JUSTICE DEPARTMENT INTERNAL INVESTIGATION POLICIES

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

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JUSTICE DEPARTMENT INTERNAL INVESTIGATION POLICIES

THURSDAY, JUNE 9, 1977

HOUSE OF REPRESENTATIVES,
GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:05 a.m., in room 2154, Rayburn House Office Building, Hon. Richardson Preyer (chairman of the subcommittee) presiding.

Present: Representatives Richardson Preyer, John E. Moss, Michael Harrington, Peter H. Kostmayer, Ted Weiss, and Paul N. McCloskey, Jr.

Also present: Timothy H. Ingram, staff director; L. Britt Snider, counsel; Richard L. Barnes, professional staff member; and Catherine Sands, minority professional staff, Committee on Government Operations.

Mr. PREYER. The subcommittee will come to order.

We are most pleased this morning to have Attorney General Bell with us for the first in a series of hearings which can importantly affect the American public's perception of equal justice under the law.

As the Attorney General and his new team begin their administration, I want to emphasize this subcommittee's intention to work with them cooperatively and not contentiously.

The subcommittee is charged with oversight of the Department. This means, of course, that we must take a continuing interest in all aspects of its operations, not just point fingers if we think something is amiss.

Thus when we invite you to join us at sessions such as today's, Judge Bell, it is in the spirit of gaining information and not in the spirit of raining accusations down on you.

I think it is interesting to note that you and I each come to our present branch of Government from the third branch, the judiciary. While you have been much higher in both of those branches than I, I hope this common experience will serve us well in the relationship between your Department and our subcommittee in the months ahead.

The fundamental American democratic principle of equal justice has taken a buffeting from events of the past several years. Even less than 3 weeks ago we heard former President Nixon still insist that the President, by his own directive, can turn a criminal act into an activity that is legal.

The Department of Justice has found itself sometimes caught in the middle on questions of how wrongdoing by Government officials

should be treated. When no indictments are forthcoming, the Department is accused of letting wrongdoers go free, but when former FBI Special Agent John Kearney was indicted recently, the Department was accused by some of its own employees of damaging morale and not acting evenhandedly. I do not envy you your dilemma on that matter.

Although the *Kearney* case and its aftermath provided some of the impetus for this set of hearings, I want to make it clear that we do not intend to try that matter in this forum. We intend to be very attentive to the need to avoid prejudicial pretrial statements about that case, and I trust all members of the committee will honor that.

The Kearney indictment, however, offers an opportunity to focus on the broader questions of how the Department proceeds in investigating allegations of wrongdoing by its employees, and also by employees of other investigative or intelligence agencies of the Federal Government.

We think it is important that light be shed on this process so that the Congress and the public can evaluate whether equality of justice extends to the agents of Government.

The Kearney indictment is the only indictment thus far resulting from disclosures of unprecedented Government eavesdropping, break-ins, and other allegedly illegal activities. While again we do not wish to prejudice specific cases, the subcommittee believes it is important that Congress and the public be given some idea of the extent to which this activity is being investigated by the Department of Justice and the reasons for not prosecuting in cases which have been closed.

Regardless of whether one agrees or disagrees with the Department's decision not to prosecute in the CIA mail-opening cases, the Department is to be commended for putting on the public record its reasons for that decision.

Finally, we think the time is appropriate for an examination of the Department's policies on providing information to the Congress. Only when it is suitably informed can the Congress convey to the public its findings that the Department is pursuing justice evenhandedly, or its belief that changes must be made.

Congressional investigative activity in the Watergate and post-Watergate periods has brought probably an unprecedented demand on the Department for its files, records, and cooperation. We are told that in the new administration the Department is reexamining what the policy should be on providing information to Congress. With its expertise and responsibilities for freedom of information, privacy, and Government records management, as well as its general oversight authority for the Department of Justice, we believe this subcommittee is in a unique position to assist you in framing an acceptable information access policy.

Before proceeding further, Mr. McCloskey, the ranking minority member, has joined us.

Do you have any general opening statement that you would care to make, Mr. McCloskey?

Mr. McCloskey. I do not have anything to add, Mr. Chairman. I look forward to the Attorney General's comments.

Mr. Preyer. Thank you.

Mr. Attorney General, it has been customary at this subcommittee's proceedings to ask that all the witnesses who may testify be sworn,

and we would ask that you and anyone with you who may be answering questions for you would be sworn at this time.

STATEMENT OF GRIFFIN B. BELL, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY MICHAEL E. SHAHEEN, JR., COUNSEL, OFFICE OF PROFESSIONAL RESPONSIBILITY; AND ROBERT L. KEUCH, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Mr. BELL. I would like to say that I object to being sworn and I object to my associates being sworn. We are lawyers. We can appear in any court in the United States and give statements in our capacity as lawyers without being put under oath. But if the subcommittee insists that we be sworn, there is nothing we can do about it. We will have to be sworn, but I do object to it.

Mr. MCCLOSKEY. I agree with the Attorney General; I would not insist that he be sworn in.

Mr. PREYER. Does the subcommittee have any feeling about that?

Mr. MOSS. Mr. Chairman, it has been my custom for 23 years of chairing investigative committees that all witnesses from four-star generals on down have been sworn. This is to my knowledge the first instance where there has been an exception taken to that proceeding.

Mr. PREYER. Well, I can understand how the Attorney General may feel. This is somewhat offensive. I think if I were in his position I would share the same feeling. However, it has been the custom of this subcommittee to swear all witnesses and I think in the interest of equality of procedure and equality of justice the Chair would ask that you be sworn at this time.

Do you swear to tell the truth, the whole truth, and nothing but the truth, on this matter before the subcommittee, so help you God?

Mr. BELL. I do.

Mr. SHAHEEN. I do.

Mr. KEUCH. I do.

Mr. PREYER. Thank you very much, Judge Bell.

First let me inform the members of the subcommittee that the Department of Justice has supplied the subcommittee a partial listing of the status of cases which were brought to the attention of the Department of Justice within the last 3 years concerning allegations of wrongdoing by Federal intelligence and law enforcement agencies acting in their official capacities.

I might say a press statement that the Justice Department sent Congress a list of FBI agents that broke the law was completely incorrect. The Department has asked that the information, because of its sensitive nature, be kept confidential by the subcommittee. Until the chairman and the subcommittee staff have had an opportunity to evaluate the information, its completeness and the Department's assertion of confidentiality, we will not get into the specifics of those cases at this hearing. We will be reporting to the members of the subcommittee on this matter shortly, however.

Also, as I had requested in my letter to the Attorney General asking him to testify, the Department has provided us with copies of relevant published Department regulations and excerpts from the U.S. attorneys' manual.

Because of the number of members present, we will be operating under the 5-minute rule in which each member will be limited to 5 minutes of questioning as his or her turn comes around. I think we might have some flexibility on that.

Mr. Moss. Mr. Chairman, in view of the nature of the material just discussed by the chairman, I would move that the subcommittee treat that material for the time being as though received in executive session under rule XI.

Mr. McCLOSKEY. I second the motion.

Mr. PREYER. You have heard the motion and the second. All in favor of the motion please say "Aye." Opposed? The motion is adopted.

Thank you, Mr. Moss.

Judge Bell, we would be pleased if you would proceed with your statement at this time in any manner that you would like to proceed.

Mr. BELL. Mr. Chairman, I received the inquiries from the subcommittee and determined that the matter is so complex that it does not lend itself to filing a written statement. So I have not filed a statement. But I am here to answer any questions that the subcommittee has.

I am prepared to attempt to answer. I have my associates with me who may have some answers that I do not have. So we are prepared now to receive questions.

Mr. PREYER. Would you identify your associates for the record, please.

Mr. KEUCH. Mr. Robert L. Keuch, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

Mr. BELL. Mr. Civiletti is out of town; Mr. Keuch is standing in for him.

Mr. SHAHEEN. My name is Michael E. Shaheen, Jr., head of the Office of Professional Responsibility, with the title of counsel.

Mr. BELL. I might say that the Office of Professional Responsibility is about 1 year old. It was created by Attorney General Levi, and all complaints, all allegations of misconduct throughout the entire sweep of the Justice Department are referred now to the Office of Professional Responsibility for investigation and recommendation. That is Mr. Shaheen's office, which is attached to my office.

Mr. PREYER. Very well. Thank you.

We are glad to have you here, Mr. Shaheen and Mr. Keuch.

Mr. Moss?

Mr. Moss. Mr. Attorney General, I am also pleased to welcome you before the subcommittee this morning. I have some questions that I would like to address to you, sir, regarding message switching.

Mr. BELL. All right.

Mr. Moss. Are you familiar with that term and its general connotation?

Mr. BELL. I have been briefed on the term, "message switching." I must say I was in Atlanta on Sunday and saw it in the newspaper and it sounds like a sinister operation to me. I do not know who thought up the rhetoric "message switching," but I have been briefed and I am prepared to answer questions.

Mr. Moss. The criminal justice system of the Nation has now become quite highly computerized while simultaneously the amount of data on individuals has burgeoned beyond any proportion dreamed up even a decade ago.

At this point in the record, I wish to include a detailed explanation of "message switching" and its ramifications that I have had prepared by the Library of Congress and I would offer it for the record.

Mr. PREYER. Without objection, the explanation will be included in the record as exhibit No. 1.

[Exhibit No. 1 follows:]

EXHIBIT NO. 1

CRIMINAL JUSTICE TELECOMMUNICATIONS: FEDERAL BUREAU OF INVESTIGATION MESSAGE SWITCHING CAPABILITY

[Prepared for the use of Members of Congress by Louise G. Becker, Analyst in Information Science, Science Policy Research Division, Congressional Research Service.]

Recent technological advances have permitted the development of extensive telecommunication networks in the criminal justice community. The rapid access to automated records and the exchange of information serves an important function in a complex and mobile society. The growth in data handling activities and the requirement for rapid information exchanges among criminal justice agencies have raised certain grave concerns.

The Federal Bureau of Investigation has recently been granted approval to transmit automatically messages among National Crime Information Center (NCIC) users. This will enhance the NCIC telecommunications network, ensuring more effective communication among its users and an expansion of network facilities for some areas. This paper examines some of the problems and issues related to message switching and reviews potential areas of Congressional concern.

I. BACKGROUND

The need to access information data bases and effectively transmit information is a critical element in the functioning of a modern criminal justice agency. Computers and communication networks provide law enforcement agencies with the means to monitor criminals and their crimes, and the further ability to administer agency resources.

In the last decade the lowering costs of automated record handling have been one factor in encouraging the development of a wide range of criminal justice data bases. These data files may contain information on stolen property, wanted persons, missing persons, criminal arrests records, etc. In addition, the technology permits access to records on vehicles and licensing files needed in law enforcement operations. The need to rapidly access these files coupled with administrative and operational requirements of the criminal justice agencies have created a priority requirement to improve telecommunications. Federal, State, and local criminal justice elements have determined in recent years, that there is a need to create appropriate data bases and communications links. At the present time, the National Law Enforcement Telecommunications System (NLETS) and the FBI National Crime Information Center (NCIC) network function separately in serving as national networks for law enforcement agencies at all levels.

(a) National Law Enforcement Telecommunication System (NLETS)

To permit effective communications among criminal justice agencies NLETS provides telecommunication links for the States and local users. Although a private corporation, NLETS membership consists of State representatives and includes associate members from Federal and other organizations. NLETS does not maintain or operate data bases but only provides telecommunication links to data maintained by the States. For example, specific vehicle information may be available from the State Motor Vehicle Bureau. NLETS, in cooperation with the States telecommunication systems, allows access by any one of its users in other areas of the country. NLETS provides the capability to route messages (message switch) among network users. The advantage to this type of message transfers is that more than one user may be designated as the recipient of a type or class of message.

(b) FBI—National Crime Information Center (NCIC)

Since 1967 the Federal Bureau of Investigation has operated the NCIC network which provides access to selected data bases. NCIC contains data on wanted persons, stolen and lost property (motor vehicles, boats, securities, etc.), missing persons, as well as the controversial computerized criminal history (CCH) files. The National Crime Information Center, which serves Federal, State, and local criminal justice agencies, permits direct access to only NCIC files. [See Figures 1 and 2 for a map of network and content of NCIC files.]

The FBI, while serving as a repository for this critical information, does not generate all of the data. The data and records are input by the "originating agency", which in many instances is the State or local law enforcement agency. NCIC, while providing certain system standards and guidelines, relies on appropriate input from the users. Reliable access to and transmission of data are essential requirements of the NCIC network. To improve and expand the operation of NCIC the FBI has identified the need to route messages among users so that it will permit effective and rapid transmission of the information.

II. MESSAGE SWITCHING

The controversy surrounding message switching stems from some basic concerns regarding the transmission of data that may impact on the personal lives of individuals. The control and monitoring of criminal justice networks and data bases have become important factors in a democracy.

Message switching, basically, permits the transmission and routing of information in a telecommunication network without manual interference. In a computerized network, which has message switching, it is possible to forward information, using prescribed conventions, to one or more terminals on the network. For example, an "all points bulletin (APB)" may be sent to reach all terminal points or a message may be limited to a designated terminal or groups of terminals on that same network. In brief, message switching expedites communication within a network or telecommunication system. Not only does it allow specific records or files to be transmitted but it provides the means for essential administrative and operational messages to be routed.

(a) FBI message switching plans

In the mid 1970s the FBI requested approval for developing a limited message switching capability. The proposal for NCIC limited message switching implementation plan, released in April 1975 by the U.S. Department of Justice, outlined the restrictions and limitations of this capability. The FBI had arrived at an agreement with National Law Enforcement Telecommunication Systems that this limited message switching would not "supplant" NLETS. In the implementation plan the NCIC noted its support for NLETS handling of non-NCIC related criminal justice telecommunication traffic.

Even this limited message switching capability would make the NCIC more responsive to user needs. The implementation of a message switching capability, as noted in the FBI plan, "would allow NCIC users to take advantage of the NCIC telecommunications network to transmit and receive messages to and from other NCIC users." The revised implementation plan for NCIC message switching specifically outlines types of messages to be transmitted. (See appendix A).

On May 19, 1977 the Deputy Attorney General, Peter F. Flaherty, in a memo to the FBI Director, Clarence M. Kelley, approved the FBI limited message switching. The applications involving the NCIC network that have been approved include the following: (1) switching messages relating to NCIC files unrelated to CCH (computerized criminal histories) file, and (2) switching messages at the request of NLETS to and from remote localities, such as Puerto Rico.

This authorization should allow the transmission of messages between the United States and the Canadian Police Information Center in Ottawa, Canada. In addition, selected elements within the Department of Defense (DoD) and the Drug Enforcement Administration (DEA) have expressed interest in accessing NLETS for law enforcement purposes. The May 19, 1977 approval will assist in facilitating these exchanges, and it will be limited to non-CCH files for the present.

(b) Technical Limitations

While the authorization of limited message switching within the NCIC network is an essential step there may be an additional and implied requirement to

improve the system technically. Although it is possible for the NCIC system configuration to accomplish limited message switching at this time future requirements may place the system in difficulty and then it may be essential to augment the present system capacity with additional telecommunications equipment.

III. MAJOR ISSUES AND CONCERNS

While some aspects of the total impact of FBI limited message switching are not fully understood at present, it is reasonable to assume that expanding the criminal justice telecommunications capability will require additional Congressional oversight. The recent approval of message switching for the NCIC network calls attention to several broad issues that require some consideration.

(*a*) *Privacy and civil liberties*

There are certain dangers inherent in the use of uncontrolled technologies by the criminal justice community. Unwarranted surveillance and data collection by law enforcement groups has made Congress aware of the potential that these activities have infringing on personal privacy and creating an atmosphere in conflict with the precepts of a free society. (See Appendix B Privacy: Implications of Information Technology.)

Congress has expressed, both through legislation and selected oversight actions, a desire to bring law enforcement activities in line with our traditions and beliefs. Over the years Congress has debated the critical issues of privacy and the legitimate needs of the law enforcement community. Balancing the needs of the individual and society for the protection of privacy while permitting appropriate criminal justice activities to continue has been a matter of critical concerns.

(*b*) *Shared responsibility for law enforcement*

Providing the FBI with the potential to control and monitor messages within the criminal justice community raises the spectra, real or apparent, of a Federal agency possibly gaining control over the lives of individuals and perhaps increasing the dependence of State government law enforcement on the Federal.

Even the present limited message switching across the criminal justice network may provide an additional danger in that it gives the Federal Government greater advantages in the traditionally shared law enforcement responsibility.

(*c*) *Controlling international data exchanges*

The message switching capability as outlined in the Department of Justice memo (Flaherty to Kelley, May 19, 1977) would allow the flow of criminal justice information across an international border, thus providing an important precedent that could shape future policy in this area. It is not clear at this time whether the data transfers to Canada would be strictly limited to NCIC information or if they would include other criminal justice intelligence.

Some of the dangers of the trans-border flow of data of this kind include difficulty of controlling access as well as maintaining security in such a system. There is the added danger that the utilization of the information by a foreign power may not always be in keeping with our policies. There are also some inherent dangers in developing additional resources for monitoring other data in the network.

(*d*) *Management of telecommunication resources*

Congressional concern with the effective management of computers/communication networks is also impacted by the recent approval and requirement of limited message switching. The need to develop a comprehensive telecommunication plan for the Federal and related criminal justice community may be essential to future implementation direction. The Department of Justice has recently requested approval to purchase equipment to implement the JUST system, a telecommunication network serving other criminal justice elements. This system, future augmentation of NCIC and NLETS, as well as other law enforcement related systems such as Department of Treasury TECS systems will require some cooperative and coordinated efforts on the part of those in the Federal and State criminal justice community.

The strengthening of computer and telecommunication resources management is generally recognized as being critical. In addition, the active participation of responsible law enforcement agencies in some of the decisions might be considered.

(e) Congressional considerations

The complexity of the problems and the difficulties associated with managing responsibility for criminal justice information and communication requirements requires additional examination:

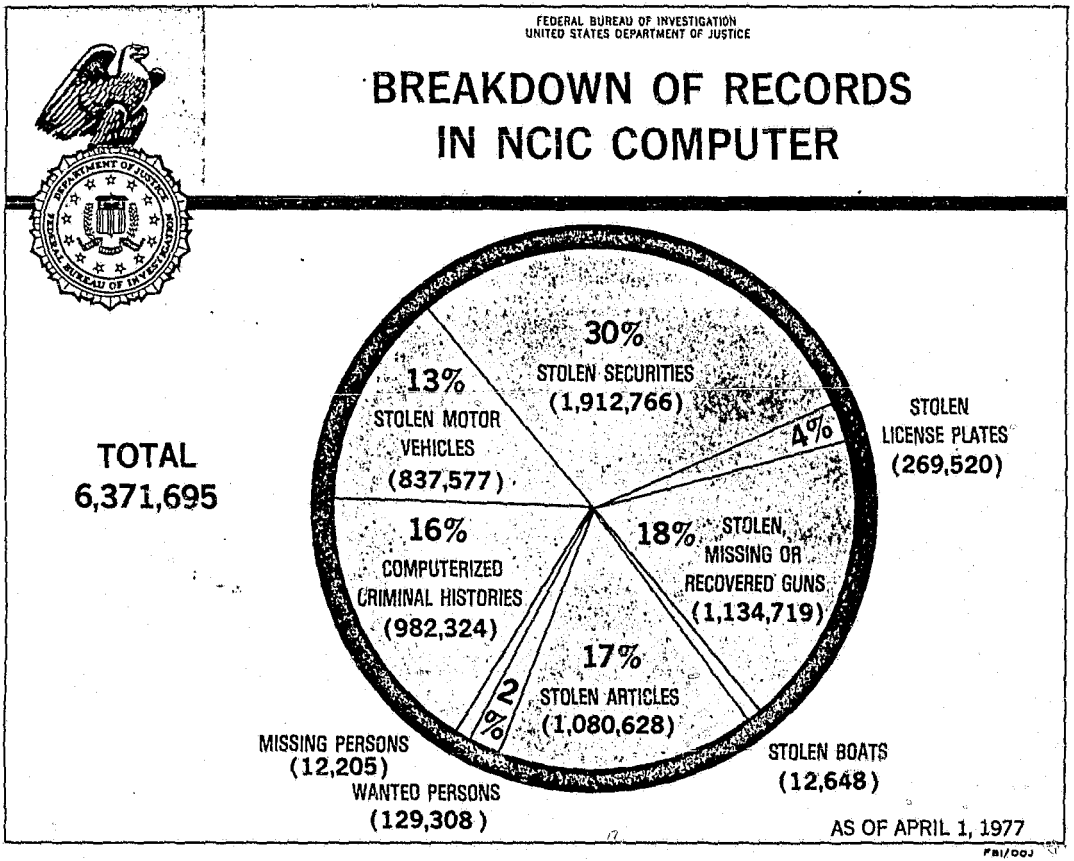
What coordinative efforts and management controls are needed to ensure adequate resources management for telecommunications in the criminal justice community?

What controls and oversight are needed to ensure good management and appropriate operation of criminal justice telecommunication system?

Are there significant safeguards and guidelines in the present criminal justice computer/communication system to fully protect the validity, reliability, and security of the information? Do these safeguards protect the individual from unwarranted and nonessential surveillance?

What controls can be placed on data transmitted internationally that will protect individual rights and ensure adequate protection of the files?

What means will insure comprehensive and continued oversight of critical computer/communication networks?



APPENDIX A Figure 1

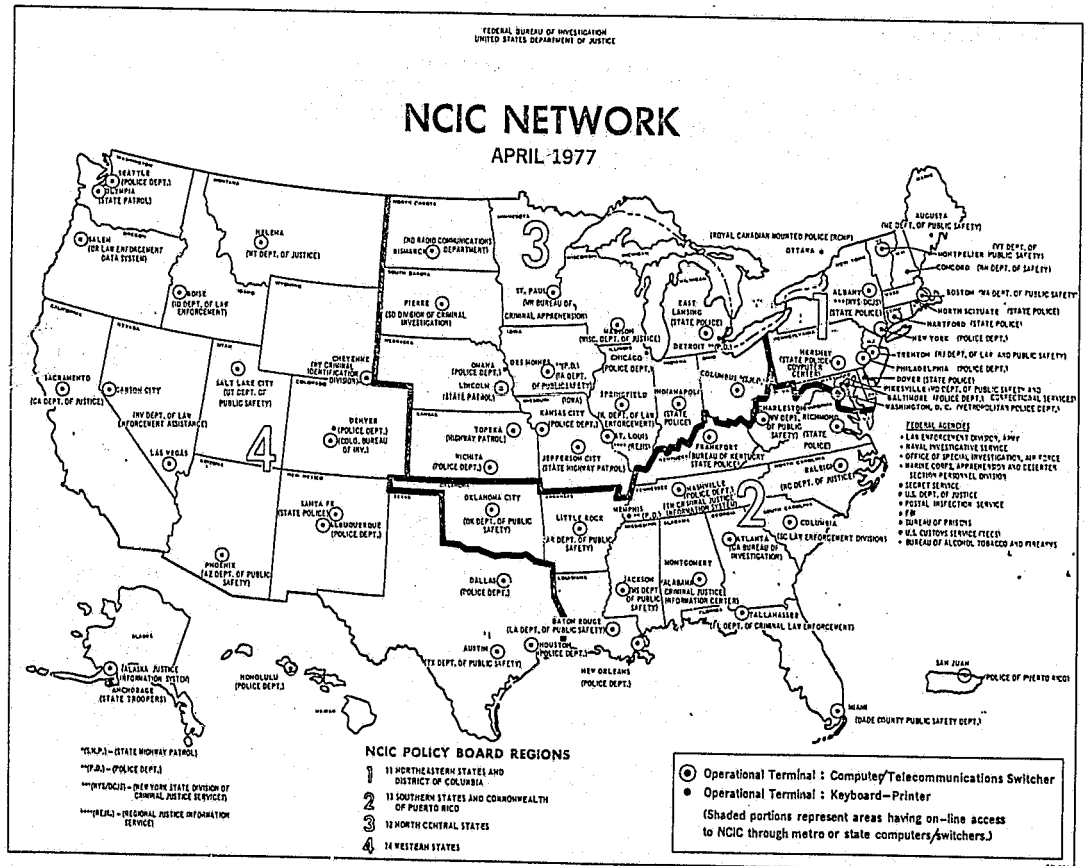

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
NCIC NETWORK
APRIL 1977
NCIC POLICY BOARD REGIONS
1 11 NORTHEASTERN STATES AND DISTRICT OF COLUMBIA
2 13 SOUTHERN STATES AND COMMONWEALTH OF PUERTO RICO
3 12 NORTH CENTRAL STATES
4 14 WESTERN STATES
Operational Terminal : Computer/Telecommunications Switcher
Operational Terminal : Keyboard–Printer
(Shaded portions represent areas having on-line access to NCIC through metro or state computers/switchers.)
FEDERAL AGENCIES
• LAW ENFORCEMENT DIVISION, ARMY
• NAVAL INVESTIGATIVE SERVICE
• OFFICE OF SPECIAL INVESTIGATION, AIR FORCE
• MARINE CORPS, APPREHENSION AND DESERTER SECTION PERSONNEL DIVISION
• SECRET SERVICE
• U.S. DEPT. OF JUSTICE
• POSTAL INSPECTION SERVICE
• FBI
• BUREAU OF PRISONS
• U.S. CUSTOMS SERVICE (TECS)
• BUREAU OF ALCOHOL TOBACCO AND FIREARMS

Figure 2

APPENDIX A

U.S. DEPARTMENT OF JUSTICE, NATIONAL CRIME INFORMATION CENTER—PROPOSED LIMITED MESSAGE SWITCHING IMPLEMENTATION PLAN

PREFACE

The purpose of this implementation plan is to set forth a proposed method of switching National Crime Information Center (NCIC)-related messages over the NCIC telecommunications network.

