intelligence in those matters in the field of Communications Intelligence for which he is responsible," i.e., coordination of the foreign intelligence activities of the United States.

NSCID 9, revised December 29, 1952, reconstituted USCIB to operate under the newly-created Special Committee of the National Security Council for COMINT consisting of the Secretaries of State and Defense and the Attorney General (when F.B.I. matters were before the committee), assisted by the Director of Central Intelligence.

The United States Intelligence Board (USIB) was established by NSCID 1 in 1958 to "maintain the relationship necessary for a fully coordinated intelligence community and to provide for a more effective integration of and guidance to the national intelligence effort..." (The "intelligence community" includes the CIA, the intelligence components of State, Defense, Army, Navy, and Air Force, the F.B.I., AEC and NSC. Other components of the departments and agencies of the Government are included to the extent of their agreed participation in regularly established interdepartmental intelligence activities.)

The membership of the USIB since 1964 has been the Director and Deputy Director of Central Intelligence; the Director of Intelligence and Research, State Department; Director, DIA; Director, NSA; an AEC representative, and a representative of the Director, F.B.I. (Revised NSCID 1 effective 2/17/72 added a representative of the Secretary of Treasury). In addition, the Director of Central Intelligence, as Chairman, shall invite the chief of any other department or agency having functions related to the national security to sit with the USIB whenever matters within the perview of his department are to be discussed.

1. NSCID 1, March 4, 1964

NSCID 1 (revised March 4, 1964 and effective until February 17, 1972) directed that the USIB advise and assist the Director of Central Intelligence and:

(1) Establish policies and develop programs for the guidance of all departments and agencies concerned.

(2) Establish appropriate intelligence objectives, requirements and priorities.

(3) Review and report to the National Security Council on the national foreign-intelligence effort as a whole.

(4) Make recommendations on foreign-intelligence matters to appropriate United States officials, including particularly recommendations to the Secretary of Defense on intelligence matters within the jurisdiction of the Director of the National Security Agency.

(5) Develop and review security standards and practices as they relate to the protection of intelligence and of intelligence sources and methods from unauthorized disclosure.

(6) Formulate, as appropriate, policies with respect to arrangements with foreign governments on intelligence matters.

The 1964 NSCID 1 provides that the USIB shall establish subordinate committees and working groups as appropriate and that the Executive Secretary and staff shall be under the direction of the DCI. (Paragraph 2c). This NSCID 1 further directs that the USIB reach its decisions by agreement, and that its decisions and recommendations be transmitted by the Director of Central Intelligence, as Chairman, to the departments and agencies concerned, or to the National Security Council when higher approval is required. (Paragraph 2d) Decisions of the Board arrived at under appropriate authority and procedures "shall be binding, as applicable, on all departments and agencies of the Government." (Paragraph 2g) (Emphasis added.)

2. NSCID 1, February 17, 1972

NSCID 1, effective February 17, 1972, provides that the USIB shall advise and assist the Director of Central Intelligence with respect to:

(1) The establishment of appropriate intelligence objectives, requirements and priorities.

(2) The production of national intelligence.

(3) The supervision of the dissemination and security of intelligence material.

(4) The protection of intelligence sources and methods.

(5) As appropriate, policies and with respect to arrangements with foreign governments on intelligence matters.

Items 2 and 3, above, are new additions, while Items 1, 3 and 4 of the 1964 NSCID 1 were deleted. The revision appears to be primarily one

of form, however. The basic duties of USIB remain substantially the same.

Both the 1964 NSCID 1 (Paragraph 3a) and its 1972 successor (Paragraph 3c) provide that the DCI shall act for the National Security Council by issuing such supplementary directives (DCIDs) as may be required and that such directives shall, as applicable, "be promulgated and implemented within the normal command channels of the departments and agencies concerned."

The 1964 NSCID 1 specifically directs that such DCIDs shall be issued "with the concurrence of the USIB", while the 1972 NSCID 1 authorizes the issuance of DCIDs "after appropriate consultation".

The provision in Paragraph 2g of the 1964 NSCID 1 that decisions of the USIB "shall be binding, as applicable, on all departments and agencies of the Government" was deleted in the 1972 NSCID 1, but the continuing provision, supra, that DCIDs be "implemented within the normal command channels of the departments and agencies concerned" seems to overlap the deleted phrase.

Paragraph 5c of the 1972 NSCID 1 effects a change in the authority to establish subordinate committees and working groups of the USIB. The primary authority previously vested in the Board was shifted to the DCI in 1972. The DCI's actions in this regard, of course, are still taken with the advice and assistance of the USIB. (See I(C), supra)

On April 10, 1970, the Director of BNDD, John E. Ingersoll, sent a list of requirements for communications intelligence to NSA. (Tab BB) The memorandum noted that "the consideration of the President's keen

[redacted]

Each requirement contained in the IGCP obligates NSA to perform three principal tasks with respect to the desired intelligence: to collect, to process, and to report, the requested information. Individual consumer agencies may approach NSA directly for information with respect to the reporting component of the requirement. By doing so, they do not necessarily request additional collection and/or processing efforts. [redacted] pointed out, however, that consumers and NSA are often in direct contact and USIB cannot maintain complete oversight. Consequently, NSA may, without the knowledge of USIB, embark upon a new collection requirement. [redacted] made this point because he did not want to unequivocally state that NSA strictly performs only those tasks specifically set out in the IGCP. The prescribed procedure for handling direct requests from consumer agencies to NSA is set forth in a memorandum (Tab CC) for the members of the SIGINT Committee from [redacted] SIGINT Committee Chairman, dated July 14, 1971:

> When an Agency submits a requirement to NSA which falls within a line item and does not require in NSA's view additional resource allocations it should be honored by NSA. A supplemental requirement is not the vehicle for levying a new or changed requirement that is an add-on or deletion to the existing IGCP line items... NSA... should determine whether the supplemental requirement can be met from the managerial standpoint including feasibility and cost.... If the desired reporting is either (a) not within resources of (b) constitutes an add-on, deletion or significant change, in scope, periodically or timeliness, to an existing line item, NSA will so inform the consumer in question who may then formulate a new line item requirement for addition to the IGCP as guidance and forward it to the IGS. When

TOP SECRET [redacted]
HANDLE VIA COMINT CHANNELS

interest in eliminating the problem of drug abuse, it appears appropriate to include this requirement under Priority National Intelligence Objectives." The latter are set forth in DCID 1/3 of May 16, 1968.

[redacted]

The formulation of IGCP requirements was reportedly instituted in 1966 to provide NSA with specific priorities and guidelines in its overall responsibility for collecting signals intelligence for the United States.

[redacted]

approved by the IGS the SIGINT Committee will consider the item for incorporation as supplemental guidance to the IGCP. The SIGINT Committee will issue changes to the IGCP as appropriate unless further action by USIB is required.

On July 20, 1971, [redacted] member of the IGS sent a memoradum (Tab DD) to other IGS members which stated, in pertinent part:

1. Although it was recognized at the time the IGCP was drafted [1970?] that there was under development a processing effort against ILC traffic related to international narcotics activities, NSA advised the IGS that such effort should not be given visability.

2. During the past year this effort was increased in scope, with most of the work done on the basis of informal requests for information from the various agencies involved in the problem. COMINT produced has been of great value to the CIA production offices and has been used as a principal source of information in several intelligence reports and memoranda. We understand that it has also bee of considerable value to operational components, such as the Bureau of Narcotics and Dangerous Drugs.

3. CIA believes that because of the importance of this topic to national intelligence, it should be covered by a specific general line item in the IGCP for Subelement 32 and we propose the following statement:

   "Report information relating to the international trafficking in narcotics and dangerous drugs.

   Timeliness to be "within 72 hours after recognition" and reporting to be at an estimated completeness level of "2," which we understand from NSA to be the level of the current effort.

On August 11, 1971, the IGS approved, inter alia, the following change to the IGCP (Tab EE):

i. Add line item on international narcotics traffic activity (line item 8).

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HANDLE VIA COMINT CHANNELS

On August 20, 1971, the new narcotics requirement was added to Group B, Subelement 32 of IGCP (Tab FF) which applied to ILC (international commercial communications) networks, as opposed to foreign internal communications. The specific requirement was to report the following "within 72 hours after recogn

> "8. International Narcotics activities.
> a. Report information relating to the international trafficking in narcotics and dangerous drugs."

The July 22, 1974 revision of IGCP Subelement 32 contains identical language. (Tab GG).

On January 10, 1973, [redacted] member of IGS, sent another memorandum (Tab HH) to IGS members recommending the following:

1. In July 1971 CIA recommended, and in August 1971 USIB approved, a change in the IGCP reporting specification to include a requirement for information on international trafficking in narcotics and dangerous drugs from international commercial communications (Subelement 32). NSA has further developed its processing effort against other communications carrying informaiton on this topic to where we should now include a regular reporting requirement for such information contained in various national internal and external communications.

2. The attachment lists by Subelement, those countries and Line Items which pertain to this requirement. No change in the level of reporting or timeliness is made. This supplemental requirement merely points up that narcotics trafficking information is specifically required to be reported when recognized in the target communications.

3. This requirement has been coordinated with the Chairman, Intelligence Subcommittee, Working Group of the Cabinet Committee on International Narcotics Control.

Upon this recommendation, a change in the reporting specifications for Subelements 24, 26, 27, 28, and 29 (respectively: Other Asian Coutries, i.e., India; Latin America; Western Europe; Middle East and North Africa; and Sub Saharan coutries) pertaining to international trafficking in narcotics and dangerous drugs was adopted and included in the IGCP in 1974. (Tab II). Generally, the language of this additional line item is identical in each Subelement and in all cases refers to travel. For example, Item 6, Group B, Subelement 27, of the 1974 IGCP provides:

> d. Travel of selected individuals. a/
> (1) Travel of individuals related to narcotics trafficking. b/

a/ As specified by or through CIA

b/ As specified by BNDD, ONNI, Customs, and/or CIA

The above specification would seem to imply that NSA would be provided with targeted individuals [Watch Lists] by the consumer agencies.