In an effort to upgrade the NCIC system and be responsive to the needs of its users, the FBI requested the approval of the Attorney General to implement a message switching capability which would allow NCIC users to take advantage of the NCIC telecommunications network to transmit and receive messages to and from other NCIC users.

On October 1, 1974, the Deputy Attorney General by letter to the Director, FBI, advised ". . . it is deemed appropriate for the FBI to engage in limited message switching . . ."

The Deputy Attorney General's letter further stated: "Any action to implement this decision, however, must be preceded by the establishment and approval of an implementation plan . . ."

As will be seen by the subsection entitled "Implementation Plan Time Table," the implementation plan is to receive wide distribution among interested local, state and Federal agencies prior to review by the Attorney General for his action.

In seeking limited message switching capability, it is neither the intent nor desire of NCIC to supplant the National Law Enforcement Telecommunications Systems, Inc. (NLETS). NCIC is fully supportive of NLETS handling non-NCIC-related criminal justice telecommunications traffic.

There follows a proposal for the implementation of a limited message switching capability on the NCIC telecommunications network.

TYPES OF MESSAGES TO BE TRANSMITTED OVER THE NCIC TELECOMMUNICATIONS NETWORK

The following are the types of messages which can be transmitted over the NCIC telecommunications network. The definitions of these message types have been agreed upon by members of the NCIC Advisory Policy Board and the Board of Directors of the National Law Enforcement Telecommunications Systems, Inc. (NLETS):

1. Messages transmitted to the files of NCIC and the NCIC responses thereto.
2. Messages transmitted to or from NLETS terminals at NLETS' request.
3. (*a*) Switching of formatted confirmation of hits on NCIC files. (*b*) Switching of CCH inquiries and responses. (*c*) Switching of formatted criminal history inquiries and manual responses. (*d*) Switching of formatted messages with minimum free text for supplemental criminal history record information.
4. (*a*) NCIC-related management and operational messages transmitted from NCIC control terminal agencies to NCIC. (*b*) NCIC-related management and operational messages transmitted from NCIC to NCIC control terminal agencies. (*c*) NCIC-related management and operational messages transmitted from NCIC control terminal agencies to NCIC control terminal agencies. (*d*) Automatic notification (e.g., $.8., $.11., etc.).

The following discussions and examples of each message type are furnished to further describe and clarify the types of messages to be transmitted over the NCIC network:

Message type 1

This type of message is used by an agency to transmit entry, clear, cancel, locate, modification, and inquiry transactions to the NCIC files and by NCIC to transmit responses to the incoming messages (i. e., acceptance, rejection, positive response ("hit") and "no record" response).

Examples of type 1 messages are:

(1) The entry of a record in any file and NCIC's acceptance or rejection of such an entry;

(2) The modification of an existing record in any file and NCIC's rejection or acceptance of the message; and

(3) An inquiry of any file with NCIC's positive response, "no record" response, or rejection of the inquiry.

Message type 2

This type of message is free text and is used as an assist to NLETS in transmitting messages to/from agencies approved by NLETS to access its system through NCIC facilities.

Examples of type 2 messages are:

(1) The transmission of data from the Alaska NCIC terminal through the NCIC computer to the NLETS switcher in Phoenix, Arizona; and

(2) The transmission of data from the NLETS switcher in Phoenix, Arizona, through the NCIC computer to the Alaska NCIC terminal.

Message type 3(a)

This type of message is formatted and used by an inquiring agency to request confirmation of information received as a result of an operational inquiry of an NCIC file from an entering agency and for the entering agency to transmit confirmation data back to the inquiring agency.

Examples of type 3(a) messages are:

(1) An inquiring agency, following receipt of a positive response to an operational inquiry to any file, transmits a formatted message to the entering agency to determine if its record is still valid and requests details; and

(2) An entering agency transmits a formatted message to an inquiring agency regarding the status of the entering agency's arrest warrant.

Message type 3(b)

This type of message is used by an agency to obtain the details of a single-state offender indexed in the Computerized Criminal History (CCH) File and whose record is stored at the state level. It is also used by a state of record to transmit the details of a CCH record to an inquiring agency.

Examples of type 3(b) messages are:

(1) An agency transmits an inquiry through NCIC to the state of record requesting the details of a single-state offender's CCH record; and

(2) The state of record transmits the details of a single-state offender's CCH record through NCIC to an inquiring agency.

Message type 3(c)

This type of formatted message is to be used by an agency to request of another agency a noncomputerized criminal history record. It is also to be used by an agency possessing the noncomputerized criminal history record to transmit the details of the record to an inquiring agency.

Examples of type 3(c) messages are:

(1) An agency transmits a formatted request to another agency for a noncomputerized criminal history record; and

(2) The agency of record transmits a formatted criminal history record to an inquiring agency.

Message type 3(d)

This type of formatted message is to be used by an agency to transmit a request to another agency for more detailed criminal history information than it received in message types 3(b) and 3(c). It is also to be used by the agency of record to transmit to an inquiring agency more detailed criminal history information than transmitted in message types 3(b) and 3(c).

Examples of type 3(d) messages are:

(1) After an inquiring agency transmits a type 3(b) or 3(c) message, receives a response, and desires more detailed information, it transmits a request for those details; and

(2) An agency of record transmits information concerning a criminal history which is more detailed than that transmitted under messages 3(b) or 3(c), such as pretrial data.

Message type 4(a)

This type of message is free text and used by any control terminal agency to transmit NCIC-related management and operational messages to NCIC.

An example of type 4(a) message would be when an NCIC control terminal agency transmits a request to NCIC for the specifications for a high-speed interface with the NCIC computer.

Message type 4(b)

This type of message is free text and used by NCIC to transmit NCIC-related management and operational messages to any control terminal agency.

An example of type 4(b) message would be when NCIC responds to a request from an NCIC control terminal agency for the specifications of a high-speed interface with the NCIC computer.

Message type 4(c)

This type of message is free text and is used by control terminal agencies to transmit NCIC-related management and operational messages to other control terminal agencies.

An example of type 4(c) message would be when one NCIC control terminal agency advises one or more NCIC control terminal agencies of the date and location of an NCIC regional meeting.

Message type 4(d)

This type of message is used by NCIC to automatically notify an agency of activity against an NCIC file which is of interest to that agency.

Examples of type 4(d) messages are:

(1) The automatic notification to an entering agency that another agency has inquired against its record; and

(2) The entry message by State A of a stolen vehicle, which is registered in State B, is transmitted to State B.

Criminal Justice Information Systems Appendix B

(By Becker, Louise, Science Policy Research Division)

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Issue definition

The development and automation of criminal justice information systems (CJIS) at the Federal, State, and local levels have caused considerable concern. These systems often contain sensitive personal data, such as arrest records, corrections information, and intelligence/investigatory data, which, if misused, may cause the individual harm or embarrassment. The maintenance and handling of criminal justice records are often the responsibility of three Government entities—law enforcement, corrections, and the courts. The independent nature of these entities presents some problem with regard to the development of adequate regulations and controls, as well as the additional requirement to create appropriate standards. The introduction of computers and modern communications to handle this information has contributed to public concern and suspicion. Balancing the legitimate information needs of the criminal justice community, protecting personal privacy of the individual, and allowing access by the press and public to records have been major concerns of those responsible for controlling and administering criminal justice information systems.

Background and policy analysis

With the increase in criminal activity, law enforcement and related agencies have moved to utilize modern tools and techniques to meet what many see as an increasingly critical situation. In 1967, the President's Commission on Law Enforcement and Administration of Justice report, "The Challenge of Crime in a Free Society," encouraged the use of computers and other technologies to assist the criminal justice community. The Commission quickly recognized the need to establish safeguards in criminal justice information systems (CJIS) to protect the individual. They noted that the potential misuse and abuse of these data, as well as the incompleteness or inaccuracies in records, could cause immeasurable harm.

Further encouragement to the development of computer-communication networks came about with the passage of the Omnibus Crime Control and Safe Streets Act of 1968, which established the Law Enforcement Assistance Administration (LEAA). In an effort to improve and modernize criminal justice agencies, LEAA has supported the development of computerized information systems. [For further information concerning LEAA see Issue Brief IB76002, Crime: Law Enforcement Assistance Administration (LEAA).]

A parallel development has been the Federal Bureau of Investigation (FBI) National Crime Information Center (NCIC), which serves as a law enforcement information network. NCIC, established in 1967, interconnects a centralized computer center in the Washington, D.C., area with terminals located in law

enforcement agencies throughout the country. Select Federal criminal justice agencies also have limited access to this system. NCIC files contain information on wanted and missing persons, as well as stolen property such as motor vehicles, boats, guns, securities, and license plates. In addition, NCIC contains the controversial computerized criminal history (CCH) file. Currently, CCH has over 750,000 records on individuals, and eight States—Arizona, California, Florida, Illinois, Michigan, Nebraska, North Carolina, and Virginia—supply the FBI with their State criminal history records. Planning and safeguards for NCIC are specified by the NCIC administrators and the NCIC Advisory Policy Board. At the semiannual meeting of the Board in New Orleans on April 26 and 27, 1976, it was announced that FBI Director Clarence Kelley had requested authorization from the Attorney General to terminate FBI participation in the CCH program. There has been considerable concern over both the CCH system and the FBI message-switching plan. Computerized message-switching would allow the transmission and routing of criminal justice information between State criminal justice agencies computers via NCIC lines and therefore permit *most* CCH files to be stored at the State level. This would allow for decentralization of most CCH files. NCIC, with regard to the CCH file, will, in most cases, contain only an index. This computerized communication network, which would control criminal justice information between States, has caused concern that it might lead to the creation of a powerful centralized national police force. The Attorney General, Edward H. Levi, has deferred action on the FBI request for message-switching pending approval by Congress of legislation controlling CJIS. At this time there has not been any reaction from the Attorney General on this recent request concerning CCH. Much of present-day law enforcement message-switching is being handled by the National Law Enforcement Telecommunication Systems (NLETS). This system provides a computer-switching communications network that links local and State law enforcement agencies in the United States and select Federal agencies. This system is controlled by participating member States and receives support from the Law Enforcement Assistance Administration.

The problems of security and privacy of criminal justice information have also been examined by the LEAA-supported SEARCH Group, Inc. (formerly Project SEARCH). This group, composed of representatives of 50 States and the U.S. possessions, has taken an active role in providing guidelines in developing privacy and security elements in criminal justice information systems. The SEARCH document "Considerations in Criminal History Information Systems," which outlines some of the safeguards with regard to data content, use, dissemination, and rights of challenge and access, has had a major impact on legislation pending before Congress. More recently, SEARCH issued a report, Standard for Security and Privacy of Criminal Justice Information (Technical Report no. 13).

In the 93d Congress, the Omnibus Crime Control and Safe Streets Act of 1968 was amended by the Crime Control Act of 1973, P.L. 93–83 (87 Stat. 197; 42 U.S.C. & 3701 et. seq., Aug. 6, 1973) to provide for security and privacy of selected CJIS. On May 20, 1975, the Department of Justice issued regulations "governing the dissemination of criminal records and criminal history information." These regulations provide privacy safeguards of individual records in files maintained and administered by the FBI, criminal justice agencies receiving funding from LEAA, and interstate, State, or local agencies exchange of records. One of the major objections to the regulations issued on May 20, 1975, was the issue of dedicated vs. shared computer systems. Many of the States, because of economic considerations, have computer facilities shared by a number of their State agencies. Often these facilities are managed and controlled by an administrative agency. On Oct. 24, 1975, the Department of Justice modified the original proposed regulations so that shared facilities would be allowed if proper precautions were taken. In the proposed regulation, management and access to CJIS would still remain under control of a criminal justice agency.

The Department of Justice held hearings on Dec. 11, 12, 15, 1975, to determine whether the regulations were adequate regarding the limitations on the dissemination of criminal history record information to non-criminal justice agencies. The purpose of the hearings was to assess whether the present regulations provided the proper balance between the public's right to know such information and the individual's right to privacy. The amended regulations, issued Mar. 19, 1976, do not prohibit dissemination of conviction data and criminal history record information relating to offenses for which an individual is currently within the criminal justice system. The regulations do not prohibit the dissemination of criminal history records for the purpose of international travel (e.g., issuing

visas and granting citizenship). After Dec. 31, 1977, the regulations require that dissemination of nonconviction record information to those other than criminal justice agencies would require specific authorization statute or order. The amended regulations do not cover court records of public judicial proceedings, regardless of whether those records are accessed chronologically or alphabetically.

An additional development has been a reexamination by the courts of law enforcement agencies' responsibilities in transmitting accurate and reliable data.

Until recently, courts have generally been reluctant to interfere with the administrative discretion of law enforcement agencies in the dissemination and maintenance of criminal files, and have, therefore, been slow to limit use of files or to permit remedies to alleviate hardships caused by unnecessary or inaccurate records. *Menard* v. *Saxbe*, 498 F.2d 1017, decided by the U.S. Court of Appeals for the D.C. Circuit in 1974, marked the first time that a court required expungement of FBI files. In that case, the Court ended a 9-year struggle by Menard to remove his arrest record from the FBI, by ruling that the FBI had no authority to retain the arrest record once it had been notified by local police that the detention of the plaintiff was not an arrest. Menard had been arrested by Los Angeles Police on suspicion of burglary and released without charges after two days, when they failed to find any evidence to connect him with any crime.

In its opinion, the Court of Appeals found that the FBI's identification records were "out of effective control," since there were no methods to check accuracy of information submitted by the agencies or to provide followup to assure that records of arrest were amended to show an ultimate non-criminal disposition. Despite the possibility of inaccuracies in the data, the FBI, was found to have actively disseminated records received throughout the nation. The Court held that the Bureau had a responsibility as keeper and distributor of identification records to assure that those records are "reliably informative," when, as in the case of arrest records and criminal files such records could have a substantially detrimental effect on record subjects.

The same court expanded the FBI's responsibility in a more recent case. *Tarlton* v. *Saxbe*, when it decided in 1974, 507 F.2d 1116, to include a duty to safeguard the accuracy of its files. The FBI was found to have a duty to prevent dissemination of inaccurate arrest and conviction records and must take reasonable precautions to prevent inaccuracy. It was recognized that the specific nature of the duty would vary as to the particular role that the Bureau would play in the collection and dissemination of the criminal information in the Federal system and the practicalities of judicial administration and executive efficiency.

The Court suggested that the lower court could consider whether the FBI should forward records to the originating law enforcement agency for comment or contradiction, upon the request of the record subject detailing allegations of inaccurate entries, whether local law enforcement agencies should be required to forward to the FBI the final disposition of the case, and whether it was feasible to allow the record subject direct access to his FBI files to examine them for errors. This case is significant in that it provides precedent for greater judicial supervision and control of criminal records, and would permit application of remedies beyond those provided by specific statutes.

On Feb. 20, 1976, the U.S. District Court (*Tarlton* v. *Saxbe*) held that challenges to FBI criminal records must ordinarily proceed first before the appropriate local agencies or courts. In addition, the court ruled that the FBI has the responsibility to forward such challenges to proper local channels for consideration, and that a pending challenge need not be reflected on an individual FBI criminal record. Upon conversion to computerized files, the dissemination of FBI criminal records for all individuals over age 35 must delete non-serious offenses. The court ruled that year-old arrest records without dispositions may presently be disseminated for law enforcement purposes. The FBI was ordered to conduct a feasibility study relating to methods to keep disposition entries on criminal records reasonably current.

Most recently, the Supreme Court [*Paul* v. *Davis* (49 Law Week 4337)] held that an individual was not deprived of his rights under the 14th amendment because of the dissemination of his arrest record. In this case, the arrest record was circularized before final action. The court held no damages could be recovered despite the police department's characterization of the plaintiff as an "active shoplift." (Subsequently, the charges against the individual were dropped.)

Recent events have served to focus public attention upon the potential dangers inherent in surveillance activities, data banks, and intelligence activities by the criminal justice community. Congress has begun to examine the legitimate needs

of the law enforcement community and the proliferation of criminal justice information files. Five problem areas have been identified as meriting consideration:

(1) How can all criminal justice records be made secure and confidential, as well as accurate and complete?

(2) What controls must be established to prevent misuse of information within the criminal justice community?

(3) What procedures can be implemented to regulate criminal justice information outside criminal justice agencies?

(4) Can appropriate measures be established to control the development and operation of intelligence and investigatory records?

(5) What special controls on criminal justice information, especially those systems that handle personal data, must be instituted?

In the 92d and 93d Congresses, several bills were introduced that focused upon arrest records and the regulation of criminal justice information systems. Hearings were held by Senate and House Judiciary Committees on this subject. In the closing days of the 93d Congress, Sen. Sam Ervin (D–N.C.) (then chairman of the Senate Judiciary Subcommittee on Constitutional Rights) introduced S. 4252, "Criminal Justice Information Control and Protection Act of 1974." This bill was subsequently introduced in the 94th Congress as S. 1427 (Tunney) and H.R. 62 (Edwards of Calif.). In addition, the bill supported by the Department of Justice (S. 1428 (Tunney)/H.R. 61 (Edwards of Calif.)) was introduced. The Justice bill and the others are similar in intent, but have some significant differences in approach. Basically, the bills provide for the control and monitoring of criminal justice information systems. The purpose is to protect the individual's right of privacy and to allow the collection, use, and dissemination of criminal justice data to be controlled. The Justice Department bill (S. 1428/H.R. 61), would encourage the responsible exchange of complete and accurate criminal justice information. This bill would place administrative and operation controls with the criminal justice agencies. S. 1427/H.R. 62 would focus administrative and operational controls in a Criminal Justice Information Systems Board. This board would have authority to develop and oversee the enforcement of procedures and regulations. More recently, S. 2008 (Tunney)/H.R. 8227 (Edwards of Calif.) was introduced, which, although similar to S. 1427/H.R. 62, places some controls in a criminal justice commission. This commission would have a limited life span and powers.

Hearings were held on these bills in mid-July by the Senate and House subcommittees of the Committee on the Judiciary.

The Privacy Act of 1974 excludes criminal justice information systems. There has been consideration in Congress of legislation to amend the Privacy Act to include the Federal Bureau of Investigation, as well as other law enforcement agencies. (See Issue Brief IB74105, Privacy: Implications of Information Technology).

Since the administration of law enforcement and criminal justice is primarily the responsibility of State and local governments, some of the activity to improve the administration of CJIS has been concentrated in State Government. Several States have considered laws dealing with the security and privacy of CJIS. For example, Massachusetts, Alaska, and Iowa have legislation in this area. These State bills have placed some responsibility for monitoring CJIS in the hands of a commission, council, or board. A number of the States have expressed concern over the Federal regulation of CJIS, specifically over dedicated vs. shared computers.

One of the key issues has been the use of shared vs. dedicated computer systems to handle criminal justice information. A dedicated system generally implies that a computer and related equipment are used for one purpose or by one user. On the other hand, a shared system may provide computer capability to a number of users or groups. Shared computer systems may provide a wide range of services, from a batch mode (one job at a time) to concurrent processing in real time and on-line (direct access by the user to the computer). The controversy in using shared systems stems from the difficulty in providing adequate computer security. In addition, some States' data processing functions are centralized. The decision to have a dedicated computer systems to handle criminal justice information is now left to the State.

The above mentioned opposition to the Department of Justice regulations has been met in part by the Oct. 24, 1975, revision of regulations, discussed above.

Legislation

Several bills that impose standards for the security, accuracy, and confidentiality of criminal justice information were introduced in the 94th Congress.

These bills provided for the protection of rights and privacy of individuals, and the control of the collection and dissemination of criminal justice information.

S. 1428 (Tunney)/H.R. 61 (Edwards of Calif., for the Dept. of Justice), the Criminal Justice Information Control and Protection Act of 1975, required records on individuals to be accurate and complete, and to be administered by the criminal justice agencies.

S. 1427 (Tunney)/H.R. 62 (Edwards of Calif.), the Criminal Justice Information Control and Protection Act of 1975, centered administration and control in the Commission on Criminal Justice Information.

S. 2008 (Tunney)/H.R. 8227 (Edwards of Calif.), the Criminal Justice Information Control and Protection Act of 1975, created a Commission on Criminal Justice Information with overall administration and enforcement powers, but with a 5-year life span.

H.R. 2635 (Abzug) amended the Privacy Act of 1974 by eliminating various exemptions now contained in the law. In addition, provisions dealt with the individual's right to request corrections in his records.

No further action was taken in the 94th Congress on these bills.

Hearings

U.S. Congress. House. Committee on the Judiciary. Subcommittee No. 4. Security and privacy of criminal arrest records. Hearings, 92d Congress, 2d session, on H.R. 13315. [Washington, U.S. Govt. Print. Off., 1972] 520 p.

Hearings held Mar. 16, 22, 23; Apr. 13 and 26, 1972.

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Civil Rights and Constitutional Rights. Dissemination of criminal justice information. Hearings, 93d Congress, 1st and 2d sessions, on H.R. 188, H.R. 9783. H.R. 12574 and H.R. 12575 [Washington, U.S. Govt. Print. Off., 1974] 586 p.

Hearings held July 26; Aug. 2; Sept. 26; Oct. 11, 1973; Feb. 26 and 28; Mar. 5 and 28; Apr. 3, 1974.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitutional Rights. Criminal justice data banks—1974. v. I and II Appendix. Hearings, 93d Congress, 2d Session, on S. 2542, S. 2810, S. 2963, and S. 2964. [Washington, U.S. Govt. Print. Off, 1974] 1149 p.

Hearings held Mar. 5–7, and 12–14, 1974.

Criminal Justice Information and Protection of Privacy Act of 1975. Hearings, 94th Congress, 1st session, on S. 2008, S. 1427, and S. 1428. July 15–16, 1975. Washington, U.S. Govt. Print. Off., 1975, 311 p.

Chronology of events

03/19/76—Additional amendments to U.S. Dept. of Justice proposed regulations to Subpart A and B were published [Federal Register (41 FR 11714)].

11/10/75—Attorney General deferred action on FBI message switching plan pending approval of Congress on criminal justice information legislation.

10/24/75—Amendment to U.S. Dept. of Justice proposed regulations on criminal history records [Federal Register (28 CFR Part 20)].

05/20/75—U.S. Dept. of Justice proposed regulations on criminal history records and information [Federal Register (40 FR 2114)].

04/14/75—FBI proposed message-switching plan was submitted.

12/31/74—Enactment of the Privacy Act Plan of 1974 (P.L. 93–579).

03/22/74—SEARCH Group Inc. (formerly Project SEARCH) established.

03/00/74—GAO was requested by the Senate Subcommittee on Constitutional Rights to examine the use of criminal history information by criminal justice agencies.

02/23/74—President Nixon created the Domestic Council Committee on the Right of Privacy, headed by Vice President Ford.

08/06/73—The Crime Control Act of 1973 (P.L. 93–83), Amendment to Omnibus Crime Control and Safe Streets Act of 1968, was passed.

01/23/73—LEAA National Advisory Commission on Criminal Justice Standards and Goals final report "Criminal Justice System" issued.

01/16/73—GAO report issued on the "Development of a Nationwide Criminal Data Exchange System—Need to Determine Cost and Improvement (B–171019)."

10/20/70—LEAA created the National Advisory Commission on Criminal Justice Standards and Goals.

07/00/70—Project SEARCH Committee on Security and Privacy issued report, "Security and Privacy Considerations in Criminal History Information Systems."

03/30/69—Project SEARCH (System for Electronic Analysis and Retrieval of Criminal History) commenced 18-month effort to develop a prototype computerized Criminal Justice system.
06/19/68—Passage of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351).
00/00/67—Commission on Law Enforcement and Administration of Justice issued report, "Challenge of Crime in a Free Society."
01/27/67—F.B.I. established the National Crime Information Center (NCIC).
07/23/65—Executive Order 11236 established the Commission on Law Enforcement and Administration of Justice.

Additional reference sources

Becker, Louise Giovane, Congressional interest in security and privacy of criminal justice information systems. In Proceedings 1975 Carnahan Conference on Crime Countermeasures, May 7-9, 1975. [Lexington, Ky., College of Engineering, University of Kentucky, 1975] p. 1-8.

Project SEARCH. Committee on Security and Privacy. Security and privacy considerations in criminal history information systems. Technical Report No. 2, July 1970. [Sacramento, Calif., California Crime Technological Research Foundation, 1970] 55 p.

SEARCH Group, Inc. Standards for security and privacy of criminal justice information. Technical Report no. 13. Sacramento, Calif. [1975] 30 p.