[redacted]

4. U.S. Intelligence Objectives

DCID No. 1/2, effective January 21, 1972, listed the U.S. intelligence objectives and priorities which were to serve as guidance for planning and programming for the subsequent period of five years. These objectives identified intelligence targets in terms of information needed "to enable the U.S. intelligence community to provide effective support for the decision making, planning and operational activities of the United States Government relating to national security and foreign policy." (Emphasis added.) The listed objectives included the following:

> 71. Non-governmental activities detrimental to U.S. interests. Activities of individuals and non-governmental organizations in the subject country which have an adverse impact on the interests of the United States and the welfare of its citizens, including the production and distribution of dangerous drugs and narcotics, training of terrorists and high-jacking.

Latin America was designated as one of the areas concerning which such intelligence should be gathered.

On January 31, 1972, the DCI requested the Critical Collection Problems Committee (CCPC) of the USIB to conduct a review of intelligence efforts against narcotics, looking into such problems as the coordination of collection, dissemination and production of national intelligence information on narcotics.

In October, 1972, the CCPC reported as follows:

SIGINT INFORMATION ON NARCOTICS AND DANGEROUS DRUGS

1. No SIGINT resources are dedicated solely to the intercept of narcotics information. The SIGINT which is now being produced on the international narcotics problem is a by-product of SIGINT reporting on other national requirements. However, in order to provide maximum support to U.S. Departments and Agenices in the field of international illicit narcotics activities, the SIGINT collection and reporting system worldwide has been tasked to report any narcotics information which is collected.

2. Most SIGINT reports on narcotics and dangerous drugs are disseminated electrically to customer agencies.

In the absence of a COMINT-secure teletype circuit to the BNDD, special arrangements for regular courier service have been made.

[redacted] Drug operators communicate covertly, concealing who and where they are, and send only isolated or sporadic messages. Consequently, they tend to use either telephone or prearranged numbers or over-the-counter paid telegrams. This makes intercept and exploitation of such communications exceedingly difficult, but significant results might well be achieved.

5. The effective use of SIGINT information in support of on-going operations while at the same time protecting the source has been a problem. SIGINT frequently produces information which is valuable in an operational sense, but if used indiscreetly will result in a serious compromise. Any compromise can result in improved foreign communications security measures. The effect may be a permanent or temporary denial to the U.S. of intelligence information over and above the immediate drug problem. It is necessary to emphasize that in handling SIGINT, long-range interests must not be sacrificed for short-term gains.

6. Successful usage of the SIGINT product is largely contingent upon close collaboration between the SIGINT producers and the appropriate customer agencies. Frequent exchanges between NSA, BNDD and CIA will ensure that SIGINT is exploited to its full capacity.

Recommendation

It is recommended that NSA, in conjunction with interested customers, particularly BNDD and Customs, make appropriate determination of what COMINT support is required on the narcotics problem and that the requisite priorities be established through the SIGINT Committee. (Tab LL)

Paragraphs (1) and (4), above, indicate an apparent lack of knowledge concerning the NSA's interception of international voice communications for narcotics intelligence which began in 1970. There seems to be an awareness of everything else, however, including the courier service between NSA and BNDD by which the latter received the product of the voice interceptions.

Based upon its study, the CCPC submitted recommendations to the USIB on November 3, 1972 which were approved by USIB on January 11, 1972 and incorporated in the IGCP on February 23, 1973 to include a broader requirement for "information related to narcotics trafficking" in Latin America and other specified countries.

In the DCI's August, 1973 "Perspective of the Intelligence Community," it is pointed out that as long as there exists a narcotics problem, intelligence agencies will be involved. In the KIQ's (Key Intelligence Questions) for FY 1974 and FY 1975, there are two questions regarding the narcotics problem. The first is to identify traffickers and producers and their methods; the second relates to the effectiveness of anti-narcotics

programs in Mexico, France, Turkey, Thailand, Burma, and Laos. The second question included information concerning the willingness of those governments to "cooperate with the United States' efforts to expose and prosecute producers, traffickers, and their collaborators."

H. PRESIDENT'S FOREIGN INTELLIGENCE ADVISORY BOARD (PFIAB)

By Executive Order 10655 (February 6, 1956), President Dwight D. Eisenhower established the President's Board of Consultants on Foreign Intelligence Activities (PBCFIA) "in order to enhance the security of the United States and the conduct of its foreign affairs by furthering the availability of intelligence of the highest order...." EO 10656 empowered the Board to review the foreign intelligence activities of the Government and the performance of functions of the Central Intelligence Agency and report its findings directly to the President. Its authority also extended to a review of foreign intelligence functions of other executive departments and any other related foreign intelligence matters which the President's Board deems appropriate.

By Executive Order 10938 (May 4, 1961), Executive Order 10656 was cancelled by President John F. Kennedy and the PFCFIA was reconstituted as the President's Foreign Intelligence Advisory Board (PFIAB). Its functions remained essentially the same as its predecessor Board; i.e., continuing review and assessment of all functions of the CIA and other departments having similar responsibilities in foreign intelligence and related fields in order to advise the President on matters bearing on foreign policy, national defense and security.

By Executve Order 11460 (March 20, 1969) President Richard Nixon cancelled Executive Order 10938 and reconstituted the PFIAB. While predecessor Boards served a purely advisory function, President Nixon expanded the role of the PFIAB to "receive, consider and take appropriate action with respect to

matters identified to the Board . . . in which the support of the Board will further the effectiveness of the national intelligence effort." (Emphasis added.) The Nixon order also expanded the jurisdictional mandate of the Board beyond that of foreign intelligence-related matters by providing that the Board would "advise the President concerning the objectives, conduct, management and coordination of the various activities making up the overall national intelligence effort."

Since its inception in 1956, the Board has conducted its affairs independently of the National Security Council and has had continuing direct access through both its Chairman and the full Board to the President and his National Security Advisor. While independent of the NSC and its "40 Committee" on covert operations, the Board has had continuing access to all material maintained by the NSC and its committees, except during the Nixon Administration when the Board was denied access to such materials.

PFIAB minutes and records reflect the following:

May 26, 1961

* * *

5. The President should not be publicly identified nor otherwise publicly involved with non-overt political, psychological, propoganda, paramilitary, or clandestine intelligence activities.

6. The Central Intelligence Agency should strive to achieve anonymity in its officials and activities . . .

February 5, 1971

The Chairman opened the meeting by asking Attorney General Mitchell for his views on the adequacy of the overall U.S. intelligence effort.

Mr. Mitchell stated . . . that his office relies on information which it gets from NSA and CIA which may be collateral to the primary collection goals of these agencies but which is recognized as being useful to the DOJ and is forwarded to them. [redacted] He said that electronic surveillance is restricted to violence-prone groups, and that in these cases electronic surveillance is clearly within the jurisdiction of the Presidential responsibilities for maintaining law and order. (Emphasis added.)

* * *

[redacted]

Mr. Mitchell said that NSA and FBI Director Hoover are having a running battle on this very point. NSA is also urging resumption of physical entry... Mr. Mitchell said we have more taps on now than when the Republicans came to Washington...

March 31, 1971 Memo for Board

[redacted] (4) operations, generally known as SHAMROCK, whereby U.S. commerical communications firms make available to the U.S. Government copies of international

commercial communications transmitted by foreign missions, or permit the U.S. communications by photography, etc....

The vast majority of SHAMROCK collection is performed by NSA itself, i.e., through its own agreements with U.S. commercial communications firms and utilizing its own personnel. NSA obtains, on a daily basis, large quantities of commercial telegraphic traffic originated by foreign governments and foreign private enterprise within the United States...

February 3-4, 1972

Discussion with Mr. Nelson Gross, Special Assistant for Narcotics to the Secretary of State, and with Mr. Walter Minnick, Staff Coordinator for the Cabinet Committee on International Narcotics Control.

Mr. Gross opened the discussion by saying that the Cabinet Committee had been established to provide a focal point at a high level for the Administrations program to combat the illegal importation, distribution, and use of narcotics. He said... that the only hope of success in combating this evil is to have a coordinated program which simultaneously seeks to stem the supply from abroad, prosecute the traffickers both at home and abroad, and to reduce demand through the provision of effective medical advice.

The Department of State's role is to work with foreign governments to reduce the production of heroin... and to stimulate and coordinate international cooperation in breaking up trafficking networks. Mr. Gross said... that the success of these programs would be wholly dependent on intelligence. Mr. Gross was critical of CIA efforts to date.... Mr. Gross said that CIA has

been given responsibility for coordinating all narcotics intelligence abroad, but has assigned insufficient manpower to do the job... Mr. Gross said that the FBI had not been asked to work on this program because the BNDD... has exclusive jurisdiction for narcotics....

Mr. Minnick said that the purpose in establishing the narcotics program at the Cabinet level was to add White House clout in getting the cooperation of all the necessary Government agencies and bureaus. Mr. Gross said that clearly the program had all the authority it needs... (Emphasis added.)

Discussion with [redacted] Chairman of the Intelligence Subcommittee of the Cabinet Committee on International Narcotics Control.

[redacted] is Mr. Helms' Special Assistant for narcotics matters and Chairman of the Cabinet Committee Subcommittees for Intelligence....

[redacted] said that the Agency's role in the narcotics program began in October 1969 with a White House request for CIA to do whatever it could to help with this problem. Such a directive, he said, raised two problems for the Agency: the first was to establish a mechanism and working relationship with law enforcement authorities and the second was adjusting agency priorities. He said that the Agency mission was to support the narcotics program by establishing where illicit narcotics were coming from and, secondly, to provide intelligence for the diplomatic effort to reduce production and trafficking. [redacted] said that the Agency has moved slowly for good reason....

said... the primary groups involved are criminal syndicates.

...stated he was satisfied that the Agency had a sense of urgency....

.. said that NSA provides regular coverage of persons on a watch list and is prepared to do more as soon as the Intelligence Subcommittee can develop the necessary target data.

Discussion with DCI Helms

Mr. Helms had been asked to discuss the allocation of intelligence resources for the narcotics problem.... He agreed to follow up Dr. Baker's suggestion to see if CIA couldn't give some direct assistance to the BNDD in organizing their files and staff for participation in what is now a major Government program.

Discussion with Mr. John Ehrlichman, Assistant to the President for Diplomatic Affairs.

Mr. Ehrlichman had been asked to discuss... the role of foreign intelligence in combating our domestic narcotics problem...

In conclusion, the Chairman offered Mr. Ehrlichman any assistance which the Board could render with respect to the narcotics problem...

February 3, 1972 (CIA) Memorandum on Intelligence Support for International Narcotics Control.