U.S. General Accounting Office. How criminal justice agencies use criminal history information; Report to the Senate Subcommittee on Constitutional Rights, Committee on the Judiciary, by the Comptroller General of the United States. [Washington, 1974]. (B-171019 Aug. 19, 1974)

U.S. Law Enforcement Assistance Administration. National Advisory Commission on Criminal Justice Standards and Goals, Criminal justice system. [Washington, U.S. Govt. Print. Off., 1974.] 286 p.

U.S. President, 1963-1969 (Johnson). Commission on Law Enforcement and Administration of Justice. The challenge of crime in a free society. [Washington, U.S. Govt. Print. Off., 1967.] 340 p.

—— Task Force Report: Science and Technology. Prepared by the Institute for Defense Analyses. [Washington, U.S. Govt. Print. Off., 1967] 228 p.

Mr. Moss. It has been recognized that the control and monitoring of criminal justice networks and data bases are essential factors in a democracy. These networks and data bases have grown like mushrooms in recent years, as Government has extracted massive quantities of information from individuals, often under penalty of law. Transmission of this data has become an awesome power. It must be controlled, and carefully monitored, for the abuse potential is great.

The ability to message-switch is the ability to transmit data, including mere accusations or inquiries, to all points of the compass; the largest single network for criminal information is the FBI's National Criminal Information Center.

The FBI has long sought permission to use its computers and NCIC in a message-switching fashion. In 1975 permission was sought. In the Congress certain Members, including myself, vehemently opposed such a grant of authority to the FBI. At that time, with the help of then President Ford and the cooperation of the then Attorney General Levi, both showing considerable sensitivity to the issues of privacy that had been raised by the Members of Congress, the permission sought by the FBI was denied.

At this point in the record, Mr. Chairman, I wish to offer the correspondence and the resulting press comment on that proposal for message switching. I would offer that as exhibit No. 2.

Mr. PREYER. Without objection, exhibit No. 2 will be admitted into the record.

[Exhibit No. 2 follows:]

EXHIBIT NO. 2

JOHN E. MOSS
3RD DISTRICT
SACRAMENTO, CALIFORNIA

ADMINISTRATIVE ASSISTANT
JACK MATTESON

LEGISLATIVE ASSISTANT
PATRICIA LYNCH

WASHINGTON OFFICE:
ROOM 2354
RAYBURN HOUSE OFFICE BUILDING
PHONE (202) 225-7163

DISTRICT OFFICE:
DISTRICT REPRESENTATIVE
JERRY WYMORE
8058 FEDERAL BUILDING
650 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814
PHONE (916) 449-3543

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

GOVERNMENT OPERATIONS COMMITTEE
SUBCOMMITTEES:
LEGISLATION AND NATIONAL SECURITY
GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS

DEMOCRATIC STEERING AND POLICY COMMITTEE

INTERSTATE AND FOREIGN COMMERCE COMMITTEE:
CHAIRMAN,
OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE

JOINT COMMITTEE ON ATOMIC ENERGY

June 11, 1975

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

As Vice President and chairman of the Committee on Privacy, you played an effective and active role in probing and preventing unauthorized government invasions of privacy. With this in mind, I wish to register with you my grave apprehensions over just such a matter, which affects every person in this country. It involves the F.B.I., criminal data files and transmission of such information around the country via computer telecommunications systems.

Certain actions of some Federal executive departments seem to be aimed at obtaining control of all computerized crime information flowing among state, local and Federal law enforcement entities. In this regard, the F.B.I. is definitely playing a questionable role which may endanger the privacy of any or all Americans at any given time. There is therefore a real possibility that by gaining control of such functions and facilities, we may see imposed upon the nation a national police force.

The FBI's National Crime Information Center (NCIC) and plans for its expansion constitute a clear and immediate danger which cannot be underestimated in terms of potential for abuse. The NCIC Telecommunications System should not be expanded to permit message switching for any purpose, particularly in light of the FBI's

previous record and continued reluctance to cooperate with Congress.

Not only has the F.B.I. sought to suppress Federal aid to a nationally accepted, state and locally-managed criminal justice telecommunications system (National Law Enforcement Telecommunications System--NLETS), but it has offered no justification for its attempt to create a monopoly on functions performed at the Federal level in these areas. The most serious issues raised are as follows:

1) The Federal government has no Constitutional role to provide data processing or telecommunications services designed primarily to satisfy state and local criminal justice missions.

2) The Federal government should not manage or control state and local telecommunications functions.

3) Should the F.B.I. be allowed to engage in message switching, state and local criminal data systems could be absorbed into a potentially abusive, centralized communications and computer information system under F.B.I. control.

4) Such a system under one control could be used to monitor regular operations of state and local law enforcement authorities, allowing Federal authorities to exert pressure on those agencies. Federal agencies could also gather data on individuals to which government is not entitled, violating the spirit of Federal privacy legislation.

5) An agency controlling a message switching capacity could also engage in surreptitious intelligence gathering. No system capable of central monitoring of state and local operations should be authorized until adequate safeguards are established. This has not been the case up till now.

The F.B.I.'s record, as continually exposed to public view since Watergate, does not justify reposing such power and trust in it or any other Federal agency. Much concerning

the FBI's abuses of power still remains to be revealed. In light of this situation and your concern, I trust you will act decisively and with dispatch to disapprove the FBI's request to engage in any form of message switching, or to expand NCIC in any manner.

Sincerely,

John E. Moss
Member of Congress

JEM:Ft

THE WHITE HOUSE

WASHINGTON

July 11, 1975

Dear Mr. Congressman:

On behalf of the President, I would like to thank you for your letter of June 11. The issue that you raise--expansion of the NCIC's telecommunications system to include a message switching capability--is currently under review within the Justice Department. Several agencies within the Administration have raised questions regarding the implementation of such a system, mirroring your concerns. These have been forwarded to the Department for comment. I have also taken the liberty of forwarding your letter to the Attorney General for his personal review.

I can assure you that the matter will receive the most careful consideration before any decision is made. Once again thank you for your views on this matter.

Sincerely,

James M. Cannon
Assistant to the President
for Domestic Affairs

The Honorable John E. Moss
House of Representatives
Washington, D. C. 20515

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

July 16, 1975

Honorable John E. Moss
U.S. House of Representatives
Washington, D. C. 20515

Dear Congressman Moss:

Your letter dated May 27, 1975 to the Attorney General requesting answers to questions concerning criminal justice information systems has been referred to me for a response.

(1) Authorization to circulate the proposed limited message switching implementation plan was granted the Federal Bureau of Investigation in order to obtain comments from those to whom it was circulated. It was our hope that circulation of the Plan to interested parties prior to implementation would give us the opportunity to benefit from their views.

(2) The NLETS grant application for 1975 has been approved subject to several conditions. The Department remains committed to NLETS and has no intention of having it superseded by the National Crime Information Center (NCIC). We encourage NLETS' efforts to service state-to-state requirements for messages between law enforcement agencies.

(3) The FBI is engaged in switching messages only to and from Alaska as a courtesy to NLETS which does not have that capability.

(4) The FBI is not preparing to engage in message switching other than that as described in its Plan.

(5) Congress has been advised of the FBI's NCIC operations in appropriations hearings and in written responses to congressional communications. With respect to the proposed implementation plan, interested members of the Congress were specifically requested to comment. Furthermore, since 1930, when 28 U.S.C. §534 was enacted, Congress has mandated that the Attorney General provide the type of information currently supplied through NCIC.

As you know, the Plan provides for decentralization of records now being maintained in Washington, D. C. Limited message switching would assist in implementing that decentralization effort.

(6) Mr. Pommerening's letter of January 8, 1975 was not intended to "interfere with federal assistance specifically delineated by Congress to be under the sole control of LEAA." Rather, he was ensuring that there was responsible coordination of federal programs in order to avoid confusion and waste of scarce resources within the law enforcement community.

If I am correct in inferring from the tenor of your questions that you are concerned about the relationship between NLETS and NCIC, let me allay some of those concerns. At a joint meeting of the Boards of NLETS and NCIC in Kansas City on June 11th and 12th, 1975, a joint resolution was reached which defined more precisely the types of messages which NCIC would handle if the message switching plan were implemented. The spirit of that resolution is that each organization recognizes the functional validity of the other and defers to the other in its area of operation. Enclosed you will find a copy of that resolution.

Sincerely,

Harold R. Tyler, Jr.
Deputy Attorney General

Enclosure

JOHN E. MOSS
3RD DISTRICT
SACRAMENTO, CALIFORNIA

ADMINISTRATIVE ASSISTANT
JACK MATTESON

LEGISLATIVE ASSISTANT
PATRICIA LYNCH

WASHINGTON OFFICE:
ROOM 2354
RAYBURN HOUSE OFFICE BUILDING
PHONE (202) 225-7163

DISTRICT OFFICE:
DISTRICT REPRESENTATIVE
JERRY WYMORE
8058 FEDERAL BUILDING
650 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814
PHONE (916) 449-3343

CONGRESS OF THE UNITED STATES
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WASHINGTON, D.C. 20515

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INTERSTATE AND FOREIGN COMMERCE COMMITTEE:
CHAIRMAN,
OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE

JOINT COMMITTEE ON ATOMIC ENERGY

July 28, 1975

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

On June 11, 1975, I wrote you on one of the most crucial issues confronting our country; proposed expansion of the FBI's computer and telecommunications network to include message switching capability. I regret that the response I received, signed by James Cannon, A Presidential Assistant, dated July 11, 1975, did not deal meaningfully with the issues involved.

In view of your previous concerns in this area, I feel you would really want a more detailed response to reach me. There is substantial public evidence available to show that the FBI seeks a monopoly over Federal criminal data and its transmission, rousing apprehensions that in this manner the FBI could evolve into a national police force.

On May 27, 1975, I wrote the Attorney General, seeking the present and projected status of message switching. The July 16, 1975, response from Deputy Attorney General Harold Tyler states, in part:

"The FBI is not preparing to engage in message switching other than that as described in its plan."

This statement does not dovetail with information contained in the July 11, 1975, letter from Mr. Cannon, indicating that message switching is, "currently under review within the Justice Department."

Under the already published plan, circulated by the FBI April 14, 1975, the scope of proposed message switching is all-inclusive, despite claims that initially it will be limited. The central issue is whether there will be any message switching at all of state and local criminal justice information by any Federal agency. Just as a person should not tolerate a small cancer, so our society should not allow limited message switching by the FBI or any similar organization.

The Justice Department is, according to Mr. Tyler's response, pursuing implementation of the original plan for limited message switching. Justice seems, therefore, to be ignoring the status of the proposal as described by Mr. Cannon. I would appreciate knowing if Justice is pursuing this course with White House knowledge and authorization. I am enclosing a copy of Mr. Tyler's response.

A substantive expression of concern from you is critical. I would deeply appreciate knowing your views on the following questions, which were asked in my original letter but not answered by Mr. Cannon's response.

1) Does the Federal government have a Constitutional obligation to provide data processing or telecommunications services designed to primarily satisfy state and local criminal justice missions?

2) Should the Federal government manage or control state and local telecommunications functions dealing with criminal matters?

3) Could FBI message switching result in absorption of state and local criminal data systems?

4) If the above is possible, would there be a potential for significant abuse by an FBI-controlled centralized system?

5) Could such a system be used to monitor state and local law enforcement operations, allowing Federal pressure to be exerted on these agencies?

6) Could such a system be used to gather data on individuals to which the Federal government is not entitled?

7) Could an agency controlling such a system engage in surreptitious intelligence gathering?

8) Do any safeguards exist to prevent such activities?

Finally, Mr. President, although the July 11, 1975, letter indicates that my concerns and letter have been forwarded to the Attorney General for comment, nevertheless this is an issue so important that only you can expedite clarification and, in a timely fashion, affect policy.

Sincerely,

John E. Moss
Member of Congress

JEM:Ff

Enclosure

[From The Denver Post, June 4, 1975]

POLICE STATE FEARED: FBI RECORDS-PROPOSAL DENOUNCED

(By David Burnham)

WASHINGTON—An agency within the Justice Department has denounced a plan by the Federal Bureau of Investigation for expanded communications and record-keeping on the ground that the computerized system might lead to federal control of the police.

The blunt criticism of the FBI from a sister agency in the Justice Department was made in a 19-page report of the Law Enforcement Assistance Administration, made available to the New York Times Tuesday.

It echoed similar complaints from the White House Office of Telecommunications Policy, the Domestic Council's Committee on Privacy, and the chairman of both the House and Senate constitutional rights subcommittees.

PLAN APPROVAL

Despite the wide opposition, the FBI reportedly still is aggressively seeking approval of its plan, and at least one White House official has registered a complaint about a recent Justice Department action that he said appeared to push the bureau closer to its goal.

In a second development concerning federal computers, the General Accounting Office has recommended that the Agriculture Department be prohibited from going ahead with its $398 million eight-year plan to develop a computer information system because it fails to guard the privacy of millions of farmers and department employees whose names are contained in the agency's existing files.

In a third development, Deputy Defense Secretary David Cooke told a House government operations subcommittee Tuesday that dossiers the Army had compiled on Vietnamese-war protesters and other dissidents still might exist in federal intelligence agencies that exchanged information with the Defense Department.

Cooke said the Army files, originally compiled in the late 1960s, either had been destroyed or awaited orders for destruction, but that he was "relatively certain" the information had been exchanged with other agencies such as the FBI, the Central Intelligence Agency and the National Security Agency.

A copy of the report criticizing the FBI's plans to broaden its existing criminal justice information system—and the bureau's lengthy response—were made available to Rep. John Moss, D-Calif., after the lawmaker had made repeated demands for them over the last 4½ months.

The Law Enforcement Assistance Administration report said the existing National Crime Information Center of the FBI raised many serious questions when combined with the proposal to permit the bureau to enlarge its capability with a technical improvement known as "autodated message switching."

RAISES CONCERN

The report said the proposal to enlarge the FBI's computer capability raised concerns over:

The development of the "big brother" system.

Reduced state input and control over security, confidentiality and use of state-originated data.

Increased dangers resulting from use of nonupdated, and hence inaccurate, centrally maintained "rap sheets."

The report further said that "it is critical to recognize that decisions in these areas raise basic questions re: federal-state relations and the concept of federalism."

Late last year, in a letter to William B. Saxbe, then the attorney general, the acting director of the White House Office of Telecommunications Policy, John Eger, said he feared the FBI expansion "could result in the absorption of state and local criminal data systems into a potentially abusive, centralized federally controlled communications and computer information system."

The specific subject of concern is an FBI proposal to add equipment that would automatically switch local messages through the bureau's existing, National

Crime Information Center. The center now provides law enforcement agencies in one part of the country with information, such as charges filed and dates when an individual was arrested, in another part of the country.

"Any agency controlling a message switching capacity" Rep. Moss said, "could also engage in surreptitious intelligence gathering.

"No system capable of central monitoring of state or local operations should be authorized," he said, "until adequate safeguards are established and this has not been the case up to now."

The FBI response to the criticism by its sister agency said the FBI had long recognized the "sanctity of the privacy of the individual." It insisted that it was fully concerned with "security and privacy considerations."

[From the Washington Post, June 5, 1975.]

2 PROPOSED FOR U.S. COMPUTER BANKS ON INDIVIDUALS HIT

(By Donald M. Rothberg, Associated Press)

Proposals for two federal computerized data banks that would contain millions of names were critized yesterday in Congress and within the administration as being dangerous and unnecessary.

One, an FBI proposal to broaden an existing computerized criminal history information system linking police departments around the country, was described by a White House aide as carrying the potential for violating "the spirit if not the letter of federal privacy legislation."

The other was a Department of Agriculture plan to purchase a $398 million computer system to centralize department records that the General Accounting Office said include "personal information on its employees as well as on farmers' incomes and financial positions."

Rep. John E. Moss, (D-Calif.), chairman of the House Government Information subcommittee, made public the criticisms of both systems. Moss, who had asked the GAO to examine the Agriculture Department proposal, forwarded the GAO recommendation that it be killed to the chairman of the House and Senate agriculture appropriations subcommittees. GAO is a congressional watchdog agency.

Moss also said he would oppose the FBI plan.

Among the documents made public was a letter dated May 12 from John Eger, acting director of the White House Office of Telecommunications Policy, to Deputy Attorney General Harold R. Tyler Jr.

Eger wrote that the FBI proposal "could result in the absorption of state and local criminal data systems into a potentially abusive, centralized, federally controlled communications and computer information system."

"One basic concern," he added, "is the threat posed by a system which could be used by a federal law enforcement agency to monitor in detail the day-to-day operations of state and local law enforcement authorities."

Eger noted that only four states so far have been willing to include their criminal history information in such a system, and he questioned whether there was any need for it.

Another report critical of the FBI proposal came from the Law Enforcement Assistance Administration, the federal agency which has disbursed billions of dollars in crime-fighting grants to state and local governments.

The LEAA study supported the principle of computerizing criminal history records but questioned whether the information should be centralized under federal control.

Maintaining such files in independent state systems would "be most effective in satisfying law enforcement needs without unduly endangering individual rights," the LEAA study said.

In a memorandum, the FBI contended the LEAA had once supported its proposal for a computerized criminal history system and should continue to do so.

The GAO report on the Agriculture Department proposal said USDA officials began acquiring the new computer system before they had determined their needs.

The GAO noted that Congress became concerned because it had not been fully informed of plans for the project and because the USDA data bank "could pose a serious threat to the privacy of individuals, particularly since such a network might be expanded to link all government computers."

[From the Washington Post, Nov. 11, 1975.]

LEVI HALTS FBI PLAN ON DATA

Attorney General Edward H. Levi said yesterday he has shelved a controversial FBI proposal that the bureau take over computerized switching of messages between state law enforcement agencies.

Levi said the department shares the concern of some critics who fear the communications network could threaten the privacy of criminal justice information.

Levi said he will take no action on the FBI request until Congress enacts legislation regulating the exchange of computerized criminal history information.

He outlined his views in letters to Sen. John V. Tunney (D-Calif.) and Rep. Don Edwards (D-Calif.), chairmen of the Senate and House Subcommittees on constitutional rights.

[From Los Angeles Times, June 5, 1975]

FEDERAL DATA BANKS—FOR CRIME, FARM RECORDS: DATA BANK PLANS SCORED AS ENDANGERING PRIVACY

WASHINGTON (AP)—Proposals for two federal computerized data banks that would contain millions of names were criticized Wednesday in Congress and within the Ford Administration as being dangerous and unnecessary.

One, an FBI proposal to establish a computerized criminal history information system linking police departments around the country, was described by a White House aide as carrying the potential for violating "the spirit if not the letter of federal privacy legislation."

The other was a Department of Agriculture plan to purchase a $398 million computer system to centralize department records that the General Accounting Office said include "personal information on its employes as well as on farmers' incomes and financial positions."

Rep. John E. Moss (D-Calif.), chairman of the House government information subcommittee, made public the criticisms of both systems.

Moss had asked the GAO to examine the Department of Agriculture proposal and he forwarded the GAO recommendation that it be killed to the chairmen of the House and Senate agriculture appropriations subcommittees.

Moss also said he would oppose the FBI plan.

Among the documents made public was a letter dated May 12, from John Eger, acting director of the White House Office of Telecommunications Policy, to Dep. Atty. Gen. Harold R. Tyler Jr.

Eger wrote that the FBI proposal "could result in the absorption of state and local criminal data systems into a potentially abusive, centralized, federally controlled communications and computer information system."

"One basic concern," he added, "is the threat posed by a system which could be used by a federal law enforcement agency to monitor in detail the day-to-day operations of state and local law enforcement authorities."

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Another report critical of the FBI proposal came from the Law Enforcement Assistance Administration, the federal agency that has disbursed billions of dollars in crime-fighting grants to state and local governments.

The LEAA study supported the principle of computerizing criminal history records but questioned whether the information should be centralized under federal control.

Maintaining such files in independent state systems would "be most effective in satisfying law enforcement needs without unduly endangering individual rights," the LEAA study said.

In a long responding memorandum, the FBI contended that the LEAA had once supported its proposal for a computerized criminal history system and should continue to do so.

The GAO report on the Department of Agriculture plan said the proposed nationwide computer network containing the records of individual farmers should be stopped at least until better planning is done.

The report recommended that the General Services Administration "cancel the planned procurement of automatic data processing equipment."

The report said the Department of Agriculture should complete studies of its

data processing and communication requirements, the security and privacy problems involved and an economic analysis.

"Agriculture had not adequately considered security requirements that would reasonably protect personal or other sensitive information from unauthorized access," the report said.

The GAO also criticized the department of failing to determine the expected user requirements of the system and the comparative costs of using existing systems or alternative designs.

Rep. Charles G. Rose (D–N.C.) chairman of the House administration computer subcommittee, called for an end to the project unless the department could come up with better justification.

In proposing the plan last year, the department said that the ready availability of farmer records would provide national statistics for future farm programming and on crop conditions as an early warning system for agricultural problems.

However, Rose said the department already had the information and that computerizing it was unnecessary and wasteful.

[From The New York Times, June 4, 1975]

F.B.I.'s Data Plan Scored by Agency: Justice Unit Says Expanded Computer System Might Bring Control of Police

(By David Burnham, Special to The New York Times)

Washington, June 3—An agency within the Justice Department has denounced a plan by the Federal Bureau of Investigation for expanded computerized communications and recordkeeping on the ground that such a system might lead to Federal control of the police.

The blunt criticism of the F.B.I. by a sister agency in the Justice Department was made in a 19-page report of the Law Enforcement Assistance Administration, made available to The New York Times today. It echoed similar complaints from the White House Office of Telecommunications Policy, the Domestic Council's Committee on privacy, and the chairmen of both the House and Senate Constitutional Rights subcommittees.

Despite the wide opposition, the F.B.I. reportedly is still aggressively seeking approval of its plan. At least one White House official has registered a complaint about a recent Justice Department action that he said appeared to push the bureau closer to its goal.

In a second development, the General Accounting Office has recommended that the Agriculture Department be prohibited from going ahead with its $398-million, eight-year plan to develop a computer information system because the G.A.O. said it did not guard the privacy of millions of farmers and department employees whose names are contained in the agency's files.

In a third action, Deputy Defense Secretary David O. Cooke told a House Government Operations subcommittee today that dossiers the Army compiled on Vietnam war protesters and other dissidents might still exist in Federal intelligence agencies that exchanged information with the Defense Department.

Mr. Cooke said the Army files, originally compiled in the late nineteen-sixties, either had been destroyed or awaited orders for destruction but that he was "relatively certain" the information had been exchanged with other agencies such as the F.B.I., the Central Intelligence Agency and the National Security Agency.

A copy of the report criticizing the F.B.I.'s plans to broaden its criminal justice information system—and the bureau's long response—were made available to Representative John E. Moss after the California Democrat had made repeated demands for them over the last four and a half months.

The Law Enforcement Administration report said the present National Crime Information Center of the F.B.I. raised many serious questions when combined with the proposal to permit the bureau to enlarge its capability with a technical improvement known as "automated message switching."

The report said the proposal raised concerns over "(a) the development of the 'Big Brother' system; (b) reduced state input and control over security, confidentiality and use of state originated data and (c) increased dangers resulting from use of nonupdated, and hence inaccurate, centrally maintained 'rap sheets.'"

The report said, "It is critical to recognize that decisions in these areas raise basic questions re: Federal/state relations and the concept of federalism."

It added that "in this connection it is significant to note that the importance of preserving state and local control over law enforcement responsibility has been specifically recognized within the executive branch by Presidents Johnson, Nixon and Ford."

Late last year, in a letter to William B. Saxbe, then the Attorney General, the acting director of the White House Office of Telecommunications Policy said he feared the F.B.I. expansion "could result in the absorption of state and local criminal data systems into a potentially abusive, centralized, federally controlled communications and computer information system."

The specific subject of concern is an F.B.I. proposal to acquire equipment that would automatically switch local messages through the bureau's existing information center. The center now provides law enforcement agencies in one part of the country with such information as charges filed and dates when an individual was arrested in another part of the country.

Critics contend that if the center is given the ability to switch messages automatically it will mean the demise of a long existing arrangement under the control of the 50 states known as the National Law Enforcement Telecommunications System.

Representative Moss said that should the Justice Department give the F.B.I. the message switching equipment it "could be used to monitor the regular operations of state and local law enforcement authorities, allowing Federal authorities to exert pressure on these agencies."

"Any agency controlling a message switching capacity," he added, "could also engage in surreptitious intelligence gathering. No system capable of central monitoring of state or local operations should be authorized until adequate safeguards are established, and this has not been the case up to now."

The 37-page F.B.I. response to the report said that the criticism suggested "that security and privacy considerations are not of primary concern to the F.B.I. in its development of the computerized criminal history program." "The F.B.I. has long recognized the sensitivity of the computerized criminal history data and the sanctity of the privacy of the individual," it asserted.

On May 16, the head of the White House Office of Telecommunications Policy, Mr. Eger, criticized the Justice Department for publishing in the Federal Register proposed regulations that said the F.B.I. "shall operate" the National Crime Information Center "and any message switching which is authorized by law or regulation."