I. Two years ago the development of foreign

on narcotics... was a wholly new enterprise for the intelligence community....

* * *

B. We began to organize a narcotics intelligence effort in October 1969, when President Nixon declared international narcotics control to be a major goal of U.S. foreign policy and established a White House Task Force on heroin suppression, instructing all Federal departments and agencies, including the intelligence community, to cooperate fully with its efforts....

* * *

IX. Organized criminal conspiracies tend everywhere to monopolize the illicit trade...

* * *

a. South American smuggling operations are now carrying a substantial part of the French heroin to the U.S. via Latin America.

* * *

XIV. As a result of the presidential initiative from mid-1971, intelligence support for international narcotics control has become virtually world-wide.

A. In October 1971 the Working Group of the CCINC directed that U.S. missions in close to 60 countries draw up narcotics control action plans.

* * *

XVI. B. With the establishment of the CCINC... leadership responsibilities for coordination of foreign intelligence on narcotics passed from BNDD to CIA.

* * *

XVII. 2. The targets bring us, both in operations and production, into a closer relationship with U.S. law enforcement. Our job is to feed them intelligence and leads which they can use in their efforts to investigate and eventually prosecute or expose middle and top level narcotics traffickers in the U.S. and abroad.

XVIII. 1. The thrust of current national strategy commits the community to directly support domestic enforcement...

* * *

3. We must help them and still protect intelligence officers and sources abroad from investigative or legal disclosures. Otherwise the intelligence community will find itself where it cannot afford to go - in court as a witness.

April 12, 1972 memorandum to [redacted] from Egil Krogh, Executive Director, CCINC.

The President is intensely interested in using every means at his disposal to stop the international narcotics traffic. This includes covert action where appropriate.... (Emphasis added.)

Mr. Ehrlichman has been given the responsiblity for handling this matter within the White House and is to be assisted by Bud Krogh, David Young (who has been borrowed from Dr. Kissinger), Gordon Liddy and others.

b. Liddy's role: He is an expediter to break down bureaucratic problems by applying either grease or dynamite. He will sit with the IES and audit the IEC meetings. Mr. David Young can speak for Mr. Ehrlichman and is "heavier" than Mr. Liddy; therefore, any requests from Mr. Young should be honored without checking with Liddy.

c. IES role: 1) to prepare evaluation. Mr. Liddy noted that the IES had not yet been formally tasked in this regard. 2) provide ideas for attacking and solving the problem. 3) channel to agencies. Mr. Liddy intends to use the Staff members for direct and rapid access to their own Agencies in order to get over and minimize bureaucratic problems. He specifically stated that although agencies would be tasked through their agency heads, Mr. Ehrlichman was not prepared to wait until agencies had polished their contributions and sent them back through channels, but rather wanted to have access to information when and as it is developed. Mr. Liddy, therefore, would expect to be able to ask for things through the IES members and have them vested with the authority to get them and release them to the White House.

Beyond the foregoing, the IES seems to have been preoccupied in 1971 and 1972 with foreign support for activities planned to disrupt or harrass the national political conventions in 1972.

IV. POSSIBLE VIOLATIONS

This inquiry has focused on the interception of wire and radio communications having at least one terminal in the United States or a United States territory. Federal criminal sanctions have no application to the extraterritorial interception of communications, i.e., communications with all terminals outside the United States. United States v. Catrone, ____ F.2d ____ (2 Cir. 1975); United States v. Toscanino, 500 F.2d 267,269 (2 Cir. 1974 Berlin Democratic Club v. Rumsfeld, Civil No. 310-74 (D.D.C. March 17, 1976). (Evidence obtained from such interceptions which do not meet Fourth Amendement standards, however, is subject to exclusion in U.S. courts.)

Three categories of interceptions discussed herein require prosecutive evaluation:

(1) The interception of international communications having one terminal in the United States (or a United States territory).

(2) The procurement from commercial carriers of "cable traffic" between the U.S. and foreign countries.

[redacted]

An initial review of available facts will indicate possible violations of 18 U.S.C. 2511 and/or 47 U.S.C. 605, but a tentative analysis of the applicable statutes, legislative history, and convoluted sources of purported authorization together with anticipated difficulties in proving willfulness, preclude any unequivocal recommendation for prosecution at this juncture.

A. Interception of International Communications Having One Terminal In The United States or a United States Territory.

These interceptions were conducted by NSA in the gathering of foreign intelligence information [redacted] which, broadly defined, included the MINARET (Tab N) [redacted]

The CIA's [redacted] was devoted exclusively to the gathering of international narcotics intelligence through the interception of specific commercial voice frequencies between South America and the United States. The NSA's MINARET and [redacted] Projects included, but were not limited to, the selection and/or collection of narcotics intelligence, and involved the incidental, as well as specific, interception of voice and non-voice communications concerning a variety of subjects.

1. Pertinent Criminal Statutes

Title 18

Section 2511(a)(c)(d), Title 18, United States Code, *infra*.

Title 47

Section 605 of Title 47, United States Code, provides in pertinent part:

> ... No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person...

* * *

... no person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication... or use such communication... for his own benefit or for the benefit of another not entitled thereto...

B. Receipt of "Cable Traffic" From International Communications Carriers.

This activity was conducted by NSA under the cryptonym SHAMROCK (Tab P), and by the FBI as the "Drop Copy Operation". (Tab R)

LPMEDLEY was a CIA operation limited solely to providing NSA with a "front" location in New York City for processing SHAMROCK material. (Tab G)

1. Pertinent Criminal Statute

Title 47

Section 605 of Title 47, United States Code, provides in pertinent part:

> ... [N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addresses... (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority...

... No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication... for his own benefit or for the benefit of another not entitled thereto.

1. Pertinent Criminal Statutes

Such interception without appropriate authority, if willful, would be in violation of 18 U.S.C. §2511(a)(c)(d), or 47 U.S.C. §605, infra.

V. Applicable Statutes and Law

Prosecutive considerations in the instant inquiry are limited to possible violations of 18 U.S.C. 2511 or 47 U.S.C. 605.

A. 47 U.S.C. 605

Section 605, originally enacted in 1934, was amended on June 19, 1968 upon the enactment of 18 U.S.C. §2510, et seq. The new Section 605 was intended as a substitute rather than the mere reenactment of the old Section 605. It is designed to regulate the conduct of communications personnel, and to prevent the unauthorized interception and disclosure, or use, by any person of radio communications. 1968 U.S. Code Cong. and Adm. News 2196-2197.

> "Radio communications" or "communications by radio" means the transmissions by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission. 47 U.S.C. §153(b).

Section 605 consists of four separate clauses containing four distinct pairs of prohibitions:

(1) The first clause prohibits divulgence by any person receiving any interstate or foreign communication by wire or radio, except through authorized channels of transmission or reception.

(2) The second clause proscribes the unauthorized interception and divulgence of any radio communication.

(3) The third prohibits the receipt of an interstate or foreign radio communication by a person not entitled thereto and the use thereof for his benefit or for the benefit of another not entitled thereto.

(4) The fourth proscribes the receipt of any intercepted radio communication and divulgence thereof or use for one's benefit or the benefit of another not entitled thereto.

"Person" as used in Section 604 does not include a law enforcement officer acting in the normal course of his duties. 1968 U.S. Code Cong. and Adm. News 2197.

"Foreign communication" within the meaning of 47 U.S.C. 605 is a communication from or to any place in the United States to or from a foreign country. 47 U.S.C. §153(f).

Section 501 of Title 47, United States Code, contains the general misdemeanor penalty provisions for violations of §605 and requires that such offenses by willfully and knowingly committed.

B. 18 U.S.C. 2510, et seq.

The regulation of the interception of wire or oral communications is governed by 18 U.S.C. §§2510, et seq. 1968 U.S. Code Cong. and Adm. News 2196.

Section 2511 of Title 18, United States Code, provides in pertinent part:

(1) ... [A]ny person who

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept, any wire or oral communication....

* * *

> (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication...
>
> (d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication....

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

> "[W]ire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications. 18 U.S.C. 2510(1).
>
> "[O]ral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. 18 U.S.C. §2510(2).
>
> "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. 18 U.S.C. §2510(4).

C. Willfulness

Willfulness is essential to the commission of each of the above offenses.

1. United States v. Murdock

The legislative history of 18 U.S.C. §2511 indicates the applicable standard of willfulness in the instant context is that set forth in United

States v. Murdock, 290 U.S. 389 (1933), a criminal tax case. 1968 U.S. Code Cong. and Adm. News 2181.

In Murdock, the Court recited, with apparent approval, the following judicial connotations of the word "willfully":

> The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose... without justifiable excuse... stubbornly, obstinately, perversely.... The word is also employed to characterize a thing done without ground for believing it is lawful... or conduct marked by careless disregard whether or not one has the right so to act.... (290 U.S. at 394-395)

The standard of willfulness in Murdock is formulated as follows:

> ...[B]ad faith or evil intent... or evil motive and want of justification... It is not the purpose of the law to penalize... innocent errors made despite the exercise of reasonable care.... The requirement of an offense committed "willfully" is not met... if a taxpayer has relied in good faith on a prior decision of this court... The Court's consistent interpretation of the word 'willfully' to require the element of mens rea implements the persuasive intent of Congress to construct penalties that separate the purposeful... violator from the well-meaning, but easily confused...." (United States v. Bishop, 412 U.S. 346, 360-361 (1973))

Congress did not intend that a person, by reason of a bona fide misunderstanding, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. United States v. Murdock, supra.

2. 18 U.S.C. §2520

Section 2520 of Title 18, United States Code, provides that a good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under Title 18 or Title 47. The legislative history of Section 2520 cites Pierson v. Ray, 286 U.S. 547 (1967), as the only supporting authority and guide to the "good faith" criteria contemplated by the statute. 1968 U.S. Code Cong. and Adm. News 2196.

The Pierson case involved an action for damages against policemen for deprivation of civil rights under 42 U.S.C. §1983 and common law false arrest. The respondent policemen had arrested petitioners for breaching the peace in violation of a state statute which was subsequently declared invalid. The Supreme Court reaffirmed that the defense of good faith and probable cause is available to police officers, and further held that "a police officer is not charged with predicting the future course of constitutional law." This indicates a legislative intent in 18 U.S.C. §2520 to excuse from civil and criminal liability those persons who act under a statute they reasonably believe to be valid.