In a letter to Harold R. Tyler Jr., the Deputy Attorney General, Mr. Eger said he was "dismayed" by the order in the Federal Register.

"I believe that it is premature and inappropriate for the Department of Justice to appear to have disposed unilaterally of these issues by promulgation of the regulations in their present form," he said.

Spokesmen for both the Justice Department and the F.B.I. insisted the language in the proposed regulation merely approved message switching if and when it was authorized.

Concerning the proposed Agriculture Department computer, the General Accounting Office accused the department of moving ahead on the $398-million project without determining if it was needed, how much money it would save and whether information stored in the computer would be kept on a confidential basis.

The G.A.O., the investigating agency of Congress, said none of these determinations had been made by the department although they were required by Government regulations.

The G.A.O. recommended that the project be canceled.

Mr. Moss. Mr. Attorney General, at the time those of us in the Congress who were apprehensive over a repetition of this attempt sought to and obtained assurance that before any tentative permission for even limited message switching was granted, we would be granted the courtesy of appropriate notification ahead of time.

At this point in the record, Mr. Chairman, I offer for insertion a memorandum of May 19, 1977, from Deputy Attorney General Flaherty to FBI Director Kelley. In that memorandum Mr. Flaherty grants approval for limited message switching relating to the NCIC files and to and from remote localities, including I believe a tie-in with the Canadian system.

I would offer that as exhibit No. 3.

Mr. PREYER. Without objection, this is marked as "Exhibit No. 3."

[Exhibit No. 3 follows:]

EXHIBIT NO. 3

[MEMORANDUM]

MAY 19, 1977.

To: Clarence M. Kelley, Director, Federal Bureau of Investigation.
From: Peter F. Flaherty, Deputy Attorney General.
Subject: Message switching.

The Attorney General has referred for my consideration your memorandum dated April 5, 1977 requesting approval of message switching through the National Crime Information Center (NCIC) which is unrelated to the Computerized Criminal History (CCH) application of NCIC.

You advise that the authorization of non-CCH message switching through NCIC will provide Federal agencies and localities such as Puerto Rico with a cost-effective vehicle for gaining access to the National Law Enforcement Telecommunications Systems, Inc. (NLETS) in Phoenix, Arizona. It is my understanding, for example, that there is a pending request from the Police of Puerto Rico to access NLETS through NCIC. If access through NCIC is not permitted, Puerto Rico will be required to install a separate line to NLETS at an annual cost of $48,000. In addition, the Naval Investigative Service, the Law Enforcement Division of the U.S. Army and the Drug Enforcement Administration have expressed interest in gaining access to NLETS through NCIC. Authorization of non-CCH message switching would also permit the transfer of information between the United States and the Canadian Police Information Center in Ottawa, Canada.

The Department's Systems Policy Board and the NCIC Advisory Policy Board have endorsed the NCIC applications for which you sought approval in your April 5, 1977 memorandum.

Therefore, message switching applications over the NCIC network are approved for (1) switching messages relating to NCIC files unrelated to CCH and (b) switching messages at the request of NLETS to and from remote localities, such as Puerto Rico. This approval should not be construed to authorize the switching of CCH messages.

Mr. Moss. Mr. Attorney General, have you ever seen the memo from Deputy Attorney General Flaherty allowing message switching?

Mr. BELL. No; but I have been told by Deputy Attorney General Flaherty what was in it. I did not know about it until I saw it in the newspaper. I came back up here Monday and asked about it. That is the first I knew of it.

I also know—I want to say this now because I do not want to get crossed up with another committee of the Congress—that Deputy Attorney General Flaherty did have some discussions with Congressman Edwards in the Judiciary Committee. They have jurisdiction over this subject and I do not want to have any problem with them because I am over here answering questions to you. They apparently have preempted this subject, or they think they have.

Mr. Moss. Sir, I would suggest that the precedents of the House would indicate that the Committee on Government Operations has an overlapping and concurrent jurisdiction in almost every area of activity of government, but it has always exercised that jurisdiction as though it in every sense was equal to any other committee having jurisdiction.

Mr. BELL. I am not refusing to answer, you understand.

Mr. Moss. I realize you are not. I wanted to explain that, General Bell, only for the purpose it is always raised or perhaps raised more frequently in this committee than any other committee of Congress.

Mr. BELL. This is not an uncommon thing; we are under 19 subcommittees and 12 full committees of the Congress.

Mr. MOSS. I realize that.

Mr. BELL. So it is quite a job to keep up with all the separate jurisdictions, but I can see that there would be overlapping jurisdiction on this subject.

Mr. MOSS. I believe the initial inquiry on this matter of message switching originated through this committee back in 1975.

Mr. BELL. I see.

Mr. MOSS. Therefore, there is a longer history; I believe, however, that Mr. Edwards of California was one of the Members who had protested and had the assurance from the Department of Justice there would be no resumption without first informing the concerned Members of Congress.

Were you aware of the fact that the 1975 request of the Department was——

Mr. BELL. I was not. I can say that there would be no resumption in the sense of taking over from the States, of displacing the operation that the States have in Phoenix. I have reason to believe that it may also be financed by us.

Mr. MOSS. You are correct, and that is the NLETS system, which is partially financed by the Federal Government. The States have long resisted in a majority of instances the switching through the FBI system, preferring to have it through the system which has been established with the cooperation of the LEAA, and with, particularly, the funding assistance.

Mr. BELL. I understand Puerto Rico and Canada are involved in this latest episode.

Mr. MOSS. Puerto Rico and Canada are involved.

Mr. BELL. Is there some other country or State?

Mr. MOSS. There is a report of the Comptroller General on Interpol, which suggests that they are there, by the moving of material into countries such as Canada, that because of agreements that exist at Interpol that even the Communist countries could have access to the material made available through the NCIC system, because of its availability to other nations than the United States.

Mr. BELL. I know nothing about that.

Mr. MOSS. Interpol includes some of the countries behind the Iron Curtain.

Mr. BELL. I do not know anything about any of this, but it does not make any sense to me to tell Scotland Yard that they have to go to Phoenix, Ariz., to deal with some American States to get some information. It seems to me we have to have a national office that they can go to. I think the Canadians would have a right to come to the FBI. That does not mean that the FBI is going to have a system. They have to connect to the States themselves. They are just a conduit.

I can understand that when you are dealing with foreign nations. Now if we were trying to displace the States, that would be something else. But I probably ought not to make any kind of judgment on this without knowing more about it.

Mr. MOSS. Well, I would not want to press you, sir, if you feel at the moment that you would prefer to have a fuller opportunity to study it; I would be perfectly willing to consider the alternative of

submitting to you for more careful consideration a list of questions which I do feel bear importantly upon this subject, and I think it is a subject where we would not, in discussion, find ourselves very far apart.

Mr. BELL. Yes; I think it probably would be better to let me answer in writing.

Mr. Moss. Mr. Chairman, I ask unanimous consent that I may then submit to General Bell the questions relating to this subject and that they be included, together with the response, in the record at this point.

Mr. PREYER. Is there any objection to the unanimous consent request? If not the request is granted.

Mr. BELL. All right. We will get back to you.

[The questions and answers follow:]

JOHN E. MOSS
3RD DISTRICT
SACRAMENTO, CALIFORNIA

WASHINGTON OFFICE:
ADMINISTRATIVE ASSISTANT
KATHLEEN BENSON
LEGISLATIVE ASSISTANT
PATRICIA LYNCH
ROOM 2354
RAYBURN HOUSE OFFICE BUILDING
PHONE (202) 225-7163

DISTRICT OFFICE:
DISTRICT REPRESENTATIVE
JERRY WYMORE
DISTRICT ASSISTANT
PATRICIA LAROCHE
8058 FEDERAL BUILDING
650 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814
PHONE (916) 440-3343

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

GOVERNMENT OPERATIONS COMMITTEE
SUBCOMMITTEES:
LEGISLATION AND NATIONAL SECURITY
GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS

INTERSTATE AND FOREIGN COMMERCE COMMITTEE:
CHAIRMAN,
OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE

June 9, 1977

Honorable Griffin Bell
Attorney General of the United States
Department of Justice
Washington, D.C.

Dear Mr. Attorney General:

In accordance with our exchange and agreement at the Government Operations Committee hearings of June 9, I am enclosing the memoranda and questions that I was going to ask you. It is my hope that you will respond as quickly as possible, and that after consideration of the issues involved, revoke the limited message switching authority permitted by Mr. Flaharty.

Sincerely,

John E. Moss
Member of Congress

JEM:FSd

QUESTION SHEET CNE

QUESTION #1 - Mr. Attorney General, have you ever seen the enclosed memo before, allowing message switching by the FBI, and were you consulted before such permission was given?

QUESTION #2 - Did you know that members of the House and Senate had vehemently opposed such permission previously, and that partial permission the FBI sought in 1975 had been denied?

QUESTION #3 - Did you know about assurances given those opposing FBI message switching...that there would be appropriate Congressional consultation and information before any such permission was granted?

QUESTION #4 - Were you aware of Mr. Flaherty's intentions and actions?

QUESTION #5 - What guarantee is there that raw data on individuals will not be sent around the U.S. and to other nations under Flaherty's permission?

QUESTION #6 - Under Flaherty's memo, data from this country will be made available to Canadian authorities. We know from the recent GAO report on Interpol that U.S. data is being abused and used we know not how by Interpol. What controls can and will be placed over the Canadian system to ensure adequate protection and privacy of data?

QUESTION #7 - Will personal data on Americans be sent abroad under Mr. Flaherty's memo and the authority it grants?

QUESTION #8 - Will the Canadians have access under the National Law Enforcement Telecommunications System to U.S. Motor Vehicle Bureau files?

QUESTION #9 - It is alleged that Flaherty's memo will grant the FBI a message switching monopoly. Would you agree with such a claim?

QUESTION #10- Most qualified observers believe limited message switching is a first step. That as the system become fully utilized, there will be a demand for added computer capability. That this will lead to other types of message switching. Do you feel that this widely held theory is correct?

QUESTION SHEET TWO

QUESTION #11 - What is to prevent the FBI from including in their message switching information from their computerized friminal history file?

QUESTION #12 - What is to prevent the FBI from using its message switching monopoly to withhold data from law enforcement people it has poor relations with? Wouldn't the threat of data withholding give that agency de facto veto power over all law enforcement professionals?

#12A - If we share data with Canada, how can we refuse the requests for data sharing that inevitably will come from other nations?

QUESTION #13 - National Law Enforcement Telecommunications System is a state-supported alternative to NCIC. Won't Flaherty's memo lead to NLETS virtually going out of business, leaving FBI and Justice with sole control over all criminal telecommunications?

QUESTION #14 - Presently the states have some control, through NLETS, over criminal telecommunications. Shouldn't we jealously preserve their share of this work?

QUESTION #15 - NLETS works through a common carrier, where I have other jurisdiction. What effort is Justice making to guarantee greater state participation in these systems being developed by FBI and Justice?

QUESTION #16 - Shouldn't there be constant Congressional oversight of such activities?

QUESTION #17 - After all the revelations of recent years, do you feel there are adequate safeguards against improper release of criminal data on individuals?

QUESTION #18 - Do these safeguards protect individuals against unwarranted surveillance?

QUESTION #19 - Have you ever heard of a procedure known as "Flagging?"

As I understand it, flagging consists of marking, or flagging, certain files on individuals. For one reason or another, there is an institutional interest in them. They may be long-haired youngsters. Or civil rights activists. Or professors of romance languages. Or Congressmen. Or judges. And whenever a computerized inquiry on an individual is received, in a

QUESTION SHEET NUMBER THREE

QUESTION #20 - Do you feel that illegal surveillance of Americans could be one end product of message switching by the FBI?

QUESTION #21 - Do you think, sir, that some observers, especially in light of past disclosures and unanswered questions about the FBI, have a right to feel that we may be on the road to a national police force? To wholesale privacy invasion?

QUESTION #22 - Are you aware that Mr. Flaherty is seriously and presently considering granting authority for interstate message switching using individual criminal history files in the FBI's computers?

Enclosed please find a May 19, 1977 memo from Deputy Attorney General to Flaherty to FBI head Kelley, stating this equation in the clearest possible words.

QUESTION #23 - The accusation has been made time and again that the FBI has and does maintain dossiers on members of the House and Senate. Has this been true in the past and is it going on today?

QUESTION #24 - I understand that fingerprints are required whenever a citizen requests full disclosure of his or her files, information, rap sheets, etc., under the Freedom of Information Act? Is this true?

QUESTION #25 - Do you feel such a policy is necessary? Even when full data on the individual's personal life in the form of vital statistics is provided?

THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

Honorable John E. Moss
United States House of Representatives
Washington, D. C. 20515

Dear Congressman Moss:

Attorney General Bell has asked me to respond to your letter of June 9, 1977, in which you asked some specific questions. This letter will answer in a general way some of your questions, and more specific answers will be forwarded if you so desire.

We are aware that concern has been expressed with regard to the FBI computer files relating to computerized criminal histories, a program origianlly funded through the Law Enforcement Assistance Administration. After my confirmation I was asked to handle a request initiated by Director Kelley that the FBI be permitted either to terminate its involvement in the CCH program or to decentralize the present program by transferring data from one law enforcement agency to another through what is referred to as message switching.

This request was originally made to former Attorney General Levi in the Spring of 1976, but no action was taken. After reviewing the questions involved with representatives of the Attorney General's staff, LEAA, the FBI and others, and after receiving the recommendations of an internal Department of Justice review committee, I advised FBI Director Kelley that the CCH program should be continued without message switching. In order to service Puerto Rico, Canada and certain Federal agencies, I gave limited permission for the FBI to switch non-CCH messages through the National Crime Information Center between those agencies and to switch messages at the request of the National Law Enforcement Telecommunications System to and from remote localities such as Puerto Rico. Your office received a copy of my memorandum of May 19, 1977 to FBI Director Kelley in which I explained the limited scope of the permission. This has never been implemented, however, and I have placed the entire matter on hold, as you know.

We are carefully studying the question of the role of the Federal government in law enforcement telecommunications. To that end, my staff has had preliminary contact with members of your Committee staff, including Mr. Frank Silbey, and others interested in this question, and I have recently met in Tucson, Arizona with Mr. C. H. Beddome, Executive Director of NLETS. I would be glad to brief you on our findings once our careful review of this matter has been completed.

With regard to your questions about Interpol, responsibility for this agency is now within the Department of Justice under my jurisdiction. We have reviewed the GAO report on Interpol, which recommends that our Interpol office should require more specificity from requesters before releasing information in many cases, that only information requested should be forwarded, and that we should require more information from the requesters relative to the ultimate disposition of the cases for which information is requested. We have adopted the recommendations of the GAO report as found on page 40. (We have informed Congress of this fact by letter of June 8 to Congressman Edward I. Koch of the Committee on Appropriations, Subcommittee on Foreign Operations. A copy of that letter is attached.) Finally, with regard to the procedures for release of information, Freedom of Information and Privacy Appeals are also under the jurisdiction of the Office of the Deputy Attorney General. We are making every effort consistent with the policy of President Carter and Attorney General Bell, to release as much information as possible where no demonstrable harm will result. At the same time, we are mindful of the need for protection of the privacy of third parties. No information is released through Interpol which is not carefully screened by the Interpol staff and by the issuing agency.

I hope that this will answer to some extent the questions you have raised in your letter of June 9, 1977.

Sincerely,

Peter F. Flaherty

Attachment

Mr. Moss. Certainly.

Mr. PREYER. Thank you, Mr. Moss.

Mr. McCloskey?

Mr. MCCLOSKEY. Thank you, Mr. Chairman.

Mr. Attorney General, back in 1970 a group of people convened under the chairmanship of one Tom Huston in the White House to discuss dealing with domestic dissidence on the Vietnam war.

The document that evolved out of that conference, which was attended by top people in the Defense Intelligence Agency, representing the armed services, the CIA, and others, were to be presented to the President with the following options: (1) to monitor the international communications of U.S. citizens; (2) to intensify the electronic surveillance of domestic dissenters in selected establishments; (3) to read the international mail of American citizens; (4) to break into specified establishments and into homes of dissenting domestic dissenters; and (5) to intensify the surveillance of American college students.

All or most of those activities were clearly illegal, but the illegality was acquiesced in by all of the individuals present representing the top agencies of our Government.

Thereafter, the Department of Justice learned from the Senate select committee of the extent of the CIA mail opening operations and in late 1976 or early 1977, the Justice Department made a report at the request of the then Attorney General determining not to prosecute the CIA mail opening operations.

I want to quote to you some of the language from that report and ask you the difference between the report and its recommendations, and the situation as to the prosecution of FBI agents for breaking and entering.

Part of the language in the report on mail openings reads as follows:

> Although the Department is of the firm view that activities similar in scope and authorization to those conducted by the CIA between 1953 and 1973 would be unlawful if undertaken today, the Department has concluded that a prosecution of the potential defendants for these activities would be unlikely to succeed because of the unavailability of important evidence and because of the state of the law that prevailed during the course of the mail openings program.
>
> It would be mistaken to suppose that it was always clearly perceived that the particular mail opening programs of the CIA were obviously illegal. * * * It was until recent years by no means clear that the law and, accordingly, the Department's position, would evolve as they have. A substantial portion of the period in which the conduct in question occurred was marked by a high degree of public concern over the danger of foreign threats. The view both inside and, to some extent, outside the Government was that, in response to exigencies of national security, the President's constitutional power to authorize collection of intelligence was of extremely broad scope. * * * Applied to the present case, these circumstances lead to reasonable claims that persons should not be prosecuted when the governing rules of law have changed during and after the conduct that would give rise to the prosecution. They also would support defenses, such as good faith mistake or reliance on the approval of government officials with apparent authority to give approval * * *. The issue involved in these past programs in the Department's view [Department of Justice] relates less to personal guilt than to official governmental practices that extended over two decades. In a very real sense, this case involves a general failure of the government, including the Department of Justice itself, over the period of the mail opening programs, ever clearly to address and to resolve for its own internal regulations the constitutional and legal restrictions on the relevant aspects of the exercise of Presidential power. The actions of Presidents, their advisors in such affairs, and the Department itself might have been thought to

support the notion that the governmental power, in scope and manner of exercise, was not subject to restrictions that, through a very recent evolution of the law and the Department's own thinking, are now considered essential. In such circumstances, prosecution takes on an air of hypocrisy and may appear to be the sacrifice of a scapegoat—which increases yet again the likelihood of acquittal.

Where a prosecution, whether successful or not, raises questions of essential fairness, and if unsuccessful could defeat the establishment of rules for the future, the Department's primary concern must be the proper operation of the government for the present and in the future. The Department of Justice has concluded therefore that prosecution should be declined.

My problem, Mr. Attorney General, is in looking at the breaking and entering considered in the Huston report of 1970, along with the illegal CIA mail openings, where the Department of Justice chose not to prosecute those who opened the mail illegally, but now has chosen to prosecute at least one individual who allegedly broke in and entered illegally.

I wonder if you could comment on the distinction between the Department of Justice's report in the case of the illegality by the CIA, and the alleged illegality by the FBI?

Mr. BELL. Well, I am hard put to comment because of the continuing investigation in the FBI matter.

Mr. MCCLOSKEY. If for any reason, Mr. Attorney General, a candid answer in your judgment would require that we go into executive session, I would be glad to so move.

Mr. BELL. Let me read a statement that I want to make on the *Kearney* case and then we will see where we stand. I could read this in this room. I do not think it answers your question, but I think it probably would be well to read this much anyway.

Mr. MCCLOSKEY. I really do not want to address the *Kearney* case. I appreciate the difficulties in commenting on an individual case.

Mr. BELL. You just addressed it by the question you asked me. You asked what is the difference between them.

Mr. MCCLOSKEY. I suppose that is correct. Please continue, sir.

Mr. BELL. So that is why I am hard put to answer.

Let me read this little short answer about the *Kearney* case because there has been so much speculation about it.

News accounts both before and after indictment of former Special Agent John Kearney on April 7 have raised speculation about the Federal Bureau of Investigation and several individual FBI agents. Because of these news reports and the reactions to them, I have decided to make the following brief statement on the matter:

I cannot and will not comment on the merits of the *Kearney* case, nor on the particulars or details of the investigation. To do so would impinge on the principles of grand jury secrecy and fair trial rights and the proper administration of criminal justice.

The investigation relating to alleged acts by some Bureau agents in New York concerning Weathermen fugitives was begun by my predecessor over 12 months ago. It was assigned to a special task force of Civil Rights Division lawyers under the direction of the then Assistant Attorney General for Civil Rights.

By March of this year, that is, a little more than a month after I came into office, the investigation had encompassed more than 10 weeks of testimony before grand juries in New York and Washington. I received my first full report on the case in late March. The

investigation relates principally to alleged activities in the years 1971 through 1974, in New York and Washington, D.C.

The normal statute of limitations prohibiting prosecution after the expiration of 5 years from the activity in question of course applies to this investigation. Therefore, timely reviews and decisions with regard to grand jury actions had to be made on certain substantive charges of illegal wiretapping and certain charges for conspiracy to wiretap illegally. These reviews and decisions were conducted, and I personally participated in them.

I remain fully satisfied that the proper courses of action have been taken. Since then the investigation by the task force has continued under the direction of the Assistant Attorney General for the Criminal Division and myself. In other words, we have new people running the investigation.

There are now two aspects in the entire matter:

One, I have under review and consideration the question of further proceedings before the grand jury in New York.

Two, I have authorized continued investigation in the District of Columbia to look into matters relating to those before the New York grand jury.

I should have made that a little clearer. We do have a grand jury in Washington.

To elaborate on these two aspects and to discuss the relationship one bears to the other could only contribute to the range of publicity attached to this case and to the detriment of those involved. No one can accurately predict how long it will take to complete this process, but I can assure you that the investigation will be pursued thoroughly to proper conclusions.

I wish to state that the reviews and final determinations of the Department of Justice will be based on the facts disclosed and the law applicable to those cases, whatever those facts may turn out to be.

I plan to make no further statements on this matter at this time, nor to discuss the details of this investigation at any time before its completion.

Having said that, I would add that it is obvious from this statement that I did not consider that the investigation was complete, and I am seeing to it that it is completed. It is wide ranging.

The CIA matter you spoke about, the decision not to prosecute, I believe was made on the 17th or 18th or 19th of January. At any rate, I remember I was in the Senate in confirmation hearings when it was made; it was before I took office. I have studied that report, though. I studied it before I authorized the indictment of former Special Agent Kearney.

So I think you could infer from that that I thought there was some difference, But if I try to go into the differences I am afraid I will touch on the merits of the case. I do not know that I can do that even in executive session. I had an experience not so long ago where I had to get some information from a grand jury in New York about somebody being considered for a high post in the Government. I decided I could not even give it to another member of the Cabinet without a court order. I got a court order and was able to give it to the other person.

I think I would have been authorized to give it to the President in his chain of command up from the U.S. attorney, but if I had

done that I would have bypassed this Cabinet officer. So I sought a court order and I was able to get the court order.

I think if you feel that you need to know details, I will try to get a court order and tell you in executive session.

Mr. McCLOSKEY. Mr. Attorney General, I do not want to ask you to obtain a court order. The most important part of your job, and I think it might be the most important job of the President of the United States, is to restore the faith of the people that justice is beyond political influence.

Anything that we might suggest as to what is right or wrong at this stage would be an attempt to exert political influence on what should be your discretion alone. But I would like to say that the language in this report I have read to you seems to me to be correct. The appearance of fairness in prosecution must mean that no distinction should be made between the various kinds of crime that apparently were countenanced at all levels or at the top levels of our Government over a period of years, and the ultimate test will be the demonstration, when the current prosecutions are terminated, that there has been some difference——

Mr. BELL. Right.

Mr. McCLOSKEY [continuing]. Between the basis for declining to prosecute in the CIA illegal action and making the decision to prosecute former FBI Agent Kearney.

Mr. BELL. I think, Congressman, what you have said certainly reflects the feeling of fairness or unfairness that the American public has about this case. My mail runs so heavy in favor of the agent that it is almost unbelievable. One time it was running 100 to 1 in favor of Agent Kearney.

So what you are saying I think reflects the views of the American people. All that mail was not generated. A lot of it was just mail from plain people who just wrote in long, thoughtful letters.

Mr. McCLOSKEY. I think I have exceeded my time. Thank you.

Mr. PREYER. Thank you, Mr. McCloskey.

Mr. Harrington?

Mr. HARRINGTON. Mr. Bell, there are two areas that I would like to ask your views on; they both are fairly general.

One is based on a critical assessment of your office to date by William Safire in this week's New York Times, and it relates really to where Mr. McCloskey was going, in part, with you.

Perhaps you could briefly indicate what your attitude is going to be in terms of the Central Intelligence Agency and the apparent criticism, the duality of standards and approach within your Department as far as prosecution of a variety of activities. This is notwithstanding the narrower decision not to prosecute in areas that have been the subject of this committee and other committees' concern in recent years.

Perhaps the best way to end my question is to ask if you would comment on that implicit criticism contained in the Safire article as far as the relative approaches taken to the FBI and the CIA, notwithstanding the decision made prior to your taking office to forgo prosecution as far as mail opening.