The "legislative authorization" apparently relied upon by most of the potential defendants herein is 18 U.S.C. §2511(3), i.e., the statutory recognition of Presidential power to authorize warrantless electronic surveillances to protect the national security. This statute, upon its enactment in June, 1968, was vague with respect to the scope of such power,

and it was not until June, 1972, that the Presidential power to authorize domestic security electronic surveillances was delineated by the U.S. Supreme Court. (See III, supra.) The President's power to authorize the warrantless electronic surveillance of activities of foreign powers or their agents has not yet been defined by the Supreme Court. It is likely, therefore, that potential defendants (particulary subordinates) will seize upon the decision in Raley v. Ohio, 360 U.S. 423, 438 (1959), in which the Court held that "a State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might trangress them".

While it is true that men are, in general, held responsible for violations of the law, the layman is not required to know more law than the judge. United States v. Mancuso, 139 F.2d 90, 92 (3 Cir. 1943).

3. Zweibon v. Mitchell

The Court in Zweibon v. Mitchell, 516 F.2d 594, 671-672, (D.C. Cir. 1975), cited Pierson v. Ray, supra, in reaffirming the defense of good faith:

> Thus, in light of the fact that Congress made the applicability of Title III turn on the future course of constitutional law, as well as the fact that the legislative history and language of Title III are themselves somewhat ambiguous concerning the applicability of that chapter to national security surveillance, and considering the policy that statutes in derogation of the common law should be strictly construed, we do not believe Congress intended to preclude a good faith

> defense that Executive officials acted under what they reasonably believed were the constitutionally inherent (and therefore statutorily exempt) powers of the President....

In a footnote, the Court added:

> The rights of victims of unconstitutional actions must to some extent be balanced against the needs of law enforcement, particularly when an official in good faith acts according to a reasonable belief that his actions are lawful. (516 F.2d at 616n.278)

"Willfulness" in the instant context would seem to require bad faith rather than bad judgment. Good intentions coupled with bad judgment would not constitute such willfulness. Mullen v. United States, 263 F.2d 275, 276 (D.C. Cir. 1958).

D. "Plain View" Analogy

Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. Harris v. United States, 390 U.S. 234, 236 (1967). This "plain view" doctrine serves to supplement the prior justification and permits the warrantless seizure. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1970).

The plain view doctrine might be invoked, by analogy, to justify incidental communications intercepts, e.g., the incidental interception of communications concerning international narcotics traffic in the course of conducting Presidentially-authorized electronic surveillance for the purpose

of gathering foreign intelligence information. This analogous application of the plain view doctrine in the context of electronic surveillance finds support in 18 U.S.C. §2517(5). United States v. Kahn, 415 U.S. 143 (1974). Section 2517(5) permits the disclosure and use of communications relating to offenses other than those specified in the order of authorization where such communications are intercepted while engaged in intercepting communications in the manner authorized by the order.

NSA represents that over 50 per cent of the narcotics intelligence furnished by NSA to BNDD/DEA came from communications incidentally intercepted or incidentally received in the course of collecting foreign intelligence information pursuant to NSA's Presidential mandate and authorization.

E. "Border Search" Analogy

The Treasury Department supports receipt by the Secret Service of SIGINT intelligence from NSA on grounds that the interception of messages crossing our national borders is analogous to conducting warrantless border searches which are clearly legal (Tab MM):

> If the search of the person is, thus, permissible, is it not reasonable that equal latitude be afforded to the impersonal harvesting of international communication signals for purposes clearly of great consequence to our national security? Upon that premise, the incidental acquisition from international signal communications of important intelligence not supported by a foreign nexus is clearly an acceptable and reasonable intrusion into that realm of privacy protected by the Fourth Amendment.

The SIGINT activities of NSA constitute an essential attribute of the Executive's capability and obligation to protect and promote the national security and foreign relations of the United States. One must, in reason, attribute to NSA's SIGINT acquisition of foreign intelligence an importance which surpasses that attending the border search authority earlier characterized as "an indispensible exercise of the right of the sovereign to self-protection. . ."

VI. POSSIBLE DEFENSES

A. Interception of International Communications Having One Terminal in the United States or a United States Territory.

1. Interception of International Radio-Landline Telephone Communications

(a) 18 U.S.C. §2511

(i) Radio-Telephone Communications

The legislative history of Title III (18 U.S.C. §2510, et seq.; 47 U.S.C. §605) contains "no indication of how Congress intended to treat a radio-telephone conversation". United States v. Hall, 488 F.2d 193, 197 (9 Cir. 1973).

In the absence of such indication, particularly with respect to the interception of radio portions of such communications, the applicable statutes and legislative history must be examined to ascertain whether there is a clear, overall legislative purpose upon which one statute, to the exclusion of the other, may be validly applied to the instant facts.

The provisions of 18 U.S.C. §2511 and 47 U.S.C. §605 are not mutually exclusive. They overlap. Section 2511 prohibits the interception of "wire communications," as broadly defined in 18 U.S.C. §2510(1), while Section 605 regulates the interception and divulgence of "radio communications," as broadly defined in 47 U.S.C. §153. A tentative application of either statute is possible in the instant context.

Section 2511 prohibits, except as otherwise specifically provided:

> .... the interception and disclosure of all wire or oral communications. Paragraph (1) sets out several prohibitions. Subparagraph (a) prohibits the interception itself. This eliminates the requirement under existing law that an "interception" and a "divulgence" must take place. [47 U.S.C. §605 previously required the interception and divulgence of both wire and radio communications].... Subparagraph (a) establishes a blanket prohibition against the interception of any wire communication. Since the facilities used to transmit wire communications form part of the interstate or foreign communications network, Congress has plenary power under the commerce clause to prohibit all interception of such communications, whether by wiretapping or otherwise. (Weiss v. United States, 308 U.S. 321 (1930). 1968 U.S.Code Cong. and Adm. News 2180. (Emphasis added.)

The above would seem, at first, to foreclose the applicability of 47 U.S.C. §605 to the instant situation. The citation of Weiss v. United States, however, indicates that the legislative history refers to the scope of communications covered by §2511 rather than to the inclusion of additional methods of interception.

Weiss was a wiretapping case under the provisions of the "old" (pre-Title III) 47 U.S.C. §605 in which the Supreme Court held that the prohibitions of the second clause of §605 applied to intrastate as well as interstate and foreign communications when transmitted over wires used for both kinds of communications. Weiss v. United States, 308 U.S. 321, 327-328 (1939). This would not seem necessarily to favor §2511 in the coverage of the interception of radio portions of radio-landline telephone communications.

(ii) Wire Communications

Paragraph (1) of 18 U.S.C. §2510 defines "wire communication" to include "all communications carried by a common carrier, in whole or in part, through our Nation's communications network. The coverage is intended to be comprehensive." 1968 U.S. Code Cong. and Adm. News 2178.

But does this encompass international communications as they pass over foreign countries? Or international bodies of water? Does it really mean, as it says, communications "carried through our Nation's communications network"? If so, is our "Nation's communications network" confined to the communications network within the Nation?

Whatever the answers to the foregoing, there is no question that §2511 covers the "aural" acquisition of all wire portions of radio-landline telephone communications, and may also be construed to cover the radio portions as well. There remains an obvious qualitative difference, however, between the radio and wire segments of radio-landline telephone communications (particularly international communications) — a distinction Congress pointedly recognized and reaffirmed in maintaining the concomitant viability of §605 requiring both the interception and divulgence of radio communications to constitute a mere misdemeanor.

(iii) The "Nation's Communications Network"

The "Nation's communications network", according to [redacted] NSA, is generally regarded by those in the industry as the commercial

communications system within the United States. This system may be characterized as contiguous, switched (e.g., from wire to cable to microwave), automatic, and self-routing. It's "wireless" component is a multi-channel microwave carriers system capable of carrying up to 2,000 communications on some channels.

International commercial radio-telephone communications, on the other hand, are transmitted by high-frequency, single or multi-channel telephony which enters the national communications network through what are known as "gateways". (The latter term seems to connote passage from one system to another.) This high-frequency telephony is not as reliable as microwave transmission and is considerably more susceptible to interception by unsophisticated equipment such as ship-to-shore radio or the ordinary Zenith transoceanic-type portable radio.

Microwave transmission is "straight line" and covers much higher frequencies than "high frequency telephony" which follows the curvature of the earth. It is estimated, for example, that the radio portion of a high frequency single-channel radio-telephone communication from Montevideo, Uruguay, to New York City, could be intercepted with unsohpisticated radio receivers over an area of perhaps 30 per cent of the earth's surface. High frequency multi-channel transmissions may be de-channeled by "home-made" amateur equipment. An index of the users of international radio frequecies is reportedly published by the FCC and may be obtained from the Government Printing Office. The only guarantee of privacy in such high frequency radio transmissions is the use of special ciphony equipment to "garble" the communications. Such equipment, however, is not in general use by commercial carriers.

(iv) Justified Expectations of Privacy

The three general categories of communications covered by Title III - wire, oral and radio - are distinguished, implicitly and explicitly, according to the degree of justified expectations of privacy. While an almost total expectation of privacy seems to be justified in communications transmitted wholly by wire, the expectation of privacy of oral communications is justified only if uttered under circumstances justifying that expectation, e.g., communications in one's home or office. Communications in a jail cell or an open field, for example, would not normally justify such expectation. 1968 U.S. Code Cong. and Adm. News 2178.

(v) Felony vs. Misdemeanor

The willful interception, alone, of a wire or oral communication completes the felony offense under §2511. In the case of a radio communication, however, there must be both an interception and divulgence to constitute the misdemeanor under §605. If we ignore both the explicit legislative distinction between radio communications and other types of communications, and the implicit legislative scale of justified expectations of privacy, the severity of criminal penalties imposed by Congress would appear in some instances to be inversely proportionate to the extent of privacy violated. (See vi, infra.) Congress obviously placed radio communications below wire and oral communications on the ascending scale of justified expectations of privacy.

The court in United States v. Hall, 488 F.2d 193, 197 (9 Cir. 1973), observed that the radio portion of a radio-landline telephone communication, logically, should be afforded no more protection than those occuring between two radio transceivers. The court declined, however, to exercise its option to find that "surely Congress did not intend" such as absurd result.

The specific issue in Hall was whether the contents of defendants' radio-telephone conversations monitored by law enforcement officers should have been suppressed in the prosecution of defendants for marijuana violations. Some of the conversations were transmitted between two radio telephones, while others were between a radio-telephone and regular land-line telephone.

The Court quickly found 47 U.S.C. §605 inapplicable, stating:

> The legislative history also explicitly shows that Congress intended to exclude law enforcement officers from the purview of the new §605.... It is obvious that the legislature wanted law enforcement personnel to be governed exclusively by Chapter 119 of Title 18. Therefore, because the critical communications were intercepted by lawmen, §605 offers no impedement.

The applying 18 U.S.C. §§2510, et seq., however, the Court reached an admittedly "absurd result":

> ... [W]e are forced to conclude that, when part of a communication is carried to or from a land-line telephone, the entire conversation is a wire communication and a search warrant is required.
>
> We realize that our classification of a conversation between a mobile and a land-line telephone as a wire communication produces what appears to be an absurd result. These conversations were intercepted by an ordinary radio receiver and not by a phone tap. Logically they should be afforded no more protection than those occurring between two radio transceivers. They

> should be oral communications. However, Congress's definition of a wire communication necessitates this conclusion.
>
> This is especially ironic since Title III of the Crime Control Act contains stringent civil and criminal penalties for those who violate its provisions. In other words, any citizen who listens to a mobile telephone band does so at its [sic] own risk, and scores of mariners who listen to the ship-to-shore frequency, commonly used to call to a land-line telephone, commit criminal acts. (Emphasis added.)

The "absurd result" could have been avoided, of course, by applying 47 U.S.C. §605 to the radio portion of the radio-landline telephone communications.

Congress may have been silent as to its intent in radio-telephone situations, but it can hardly be presumed to have intended a patently "absurd result". It is a fundamental canon of statutory construction that a legislative enactment must be so interpreted as to carry out the legislative will and in a manner that would not reach an "absurd result". United States v. Lewis, 87 F.Supp. 970, 972, (D.D.C. 1955). The Fourth Amendment also "shuns absurd results". 489 F.2d at 198.

(It is one thing, of course, to interpret a statute in favor of the accused, but quite another to expand its meaning where to do so works against the accused. Pugach v. Klein, 193 F.Supp. 630, 640 (S.D.N.Y. 1961).)

The radio-telephone conversation in Hall which did not involve land-line telephones, i.e., radio-to-radio, were held not be "oral communications" within the meaning of 18 U.S.C. §2510(2) because, the

(vi) Oral Communications

There appears to be no more reason for re-classifying certain radio communications as "oral communications" than there would be to include "wire communications" under "oral communications".

Section 2510, Title 18, United States Code, contains separate and distinct definitions of "wire" and "oral" communications. There is no indication of a legislative intent to pre-empt, under the caption of "oral communications", all wire communications transmitted with a reasonable expectation they will not be intercepted. Despite the expectation of privacy, the latter do not become "oral communications". They remain, simply and exclusively, wire communications under 18 U.S.C. §2510(1).

Similarly, there is no indication Congress intended to include under "oral communications" all radio communications transmitted with a reasonable expectation they will not be intercepted. These remain radio communications under the definition of 47 U.S.C. §153(b).

It seems to be stretching 18 U.S.C. §§2510, et seq., to construe purely radio communications (even those with a reasonable expectation of privacy) intercepted by law enforcement officers as "oral communications". Nowhere in the legislative history or language of 18 U.S.C. §§2510, et seq., is there any indication that Congress intended to single out, for felony prosecution, only law enforcement officers who intercept radio communications, while providing an option to prosecute, for misdemeanors, all others who not only intercept, but divulge, such communications.

Court found, they lacked the requisite expectation of privacy. (The district judge had previously made a specific finding that defendants knew they could be heard by other people and, therefore, had no right to privacy.)

This seems, however, to be a case of reaching the right result for the wrong reason. The "new" Section 605, enacted simultaneously with 18 U.S.C. §§2510, et seq., was expressly intended as a substitute rather than the mere reenactment of its predecessor. 1968 U.S. Code Cong. and Adm. News 2196. If it has any substance at all, §605 would seem to cover at least the interception of all communications transmitted entirely by radio. It does not apply to law enforcement officers, however, because "person", as used in the statute, does not include a law enforcement officer acting in the normal course of his duties. 1968 U.S. Code Cong. and Adm. News 2197. In a letter to the Chairman of the Federal Communications Commission on September 15, 1975 (Tab NN) concerning FCC monitoring of citizen band radio transmissions, the Justice Department's Office of Legal Counsel stated:

> Giving the word "person" such an interpretation would allow law enforcement officers generally to intercept and divulge radio communications.

The application of §605 in Hall would have achieved the same result with respect to the interception of purely radio communications, but without the strained application of 18 U.S.C. §§2510, et seq.

The statute specifically defines "oral communication" as:

> ... [A]ny oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. (emphasis added) 18 U.S.C. §2510(2).

Examples of "oral communications" cited in the legislative history of Title III are communications uttered in one's home or one's office. 1968 U.S. Code Cong. and Adm. News 2178.

There are two references in 18 U.S.C. §2511 to communications by radio: One prohibits the interception of oral (not wire) communications by devices which transmit communications by radio or interfere with the transmission of such a communication (§2511(1)(b)(ii)); the other merely codifies the exception from criminal liability of FCC officials acting in the normal course of their duties. Neither provision purports to expand or amplify the definition of "oral communication" in 18 U.S.C. §2510(2). (Prior to the enactment of Title III, the exception of FCC officials was "implicit" in 47 U.S.C. §605. United States v. Sugden, 226 F.2d 281 (9 Cir. 1955), aff'd, 351 U.S. 916 (1956).)

The legislative history of Title III, while not completely clear on the point, nevertheless tends to equate the interception of "oral communications transmitted by radio" with electronic eavesdropping (bugging) to overhear private oral conversations. The legislative history cites Katz v. Unted States, 389 U.S. 347 (1967), in stating the definition of oral communication "is intended to reflect existing law." Katz involved the use

of an electronic eavesdropping device. "Wiretapping" is generally associated with the interception of wire communications. 1968 U.S. Code Cong. and Adm. News 2153-2156; 2177-2178; 2180-2181.

In the context of transmissions by radio, therefore, the definition of "oral communications" in 18 U.S.C. §2510(2) appears to contemplate private oral conversations intercepted by radio eavesdropping devices rather than the interception of communications transmitted by common carrier radio-telephone facilities. (Section 2511(1)(b)(i) would prohibit the use of leased or other telephone lines to transmit signals intercepted by eavesdropping devices. 1968 U.S. Code Cong. and Adm. News 2180.)

(vii) Overlapping Definitions

In neither 18 U.S.C. §§2510, et seq., nor 47 U.S.C. §605, does Congress reconcile the statutory definitions of "wire" and "oral" communications with "radio" communications in the radio-telephone context. This "overlap" was apparently not considered or even recognized by Congress. Even in United States v. Hall, supra, the court conceded that "the definition of wire communication is not free from ambiguity", and concluded that "[b]y reading the sections together, we can only conclude that the Congress did not mean that every conversation aided in any part by any wire would be a wire communication". 488 F.2d at 196-197.

Thus, we have two criminal statutes, one a felony, the other a misdemeanor, whose application must rest finally upon a reconciliation of the overlapping definitions of "wire communication" and "oral communication" in 18 U.S.C. §2510(1)(2), and "radio communication" in 47 U.S.C. §153(b).

The central question may be stated precisely: Which statute covers the interception of radio portions of common carrier radio-telephone communications between the United States and other coutries?

Perhaps the most succinct indication of overall legislative purpose in Title III may be found, incidentally, in the definition of "oral communications" in 18 U.S.C. §2510(2):

> ... [A]ny... communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

Obviously, the privacy of the wire portion of a common carrier radio-landline telephone communication is inherently greater than the radio portion. While such communication, as a whole, might conform with the technical definition of "wire communication" in 18 U.S.C. §2510(1), the radio portion fits equally the definition of "radio communication" set forth in 47 U.S.C. §153(b). As the Court observed in United States v. Hall, supra, the latter is infinitely more vulnerable to both inadvertent and intentional interception:

> As with any broadcast into the air, the invitation to listen is afforded to all who can hear. In the instant case, the eavesdropper merely tuned their radio receivers to the proper station.

The legislative history emphatically states that 18 U.S.C. §§2510, et seq. "...is intended to protect the privacy of the communication". (Emphasis added.) 1968 U.S. Code Cong. and Adm. News 2178. The purpose of the statutory protection, therefore, is not to maintain the absolute inviolability of the means of communication, but to protect from interception those communications which are transmitted by private means. If the method of communication at a given point in transmission is not reasonably private, it is difficult to perceive a legislative intent to pretend privacy at that point merely because the means of communication elsewhere in the chain of transmission are private.

A communication is only as private as the means of transmission employed at the point of interception. If the privacy of a communication is to be protected, the communication itself must first be private. If at some point in its transmission a communication may be intercepted over 30 per cent of the earth's surface with readily available and inexpensive radio equipment, the communication at that point can hardly be regarded as private. (See iii, supra.)

The legislative history further indicates that 18 U.S.C. §§2510, et seq., was intended to govern "the regulation of the interception of wire and oral communications", while 47 U.S.C. §605 was designed to "regulate the conduct of communications personnel" as well as prohibit the interception and divulgence, or use, or radio communications. 1968 U.S. Code Cong. and

Adm. News 2196-2197. Nothing in §605 indicates that common carrier radio communications are to be excluded from its coverage.

Notwithstanding the seemingly comprehensive coverage of radio communications by §605, however, the legislative history and definitions of wire and oral communications in 18 U.S.C. §2510 permit an initial construction of §§2510, et seq., to cover, inter alia, the interception of all radio-landline telephone communications transmitted, in part, by aid of common carrier wire (wire communications), and all "aural" radio-to-radio communications where there is a reasonable expectation such communications are not subject to interception (oral communications).

This construction of 18 U.S.C. §§2510, et seq., would leave §605 with jurisdiction over only the interception of "non-aural" radio-landline common carrier communications, and only those "aural" radio-to-radio communications which might reasonably be subject to interception. Such a construction would, of course, remove the interception or radio-landline telephone communications by "communications personnel" from the coverage of §605 which was specifically designed to "regulate the conduct of communications personnel". (Section 2511(2)(a)(i), Title 18, United States Code, expressly recognizes and contemplates that officers, employees and agents of communications common carriers may also intercept wire communications.)