Mr. BELL. I read the Safire article and I wonder if you could point me to the part of the article you want me——

Mr. HARRINGTON. I thought I was, in my own circuitous fashion. I would be glad to try again.

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Mr. BELL. I missed it.

Mr. HARRINGTON. I am asking for a policy statement on matters that are not covered in the earlier Justice Department memorandum that is obviously not yours to necessarily defend, involving the Central Intelligence Agency, matters of the kind that involve the former Director of the CIA which have been pending for some time, and matters involving general areas, either known or unknown at the present time, that could involve the violation of existing laws.

Mr. BELL. Well, the Safire article, among other things, said that the Vice President appointed four lawyers here in Washington to run the Justice Department. Of course there is utterly nothing to that.

Mr. HARRINGTON. I thought I would leave the reference to the "Gang of Four" out and get to your views on the CIA.

Mr. BELL. He said that I was spending all my time worrying about being sued.

Mr. HARRINGTON. I thought I would leave that out too and get right down to the question of what we can get by way of a statement by you on how you will deal with the question of the CIA.

Mr. BELL. Misconduct of Government people?

Mr. HARRINGTON. Right.

Mr. BELL. I will tell you exactly how I will handle it. I will handle it as I am handling the FBI break-in case; I am proceeding to get the facts and to take action. I have not condoned any law violation.

I would not handle that case today as it was handled last year. As an example, we had a complaint in the last 2 or 3 weeks about the FBI. I referred it to Mr. Shaheen's Office of Professional Responsibility. He has investigated it and is in the process of doing so.

When he finishes, if there is any cause to believe that the FBI has done anything wrong, we will decide whether it should be handled administratively or through some internal sanction system or whether it should be referred to the Criminal Division. The likelihood is that there will turn out to be nothing to the complaint. Mr. Shaheen handled more than 150 complaints last year and very few of them turned out to have any merit.

It is important, though, that the American people have a place to complain, that they know they have a place to lodge a complaint. It is important that we take action once we get a complaint.

So if the FBI break-in case began now, I would send it to the Office of Professional Responsibility. After that, if it appeared that it ought to be done, I would refer it to the Criminal Division, which might present it to a grand jury. That would be a routine way of handling it. This case was not handled in a routine fashion when it was sent to the Civil Rights Division.

Today, if somebody refers something to me about the CIA, NSA, any of the other intelligence agencies—or indeed any wrongdoing in the Government that anybody refers to me—we will handle it in a routine open way, open to the extent that we can tell about it while the investigation is going on.

Mr. HARRINGTON. Let me try to——

Mr. BELL. We will have no coverup of any sort. I would not be a party to anything like that. We will enforce the investigative techniques and the law in an evenhanded way. Everybody is going to be treated the same.

Mr. HARRINGTON. Let me go to a somewhat more specific concern that may be helpful in dealing with the CIA question. I am a member of a subcommittee of International Relations, which is dealing with the question of the CIA, Korean CIA effort, in conjunction with its government, to influence U.S. policy toward the Government of Korea.

I never, and I stress that word, in conversation with the staff heard that there has been less than fervent cooperation to date on the part of the Justice Department with that staff in attempting to assemble and coordinate information that may have been developed as a result of ongoing activities conducted by the Justice Department in this area.

Could you give us, both as it affects that subcommittee initiative and the ongoing Ethics Committee, inquiring in a narrower way into Members' conduct, a statement of yours as to what your policy will be, particularly as it would reflect the transfer of information gathered in the course of your own investigation?

Mr. BELL. I have met with Chairman Flynt of the Ethics Committee. I did not know anybody thought we were not cooperating. It is news to me. I am quite surprised at that.

Mr. HARRINGTON. That is not the subcommittee I referred to in my beginning. I am referring to the subcommittee headed by Congressman Don Fraser, dealing with it from the foreign relations perspective. Committee Chairman Flynt is dealing with it from the point of view of the House membership, its conduct and propriety.

Mr. BELL. I do not know about that. I thought you had reference to the Ethics Committee.

When I first came, I would read in the newspapers almost daily something about the CIA investigation and the number of Congressmen involved. I became very disturbed that the numbers varied so greatly; at one point the number was so high as almost to indict the entire House in the public's mind.

So I gathered together the staff that was handling the case to find out why it was taking so long. I ordered them to give me a full report, to try to terminate the matter within 6 weeks. That turned out to be a mistake. A lot of people criticized me for rushing; they said I was rushing so much I was trying to cover up things.

After I met with the lawyers handling the matter, I realized that it was a very difficult matter to develop because it involves more than one country, indeed several. They are working hard on it. I am keeping close tabs on them. I would say I am working on the case right along with the staff, and it is not our intention not to cooperate. There are some things, in the middle of an investigation, that you cannot give to another group.

We have been careful that we do not run parallel Justice Departments, one in the Congress and one in the executive department. That is why I backed out of the House Assassinations Committee activities.

I have said that we will not do anything more, even if something came up, until they finish. We cannot help two groups operating at the same time, as I see it. If we can be permitted to finish the CIA investigation, we will do everything we can to cooperate with Congress by making the information available once we have decided what we are going to do about prosecutions.

I am sorry it has taken so long. It bothers me as much as it does you that it is taking so long. But it is not that we are just loafing. It is

hard and we have about three things we are trying now that would bring the case to a head.

Mr. HARRINGTON. Let me, and I do not really expect a response, just say that the concern I have is not an intrusion into your area or intrusion into areas that might potentially affect the rights of people. It is a recognition that there is a greater capacity in terms of resources and developed skills to gather information, and my sense is prompted not by one of urgency but by the inference I drew that there had been less than a forthcoming presence on the part of your tenure as Attorney General in providing access to information, which is perhaps an entirely misplaced assumption.

I am looking this morning for some indication that we can expect, with your concerns understood, as much cooperation as those resources, in balance, would suggest in your mind, so that we can get a resolution of this and not have it become a tedious and drawn-out matter because of problems in obtaining information.

Mr. BELL. I am not going to withhold information. I am trying to run an open Justice Department, but I am not going to violate the law and I am not going to violate the Federal Rules of Criminal Procedure by giving out grand jury information. And I am going to have to be very careful in the area of foreign intelligence, but I am not trying to fight with the Congress. Congress has the duty and the right to legislate. You are entitled to all the information that we can give you.

As you know, we are having a lawsuit that started under the previous administration, with Congressman Moss. I hope that will soon be ended and we can work out some reasonable accommodation between us. I do not know anything else I can say about it except to say that, to the extent I can cooperate within the structures of the law and the rules, I will.

I have just learned Congressman Fraser has stated that he is going to set up an interview with me about this matter. I will say now publicly that I will be glad to meet with him, just as I have met with Congressman Flynt, and see what we can do to solve any problem that might be outstanding.

Mr. PREYER. Thank you, Mr. Harrington.

Mr. Kostmayer?

Mr. KOSTMAYER. Judge Bell, I have a couple of general concerns. The first is an argument which has been put forth in defense of Mr. Kearney, and I realize we are not going to talk about that and I will not deal with that specifically, but only in general terms.

Let me read you a sentence from a letter written to the President from a number of agents in my own State of Pennsylvania, written to the President on April 26 of this year:

> We are deeply concerned that loyal, devoted, patriotic Americans such as Kearney can be indicted for effectively serving the country as the times and moods indicated.

These agents defend Kearney with the argument that when he allegedly committed those acts for which he has been indicted there were standards in effect which are perhaps no longer in effect. I am concerned to know whether they are indeed still in effect and furthermore whether in your short time as the Attorney General you have become convinced that these sort of activities no longer take place in the Federal Bureau of Investigation. If you are not convinced

they have stopped, what policies and guidelines can be formulated to insure that the activities or the alleged activities of squad 47 in New York City do not occur again, so that we can be confident that these things have stopped?

Mr. BELL. Well, you have now touched on why the investigation is continuing. I do not know. I would not have any way of knowing.

There are 20,000 people in the FBI, 8,000 agents, many offices over the country. These are highly motivated, intellectual, well-trained people. I hope nothing like this is going on. If Congress will be patient, if the American public will be patient with me, I will develop a system after we finish getting the facts that will be fail-safe, that will cause the American people to believe that there is nothing going on wrong and there will not be anything wrong. I have to be certain of the facts, and that is why we are continuing the investigation.

I do not look on these cases as just routine criminal cases. I look on this as something involving the entire FBI. I think that has a lot to do with the morale being low in the FBI. They say morale is low. Well, I think it probably is, but it is because the FBI itself and its procedures are under investigation. That does not mean the morale will not be better in the end, and the Bureau will be better.

I have to have some time and have people be patient with me a while. This is hard, it is a tough road, but we are moving. I believe in the end everybody is going to be better off because we are doing this.

Mr. KOSTMAYER. I appreciate the need for patience. I think we have demonstrated some patience.

You mentioned morale. I want to ask you about that, but are you saying that you will be able to reach a point in your service as Attorney General where you can pretty well tell us that these sort of things are no longer taking place?

I realize of course that you cannot speak for everybody.

Mr. BELL. I think I will reach that point. We have to have in the FBI what the chairman knows you have in a bank; he used to be a banker. You bring people in and put in internal operating controls, and the bank examiners require that. They will come in and examine a bank. If they find internal operating controls are not sufficient, they will make you do something about it.

We have to have internal operating controls in the FBI, and someday we will not dwell on the FBI so much, we will look at other agencies too, probably, and we will find that maybe a lot of agencies need internal operating controls, but right now I am working on the FBI.

Mr. KOSTMAYER. In other words, you are not able to give us this guarantee today, not because you know one way or the other whether these things are occurring or not, but because you simply have not been on board long enough to make a judgment?

Mr. BELL. Right. I am trying to get parallel groups and see how they compare in what they did, that is all.

We are making, I think, about as precise an approach as you could make to see just what does go on in the Bureau. I would not want to say that there is anything going on that should not be going on, or vice versa, right now, because it is too big. I would not know that.

Mr. KOSTMAYER. You mentioned morale. I would like to ask you about that.

There has been a lot of talk about low morale in the Department

because of the indictment. I am very concerned about morale in the FBI. I do not have the same concern as the agents from my own State who wrote this letter to the President. I am concerned about the morale of people in the Federal Bureau of Investigation who want to obey the law, particularly the young agents but not necessarily young, of course.

I wonder if you would have some advice for them, if indeed, even today, they are being ordered to break the law as may have been the case in the past?

What is an agent of the FBI to do if he is instructed to commit an act which he knows or believes may be in violation of the law?

Mr. BELL. I have spoken to the agents in five cities, assembled, and I give them all the same advice: "Follow the manual; if it is not in the manual do not do it, get it in writing." There are agents who have done that over a period of years. "If you cannot put it in writing, do not do it."

"Who is accountable? Who told you to do it? Who told him to do it? Did the Attorney General authorize it?"

"Let the Attorney General be accountable. Let him sign it." That is what I tell them, and that is the way we will have it. People are entitled to know who is responsible.

Mr. KOSTMAYER. In other words, they would be on firm footing if they asked their superiors for these instructions to be written?

Mr. BELL. It would be worse than that. If they don't ask, they will be on very unsound ground.

Mr. KOSTMAYER. You would defend it if the superior refused to do that; you would defend the agent?

Mr. BELL. Absolutely, once this system is set up where they get it in writing. First, they look in the manual: Is it authorized in the manual? If not, you ought not to do it, and you are going to get in trouble if you do. The young agents, all the agents, will be glad to have a system like that. I think there probably has been such a system. There have been agents who followed that course, I believe.

Mr. KOSTMAYER. I want to ask you one final question that could be just a simple factual question. You may have addressed it before I came in. It is the question of legal fees of Mr. Kearney. Has the payment of these fees been resolved, or are you not yet able to answer that?

Mr. BELL. I am. I am glad to answer it. In the Senate, I think it was, the Senate Appropriations Committee, I testified on this subject. Somebody asked me if we were paying Mr. Kearney's legal fees. I said we could not pay his legal fees, but that if the money was available I would be glad to pay his legal fees because he was working for the Government when he did this. Or at least we should reimburse him if he won his case. But that was just really an aside. We can't pay his fees. We were——

Mr. KOSTMAYER. So you were correct when you told him you would be glad to pay the fees?

Mr. BELL. I didn't say that. I said if we were allowed to do it, if we had the money. That was a hypothetical. But we do furnish lawyers for agents in civil suits. Sometimes we get an outside lawyer for an agent because we have a conflict of interest within the Justice Department. Congress has been slow to reimburse us for those payments to outside lawyers, and that has to be a big problem.

Now, one of the chief morale factors in the FBI, the thing that has

more to do with lower morale than any indictment, is the fact there are a lot of suits against agents, against me, against Levi, everybody, and you can't be sure that the Government is going to furnish that lawyer, furnish your defense.

You are there working for the people in the Government, and you are sued, and if the Government walks off and leaves you, that is bad. We haven't walked off and left anyone yet, but they can't be certain that they are going to be defended.

Now, we will indemnify a drug company that makes a flu serum. I have to take the cases over and defend them, furnish the lawyers, and pay the damages. We even indemnify and hold harmless great contractors when they have Government suits and a patent misuse is claimed, that sort of thing. It is not clear we want to defend our own employees, and that is a morale factor, and something should be done about that, and I am trying to do something about it.

I am trying to work out an understanding when we can furnish lawyers and when we can't, and that sort of thing. Otherwise, I think the FBI agent is going to have to pay out of pocket for some kind of insurance. If you don't mind my saying so, I think that would be almost a disgrace.

Mr. KOSTMAYER. Thank you very much for answering my questions. I will stop now, but I want to read a final sentence from a column in the New York Times some time ago to let you know how I feel about the issues we've discussed. I think this expresses my views very well. "Mr. Bell ought to stick to the sound position that his job is to vindicate the rule of law rather than the FBI." Thank you.

Mr. PREYER. Thank you.

Mr. Weiss?

Mr. WEISS. Thank you, Mr. Chairman. May I at the outset request unanimous consent to enter in the record an opening statement as well as a copy of a letter I addressed to the Attorney General on April 15, to the FBI Director on April 16, and a response from the FBI Director on April 28, this year?

Mr. PREYER. Without objection, it will be entered in the record.

[The material follows:]

STATEMENT OF HON. TED WEISS

I would like to first welcome the Attorney General and thank him for coming here today to offer his views on matters of great concern to all Americans.

Our constitutional form of government has sustained serious damage in recent years. Basic individual rights and institutional safeguards that make our Nation a true democracy have come under repeated attack. A veritable crime wave has swept through some of the highest offices and most respected agencies of our government, threatening the very principles and processes which have characterized the United States as a land of individual liberty and equal justice.

The Federal law enforcement and intelligence agencies have contributed to this erosion of constitutional and statutory authority through their involvement in questionable and, at times, blatantly illegal actions at home and abroad.

The FBI and CIA have been invested with enormous power to uphold our legal system. They have a solemn responsibility to abide by the same standards they seek to enforce, but this power and this duty have been wantonly abused on a number of occasions.

In fact, the experience of the recent past has led the American people to question whether revelations of official misconduct represent a systemic weakness—a pervasive disrespect for the law and constitutional rights that cannot be attributed to a few individual, isolated misdeeds.

Two months ago, when former FBI agent John Kearney was indicted on felony charges, we again witnessed an arrogant abuse of governmental authority by a high public official, in this case a chief law enforcement figure.

FBI Director Clarence Kelley challenged our system of due process and equal application of the law by attempting to intervene in Mr. Kearney's case. Mr. Kelley said he would seek to use his influence to persuade Mr. Bell to accord the FBI the same unwarranted leniency previously afforded the CIA when it was alleged to have engaged in criminal actions.

Emphasizing the primacy of "the morale of the FBI" and insisting that Mr. Kearney was "motivated by the best intentions," the FBI Director sought to have the Justice Department close the case against Mr. Kearney and terminate its investigation of bureau activities.

I informed Mr. Kelley on April 16, that his statements represented "a serious abdication of your responsibility as a public official sworn to uphold the rule of law." I asked the Director whether he had so quickly forgotten the lessons of Watergate through misuse of his office as a means of protecting individual agents at the expense of public accountability and adherence to the law. Mr. Kelley's response to my letter does not satisfactorily explain his attitude toward the principle that ours is a government of laws, not individuals. Indeed, I am hopeful that this Subcommittee will call Mr. Kelley to testify on this matter.

This specific example of official irresponsibility and other, similar incidents have demonstrated to us all that the constitution and our democratic rights are only as secure as the institutions which exist to defend and preserve them.

The Justice Department is a bulwark meant to safeguard and strengthen our individual rights. It deserves our highest commendation in having brought the indictments in the Kearney case. Statements made since then by Mr. Kelley and the Attorney General raise some serious questions: Has the Justice Department acted in a manner consistent with this awesome responsibility in the case of Mr. Kearney?

Is the department determined to fulfill its constitutional and statutory obligations in its current investigations of the FBI despite ominous attempts to deter it?

Can the American people again assume that their government is committed to the principles it espouses, or will public suspicions about the privileges of the powerful once more be confirmed?

Are there sufficiently clear and stringent guidelines on the conduct of the FBI and its agents?

Is there any basis for the FBI to continue to undertake investigations not directly related to criminal matters?

Can the Justice Department regardless of its good faith and good intentions, undertake truly impartial investigations of the conduct of the FBI or any other Justice Department personnel, or is there now a need for the creation of a temporary special prosecutor to undertake such investigations?

These are some of the compelling questions which the Attorney General has been requested to answer. I sincerely hope that his response will reflect an unstinting determination to provide the impartial oversight without which this nation cannot long continue as a model of a society committed to equal rights under the law.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., April 15, 1977.

Hon. GRIFFIN BELL,
Department of Justice, Washington, D.C.

DEAR MR. BELL: I am deeply distressed by the reaction voiced by FBI Director Clarence Kelley to the criminal indictment of former bureau agent John Kearney.

Director Kelley's statement reflects an alarming indifference to the impartial application of the law and to the principle that public officials must not interfere in the proper functioning of our trial system.

I am enclosing for your consideration and response the letter I have today addressed to Director Kelley in regard to this matter. I am also enclosing a copy of my request to Government Operations Committee Chairman Representative Brooks and Subcommittee on Government Information and Individual Rights

Chairman Representative Preyer that Director Kelley be called to testify before the subcommittee on his position in the particular case and his attitude toward the Justice Department's investigation of FBI actions.

Thank you for your attention to this matter. I would very much appreciate a reply indicating your views on Director Kelley's statement.

Sincerely,

TED WEISS, *Member of Congress.*

Enclosure.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., April 16, 1977.

Mr. CLARENCE KELLEY,
Director, Federal Bureau of Investigation, Washington, D.C.

DEAR DIRECTOR KELLEY: Your reaction to the criminal indictment of former FBI agent John Kearney was most distressing and indicates, in my view, a serious abdication of your responsibilities as a public official sworn to uphold the rule of law.

Your statement, coupled with the demonstration yesterday by FBI personnel on the steps of the Federal courthouse in Manhattan, will serve to intensify public mistrust in our government's respect for its own statutes. You have explicitly stated that you will seek to use your influence with Attorney General Bell to have the FBI exonerated for past unlawful behavior in the same way that the CIA was similarly exempted from obedience to our laws.

Have you so quickly and so casually forgotten the lessons of Watergate?

Former agent Kearney may or may not be guilty of the felony charges lodged against him. That is a matter for a jury to decide, and he is most assuredly entitled to a presumption of innocence until a court of law finds otherwise. I bear no personal animosity towards Mr. Kearney or any other bureau employee. Rather, I am committed to the principle that ours is a government ruled by law, not by individuals.

You seem to imply that the merits of this case are not of primary concern. What is most important, you contend, is "morale of the FBI" and the assertion that Mr. Kearney was "motivated by the best of intentions."

I agree that the FBI should function with a high degree of commitment to its duties, and it may well be true that Mr. Kearney acted out of a belief that he was fulfilling some vital national purpose.

Would FBI morale not, however, be served better by its director's stated intention of having bureau agents abide by the same laws they seek to enforce? Your reaction to Mr. Kearney's indictment is sadly and emphatically lacking in any such realization of the equal applicability of our legal system.

And do you really maintain that motivation excuses an individual from facing the consequences of his or her actions? This is a most curious interpretation of legal liability by a chief domestic law enforcement officer of our nation.

Your statement is also glaringly remiss in not noting that the crimes with which Mr. Kearney is charged were explicitly prohibited by your predecessor, J. Edgar Hoover in 1966 and were again forbidden by the United States Supreme Court in 1972.

Nowhere in your statement is there any reference to FBI agents' duty to zealously respect the constitutional rights of Americans. Nowhere do you express a commitment to ensuring that the bureau does not again embark on an "era" of lawlessness. Nowhere do you as the Director of the FBI avow your determination to secure justice, fully and impartially, in this most serious case.

I strongly urge you not, as you have stated, "to use every means at my command to assure that his (Mr. Kearney's) current predicament is resolved as soon as possible." Mr. Kearney's fate is rightly in the hands of a jury of his peers. Any interference by you in the proper functioning of the trial process can only further undermine Americans' respect for the FBI and its top officer.

I also urge you not to act to prevent or impede the continuing investigation by the Justice Department of FBI actions during the period now under review. The bureau will be able to function as intended and agent morale and the morale of the American people will be satisfactorily high only if its overseers exercise without interference their obligation to insure FBI compliance with the law.

As a member of the subcommittee on government information and individual rights of the Government Operations Committee I intend to question continually any apparent disregard for constitutional guarantees and civil liberties whether by the FBI or any other federal agency. It is my firm belief that it is in the

best interests of this nation that the trial of Mr. Kearney proceed expeditiously and fairly and the Justice Department continue to fulfill its responsibilities by providing oversight and review of bureau policies and actions.

I trust that you will reconsider your position and will immediately rectify the impression that you are more interested in protecting the FBI than in safeguarding our constitutional form of government.

Sincerely,

TED WEISS, *Member of Congress.*

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., April 28, 1977.

Hon. THEODORE S. WEISS,
Member of Congress,
New York, N.Y.

DEAR CONGRESSMAN WEISS: Your letter of April 16, 1977, is apparently predicated on a misunderstanding of my position concerning the current Department of Justice Civil Rights Division inquiry of surreptitious entries, mail opening, wiretapping and other offenses allegedly committed by current or former FBI personnel. Please be assured that I have fully cooperated with the Attorney General in this matter, and it was not intended by my public statement of April 14, 1977, to interfere, impede or influence this inquiry. As you are aware this matter is being investigated by the Department of Justice Civil Rights Division and not by the FBI personnel under my direction, and therefore, I am not in possession of all the facts developed. In the interest of serving the process of justice, I want to assure the Attorney General is cognizant of all relevant facts concerning this matter. To this end I am furnishing information I believe to be relevant to the Attorney General.

I in no way intended to convey the impression that the FBI is above the law. I cannot too strongly emphasize my position that the FBI is bound to observe the law and the Department of Justice regulations in discharging its responsiblities.

Sincerely yours,

CLARENCE M. KELLEY, *Director.*

Mr. WEISS. Thank you.

General, I, too, want to welcome you here and to indicate at the outset that unlike you and the chairman, my experience in the criminal justice system has not been as a member of the judiciary, but as a prosecutor, and we have worked different parts of the same vineyard.

My concerns, when I first expressed an interest in having hearings on matters subsequent to the Kearney indictment, were not motivated by an interest in the Kearney indictment, itself, or what went on, but rather by Mr. Kelley's statements as to the propriety of FBI agents being indicted for alleged violations of law.

Just for the record, I wonder if we could have your statement—not concerning Mr. Kearney or the particular investigations now underway—but rather on your view of violations of the Constitution or of the criminal laws of the United States by anyone working for the U.S. Government, whether an FBI agent, CIA agent, or anyone else. What is your position on that, and will you express that clearly to the subcommittee?

Mr. BELL. I think probably I have already, by action or by deed, made my position clearer than anyone has in recent years. After all, I did indict Mr. Kearney; that was not easy. If I hadn't wanted to follow the rule of law, I wouldn't have done that. I could very easily have gone the other way. I think we have to have enforcement of the law, and it has to be evenhanded. The argument that Congressman

McCloskey was making about the CIA has caused a good deal of concern, but I think I am on the right course. I believe I am. I hope I am, because I don't want to condone law violations.

This is very complex, all this situation, as you can understand when a course of practice was started in 1936 by the President and by the Director, and it just went on and on and on for years and years, and finally in 1966 the Director said, stop; stop. And then maybe the stop was not complete. That is what I am trying to find out. I don't know how all that happened. But henceforth, if you want to know about the future, there will be no question if anybody engages in any type of activity, which denies the right of American citizens, they are going to have to suffer the consequences of the law.

Mr. WEISS. That is where I found the FBI Director's statement so incomprehensible. Your reference is exactly on the point. The former FBI Director, Mr. Hoover, in 1966, and again in 1967, in clear, unequivocal terms, stated by directive that he wanted any kind of illegal FBI behavior halted. I am therefore distressed by the current FBI Director stating that this situation had gone on without check or without any effort to break it. The Director spoke as if the agents should have the right of adverse possession to go into another area of the law because it had been done openly without any opposition. But, in fact, there had been opposition, had there not? Mr. Hoover's statement was very clearly opposed to that.

Let me ask you a broader question, because the area where the FBI seems to have gotten into difficulty is the so-called domestic intelligence field. And I will, with your patience, read you a prefatory statement.

In 1975, the FBI Intelligence Division responded to a General Accounting Office inquiry requested by a committee of this Congress with reference to the initiation of intelligence investigations. This is what the Bureau's Intelligence Division said:

> Prosecution is a secondary objective which is apparently unobtainable consistent with more valuable continuing coverage. The Attorney General should be provided on a continuing basis with information upon which to make assessments and policy recommendations pertaining to specific nonpenal aspects of the nation's internal security program.

The GAO report also determined that the program in addition to abridging guaranteed constitutional rights, has been virtually ineffective in regard to criminal prosecution. The GAO report shows that of 797 cases examined, only 3 percent were referred for prosecution. Of this total number of 797 cases, only 8 resulted in convictions. Of those prosecuted, none were prosecuted on charges arising out of violation of the sedition, treason and conspiracy sections of the U.S. Code under which the intelligence investigations are to be initiated.

Given these facts as background, do you, as the Attorney General, see a need for the FBI to conduct domestic surveillance of any U.S. citizens who are not involved in or planning a criminal activity? Is there any justification for continuing domestic intelligence?

Mr. BELL. This is not an easy question. There are three areas of intelligence operations. One is criminal. You operate on title III and get a warrant. No doubt about that. The FBI has authority, the Attorney General's authority under the statute to detect and prosecute crime. And then you have the area of foreign intelligence. But

in the middle you get to what you are talking about, which is domestic intelligence, domestic security. My position is that has to be tied to a crime. I am troubled by this. That was something that was in the Safire column, that I was threatening to shut down domestic security investigations, and that is true. I don't deny that. I want the Congress to know that.

Unless Congress is willing to give me statutory authority, clear authority, I am not willing to engage in some of these things, and I am not willing to ask the FBI to do it. The difference is right in the last sentence or two of what you read; you said something that indicates it is not to detect crime. You have to go one step further, and that is when you anticipate that there is going to be a crime committed. I am not certain we have even that much authority. For example, a terrorist operation, where you have reason to believe that they are going to blow up a building. They have bombs and explosives, we will say. Would that be covered under simple language to detect and prosecute crime?

I don't know. People have debated that, and that is something I am debating with myself right now. I think that is why I say every day, nearly, let the Congress give us a charter. Tell us what you want to do and we will do it.

Mr. WEISS. As far as your view—and I think your statement is reassuring to me, in any event—I believe, in fact, unless there is at least a tie-in, whether it is by way of prevention or pursuit of criminal activity, where there is reason to believe that a crime has been or is about to be committed, you do not believe as of now the FBI has a charter to go into those situations, nor that it ought to unless it receives some specific statutory authorization?

Mr. BELL. I think there has to be a nexus to crime. That is my view, and that has not been the view—there have been divided opinions on this. I found varied opinions in the Department, and it has not been the view just recently. As I understand the view of the law, this is not a cut-and-dried law point, but that is my view, and that is why I am pressing for a charter.

I think the Congress, probably the majority of the Congress, would want us to be able to deal with terrorists activities. But if so, then I would like to have some clear authority.

Mr. WEISS. Have you begun to draft provisions or suggestions for matters to be included in a charter? I have heard you refer now for the last few months to the charter concept. Is that proceeding? Will you be reporting to Congress? Can you indicate to us what kind of specific matters you will be including in those proposals?

Mr. BELL. I don't know, because I have a working group drafting right now. The same group that drafted the new Foreign Intelligence Surveillance Act that we had introduced in the Senate and House is now working on a charter for domestic activities of the FBI. I have given them my views. I talked to somebody on the committee, John Harmon, who is head of the Office of Legal Counsel at the Department—I think I talked with him Monday—and they seem to have it more complicated than my views.

I just wanted to amend that one sentence, "to detect and prosecute crime." I wanted to expand that enough that I could have the authority to anticipate crime, where there is probable cause to think crime might be committed.

Mr. WEISS. But the FBI would not have the power under your suggestion, for example, to place under surveillance any organization of American citizens—with no indication of a crime to be committed—simply because the FBI considers them leftists or radicals or rightists?

Mr. BELL. They are not doing that now. The problem comes in where you are surveilling an organization that has committed crime in the past, but it has been a good while ago, and they haven't done anything lately, and you don't know for sure they are going to do anything right now. That sort of situation is where you get on the borderline. If they have just committed a crime last week, you might possibly have some authority. But then you get into the complication of whom are you going to surveil, how many people. If there are 10,000 people in an organization and 5 committed a crime, how many are you going to surveil?

These are hard questions, and it ought not to be left to the FBI to have to make these judgments, or the Attorney General. It is a matter, I think, that should address itself to the Congress.

Mr. WEISS. Thank you, Mr. Chairman. I have exceeded my time for now.

Mr. PREYER. Thank you, Mr. Weiss.

I want to ask a few questions in another area about the congressional access to Justice Department information.

Before I do that, I do want to comment on the general discussion that has been had so far about the policy of the Department toward past wrongdoing. The rule of law has certainly taken a buffeting in this country in recent years. Higher morality was substituted for the law. The dubious higher morality of a Daniel Ellsberg, for example, was used as an excuse for the equally dubious higher morality to break into his psychiatrist's office on the grounds of national security. We ended up in a religious war, that is about what it amounted to, with each side contending its higher morality justified violating the law.

I must say, your bluntly honest talk here has convinced me that the rule of the law for the present and future of this country is in good hands. You came into a very difficult situation. With these religious wars going on, I can understand that there may be some problems, and it may take a little time, too, to work out a new policy. But I do feel that you have stated it about as bluntly and strongly as could be, that from now on our best national security in this country is the rule of law. It is not higher morality; we are going to go by what the manual says, going to go by the rule of law.

I think your idea of Congress giving you a charter in the area of domestic surveillance is certainly a good one. I think that would come before the Don Edwards' subcommittee, and hope you will be working with them on that.

Have you considered drafting a charter or policy in the area of congressional access to Justice Department information? I think that is susceptible to drafting a policy.

Mr. BELL. I was asking my staff, because we have had some conversations lately about this subject. We have something called a Brownell document, which I think you have a copy of, which addresses itself to this general question. But we are reviewing this whole area. This first came to my attention in the foreign intelligence area when the Vice President was working with the Senate and House leadership on access, some access on some policy. And then we are having the law-

suit with Congressman Moss. The whole subject needed reviewing.

We are reviewing any policies we have been able to find in the Justice Department, and we would like very much to work with the Congress on access policies. I had to meet with the House Assassinations Committee, as you know, on what we would do about making FBI records available. We are proceeding almost on an ad hoc basis now, and it probably would be well to reduce the ad hoc practices to a policy, if we can. We are working on that. Do you have this Brownell Order No. 116–56, dated May 15, 1956?

Mr. PREYER. Yes; apparently we do have that.

Mr. BELL. All right.

Mr. PREYER. Is it your view that this memo is still in effect, the Brownell memo, or are you using that as policy guidelines?

Mr. BELL. I think it is still in effect, but I had never seen it until this week. That is the way things are sometimes in an operation as big as ours, 54,000 people.

Mr. PREYER. But it is your view it would be better to draw up some overall policy rather than to proceed by treaties with individual groups on an ad hoc basis?

Mr. BELL. I believe that is right.

Mr. PREYER. The policy of the Justice Department has been a long-standing one to resist disclosure to Congress in matters relating to ongoing investigations and prosecutions. The fear of prejudicing upcoming trials, the problem of compromising investigatory techniques and compromising informants are the grounds generally given for that.

That clashes with another constitutionally based power, which is the power of Congress for oversight investigation. We have a classic case of competing needs of different institutions and confrontation with other values.

Can you at this time give us in general what your view would be of the congressional oversight of Department of Justice operations? There is one case, the *McGrain* case, which upholds rather broad congressional oversight policies. Is there any basis for withholding information or testimony by the Department with respect to the Department's operation? What, in general, would be your view of the scope of congressional oversight?

Mr. BELL. I think the *Moss* case in the D.C. circuit makes it clear that the duty to legislate carries with it the right to get information, and the information and oversight seem, to me, to coincide. If you get the right kind of information, then you are engaged in oversight. I think oversight is a part of legislative authority, so I have no problem with that. We are willing to have you perform the oversight functions over us, and we are willing to cooperate and make anything available we can so long as it is consistent with the law and rules of criminal procedure.

We don't intend to resist. Wherever there is some sensitive matter involved, such as maybe in foreign intelligence, we will try to make accommodations. We recognize the oversight power, and we are working to adopt policies.

Mr. PREYER. We appreciate that, and we will look forward to working with you and your associates on that.

Do you feel that Congress has any role in examining exercises of prosecutorial discretion by the Department in the sense of being able

to understand the policies underlying criminal prosecutions, not, of course, telling you whether you should or should not prosecute a particular case?

Mr. BELL. I think this is a function that could be abused by Congress. If you started calling me every day, wondering about what happened to some prosecution in St. Louis and another in New York. But if you wanted to come in and take a group of 100 and study them, then you would be engaged in oversight. So there is a fine line between the two, and I don't think you would ever abuse your power to engage in oversight in the way I am talking about. Maybe some one Member might sometime, but that would be understandable.

Mr. PREYER. Would you draw a distinction between a Member of Congress asking you about a case and a committee of Congress asking?

Mr. BELL. I have had many Members of Congress ask me about cases since I have been here. Most of the time they are wondering why we are prosecuting. I don't think I have had anybody ask me why we didn't prosecute. But I don't mind that. That is part of the American process. Certainly everybody has a right to speak to public officials under the first amendment, the right to petition for redress of grievances. Whenever a Congressman asks me something, he is asking for some constituent. I have never had a Congressman ask me for himself, or herself. So there is nothing wrong with that. What I had in mind was—and this hasn't happened yet, but I sometimes have the feeling that we are close to it—that somebody may want to be Attorney General at the same time I am Attorney General. They may want to be the U.S. attorney in a district at the same time we already have somebody else serving in that capacity.

So you get to asking about details about a particular case: How do you reach this conclusion? What was the basis of your discretion? I think the oversight function can be well performed by studying groups of cases and often by just studying status of cases. But to the extent you need to go further than that, I am willing to cooperate. I know a good deal about statistics and systems and that sort of thing, and I am available and ready to cooperate.

Mr. PREYER. I think the area in which oversight would be justified involves the underlying policy. To see a pattern of cases and group of cases, as you suggest, would be the proper way to go at it, not to meddle in individual cases.

Mr. BELL. I don't think we should have open warfare, or even a truce situation, between the Congress and the executive department. We have to keep in mind that we all are representing the American people. They didn't send us up here to squabble with each other. They sent us up here to govern, and we can't govern unless we work together.

Mr. PREYER. I recall Arthur Schlesinger, the historian, described the relationship between Congress and the executive as continuing guerrilla warfare. I think that is overstating it, and your predecessor, Mr. Levi, replied to that, that self-restraint was good in the judiciary. I think self-restraint is a good practice between the executive and Congress, and rather than permanent warfare, there should be some self-restraint and cooperation.

Mr. BELL. I agree with that.

Mr. PREYER. You had mentioned earlier rule 6(e). I have gone beyond my time, and I will just ask this question.

Do you consider rule 6(e) of the Federal Rules of Criminal Procedure dealing with the secrecy of grand jury materials applies to Congress? I think you mentioned that you would need a court order to discuss an ongoing case with the committee.

Mr. BELL. I don't think it is applicable to Congress, but it is applicable to me. I am the one that would be in trouble. I don't think it has any exemption. Whenever the Attorney General is asked by Congress, he can tell Congress. At least, that is the way I construe it. There is no problem about that, if you really needed the information. There is no Federal judge who wouldn't authorize, under some safeguards, disclosure to the Congress in executive session. I wouldn't anticipate that would be a problem. The courts, as you know, work well with the other branches of the Government.

Mr. PREYER. I will have to congratulate the courts, particularly going through the Watergate years, as being the most leakproof institutions I think that we have. I wish all of our other institutions were as leakproof. Mr. McCloskey, excuse me. I have taken more than my time here.

Mr. MCCLOSKEY. Thank you, Mr. Chairman. I would like to ask unanimous consent of the committee to tender to the Attorney General the unreleased draft committee print of the report on the "Justice Department Treatment of Criminal Cases Involving CIA Personnel and Claims of National Security," which is enclosed as tab 2 in our staff file.

I would like to ask unanimous consent to tender this report to the Attorney General with the request that the Department of Justice comment on the conclusions and facts that are set forth in this draft report.

Mr. PREYER. It is unpublished?

Mr. MCCLOSKEY. Yes, and under our rules of secrecy we can't give it to you, Mr. Attorney General, without such a vote.

Mr. BELL. That is the reason we haven't heard of it before.

Mr. MCCLOSKEY. You are about to receive a copy, I hope.

Mr. BELL. Apparently that is leakproof.

Mr. PREYER. You have heard the unanimous-consent request. Is there any objection to that? If not, it is so ordered.

Mr. MCCLOSKEY. Mr. Attorney General, I would ask with respect to the discussion of the decision of the Department of Justice that your Department comment on the accuracy of both our facts and our conclusions. Further, if you would append to your response a clear statement as to what rules and procedures you now follow with respect to the conflict between the CIA's obligation to keep its sources and methods of investigation secret and your obligation to prosecute violations of law when they are discovered. I might say the *Khramkhruan* case was one of narcotics. It has nothing to do with the matter of alleged violations of opening mail or other illegalities we have discussed.

I will deliver this to you at the conclusion of the hearing.

Mr. BELL. We will be glad to respond.

Mr. MCCLOSKEY. I would like to ask, just as a classic example, how

the Department of Justice handles this kind of situation in the delivery of information to the Congress.

Last year, we amended the Freedom of Information Act because of confusion as to whether some 200-odd statutes which directed various Government records to be kept secret were affected by the Freedom of Information Act language, which, while requiring certain things to be kept secret and permitting executive discretion to keep things secret, expressly said this did not provide the right to the executive branch to withhold information under proper request from the Congress.

The example is this: We are about to vote tomorrow on over $500 million in subsidies to the maritime industry in construction subsidies and operating subsidies. We have had two public announcements: One, that the U.S. Lines, and I will quote to you from an article in the New York Times of March 11:

> Walter Kidde & Co., which owns the shipping line, said in a filing with the Securities and Exchange Commission that among payments uncovered in a special company investigation $5,000 was given to an elected official of the U.S. Government in an attempt to insure passage of favorable legislation. The official was not identified, and Kidde said the matter was under investigation by a Federal grand jury.

Now, as Congressmen considering whether to subsidize this industry, it is of considerable importance to us whether this bribe was paid and to whom it was paid, because otherwise we in the Congress, individually and on the committee, are under suspicion that we are somehow in collusion with the very industry with whose oversight we are charged. That is example one.

The second example also involves a shipping company, Sea-Land, owned by R. J. Reynolds; in one of their SEC filings they reported that the investigation to date indicated that corporate funds had been used for domestic political contributions between the period January 1968 through early 1973, and the total amount of such contributions over the 5-year period appeared to be between $65,000 and $90,000.

Now, assuming when the SEC receives reports of criminal conduct of this kind, it is referred to the Justice Department for prosecution, so that your ongoing jury investigation—as is now occurring in New Jersey, at least, and I believe in New York, Louisiana, possibly also in Washington, D.C.—is paralleled by a congressional interest in the same set of circumstances which affect our legislative authority, what is the manner and method in your judgment by which Congress should request from the Justice Department the information in your hands which affects our legislative procedure yet which, under the law, you are properly required to keep secret?

What are your rules for disclosing or declining to disclose information to us, and what should our procedure be to obtain that information from you?

Mr. BELL. We don't have a rule of procedure. But in the case of the other Cabinet officer I recited, I did go and get a court order. I would say the procedure would be to ask us for the information; we would respond by saying we would attempt to supply it because you say that Congress needs it. We would attempt to supply it by going to New Jersey and getting a court order under rule 6.

Mr. McCLOSKEY. Should the request come from a committee signed by the committee chairman rather than an individual member?

Mr. BELL. I think it should come from the committee. That shows me—and it is almost like a subpena. I am told that it would be consistent with the Brownell order for the committee chairman or subcommittee chairman, either one, to make the request. Then we will try to get the court order.

Mr. McCLOSKEY. You would have no difficulty if we through a committee chairman submitted a request for information as to bribes or alleged bribes, in furnishing that information even though you felt the responsibility to get a court order to release it to us?

Mr. BELL. Right; we would do that. I haven't checked the Privacy Act. I don't know if we can give—what does the Privacy Act say about giving information to the Congress? Is Congress exempt from the Privacy Act?

Mr. McCLOSKEY. I might add that is like classified information which is the other major jurisdiction of this committee. When we found top secret, secret, and confidential applied only to the executive branch but not to the Congress, it threw us into some confusion. I hope further on in your tenure we will have explicit recommendations from you as to the resolution of both the classification of information and how it should relate to the Congress, the Privacy Act, and the Freedom of Information Act problems and their conflicts, because we hope to resolve those.

Mr. BELL. I have the Deputy Attorney General working in the area of the Freedom of Information and Privacy Acts, and he says it is very difficult to comply with the Freedom of Information Act on account of the Privacy Act.

Mr. McCLOSKEY. Would you remind him that possibly in 60 or 90 days this committee will be asking for recommendations on how we resolve any differences or conflicts or seeming ambiguity? Both of those acts were amended within the last 3 years and the amendments could possibly have created some unforeseen difficulties. I hope we can expect within 90 days your very careful suggestions to us on amendments of those laws that you feel are appropriate.

Mr. BELL. We will be prepared on that.

Mr. McCLOSKEY. Thank you.

Mr. PREYER. Thank you, Mr. McCloskey.

Mr. Kostmayer?

Mr. KOSTMAYER. I wanted to follow up briefly, Judge. I asked you earlier if you could guarantee us at this early point that these acts were no longer taking place, and you said, and I think it reasonable, that you are not in a position to do that yet. You haven't been the Attorney General long enough.

But I am interested to know what efforts you have made in that direction. I think you referred to some kind of internal system in the FBI and other agencies to make sure that these don't take place, and perhaps when you come back 1 year from now or even in less time than that, you would be able to describe this internal system.

I am wondering, first of all, if you can give us a hint as to what kind of precautions you are taking to assure adequate oversight, as head of the agency which includes the FBI, to prevent these kinds of things taking place, and if you have done anything to insure the

rule of law. For example, have you issued a directive to the agents that the laws will be enforced? I wonder if you have done anything along that line?

Mr. BELL. Attorney General Levi had the guidelines committee in operation when I got here. There are guidelines on almost every conceivable thing that ever faces the FBI. And then we have a manual, and a committee studying the manual. Every time they need to get a wiretap order in a criminal investigation, it comes all the way up to the Justice Department to be signed in writing. I delegated that to Mr. Civiletti, the head of the Criminal Division, and he gives me a report weekly on that activity. Now if somebody operates outside a system, they are violating the law.

Mr. KOSTMAYER. Is that——

Mr. BELL. I think it is, but I don't want to say 100 percent, because I want to finish the investigation.

Mr. KOSTMAYER. Is this what you referred to when you talked about some kind of internal system?

Mr. BELL. That is what I am talking about: Internal operating controls. I want to be sure the manual warns people that you must proceed in this manner. I am not certain it is that strong right now.

Mr. KOSTMAYER. So you might be talking about adding additional controls?

Mr. BELL. Right. I want to give a warning. I don't want to see any agent get in trouble. I have a high regard for the Bureau. I think it is one of the finest agencies in the entire Government for the people, and I want to be completely fair with them. I want to have a system where they can't get in trouble.

Mr. KOSTMAYER. I think you are right. I think that is awfully important, but I think, as you indicated a moment ago, there are so many regulations now and a good many guidelines now, and I think maybe one thing that is important is something which goes beyond that, and that is the attitude of the people who head the FBI, the attitude of the people who head the Department of Justice, and the attitude of the people who are in a position of leadership in this country. That is why I agreed with Mr. Weiss earlier about the attitude of Mr. Kelley, and his attitude seems to me to be very inadequate in this area and seems to go in the opposite direction that you are going in this morning, and I am very pleased.

I didn't expect to be so pleased with you, Judge. I am very pleased with the attitude you have expressed here this morning, and I wish you would talk to Mr. Kelley and get him to come around to your way of thinking.

Mr. BELL. Let me tell you about Mr. Kelley, and I want to say something in his defense. That statement that he issued that you disagree with, he did not issue that on his own. He came to me and asked me for permission to issue it. I said:

> I don't agree with it, but I will give you permission to issue it. As a leader of the FBI, if you feel that is what you ought to say, I am going to let you say it.

I didn't want to restrict him in what he said. He is a leader of men. And he thought that he ought to say that, and he felt that way because he had been in the Bureau back to the beginning, the Roosevelt-Hoover beginning, we will say, and I suppose his attitude might not be quite the same as mine. I had never been in the Bureau. I don't know anything about the Bureau.

Mr. KOSTMAYER. Don't you think the attitude encourages the sort of thing I read to you earlier—the letter of the Pittsburgh agents in which they talk about the President pardoning the draft evaders and wonder why the draft evaders are being pardoned and FBI agents are being indicted? Don't you think what Mr. Kelley does stirs that up?

Mr. BELL. That is right; his statement supported that attitude. But it was a tough call for him. They were getting ready to have these demonstrations in New York by the agents, and there had never been demonstrations by FBI agents in the history of the Nation. All of that was going on, and there was a lot of emotion, and that is what he chose to do.

As I said, I told him at the time I didn't agree with the statement, and I don't agree with it now. But the question he asked me—he was obeying lawful authority, and he asked me if he could issue the statement.

Mr. KOSTMAYER. And even though you are his superior and disagree with his views to some extent, you felt it was all right to permit him to make it?

Mr. BELL. I thought it was a good thing he came to me and asked me if he could make a statement. I think that shows lawful authority, or recognition of lawful authority.

Mr. KOSTMAYER. But even though his views are not similar to yours in this matter, you still decided it was all right to let him go ahead and make the statement?

Mr. BELL. I decided that and also said to the news media that I did not want to restrict those agents in New York who demonstrated, that I don't think you lose your first amendment rights because you work for the Government.

Mr. KOSTMAYER. I agree with that.

Mr. BELL. So I let them do that. I was asked, should you try to stop this? Should we try to stop it? I said no. They haven't lost the first amendment right. They have a right to assemble and petition for their grievances under the first amendment just as any other American citizen.

Mr. KOSTMAYER. I agree with that, Judge. Thank you very much.

Mr. PREYER. Mr. Weiss.

Mr. WEISS. General, I am going to disagree to some extent with the general tenor of your response to the guerrilla warfare issue that the chairman raised. I don't think we should be provoking disagreements between the legislative and executive branch, but I was brought up on the theory of checks and balances between the judicial and executive and legislative branches, and I still feel that is a pretty good theory and system to operate under.

Let me ask you about your situation during the last 2 months, since the indictment in the Kearney matter came down. You were approached by Mr. Kelley regarding the *Kearney* case and the Justice Department investigation, FBI agents demonstrated on the steps of the Manhattan Federal Courthouse, and you met with FBI agents from around the country and from the New York office regarding their concerns. In light of all of that, do you not believe when you have allegations of wrongdoing by people within the Department of Justice, including the FBI, that it puts you, as the Attorney General, charged with investigating those allegations of wrongdoing, into an almost im-

possible position? Even if what you do and what everybody else in the Department does is perfectly proper, the suspicion always exists that because of the close relationship, there may, in fact, be a slanting of attitudes and results in favor of the employees of the Department. Would you comment, therefore, on the suggestion that has been made, for example, by the New York City Bar Association for the creation of a temporary special prosecutor when an employee of the Department of Justice or any of its subdivisions is being investigated? Might not the special prosecutor represent a more appropriate way of dealing with the situation rather than having you or any other Attorney General charged with that investigation?

Mr. BELL. I disagree with that. I don't need any special prosecutor. I am able to perform my duties. I am carrying out my oath of office, and I don't need a special prosecutor.

We had a special prosecutor in the FBI case: the Civil Rights Division. They were investigating the narrow confines of the alleged crime. I am now investigating the broad area of what happened, and I am trying to gain something for the public by doing that.

If we just want to prosecute the case, I can get the U.S. attorney's office in the southern district of New York, one of the finest in the Nation, to prosecute it. That is no great problem. What we need to do is have somebody that is responsible, such as the Attorney General, who takes a broad approach. It would be bad to have a special prosecutor.

If it involved me, or somebody close to me, then I would readily say we should have a special prosecutor, if I was accused in some way. But I am new, and all this happened in the years gone by. I feel no pressure. The greatest pressure I get in the case is from people who write me, the respected people and Members of the Congress. I would think the great majority of the Congress, as nearly as I can tell, is not in favor of my position. But I shouldn't be Attorney General if I can't stand up under pressure. The Nation would be in a bad shape if the Attorney General couldn't stand up under just a little pressure like this.