The foregoing demonstrates, if nothing else, that the seemingly comprehensive coverage of "wire communication" in 18 U.S.C. 2511(1) is

neither all-inclusive nor free of ambiguity.

It is noted that the only specific reference to radio communications in the prohibitions of 18 U.S.C. §2511 is that which appears in §2511(1)(b)(ii) proscribing the interception of oral (not wire) communications by the use of devices which transmit communications by radio or interfere with the transmission of radio communications. This reinforces not only the contention that "oral communications" defined in 18 U.S.C. §2511(2) contemplate private oral conversations transmitted by radio eavesdropping devices; it also points up the omission of any similar prohibition against the use of radio devices to intercept "wire communications" as defined in 18 U.S.C. 2511(1).

(viii) Statutory Construction

When either of two statutes apply, the specific takes precedence over the general. Robinson v. United States, 142 F.2d 431 (8 Cir. 1944). Therefore, if 18 U.S.C. §2511 clearly applied to the interception of radio portions of radio-landline telephone communications, it should take precedence over the general coverage of 47 U.S.C. §605. Section §2511, however, is not unequivocal in its coverage, and sin[illegible]guities in criminal statutes and conflicts in statutory construction must be resolved in favor of potential defendants, the misdemeanor statute would seem to apply. United States v. Bass, 404 U.S. 336, 348 (1971).

(ix) Prosecutive Options

The Government has the option to proceed under 47 U.S.C. §605. Where a single act violates more than one statute, the Government may elect to proceed under either. United States v. Burnett, supra.

(b) 47 U.S.C. §605

The second and fourth clauses of Section 605 prohibit, respectively, the interception and divulgence of radio communications, and the receipt of intercepted radio communications and divulgence or use for one's own benefit or the benefit of another.

Divulgence by one who did not personally intercept the communication, however, or cause another to do so, is not a violation of the second clause of Section 605; and use for the benefit of the Government is not the type of "use" prohibited by the statute. Pugach v. Klein, 193 F.Supp. 630, 640-641 (S.D.N.Y. 1961); United States v. Lewis, 87 F.Supp 970, 974 (D.D.C. 1950), reversed on other grounds, 184 F.2d 394 (D.C. Cir. 1950).

The Government has consistently taken the position that disclosure within the Executive Branch is not "divulgence" within the proscriptions of Section 605. Nardone v. United States, 302 U.S. 379 (1037); United States v. Butenko, 494 F.2d 593, 600 (3 Cir. 1974), cert. denied, 419 U.S. 881 (1974).

In any event, "person" in Section 605 does not include law enforcement officers acting in the normal course of their duties. 1968 U.S. Code

Cong. and Adm. News 2197. The second clause of Section 605 prohibits any "person" from intercepting and divulging to "any person". It would seem, therefore, that disclosure by NSA personnel to law enforcement officers of BNDD/DEA would not constitute "divulgence" within the statute.

(c) Presidential Authorization (18 U.S.C. §2511(3))

On October 24, 1969, President Nixon created the White House Task Force for Narcotics Control and reportedly announced a decision to make narcotics a matter of foreign policy, and further directed the Director of Central Intelligence to contribute to the maximum extent possible in the collection of foreign intelligence related to traffic in opium and heroin. (Tab T2)

In August, 1971, the President created the Cabinet Committee as International Narcotics Control (which included, inter alia, the DCI (CIA), the Attorney General, Secretary of Defense, et al.) and directed that all Federal offices, department and agencies cooperate with the CCINC in carrying out its functions, including the coordination of all diplomatic, intelligence and Federal law enforcement programs and activities of international scope. (Tab T5) President Nixon also issued additional orders and made additional statements directing the mobilization of the full resources of the Federal Government to gather intelligence on international drug traffic. (See III (B), supra.)

TOP SECRET

President Ford was recently quoted as having designated the illicit export of opium to the United States as a "threat to our national security." See III (B)(6), supra.

Former Secretary of Defense Melvin Laird stated that during the Viet Nam Conflict, he regarded the importation of drugs into the United States to be a matter affecting the national security because it undermined the capability of the Armed Forces during a period of national emergency. (Tab X4)

(For specific sources of purported authorization, see III, supra.)

(d) Willfulness

See V(C), supra.

2. Interceptions of International Non-Voice Communications

(a) 18 U.S.C. §2511

(i) Interception

The legality of the interception of non-voice communications turns upon the interpretation of "intercept" as defined in 18 U.S.C. 2510(4):

> (4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

The statute thus restricts the definition of "intercept" to "aural acquisition", and the legislative history specifically excludes all other means of acquisition:

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> ... Other forms of surveillance are not within the proposed legislation... The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication. 1968 U.S. Code Cong. and Adm. News 2178.

The dictionary defines "aural" as "of or relating to the ear or sense of hearing." The words "aural acquistion", literally translated, means to come into possession through the sense of hearing. Smith v. Wunker, 356 F.Supp. 44, 46 (S.D. Ohio 1972).

The legislative history further amplifies the intended scope of "aural interceptions":

> Paragraph (4) defines "intercept" to include the aural acquisition of the contents of any wire or oral communication by any electric, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. See Lee v. United States, 47 S.Ct. 746, 274 U.S. 559 (1927); Corngold v. United States, 367 F.2d (9th 1966). An examination of telephone company records by law enforcement agents in the regular course of their duties would be lawful because it would not be an "interception". (United States v. Russo, 250 F.Supp. 55 (E.D. Pa. 1966)). The proposed legislation is not designed to prevent the tracing of phone calls. The use of a "pen register", for example, would be permissible. But see United States v. Dote, 371 F.2d 176 (7th 1966). The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication. 1968 U.S. Code Cong. and Adm. News 2178.

The foregoing clearly excludes from the coverage of 18 U.S.C. §2511 all communications transmitted mechanically, i.e., transmitted by signals independent of sound, e.g., electrical pulses.

(ii) "Aural"

"Aural acquisition" seems to have been used by the Congress neither as a term or art nor as a term of technology. The words "acquistion... through the use of any... device" suggest that the central concern is with the activity engaged in at the time of the communication which causes such communication to be overheard by uninvited listeners, i.e., the contemporaneous acquisition of the communication. It is the act of contemporaeous surveillance (by hearing, recording, or otherwise) which was at the center of congressional concern. United States v. Turk, 526 F.2d 654, 658-659 (5 Cir. 1976). This interpretation of "aural acquisition" is reinforced by 18 U.S.C. 2511(1)(c) which prohibits the subsequent disclosure of an intercepted communication.

"Aural acquisition", would seem to include, for example, the de-channeling of tape recordings of intercepted multi-channel "sound" communications. In such cases, the acquisition of the intelligible contents of a communication would not necessarily have to be contemporaneous with the interception and acquisition of the primary or "garbled sounds". In short, "aural acquisition" would appear to generally cover the interception of sounds while in the process of transmission.

(iii) Teletype and Telex Communications

Teletype and telex transmissions are clearly non-aural. Teletype technology essentially connects two typewriter keyboards by pulses of electrical energy transmitted by wire and/or radio. Telex technology maximizes the utility of teletype facilities by increasing the transmitting capacity.

[redacted]

(b) 47 U.S.C. §605

(i) Divulgence

The interception of non-aural communications is covered, if at all, by 47 U.S.C. §605, which requires divulgence, or use, in addition to interception. There is absolutely no indication that Congress contemplated §605 situations where interceptions were not accompanied by divulgence. United States v. Butenko, 494 F.2d 593, 600 (3 Cir. 1974), c.d., 419 U.S. 881 (1974).

The majority in Butenko observed that "restricting any divulgence to members of the Executive Branch.... does not necessarily mean that the

surveillance and such divulgence does not fun afoul of §605", but the dissenting Chief Judge stated that while the question did not have to be resolved in that case, perhaps such divulgence does not violate §605 "because the federal officers are really acting as agents of the executive in making the interception and the relevant "person" to be viewed as interceptor is, thus, the executive; divulgence to other agents of the executive, who receive the information in such capacity, hence would not violate the statute because the divulgees would be part of the same "person" as the divulgors." This has been the consistent position taken by the Government in such cases. Nardone v. United States, 302 U.S. 379 (1937); United States v. Butenko, supra.

Whatever the validity of the above position; the Government could hardly prosecute one of its own agents for divulging the contents of an intercepted communication within the Executive Branch in reliance upon the Government's long-standing interpretation of the statute. Furthermore, Section 605 does not apply to law enforcement officers acting in the course of their normal duties. 1968 U.S. Code Cong. and Adm. News 2197. Disclosure by NSA within the Executive Branch, particularly to BNDD, Secret Service and FBI agents is, therefore, not proscribed by the statute.

(ii) Use

Section 605 must face the canon of strict construction in favor of the accused. It is one thing to interpret the statute in favor of the accused,

but quite another to expand its meaning where to do so works against the accused. A strict construction in favor of the accused impels the conclusion that the provision "use... for his own benefit or for the benefit of another not entitled thereto", means another person and does not include use for the benefit of the Goverment. Plainly, such use is not for the government agent's own benefit. Pugach v. Klein, 193 F.Supp. 630, 640-641 (S.D.N.Y. 1961); United States v. Lewis, 87 F.Supp. 970, 974 (D.D.C. 1950), reversed on other grounds, 184 F.2d 394 (D.C. Cir. 1950).

(iii) Interception and Divulgence or Use By Different Parties

Absent a conspiracy, mere divulgence by one who did not personnally intercept the communication, or cause another to do so, is not a violation of the second clause of Section 605. Pugach v. Klein, supra. By the same reasoning, the "receipt and divulgence" prohibitions of the first clause of Section 605, and the "receipt and use" proscriptions in the third clause, would seem also to require that receipt and divulgence (or use) be accomplished by the same person to constitute an offense under §605.

(c) Presidential Authorization

See III, supra.

(d) Willfulness

See V(C), supra.

B. Receipt of "Cable Traffic" from International Communications Carriers (SHAMROCK and Drop-Copy Operation)

1. 47 U.S.C. §605

This activity is covered, if at all, by the first clause and/or third clause of 47 U.S.C. §605 which prohibit, generally, the receipt and divulgence (except upon demand of lawful authority, etc.) of interstate or foreign communications by wire or radio; and the receipt and use of radio communications.

Possible Violations of §605 involve persons in two general categories: (1) commercial communications personnel; and (2) government agents and officials.

(a) Communications Personnel

The new Section §605 is designed to regulate the conduct of communications personnel. 1968 U.S. Code Cong. and Adm. News 2197. As noted above, however, §605 apparently requires that both the willful receipt (or assistance in receiving) and the willful divulgence and/or use, be accomplished by the same person, and "use" by a Government agent for the benefit of the Government is not the type of "use" contemplated in the proscriptions of the statute. Pugach v. Klein, supra; United States v. Lewis, supra.

In addition to their reliance on the foregoing, communications personnel involved in SHAMROCK and the Drop-Copy Operation may contend their assistance to NSA and the FBI was in resonse to requests made under the Presidential power recognized by 18 U.S.C. §2511(3), i.e., "on demand of lawful authority" and, therefore, within the exceptions enumerated in §605.

The FBI asserts that the legislative history of §605 indicates Congress intended the phrase "on demand of lawful authority" to be as inclusive as the similar provision of the Interstate Commerce Act of 1887 from which the Communications Act of 1934, in part, was taken. (Tab OO) The Interstate Commerce Act of 1887, as amended in 1910 to prohibit the disclosure of communications transmitted by common carriers, provided that nothing therein should be construed to prevent the giving of information in response to "any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime..."

The communications personnel might also argue they were de facto agents of the United States Government and disclosed only to agents within the Executive Branch which does not constitute "divulgence" within the meaning of Section 605. United States v. Butenko, supra.

(b) Goverment Agents and Officials

Agents and officials of NSA and the FBI who were involved in the daily conduct of SHAMROCK and the Drop City Operation will perhaps assert they never received or assisted in receiving any of the communications furnished to them, but rather obtained the communications only after the receipt of same by communications personnel. They will likely contend also that there was no "divulgence" because dissemination was confined to a small segment of the Executive Branch.

Those officials who negotiated or maintained the informal agreements between the Government and the communications carriers were not the same persons who obtained and disseminated the actual communications within the Executive Branch. They will, of course, seek to avoid the application of Section 605 by claiming not to have received and divulged any communications themselves. As for criminal conspriacy, they will probably attempt to prove an implied delegation of Presidential power under 18 U.S.C. 2511(3).

2. Presidential Authorization

See III, supra.

3. Willfulness

See V(C), supra.

C. Interception of Domestic Communications In Testing Electronic Equipment

1. 18 U.S.C. §2511 and 47 U.S.C. §605

All interceptions which are known to have occurred within the five-year statute of limitations were interceptions of "radio" communications, i.e., the radio portions of radio-telephone communications which were not "divulged" within the meaning of 47 U.S.C. §605. The same defenses set forth in IV(A), supra, may be raised with respect to this activity.

2. Presidential Authorization

See III(E)(4), and III (F)(6).

3. Willfulness

See V(D), supra.

VII. SUMMARY OF POSSIBLE VIOLATIONS AND DEFENSES

A. Recapitulation of Inquiry

The Rockefeller Commission Report raised questions concerning seven areas of CIA-related electronic surveillance activity: CIA personnel security, activities of U.S. dissidents, toll records of telephone calls between the U.S. and a hostile country, the interception of international narcotics trafficker's telephone communications, electronic equipment testing, a survey of the potential capability of a hostile foreign power to intercept U.S. communications, and CIA assistance to the Secret Service and local police departments (pp.1-13, supra).

[redacted] However, our inquiry revealed the following eleven additional areas of questionable activity involving the CIA, NSA and FBI: NARCOG, LPMEDLEY, [redacted] overseas intercepts, [redacted] MINARET, [redacted] SHAMROCK, [redacted] and the FBI drop-copy operation (pp.14-39, supra). Five of these may also contain the elements of Federal criminal offenses, i.e., MINARET (pp.26-29, supra), [redacted] SHAMROCK (pp.32-36, supra), and the FBI drop-copy operation (p.39, supra).

Eight specific electronic surveillance operations thus require prosecutive evaluation.

1. [redacted]

From October 1972 to January 1973, at NSA's request, the CIA intercepted the radio portions of targeted radio-telephone communications between Latin America and the United States for the purpose of gathering intelligence on international narcotics trafficking. [redacted] The intelligence product was furnished to NSA which, in turn, forwarded it to BNDD.

If the radio portions of international radio-telephone communications are deemed "wire communications" (see pp. 139-140, supra), the [redacted] would be in clear violation of 18 U.S.C. §2511(1), but for the apparent blanket approval of such interceptions by Attorneys General and the Secretary of Defense in 1971 and 1972 (pp.81-84, supra). Such approval, together with the explicit Presidential insistence that CIA contribute to the "maximum extent" and "to mobilize its full resources to fight the international drug trade" (pp. 46, 58, 112, supra), could be construed as Presidential direction and authorization under 18 U.S.C. §2511(3). This defense is particularly buttressed by prior Presidential declarations that narcotics control is a matter of "foreign policy" (p.46, supra); that it is "imperative that the illicit flow of narcotics and dangerous drugs into this country be stopped as soon as possible" (p.47, supra); that illicit drugs are a "menace to the general welfare of the United States" (p.46, supra); that "winning the battle against drug abuse is one of the most important, the most urgent national priorities confronting the United States today" (p.57, supra); that "keeping dangerous drugs out of the United States [is] just as important as keeping armed enemy forces from landing in the United States" (p.58, supra). Such Presidential language could be easily construed as equating narcotics control with national security.

Congress has also recognized the need for international narcotics intelligence and the general propriety of utilizing CIA and NSA resources to obtain it. (pp.49, 63, supra; Tab T7)

Although the foregoing does not conclusively establish legitimate authorization, it sufficiently clouds the issue to make proof of willfulness on the part of subordinates essentially impossible. Likewise, the purported "authorization" by the President, Attorneys General and Secretary of Defense is so general, so amorphous, that it would be impossible to prove beyond a reasonable doubt that eithe of them specifically "authorized" [redacted]

It thus appears that no real probability exists for convicting anyone involved [redacted] Consequently, it would not seem to warrant further prosecutive pursuit.

(See Summary Outline, Tab D, for complete listing of possible defenses.)

(See Summary Outline, Tab F4, for additional detail.)

4. MINARET

The chartering of MINARET on July 1, 1969, formalized NSA's de facto collection and dissemination of intelligence concerning Presidential protection and foreign influences on domestic organizations and individuals which might create civil disturbances and/or undermine the national security. The Attorney General advised the PFIAB on February 5, 1971 that electronic surveillance to obtain intelligence concerning violence-prone groups was clearly within the jurisdiction of the Presidential responsibilities for maintaining law and order (pp.107, supra). Such intelligence was gathered and distributed by NSA to Federal consumer agencies, i.e., the CIA, FBI, Secret Service, ACSI, DIA, and State Department, all of whom levied requirements on NSA under NSCID 6 (pp. 78, supra). BNDD levied narcotics intelligence requirements on NSA in April 1970. [redacted]

MINARET intelligence, except one category of international voice communications involving narcotics, was obtained incidentally in the course of NSA's interception of aural and non-aural (e.g., telex) international communications, and the receipt of GCHQ-acquired telex and ILC cable traffic (SHAMROCK) [redacted]

Possible violations in MINARET are (1) aural acquisition (and/or use, disclosure, etc.) of wire and oral communications (18 U.S.C. §2511); and (2) receipt or interception and divulgence or use of radio communications (47 U.S.C. §605).

In conformity with NSA's one-terminal rule (p.61, supra), all MINARET communications apparently had at least one terminal in a foreign country and,

excluding SHAMROCK communications, were obtained through the interception of radio portions of international communications from sites both within and without the United States.

On November 6, 1975, the Attorney General noted in his testimony before the Senate Select Committee that it is arguable that "if matters are picked up out of the air, so to speak, as waves of some kind across the ocean, that there is no reason for people to assume that the conversations are private and therefore the fourth amendment does not apply". Hearings Before the Select Committee to Study Governmental Operations With Respect to Intelligence Activities of the Senate, 94th Cong., 1st Sess., V5, pp.115-116 (1975). Although the Attorney General expressly declined to make such an argument because "it goes too far", it nonetheless remains available as a tentative and plausible defense. (See pp.128-142, supra.)

Assuming, however, such defense is not viable, the dissemination of intelligence incidentally derived from clearly legitimate NSA operations to "provide for the SIGINT mission of the United States" (p.77, supra) appears to be lawful under the "plain view" doctrine (p.125, supra), particularly in view of the general absence of statutory restrictions on NSA intercept activities.

Our inquiry confirms the following findings of the Senate Select Committee regarding the lack of statutory restrictions on NSA:

* * *

> ... [N]o existing statutes control, limit or define the signals intelligence activities of NSA....

* * *

> No statute or executive directive prohibits NSA's monitoring a telephone circuit with one terminal in the United States.
>
> * * *
>
> It is important to note that the decision to terminate the watch list was ultimately the administrative decision of an executive agency. There is no statute which expressly forbids such activity, and no court case where it has been squarely at issue. Without legislative controls, NSA could resume the watch list activity at any time upon order of the Executive.... (S.Rep. No. 94-755, 94th Cong., 2nd Sess., Book ____, pp.736, 756, 761 (1976).

The apparent lack of statutory restriction on NSA intercept activities was reinforced by a memorandum from NSA General Counsel to the Office of the NSA Director on July 24, 1968 reporting that the enactment of 18 U.S.C. §2511(3) on June 19, 1968 removed "any doubt as to the legality of SIGINT... activities of the Executive Branch of the Government". (p.85, supra; Tab Y2)

NSA's purposeful interception of the radio portions of international radio-telephone communications to obtain narcotics intelligence for BNDD began in September 1970 and continued until June 1973. Apparently, NSA only intercepted narcotics communications having one terminal (at least) in a foreign country. Consequently, this activity conformed with NSA's long-standing "one-terminal" rule (p.81, supra), Presidential priorities (pp.46-58, 109, 111-112, supra), possible USIB approval (p.97, supra), "ground rules" approved in 1971 and 1972 by Attorneys General and the Secretary of Defense (pp.82-84, supra), and the "national security" nature of drug trafficking during the Viet Nam War (Tab X4).