Mr. WEISS. It is not a matter of you, Judge. I know that you as the Attorney General, as the chief of that office and that Department, have to be balancing considerations. You have to be balancing the merit of the prosecution or investigation in the first instance and also the consequence that such an investigation is going to have on your Department.

I just ask that you really reconsider and review this situation, because I think sometimes you might lean over the wrong way, too, that you might do injustice to the agents involved because of your concern that it not appear that you are dealing unfairly with them.

Mr. BELL. Well, you are making a good point, because I do have the responsibility for the morale. There is no doubt about that. I suppose I may not worry as much as I should about stepping aside, because I was a judge so long, where you couldn't step aside.

Mr. WEISS. Right.

Mr. BELL. I was in high pressure cases for years, and I never think about that. I think that is my job, and I will do it. But I can see what you are saying. Also, you have to think about how it appears, too.

Mr. WEISS. I would appreciate it if you and some of your staff would

give further consideration to my suggestion regarding the special prosecutor and perhaps come back to us with a response after you have had time to think about it.

Mr. BELL. I will be glad to think about it. I didn't mean to cut you off.

Mr. WEISS. Thank you, Mr. Chairman.

Mr. PREYER. We have a vote on the Department of Interior appropriations bill on the floor. At this time, we have a number of additional questions about Mr. Shaheen's Office of Professional Responsibility. The Chair would like to adjourn, subject to the call of the Chair in the future to continue to pursue the matters that we haven't had time to complete today. I take it, Mr. Attorney General, you wouldn't have any difficulty with our calling Mr. Shaheen for additional testimony and perhaps Mr. Flaherty on the FBI message switching question.

Mr. BELL. That would be fine.

Mr. PREYER. The record will be left open for questions by the staff and the members.

Again, we thank you very much for being with us today.

Mr. BELL. Let me ask you one question. My staff people suggested that you ask your majority counsel and minority counsel to meet with two of my people in producing a procedure for supplying material, access policies. My people would be Phil Jordan and Ray Calamaro, sitting behind me. If we can get those four to work together, we might come up with a policy.

Mr. PREYER. We would be very happy to do that, and we so instruct our very excellent minority counsel and majority counsel to do that. This is something I think Congress has needed for a long time. I think we could do something that is beneficial in that area.

Thank you very much, General.

We will adjourn at this time.

[Whereupon, at 10:55 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

JUSTICE DEPARTMENT INTERNAL INVESTIGATION POLICIES

TUESDAY, JUNE 21, 1977

HOUSE OF REPRESENTATIVES,
GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2226, Rayburn House Office Building, Hon. Richardson Preyer (chairman of the subcommittee) presiding.

Present: Representatives Richardson Preyer, Peter H. Kostmayer, Ted Weiss, and Dan Quayle.

Also present: Timothy H. Ingram, staff director; Richard L. Barnes, professional staff member; Maura J. Flaherty, clerk; and Catherine Sands, minority professional staff, Committee on Government Operations.

Mr. PREYER. The subcommittee will come to order.

We are certainly glad to have Mr. Shaheen here today.

On June 9, the subcommittee began its examination of Department of Justice policies and practices on internal investigations by hearing from Attorney General Bell.

Today, we continue those hearings with the principal testimony of Mr. Michael Shaheen, Jr., Counsel for the Department's Office of Professional Responsibility.

This office was established just 18 months ago by Attorney General Levi. It concerns itself with allegations of wrongdoing against Department employees.

We anticipate hearing from Mr. Shaheen this morning on a number of details about the operation of the office, both its successes and the problems it has encountered.

As I said in the context of Attorney General Bell's appearance, the subcommittee is concerning itself with the Department's policies and practices and does not, in a public forum, want to get into details of an individual case in any way which may prejudice the rights of the persons concerned.

So, we will operate from that same position today in hearing from Mr. Shaheen about the matters his office has reviewed.

Earlier this year, Mr. Shaheen submitted to the Attorney General a first annual report of the Office of Professional Responsibility, and the report will be entered in the record.

The Department informed us it has no objection to this publishing of the report.

Is that correct?

STATEMENT OF MICHAEL E. SHAHEEN, JR., COUNSEL, OFFICE OF PROFESSIONAL RESPONSIBILITY, DEPARTMENT OF JUSTICE

Mr. SHAHEEN. Yes, that is true.

[See report on p. 97.]

Mr. PREYER. Mr. Shaheen, you were sworn as a witness when you appeared with the Attorney General, and that oath carries forward in continuation of these hearings.

Will any of these gentlemen accompanying you testify today?

Mr. SHAHEEN. No, sir. They may give me a number or a citation, but, no, sir.

Mr. PREYER. Fine. Again, we appreciate very much your being here.

If you have any prepared statement you wish to make at the outset, or any unprepared statement, please feel free to do that right now.

Mr. SHAHEEN. Thank you, Mr. Chairman.

Mr. PREYER. And we will ask some questions. We might call on counsel to put some more detailed questions to you after the members of the panel have had a chance to question you.

Mr. SHAHEEN. Thank you, Mr. Chairman.

Mr. Chairman, members of the subcommittee and staff, it is a pleasure to appear before you and to engage in what will be another exchange with the Congress in its oversight responsibilities.

I was preparing a statement for submission, but once we had cleared for introduction into the record the annual report, I construed that as an adequate statement of what I could use to inform the subcommittee of the Office's functions, its successes, and its earlier shortcomings or inadequacies.

Briefly, and with a little more particularity, the Office is the Attorney General's principal adviser and reviewing officer, as an office, when it comes to allegations, criminal or involving ethical breaches on the part of departmental employees.

The Office reports directly to the Attorney General as an extension of his office. The regulation establishing the Office, however, provides that in the event the Attorney General may be the subject of an allegation, he, too, being a departmental employee—the reporting procedures are such, as provided for in the regulation, that I report, then, to the Deputy Attorney General and the Solicitor General.

No one is spared from an allegation review by the Office, irrespective of rank, from the GS-1 to a level 1 on the Presidential scale.

We receive and review all allegations. We are tightening our grip on that. We started off by Attorney General Levi, not knowing—as I told Mr. Ingram and Mr. Barnes—what the Office as an Inspector Generalship did in the Department with prosecutorial discretion.

We played it carefully, cautiously, sensitive to the rights of the people against whom some allegations were made and I think, on balance, we have satisfied two Attorneys General now, that the Office is strong, serves a needed function, and does so with uncommon dispatch when dispatch is needed, that is, to remove a cloud when one hangs over the subject of allegation or to remove the subject when the cloud proves to be substantial and substantive and with merit.

We coordinate investigations when they are criminal in nature with the Division—usually the Criminal Division—although the Civil Rights Division and the Tax Division have criminal components in them—criminal enforcement components.

We coordinate with those divisions closely their investigations of employees when a nonconflict situation so permits.

Lastly, we have a new order, and we have invoked it: The right to pursue an investigation ourselves irrespective of its nature, that is, really when it is criminal, by our making recommendations to the Attorney General whether it had better be conducted by our Office, because too many areas pose conflict problems, or the appearance of conflict, and we had better let the matter stay in our office for review, pursuit, and investigation.

That concludes my preliminary remarks and I am prepared to—or welcome—any questions you might want to ask.

Mr. PREYER. Thank you, Mr. Shaheen.

Mr. Kostmayer?

Mr. KOSTMAYER. There is one area in the report which you submitted about which I would like to inquire.

Mr. SHAHEEN. Yes, sir.

Mr. KOSTMAYER. I don't think it is particularly significant, but it deserves some clarification. It's on page 7 of your report.

You act as a watchdog within the Department and you have departmentwide jurisdiction; is that right?

Mr. SHAHEEN. Yes, sir.

Mr. KOSTMAYER. In the section on "Morals offenses," how do you make judgments about what is "sexually aberrant behavior." Can you answer that for me, please?

Mr. SHAHEEN. Yes, sir. I was hoping——

Mr. KOSTMAYER. I see that you minimize it in the report, but nevertheless——

Mr. SHAHEEN. I must confess, yesterday when we were looking at sample questions, we were hoping that we would not have to address that, but we are prepared to address it.

I will address it this way. It is funny that that would be the first one to target in on.

We do not determine what is aberrant sexual conduct. If this report were printed in the newspaper, people would think we are maybe establishing ourselves as evangelists or crusaders or people who advertise for orange juice in Florida.

Our problem with the definition of "aberrant sexual behavior" is any behavior of a sexual sort that reflects adversely on the integrity and competence of the Justice Department to administer the law and enforce the laws.

I mean, if it is what 90 percent of the people would regard as normal sexual behavior, is done in the middle of Pennsylvania Avenue, and involves a Department attorney, we think that adversely impacts on the public's perception and belief and faith in the ability of that individual to enforce a law if he happens to be an attorney with the Department of Justice.

"Aberrant" is anything unusual that adversely impacts upon the people and their perception of the Department's ability with its colleagues to allow that man or woman to participate in the exercise of the prosecutorial discretion reposed in the Department.

Mr. KOSTMAYER. I gather you are not involved in the investigation of the FBI and the alleged violations by their agents?

Mr. SHAHEEN. Yes, sir. In a way. We are certainly briefed, and

have been briefed, since the coming on of Judge Bell. We were tangentially briefed by Mr. Days'—Assistant Attorney General Days of the Civil Rights Division—predecessor, J. Stanley Pottinger.

But we are participating in an advisory capacity as a consultant in that because it involves departmental employees.

Mr. KOSTMAYER. But the bulk of the investigation is being handled by the Civil Rights Division?

Mr. SHAHEEN. It is being handled by the Civil Rights Division attorneys under the direction of the Assistant Attorney General for the Criminal Division.

Mr. KOSTMAYER. Normally, do you initially receive complaints from the public concerning agents?

Mr. SHAHEEN. We didn't in that case, but we were promptly informed of their receipt. There is a regulation—to answer your question, yes. And we were informed of that instance by Mr. Pottinger and jurisdiction properly lay in his division for the pursuit of that investigation.

Mr. KOSTMAYER. Thank you, Mr. Chairman.

Mr. PREYER. Thank you, Mr. Kostmayer.

Mr. Quayle?

Mr. QUAYLE. I want to get an understanding of the Office. How many people do you have working for you in your particular office?

Mr. SHAHEEN. In the Office itself, Mr. Quayle, there are four attorneys and two secretaries. The Office has employed, I think, as many as—on a full-time basis, reporting directly to the Office, as many as 70 people at one time, or more. But that is on a task force basis.

On a full-time basis, there are four attorneys—and we just got the fourth one recently—so there are four attorneys and two clericals.

Mr. QUAYLE. OK. When a complaint is made to your Office, is it a written complaint?

Mr. SHAHEEN. Some of them.

Mr. QUAYLE. Can it be an oral complaint?

Mr. SHAHEEN. It can be an oral complaint, and we would receive it and allow it to stand as an oral complaint. We, of course, make a memo of the date, the nature of the complaint, the man who gave it to us.

When it comes from a citizen, we request that it be reduced to writing. That varies from instance to instance. The complaint that is received orally is reduced to writing. It is a question of who reduces it to writing. We need it to proceed on.

Mr. QUAYLE. When you say "received from a citizen," I assume you are referring to somebody outside of the Department?

Mr. SHAHEEN. That's right.

Mr. QUAYLE. What kind of a breakdown of complaints, orally and written, what kind of percentage of complaints do you receive from people outside the Department?

Mr. SHAHEEN. I think easily over half.

Mr. QUAYLE. Over half?

Mr. SHAHEEN. Yes, sir.

Mr. QUAYLE. In other words, I guess I can conclude that there is a reasonable awareness of the operations of your Office and the responsibilities that you are charged with.

Mr. SHAHEEN. Right. One of the questions asked in draft form submitted by one of the staff was "How do people know about the Office?"

The more that is written about it—about its operations, existence—the more we find people sending in complaints. But we are published in the Federal Register. We are in 28 CFR. The present Attorney General has made five speeches about the Office to large university assemblages.

Both Attorneys General—Levi and Bell—have sent out—Judge Bell recently has sent a long directive reminding everyone, including all 94 U.S. attorneys, of their reporting responsibilities with the Office.

We are published in the Government manual and the Congressional Record—not the Congressional Record. That little book that you come out with every year saying who won and who didn't in the elections in the various departments.

So, yes. Our relative exposure has increased with the length of the existence of the Office.

Mr. QUAYLE. You have been in existence 2 years?

Mr. SHAHEEN. Since December of 1975—late December.

Mr. QUAYLE. So, that has been just a year and a half then.

Mr. SHAHEEN. Right.

Mr. QUAYLE. And you have received about 150 cases out of that total?

Mr. SHAHEEN. That was as of January 1977. Let's pretend that we started off working on the 1st of January 1976. Taking us to this past January, we handled directly, that is, the Office itself, directly pursued allegations in the number of 152.

A number slightly in excess of that number were also received by the Office that were referred to the various components of the Department for pursuit by them with reports back to us. One hundred fifty-two is the figure we lay claim and responsibility for.

The others, we have subordinate responsibility for because we felt, according to the regulations and its provisions, jurisdiction properly belonging either in the Criminal Division or INS or the FBI, but with the request that they report back to us their findings.

Mr. QUAYLE. I assume in the first couple of months you didn't receive that much. It is picking up more and more. Is this true in the last, let's say, 3 or 4 months as compared to 3 or 4 months before that?

Mr. SHAHEEN. I don't know that—we might have a slack period right now, I'm not sure. But the first month we were in business, we were in the newspapers on a daily basis because it was leaked that our Office had been assigned the first investigation of the FBI ever to be run outside of the FBI.

I came home from Christmas vacation to be handed the U.S. Recording Co. investigation—the alleged findings of corruption, kickback, and other allegations involving the FBI.

That was the first investigation ever conducted of the FBI outside of the FBI, and we started getting a lot of complaints that month. Probably more that month than—and everytime there was a big news leak about that, we would get a lot of complaints.

We handled Cointelpro and people would write us a lot of letters when this committee was chaired by Madame Abzug.

It depends. I would says that we average 30 to 35 a month now, but when something happens to raise our public profile, we get a lot more.

I might say the percentage of the meritless ones increase as well.

Mr. QUAYLE. You say that, as far as making the public aware, the Attorney General continually refers to this in a number of speeches to the district offices——

Mr. SHAHEEN. And to the heads of all of the offices, bureaus, boards and divisions in the Department.

Mr. QUAYLE. Saying that the Office is available?

Mr. SHAHEEN. Not "available." That you have a responsibility to report, read the regulation and—I have a copy of that here if you would like it.

Mr. QUAYLE. What other efforts besides that one are being made to let John Q. Public know about the Office?

Mr. SHAHEEN. We have a full plate. I am not sure.

We welcome opportunities to make addresses before concerned citizens' groups, but right now, I can't answer that with anything specific.

Mr. QUAYLE. Do you feel comfortable with the way that the office is created? That you have sufficient independence necessary to operate and be the watchdog of your employees and cohorts?

Mr. SHAHEEN. Yes, sir.

I would like to embellish on that answer, if I might.

I think I survived the transition because no one would want my job, and I told Attorney General Levi while I was Special Counsel for Intelligence—let me give you a little history about the job.

I was the Attorney General's Special Counsel on Intelligence. It was through my office that all of the FBI and a lot of the CIA abuses came to the attention of Mr. Church. I got to see them 3 months before they were put in the newspapers; before we read about them, at large.

I proposed to the Attorney General—he kept talking about some order they wanted to get out, some office. I didn't know what he was talking about, but he had heard me talking about a memorandum that I was preparing. I had been his counsel for nearly 1 year. That's wrong. About 8 months.

I had learned one thing quickly, and that was that in the Department, the opportunity for abuses was great because some of the more institutional parts of the Department, for example, the Bureau at the time, regarded everyone in the Justice Department as mere transients, I thought.

There were too many places in the Department that the Bureau turned to consult. That was the Department's fault, more than the Bureau's.

I proposed in a memorandum to the Attorney General that there be some office created—I think I called it "Counsel to the Attorney General for Intelligence." So, any Attorney General or any Attorney General coming in could turn to one person and say, "What are they doing over there across the street?"

Well, 2 or 3 weeks later, the Attorney General hands me what turned out to be the regulation establishing this office and says, "Here I want you to have this. I would like you to accept this appointment."

I read it very briefly, and I said, "Well, that's not what—" I said I was not seeking the job. I think I told him though someone from the outside should be the "Special Counsel for Intelligence." I was trying to return to private practice.

I told him this was not what I wanted, this was not what I was proposing. He said he knew that, but he wanted me to take it. I said I would think about it. I came back and there were some conditions, one, that it not be cosmetic; two, that I would be able to

choose my own staff; and, three, that it be kept small; and, four, that the regulation say and mean what it says: That if the Attorney General became the subject of an allegation that I would pursue it.

I so testified before two subcommittees of the Senate.

I told them I didn't think anyone should keep the job for longer than 2 years. The longer I have been on the job, the more persuaded I have become of that.

I have also told Judge Bell that. But, the gist of it was that I considered it one of my strongest points to be my resignability, and that I did not intend to take a job at the Justice Department at the risk of skewering my professional integrity and my ability to practice law when I did decide to return to private practice or public practice, one or the other.

If he meant business, I meant business, and if I had a problem, I wouldn't hesitate to resign. I am satisfied as to my independence.

Mr. QUAYLE. Let's take it on a more abstract basis.

Mr. SHAHEEN. OK.

Mr. QUAYLE. Extracting your personal involvement, and I think a more theoretical approach, it says that "counsel," which is to be your office, "shall be subject to the general supervision and direction of the Attorney General."

Mr. SHAHEEN. Right.

Mr. QUAYLE. And yet you referred, I think, in your opening remarks, as an extension of the Attorney General's office.

Mr. SHAHEEN. Yes.

Mr. QUAYLE. It would just seem to me that if this Office was going to operate on a strong and very credible basis—and I am not saying it hasn't—that there has simply got to be more independence. If you are going to be under the complete supervision and direction of the Attorney General, you don't have independence. I think you need more independence to operate more efficiently.

Mr. SHAHEEN. That's a good question.

I would suggest, Mr. Quayle, that the words, "direct supervision" are inaccurate——

Mr. QUAYLE. "General supervision and direction."

Mr. SHAHEEN. Right. That is generally inaccurate as a fair characterization. That unfairly characterizes the way General Levi and Judge Bell have—they do not direct our Office. We report to them, and we submit our recommendations.

I might add that every recommendation that we have submitted—some have involved the dismissal of Presidential appointees—every one we have ever submitted to the Attorney General or the Deputy Attorney General has been accepted and implemented.

I see your problem, and I would share it——

Mr. QUAYLE. Let's say if we didn't have people with the integrity of Levi and Judge Bell——

Mr. SHAHEEN. Right.

Mr. QUAYLE. Perhaps we could have some problems with them.

Mr. SHAHEEN. Right. I will acknowledge that—yes, I would agree with you.

Mr. QUAYLE. We have a disciplinary commission in the State of Indiana that is quite independent. It is selected by the Supreme Court. Commission members elect a chairman who works independent of the Indiana Bar Association

I think you have to have this independence to maintain and carry out the credibility and integrity that you have established so far.

So, that is a place where we could give you help—in Congress——

Mr. SHAHEEN. And you have. Both Attorneys General are aware that I have come up and testified and have made the statement that if I were blocked—Senator Mondale, now Vice President, asked "What would you do if the Attorney General didn't want you to do it any more? Didn't want you to pursue it any more? That he had determined there was nothing to it."

I said, "If I disagree with him, I would tell him. I would tell him that I plan to proceed."

He said, "Well, what if he said 'No'?" I said, "Well, he can't fire me. He can send me to Alaska." I am not a Presidential appointee, by the way, Mr. Quayle.

So, they can still pay me the same bucks, but they can send me out on a detail in Alaska, doing something else. But I would resign.

Mr. QUAYLE. But this is a particular——

Mr. SHAHEEN. You're right. That's a problem. I suppose that it boils down to, you know, you can have all the laws—I think Archibald Cox said, "You can have all the laws and regulations, but it boils down to the character of the individual who is required to enforce them."

If I didn't have faith in the integrity of the present Attorney General, I would submit my resignation.

Mr. QUAYLE. I was just making a point.

Mr. SHAHEEN. I think your point is well taken.

Mr. QUAYLE. I was making the point to preserve the faith in the integrity——

Mr. SHAHEEN. Yes, sir. I think your point is well taken.

Mr. QUAYLE. Just to shift gears to one other area I had a question on in this report.

Your task force staff of five attorneys and two research analysts concerning the Martin Luther King—I wonder if you would care to comment upon the conclusion that you have, that there is no evidence of conspiracy in lieu of the present ongoing investigation of the House Assassinations Committee?

Mr. SHAHEEN. I will comment briefly. If it is not enough comment, ask me some more questions.

We were asked by the Attorney General to answer both questions. One, the question of the assassination—an honest and fair one by the FBI—was there any complicity by the FBI that we could discover?

In the course of our file review—and that is what it was, a file review—both the Department of Justice's files and FBI files, if they showed any complicity by its agents, would they warrant criminal or administrative sanctions?

I forget what the other one was. It is in the report.

"Whether the relationship between the FBI—whether any new evidence has come to the attention of the Department bearing on the assassination which should be dealt with by the proper authorities."

Mr. Pottinger had initially taken on this task. He had volunteered for it and his approach was an unsuccessful one in that he, personally, his principal deputy and the chief of his criminal section took it upon themselves to review what my five attorneys and two research analysts took 8 months to do, going all over the country, and looking at abso-

lutely every document that was directly or logically related to Martin Luther King, his associates, his associations, both as to the assassination investigation and the security investigation.

That was the one involving his alleged involvement with Communists or Communist advisers.

To give you the anecdote, the Attorney General—he was the first to review the report in classified form—thought it was a very good report. Judge Bell did, too, notwithstanding some of the criticisms. One of them was that we couldn't tell for sure the source of Ray's finances. We could speculate. But Bell thought the report was a good one on the whole.

In the presence of approximately 20 FBI agents whom we had asked to tell us where we were factually wrong on the report, I made the statement that no one anywhere in the world could claim that they had seen everything as the members of the task force had seen everything.

The FBI field office, the Washington field office, every field office in the United States and abroad, and the Justice Department's files—the AG's files—the regional files—there was silence from the FBI.

No one in the FBI knew as much about the investigation, both security and assassination history, as the members of the task force.

I asked the Attorney General, I said before I would assume the responsibility of having the investigation of the file review conducted under the aegis of my office, that I would be the one to pick the detailees.

Usually when you ask to get someone to work on a task force, they give you the people that are most expendable. That was painful, because I picked the people and they were very good people, in fact, they were the best. I had supervised them previously when I was in the Civil Rights Division.

We looked through those files—they did. We found that the investigation was the most massive, painstakingly thorough, we thought, that the FBI had ever undertaken. They are so proud of that investigation and the task force's conclusions, with reason, and their—the FBI's—frustrations have been they could not present it to the public because of Mr. Ray's plea, and that the monument of all of their efforts still stands subject to the review of the House Assassinations Subcommittee. I think that's under Delegate Fauntroy.

We just merely went through the files; we interviewed 40 witnesses which was not contemplated by the Attorney General, and we merely tested the validity of the Bureau's conclusion.

You know, you can conduct an assassination investigation, and we thought it was a logical and appropriate thing to determine, whether the Bureau had settled upon the right man as the assassin as a measure of its thoroughness and painstaking nature.

We concluded that it was a thorough investigation and that they had picked the right man as the assassin. That was our conclusion. And our conclusion was that there was no conspiracy.

We believe that the 2-year study by the House subcommittee will vindicate us.

Mr. QUAYLE. I think—my own personal opinion is—that you are probably right and perhaps we are wasting our time in that particular area.

Mr. SHAHEEN. I don't think you are. I think it is important that the subcommittee do that because Attorney General Levi and Judge Bell have both indicated that measure of one's capacity to investigate one's self, that is, my office or our office, to investigate allegations of wrongdoing by Department personnel, that they are going to test that.

It is for Congress to complain that you can't really trust a part of the Justice Department to investigate another part of Justice. But that is what we did in the King assassination. We welcome the subcommittee of Delegate Fauntroy because we think it is going to provide an opportunity for an outside unit to say, "Yes, what they said was so."

Mr. QUAYLE. Thank you, very much.

Mr. SHAHEEN. Yes, sir.

Mr. PREYER. Thank you, Mr. Quayle.

Mr. Weiss?

Mr. WEISS. Mr. Shaheen, starting exactly where you left off and pursuing the line of questioning Mr. Quayle had undertaken earlier, rather than having an outside body like Congress validate from time to time the independence and the integrity of investigations undertaken by the in-house Office of Professional Responsibility, wouldn't it make much more sense, in fact, to have an independent outside body to start with in those matters where you have allegations of misconduct against certain selected personnel from the Attorney General on down in the Department of Justice?

Mr. SHAHEEN. Congressman, I have been asked to address that question on a number of occasions.

I am ill-equipped to answer that because I always look at it from the point of view that if I were the Attorney General—I know, and I have studied briefly or casually the special prosecutors bills—the various ones—and it is my feeling that it might be better, but that is a policy consideration I am not equipped to address.