The broad, sweeping SIGINT responsibilities and powers of NSA, combined with vague or non-existent restrictions on NSA in exercising that power to carry out such responsibilities, would seem to render further prosecutive pursuit of MINARET futile. The plain view doctrine appears to legitimize the incidentally-acquired MINARET intelligence, and the aforementioned circumstances of gathering the narcotics intelligence for BNDD makes proof of willfulness highly improbable, if not impossible.

(See Summary Outline, Tab N, for additional analysis and detail.)

7

6. SHAMROCK

In SHAMROCK, the NSA gathered international non-aural communications from ILC carriers (principally ITT, RCA and WUI) from 1957 to May 1975. NSA inherited this operation from military agencies which began collecting cable traffic during WW II and continued thereafter as essential to the national security with the approval of Secretaries of Defense, Attorney General Tom Clark and President Truman.

The method of obtaining ILC communications varied with changing technology and circumstances, but from the mid-1960s to May 1975, NSA employees received or had access to virtually all ILC traffic which passed through the New York City offices of RCA and ITT. The offices of WUI in New York City and Washington, D.C. furnished NSA with microfilm of [redacted] and possibly other) ILC communications until 1969. The WUI communications were selected out and microlfimed for NSA by WUI employees. (The offices of RCA, ITT, WUI and other ILC companies in several other cities also contributed to SHAMROCK at various times.)

NSA also requested and received cable traffic from the FBI which the latter obtained from RCA, ITT and WUI until the termination of its "Drop-Copy Operation" in April 1973.

In about 1967, NSA began extracting domestic intelligence from the ILC communications (magnetic tapes) received from RCA and ITT. This was done without the knowledge of RCA or ITT and continued until the termination of [redacted] Such domestic intelligence was disseminated to consumer agencies pursuant to the MINARET and [redacted] charters.

Notwithstanding the extraction of MINARET and [redacted] intelligence in addition to [redacted] NSA officials contend that it constituted only a small portion of the total traffic received. The remainder (90%+) was not used in any respect in an effort to minimize the NSA intrusion.

SHAMROCK involves possible violations of 47 U.S.C. §605. (Section 2511 of Title 18, United States Code, does not apply because none of the communications were apparently acquired by "aural" means. Rather, they were mechanically transmitted and received through pulses of electrical energy, e.g., telex.)

NSA finds support for conducting its SHAMROCK operation in the following: NSA's "inheritance" of the project which was continued after WW II at the instance of the Secretary of Defense, Attorney General and the President (pp.32-33, supra); the purported knowledge and receipt of SHAMROCK-type communications by the President and his National Security Advisor from 1966 to 1969 (p.41, Tab N); Presidential authorization (pp.46-60, 106-113; 144, supra); knowledge and approval of the Attorney General and PFIAB in 1971 (pp.107-108, supra); knowledge and tacit approval from 1969 to 1973 of the Secretary of Defense (p.33, supra); and the mandate of NSCID 6 (pp.76-80, supra). (NSA contends that the exclusion of unencrypted written communications from its mandate under NSCID 6 is limited to mail and communications other than those sent electronically. S.Rep. No. 94-755, 94th Cong., 2nd Sess., Book ____, pp.737-738 (1976).)

If NSA had prima facie authority to collect NSA traffic from ILC carriers for national security purposes, it may be contended that domestic intelligence incidentally derived therefrom was lawfully obtained under the "plain view" doctrine. (See p.125, supra)

Section 605 of Title 47 prohibits (1) divulgence by anyone receiving any foreign communication by wire or radio, except upon demand of lawful authority; or (2) receipt and use of such communication by a person not entitled thereto.

In addition to the purported "authority" defenses above, potential SHAMROCK defendants may assert (1) there was no divulgence outside the executive branch and, therefore, no divulgence within the meaning of §605; (2) there was no divulgence or use by any person who actually received communications; and (3) use for the benefit of the Government is not the type of "use" contemplated in §605 (pp.143-153, supra). Thus, the argument may be made that no Federal criminal statute covers the SHAMROCK activity. Section 605 does not apply to FBI, BNDD or other law enforcement personnel (pp.133-132, supra), nor to the mere receipt of communications and divulgence within the executive branch.

While the foregoing defenses do not clearly absolve the participants, they would seem to provide the basis for a sufficient showing of good faith and lack of willfulness to preclude successful prosecution of NSA, FBI and other consumer agency personnel involved. (See pp.121-125, supra.)

(See Summary Outline, Tab P, for additional detail.)

7. FBI Drop-Copy Operation

From 1941 to April 18, 1973, the FBI obtained copies of international "cable traffic" from ILC carriers for purported national security purposes, [redacted] By 1947, the FBI was receiving the cable traffic of 14 countries from RCA, WUI and Mackay Radio. In 1947 and 1949, the Secretary of Defense assured RCA, ITT and WUI that the assistance they were providing was essential to the national security of the United States, and both the President and Attorney General concurred in the request that it continue.

When the Drop-Copy Operation was terminated in 1973, the FBI was obtaining the "raw" cable traffic of 21 countries from the Washington, D.C. offices of ITT, RCA and WUI. The traffic of 10 of these countries was obtained for NSA.

During the 30-odd years of the Drop-Copy Operation, the FBI obtained cable traffic from various offices of six ILC companies in New York City San Francisco, Los Angeles, Portland and Washington, D.C.

It appears that as late as March 22, 1971, the PFIAB and Attorney General were aware of the FBI's operation (p.107, supra). The FBI finds authorization for its Drop-Copy Operation in such knowledge and acquiesence; in NSCID 6 which authorizes the NSA Director to issue direct mandatory assignments to any agency engaged in SIGINT operations (p.78, supra); and in the FBI's own authority by virtue of Executive Order to conduct counter-intelligence operations within the United States. (Tab R4)

Possible violations and defenses are the same in the Drop-Copy Operation as in SHAMROCK, supra.

(See Summary Outline, Tab R, for further detail.)

[redacted]

VIII. CONCLUSIONS AND RECOMMENDATIONS

This Report does not present particulars upon which affirmative prosecutive decisions may be made in specific cases. It rather provides the legal and factual detail for determining whether inquiry into specific activities should be terminated for lack of prosecutive potential or further pursued by grand jury. (If additional evidence of significant prosecutive value exists, it is not likely to be obtained without a grand jury.)

The writer recommends that the inquiry be terminated in all respects for lack of prosecutive potential. There appears to be little likelihood, if any, that convictions could be obtained on the basis of currently available evidence or evidence which might reasonably be developed.

The investigation has not revealed a single instance in which intelligence obtained by means of electronic surveillance was gathered or used for personal or partisan political purposes. The participants in every questionable operation, however oblivious or unmindful, appear to have acted under at least some colorable semblance of authority in what they conscientiously deemed to be the best interests of the United States. While they may be regarded in current perspective as having abused their broad discretionary power on occasion, that ill-defined power was conferred upon them and their agencies with the levy of sweeping legislative and executive requirements, e.g., the National Security Act and NSCIDs. If the intelligence agencies possessed too much discretionary authority with too little accountability, that would seem to be a 35-year failing of Presidents and the Congress rather than the agencies.

In addition to the previously enumerated defenses which may be invoked in the event of prosecution, there is likely to be much "buck-passing" from subordinate to superior, agency to agency, agency to board or committee, board or committee to the President, and from the living to the dead. The defense

may be expected to subpoena every tenuously-involved government official and former official to establish legitimate authorization or convoluted theories or purported authorzation. While the high office of prospective defense witnesses should not enter into the prosecutive decision, the confusion, obfuscation and surprise testimony which might result cannot be ignored.

Other practical considerations include the implications and complexities of providing discovery of national security materials (e.g., NSC, PFIAB, DOD, and White House documents and records), as well as sensitive foreign intelligence-gathering methodology and technology. These considerations become particularly acute when weighed against the minimal chances of sustaining the technical proof of violations and the probable lack of juror enthusiasm for convicting those whom the defense may plausibly portray as dedicated employees who only followed orders in trying to protect the national interest, keep heroin out of the United States, etc.

The above observations are made with full appreciation that the subject matter is an international cause celebre involving fundamental constitutional rights of United States citizens. While the violation of those rights, whether intentional or inadvertent, cannot be condoned, the prosecution of alleged malefactors without any reasonable probability of conviction would seem to be equally indefensible.

It is suggested that the remedy for the peculiar wrongs discussed herein might be more effectively and appropriately sought in corrective legislation and adminstrative revision than in the pursuit of punitive and retributive measures which are likely to fail. To that end, the following innovations appear to be as essential as they are obvious:

1. Governmental agencies charged with the research and development of electronic equipment essential to the national security should be provided with clearly defined authority and procedures for testing such equipment against appropriate communications systems.

2. Consideration should be given to seeking specific congressional and presidential designation of certain international criminal activities as matters affecting the national security (e.g., international narcotics trafficking, gun-running, etc.) for purposes of foreign intelligence-gathering. (It is pure folly, for example, to pay millions of dollars to Turkey to reduce the production of opium destined (initially) for Corsica, while at the same time deliberately denying U.S. law enforcement agencies the benefit of our most sophisticated and effective apparatus for gathering intelligence on heroin en route to the United States.)

3. National security intelligence agencies should be authorized to provide appropriate U.S. law enforcement agencies with criminal intelligence incidentally obtained in the exercise of their lawful functions, including information indicating criminal activity on the part of U.S. citizens. (There is no rational basis for protecting U.S. citizen-criminals from the consequences of such "plain view" evidence.)

4. An effort should be made (consistent with the constitutional rights of criminal defendants) to secure legislation and/or rules changes to prevent the public identification of national security agencies as the source of criminal intelligence incidentally obtained in the exercise of their lawful functions, at least where such evidence is not introduced at trial.

5. The authority of the CIA, NSA and FBI to perform their respective missions in the field of electronic surveillance should be clearly delegated and delineated with specific procedures prescribed for the lawful exercise of that authority.

6. The Office of General Counsel for each intelligence agency should be staffed with one or more attorneys with expertise in electronic surveillance law and Federal criminal law and procedure.

7. Agency personnel should be required to consult their General Counsel and confirm, in advance, the legality of all electronic surveillance projects.

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THE END