I don't agree that that should be so. It might be necessary. But, again, if you are the Attorney General—and we are about to send one to jail on the 22d—tomorrow—I think—I'll just rest on my earlier answer.

It raises an interesting question. I am not prepared to make a policy determination on it. Others who have studied it at length should be asked that and advise you of their opinion, but my personal one—not the departmental one—is that if you can find something wrong with me or the Attorney General, you should do what we are doing with one tomorrow.

Mr. WEISS. Well, Mr. Shaheen, the problem is—as you have indicated—no person should hold the position you hold for more than 2 years.

Mr. SHAHEEN. That's a rough figure, but I—yes.

Mr. WEISS. Right. And the Attorney General in there now is not going to stay there forever.

Nobody, when they appoint an Attorney General or a counsel to head the Office of Professional Responsibility, anticipates what is going to happen to them, a case in point being the fate of the Attorney General who is going to go to jail tomorrow.

But the fact is that we are dealing with human beings, so it seems to me that the pressure, the rationale for having independent people in independent offices is a safeguard against the foibles of people.

In that context, have you had occasion to testify on S. 555, which has been reported now by the Senate Government Operations Committee?

Mr. SHAHEEN. Could you tell me——

Mr. WEISS. That is the bill that creates the Office of Special Prosecutor.

Mr. SHAHEEN. No, sir. I have not been provided a copy.

Mr. WEISS. One of the provisions that they have is that a special prosecutor would have to be appointed by the Attorney General in the event that you have an investigation involving the President, Vice President, Cabinet officers, top-level executive branch officers, Justice Department officials, Director of the CIA, Commissioner of the Internal Revenue, or any top official in the President's campaign organization.

They also propose an addition to that, in essence, creating by statute the office which you have right now——

Mr. SHAHEEN. The Office of Government Crimes? Is that it?

Mr. WEISS. That is so. The Office of Government Crimes.

Rather than having an office created by Executive order, I assume that you really exist by the order of the Attorney General?

Mr. SHAHEEN. Sure. And part of that order is that if the Attorney General didn't like that office, he could abolish the order creating that office.

I will strengthen the basis upon which you are proceeding with your question. Yes, sir.

Mr. WEISS. Do you believe that it makes sense, never mind the office of special prosecutor, that it makes sense to create your office—the office that you head by statute?

Mr. SHAHEEN. It might; yes, sir. My personal view is that it does make sense. I understand that was one of the recommendations—I know it was one of the recommendations of the Church committee and now the Senate Intelligence Committee under Senator Inouye.

I am not sure, Congressman Weiss, that the Office of Government Crimes is the same as the Office of Professional Responsibility.

Ours—and this goes to several of the draft questions that Mr. Barnes and others of the staff submitted for my review in anticipation of this session. Our function is—and the reason we are able to do it with a fairly small staff—our function is to receive allegations of abuse, criminal wrongdoing, by the employees who would be in the Office of Government Crimes, you know, prosecutorial abuse, that a defense attorney could want—as an example, the Governor of a State writing—blasting—some attorney from one of the litigating divisions of the Department, and this is pretty symptomatic.

That letter went to the mail room, the mail room saw the attorney's name mentioned, the letter of complaint went to the attorney who was complained about. He drafted the response for his boss, his boss sent it off, and the Governor was told what his answer was. The guy about whom the complaint was made drafted the letter.

That is not likely to happen now but——

Mr. WEISS. That was happening as recently as December of 1975?

Mr. SHAHEEN. Sure.

Mr. WEISS. Pretty sad commentary, isn't it?

Mr. SHAHEEN. Sure. But I want to draw the distinction, Congressman, between the Office of Government Crimes and what our office does.

Our office does not make prosecutive judgments. We review allegations of abuse of, say, those who do make it, so the Office of Government Crimes is not quite the same as our office—would not do what our office does now.

Mr. WEISS. Let's focus in on that.

Mr. SHAHEEN. OK.

Mr. WEISS. As I read the Executive order or memorandum that Attorney General Levi issued to create your Office, apparently the major responsibility for conducting the investigation of themselves still falls back on the specific department which is accused of the wrongdoing.

Is that correct? Let me——

Mr. SHAHEEN. I don't think that is——

Mr. WEISS. I will read from section 0.39b, "Relationship to other departmental units." Paragraph (b): "Primary responsibility for investigating an allegation of unprofessional conduct that is lodged against an employee of the Department normally shall continue to rest with the head of the office, division, bureau, or board to which the employee is assigned."

Mr. SHAHEEN. That's right.

Mr. WEISS. OK. Now, how does that fit in with your office?

Mr. SHAHEEN. We receive the allegation and say, "OK, Director of the U.S. Marshal Services, this is a complaint against a U.S. Marshal. Please conduct the necessary inquiry and report back your findings to us."

What "us" means is Mike Shaheen, our office, and the Attorney General, if necessary.

It is far different under the new setup or under the existence of the Office of Professional Responsibility to have an allegation, either administrative or criminal. If it is criminal and involved a U.S. Marshal, we would deal with the Criminal Division, Congressman.

There are unprofessional breaches that you read from. That is that paragraph dealing with unprofessional breaches. We send that to the U.S. Marshal saying, "Please prepare a memorandum that responds to the allegation and forward it to us."

That is different than if he were preparing a memo for their own internal use. He knows that he is writing a piece of paper that is not going to be for his own use—his own exclusive use—it is going to be for us for purposes of making a recommendation to an authority that is much higher than he: The Attorney General.

Mr. WEISS. When did the investigation take place of the FBI involvement in some installation pertaining to West Virginia, Virginia—some place close by—where apparently the investigation that was conducted of the FBI's role initially and in the coverup was so badly done that the Attorney General—Attorney General Levi at that point—concluded that the whole thing was a whitewash?

Do you know the specific investigation I am talking about?

Mr. SHAHEEN. You used some descriptive words that make it sound like it is one of two investigations.

You are either talking about, I think, the Virginia wiretap—Richmond wiretap—or the FBI U.S. recording, abuse of power, financial corruption—allegations.

Mr. WEISS. I think it is the Virginia wiretap.

Mr. SHAHEEN. When did the—what was the question?

Mr. WEISS. Was that undertaken prior to the creation of your office?

Mr. SHAHEEN. Yes, sir. It was initiated prior to the creation of our office. It continued while our office was in existence.

Mr. WEISS. Right. And what role did you then have occasion to review and discuss or discount the conclusion and the conduct of that investigation by the FBI with its own wrongdoings—alleged wrongdoings?

Mr. SHAHEEN. The Attorney General did that, Congressman, himself.

My office was involved in an element of it, [illegible] be general and nonspecific within the guidelines the chairman says we must adhere to. But there were abuses of the grand jury process.

Mr. WEISS. But isn't there a danger—again, I am not concerned about the specific case—when, in fact, you go back to the very department or agency or head of a division charged with the alleged wrongdoing to undertake an investigation of that wrongdoing?

That if, in fact, there was wrongdoing, that they are going to make an effort to really cover that up rather than to come clean? And that by using this method of referral, which is what you really have, you are the recipient and the referring out agency, and then you receive back the report that they have undertaken it.

By the time that they have concluded their investigation, they have interviewed the witnesses—by the time you have to go over it, you may, in fact, not find the evidence in existence, which was apparently the case to some extent in this situation, or that, in fact, your job has become more complicated than it would have been had you had the advantage of independent capacity to go in and investigate the alleged wrongdoing.

Isn't that a danger in this kind of referring back to the wrongdoer?

Mr. SHAHEEN. Not to the wrongdoer.

Mr. WEISS. To the alleged wrongdoer.

Mr. SHAHEEN. No, not to the "alleged" wrongdoer. To the head of the division by whom the wrongdoer is employed.

Mr. WEISS. Well, OK. Now——

Mr. SHAHEEN. And he will have a section that, if he wants to investigate it, and he will investigate it—our order is that he investigate it—he will send it to a section that that individual is not employed in to pursue the investigation.

The point is—I disagree also with your earlier premise and that is, maybe 5 years ago there would have been a predisposition to cover up, to spare embarrassment of breaches of conduct by a subordinate.

But nowadays we find that when the head of a division, bureau, board, or agency finds there is just a little bit of wrongdoing, he wants to fish or cut bait. He wants to get rid of him.

We have all been taught an incredible lesson by Watergate, and if there is a predisposition, one way or the other, I am saying it is greatly in favor of dismissing the employee and then considering whether to proceed criminally against him.

Mr. WEISS. Again, not to get into the specifics of the cases——

Mr. SHAHEEN. I am not talking about Richmond now.

Mr. WEISS. But just to tie the timetable down, the initiation of that case was some years after Watergate, yes?

Mr. SHAHEEN. Yes, sir.

Mr. WEISS. About 3 years after.

Mr. SHAHEEN. Something like that. I'm not sure about the date.

Mr. WEISS. And it would seem there would be a fresher recollection of Watergate 3 years after than 5 years after.

Isn't there a danger that, as we recede from Watergate, there is likely to be more of a tendency to forget what Watergate was all about?

Mr. SHAHEEN. That is natural and quite human; yes, sir.

Mr. WEISS. And therefore, again, wouldn't it make much more sense not to have the investigation of wrongdoing—alleged wrongdoing—conducted by the same agency, even though it is the head of the agency rather than the person who is supposedly directing charges?

But aren't you really getting back to the same situation——

Mr. SHAHEEN. You are saying the FBI? The FBI was not responsible for conducting that investigation. The Criminal Division conducted it.

Mr. WEISS. Well, OK—Justice Department. Isn't that still the same kettle of fish?

Aren't you still in the situation where, for reasons of morale, for saving face, for not looking bad before Congress or the press or the world at large, that there is a tendency to try to put the best face on what went on in the Department?

Isn't there a danger that that may be?

Mr. SHAHEEN. There is always that danger, Congressman. I agree. There is always that danger.

Mr. WEISS. If I may—Mr. Chairman, you may ask me to cease any time if other people would like the chance to question Mr. Shaheen——

Mr. PREYER. I would like to ask a few general questions and then we will go back and see if there are any more.

Mr. Weiss and Mr. Quayle have gone into the question of independence of the Department and the desirability of establishing a statute.

As I understand your reply, you feel this is a policy question which you don't feel you should necessarily comment on.

Let me ask this. Assuming we didn't go the setting-it-up-by-statute route and kept the office more or less as it is, do you think it could be useful to give you prosecutorial authority—prosecuting authority—and your own investigative staff?

As I understand it now, you bring in your investigative staff from the outside.

Mr. SHAHEEN. We do on a very ad hoc basis, Mr. Chairman.

As to the prosecutorial authority, I think there would be a problem with that. That ties in with the response I made, very inarticulately, to Congressman Weiss.

I think—I thoroughly appreciate his concern over the statutory creation of an Office of Government Crimes.

If you want to create my office by statute, you should. There are two separate functions, and that goes to the prosecuting power since so much of what we do is investigate allegations of prosecutorial misconduct. We would not want to be engaged in the same exercise as is so often the subject of an allegation that we are required to review.

We would be reviewing our own office personnel in the exercise of—and then, the previous disposition for humans to put the best light on the most unhappy series of circumstances would fall directly on us and our office personnel.

So, I would not want prosecutorial power for the Office of Professional Responsibility. If Congress determines that a statutory creature called the "Office of Government Crimes" should be created then that would be fine.

The other problem is you would have essentially two criminal divisions and one is usually enough, although there are components in the Department that have a criminal function as I have earlier averted to.

The other thing is we do have grand jury authorization. We have been there, but as observers, to reduce or eliminate the risk of abuse when we had anticipated some.

Mr. PREYER. How about your investigative staff?

Mr. SHAHEEN. We find that the resources of the Department have, under both Attorneys General, been placed at our complete disposal. We have a 50-man audit team in the Office of Management and Finance that has been of invaluable assistance.

I think the fact that we are unique, I think, in the Department, because of the ease and access to the Attorney General, and because of the nature of our charter, we are unique in our capacity to put a task force together drawn from outside of the Department where there—I will discuss the U.S. Recording Company investigation to tell you that the agents were picked by the Director with the concurrence of the Criminal Division and my office who was heading it.

We also had special agents from the Internal Revenue Service detailed to us, and they were also of our choice. They had a terrific track record.

And to give you an answer you have also submitted to me in draft, we have gone back to see if any of these people who conducted the investigation who were from the FBI suffered any retribution.

The ones we have checked on have been advanced in their careers—substantially advanced in their careers—and as a result of that investigation, there has been a significant overhaul in the reorganization of the FBI itself and some of its vouchering processes.

I have gotten off on a tangent, Mr. Chairman. I apologize.

No, I don't think I would like the prosecutive power.

Mr. PREYER. You mentioned earlier, as I understood you, that one of the conditions when Mr. Levi offered you the position was that your office should be small.

Would you briefly give us the virtues of keeping it small or enlarging it?

Mr. SHAHEEN. The virtue of having it kept small is the personnel—they are behind me. I run the great risk of ingratiating myself further with them, but they are an inordinately able and gifted group.

I had the responsibility in an earlier incarnation to supervise them when I was in the Civil Rights Division. I was aware of their abilities. Because I knew their abilities, I knew that I could—well, each was in a section then of 20 or 25 attorneys. One was a section of 25 lawyers. I supervised those sections, or had supervisory responsibilities for those sections, and I found about four attorneys—I don't want to indict the Civil Rights Division, maybe they have changed or those sections have changed—but I found four attorneys could do the entire section work.

They could not only do their work, often they had to redo and undo

the work of the other attorneys. I found that if you find some capable people, that you can keep an office small.

I think we could enlarge to, maybe at the most, 10. The virtue of a small office is that it does not become a bureaucracy of its own. That is a concern of ours—of mine.

Mr. PREYER. So, your modus operandi is to keep it small and to bring in ad hoc——

Mr. SHAHEEN. Yes, sir. It gives us a great flexibility. No one can be prepared for. We can tailor the requirements of an investigation to conform to the specific conflict or appearance of conflict of interest situations that the subjects cannot anticipate.

Mr. PREYER. You mentioned that you either remove a cloud from the subject or else you remove the subject.

Mr. SHAHEEN. We recommend the removal, right.

Mr. PREYER. When you see patterns of misconduct which may have emerged, are there any other reform actions that you feel your office might take or recommend, other than just individual prosecution or individual discipline?

Mr. SHAHEEN. Yes, sir.

I mentioned that as a result of one of our investigations and its recommendations, Director Kelley was in part inspired to reorganize because of what we did, and Mr. Levi to reorganize some parts of the FBI and its vouchering and procurement procedures. That's a specific instance.

There are other components in the Department that have, because of what we have found and done, altered their procedures. Again, the ones that come readily to mind are procurement.

Also, in determining how to apply sanctions—administrative sanctions—to personnel and other components that are protected by civil service consistent with due process, we have the right and the responsibility to recommend to the Attorney General such changes which, in the course of our review of things, we think would make for better practices and policies.

Every time the Attorney General—I appeared with him the last time—referred to "internal operating controls" that he wanted devised for the FBI, part of the responsibility for developing those would fall to my office.

Mr. PREYER. So, you deal with policies and procedures and not just personalities?

Mr. SHAHEEN. We consider that an important part of the office's function, yes, sir.

Mr. PREYER. You answered to Mr. Quayle, I think, that there were some 30 to 35 complaints a month coming in, and you explained where they came from.

Do you think you should take any other initiatives, or are there any initiatives that you could take, to ferret out misconduct rather than just wait for complaints to come in to you?

Mr. SHAHEEN. We are going to think about that. Yes, sir. The answer is an obvious, "Yes," sir.

The other thing, Mr. Chairman, is that figure of 20 to 35 complaints a month is a figure that represents the complaints that we find to be of sufficient merit, those that we find are not patently frivolous.

We do not consider—and I used this with Mr. Ingram and Mr.

Barnes—a complaint by a little lady that says she has been wired by the CIA, NSA, and FBI, by a 1-inch diameter pipe, for purposes of using her in foreign policy and electronic surveillance as an instrument of espionage. We don't consider that a serious—we don't believe that the technology of the country has advanced to permit that.

We consider that a patently frivolous complaint. We get a lot of those. That figure of 20 to 35 a month does not reflect those.

Mr. PREYER. The 20 to 35 are substantive?

Mr. SHAHEEN. Or appear to be substantive or we do not risk not considering them substantive.

My great fear is—and again, I told the staff informally—that we will get one that we almost consider patently frivolous and it will get away from us and it will turn out to be the one in a million that we should have paid serious attention to.

So, everything in the office is read by everyone before it leaves in any form. Another virtue in having a small office.

Mr. PREYER. A frivolous complaint is a problem when you get into areas that are controversial, like the Cointelpro—having been on the Assassination Committee, I received a number of telephone calls, usually after midnight and on weekends, which I don't think add much to the advancement of the investigation.

Do the employees of the Department have any sense of duty to report misconduct to you? Has the Department done anything to impress on them that you are there as a sort of an honor code, that they should report misconduct to you?

Mr. SHAHEEN. Yes, sir. The Attorney General has, I have, the heads of the components of the Department have impressed upon them either to get rid of the person who is the subject of some wrongdoing, or either the need to vindicate that person.

Yes, sir. We have impressed upon the people, and we think they understand who we are, where we are, and there is, we think, sort of an honor code. It's getting better.

Mr. PREYER. Have you done anything, or do you intend to do anything, to let outsiders know that you are there?

I assume that most of the complaints that come to you now are referred to you by being complaints that come in the Department. I don't suppose the general public knows you are there really, do they?

Mr. SHAHEEN. A lot do. That goes to an answer I gave to Mr. Quayle.

We get a lot of—over half our complaints come from citizens. It is a result of some press coverage involving the office.

As to the efforts the office will initiate to make the public more aware. I will think about it and we will try to come up with something to do that.

I can't answer that any more completely than that, Mr. Chairman.

Mr. PREYER. One side effect of putting it in statutory form, I would think, is that it would be a form of notice to the public that you are there; that this is available.

Has there been any auditing of any of the various divisions—did you do any auditing?

Mr. SHAHEEN. We have used the internal audit staff of the Office of Management and Finance to audit, and it was part of the submission

tendered in January with the annual report of the six components of the Department with an Internal Inspection Division.

We now spot audit when we have a matter that, let's say, involves the DEA, FBI, and so forth. We will say, "Hey, we would like to see this—the entire file on that."

Yes, we have our own spot audit. We hope to refine that. We are already developing mechanisms to refine the audit procedure—the audit responsibility—that is part of the office.

Mr. PREYER. Let me ask the other members—I have taken my full 5 minutes here.

Are there any further questions, Mr. Kostmayer?

Mr. KOSTMAYER. Mr. Shaheen, what would you do if an agent from the FBI came to you and said that he had been instructed to commit an act which he regarded as illegal and, in fact, that he had come to you to complain about his superior?

If his visit was to complain about a superior who had allegedly urged him to commit an illegal act, or what he considered to be an illegal act, what would you do? What would you advise him to do, and what would you do in relation to his superior?

Mr. SHAHEEN. First, I would—I don't know what I would do first. I would ask him to secure that instruction in writing if he could. If he couldn't, I would report it to the Attorney General. I would call the head of the FBI's OPR Office over to my office——

Mr. KOSTMAYER. OPR?

Mr. SHAHEEN. The FBI has their own Office of Professional Responsibility; I'm sorry.

This is a—we have gotten allegations, not involving instructions to subordinates to do something they felt was illegal, but allegations from subordinates about the propriety of the actions of their superiors. They have been pursued, and they have resulted unhappily for those who were found to be accurately the subject of allegations.

Mr. KOSTMAYER. It seems to me that that would be an almost impossible function for you to fulfill within the Department of Justice.

Mr. SHAHEEN. I think the reason——

Mr. KOSTMAYER. Politically, socially——

Mr. SHAHEEN. They know that it is going to be done. They know that Judge Bell and Edward Levi were determined to see that that happened. I think in some quarters, I am not terribly popular.

Mr. KOSTMAYER. But even your answer to me—which is an adequate answer—indicates that you are not even sure about what is to be done there.

Mr. SHAHEEN. I'm not sure how many different ways I could cover that base is why I am not unsure of what I would do. I am unsure in what order I would do it.

It has happened before. We have never gotten an allegation from a subordinate that he was asked to perform something illegal by a superior.

Mr. KOSTMAYER. That is one of the things which concerns me.

Mr. SHAHEEN. That I am not prepared for that?

Mr. KOSTMAYER. No; that you have not gotten those. Yet it may not have taken place. I don't want to say that it has taken place.

But I think you question the effectiveness of your operation when you say that you have never received a complaint of an agent in the

FBI that he has indeed been ordered to do something illegal by a superior.

Mr. SHAHEEN. Well, I will——

Mr. KOSTMAYER. That is not your fault.

Mr. SHAHEEN. I know. But I will apply that to the entire Department. I don't think there are that many occasions—have we received any allegations?

[Directing his question to his staff, behind him.]

Mr. SHAHEEN. I think that applies departmentwide. No one has come to us and said that they have been asked to commit illegal acts.

We found out about illegal acts by others who have reported them.

Mr. KOSTMAYER. There is a big difference between whether or not they come to you to complain about that and whether or not they have taken place.

It was just this past Sunday I read on the front page of the Washington Post, and these took place some time ago—I guess you read it, too—about reports on the late Justice Frankfurter, for example, where the FBI had files.

Mr. SHAHEEN. The ACLU.

Mr. KOSTMAYER. In all fairness to you and to Judge Bell, this was long before you were there. I am not blaming anybody who is there now.

But I think that to say that just because your office has not received these complaints should not have us believe that they don't happen.

Mr. SHAHEEN. Oh, no. That's exactly right.

That comment should apply with equal force to the Criminal Division. How many complaints have they received——

Mr. KOSTMAYER. Sure.

Mr. SHAHEEN. And I daresay, their answer would be "zero."

Mr. KOSTMAYER. Sure. I singled you out because you are here.

Mr. SHAHEEN. I understand.

Mr. KOSTMAYER. I wanted to pursue the subject that Mr. Weiss raised a little bit, although you did answer it, and it has a little to do with the question I just asked.

Isn't it difficult for an agency of the Department of Justice, which you are, to investigate alleged violations of other agencies within the same department? Isn't there just something about that that is impossible?

How can personnel of the Department of Justice investigate violations allegedly committed by personnel of the Department of Justice? That just doesn't make sense, does it really? Shouldn't there be some outside agency which does it?

Mr. SHAHEEN. Well, there is the congressional oversight responsibility, but the way—how can it be done?

I can say that as far as our office is concerned, it has been done.

If you indicate to the heads of the offices and the section chiefs and the line people that you have your charter from the Attorney General, and that you are called upon regularly to report to the Congress, and are asked questions that you do not have answers to, and some tough questions that you do have answers to, that you intend to see that the job is done, that you intend to pursue with vigor and fairness an allegation, you just get the job done, you know.

How do you put people in jail? You pursue them until you get them there.

Mr. KOSTMAYER. Who does the prosecuting if you don't?

Mr. SHAHEEN. The Criminal Division or the other prosecuting elements that have that authority and power.

Mr. KOSTMAYER. Do they have to follow up on a matter if you conclude that prosecution is necessary? Do they have to accept your recommendation, or do they then make their own judgment?

Mr. SHAHEEN. We ask them to make a separate judgment. If, after they have made it one way or the other, we determine whether to pursue—make administrative recommendations.

Mr. KOSTMAYER. And if you recommend prosecution and they decide not to prosecute, what do you do then?

Mr. SHAHEEN. We won't recommend prosecution. If they don't recommend prosecution and we feel it is in order, we take it to the Attorney General.

Mr. KOSTMAYER. And he resolves the dispute between you and the Criminal Division?

Mr. SHAHEEN. Right.

Mr. KOSTMAYER. Wouldn't it be better if—I know you have answered this when the chairman asked it before, but wouldn't it be better if you had the power to go ahead and prosecute on your own?

Mr. SHAHEEN. No, sir. Because a lot of what we do is investigate allegations of abuses of prosecutorial misconduct. We wouldn't want to find ourselves doing that activity that is so much the subject of allegations that we receive.

Mr. KOSTMAYER. Who watches you guys now?

Mr. SHAHEEN. The Attorney General, the Deputy Attorney General, the Associate Attorney General.

Mr. KOSTMAYER. I want to ask this, who watches them? We watch the press and who watches us? [Laughter.]

You said that you are going to be involved in setting up some of these internal procedures within the Department of Justice.

Mr. SHAHEEN. I think Judge Bell was referring to the FBI, but there will probably be some that will be recommended for others in the——

Mr. KOSTMAYER. Do you have a timetable or any idea when those procedures will be established and promulgated?

Mr. SHAHEEN. I don't have a timetable, no.

Mr. KOSTMAYER. Even a broad timetable?

Mr. SHAHEEN. No, sir, because others are going to have to participate, and I don't know how long, what time frame they will require to do what they need to do.

Mr. KOSTMAYER. And they will somehow be different from procedures which are already in existence I gather?

Mr. SHAHEEN. Likely to be. Yes, sir.

Mr. KOSTMAYER. I asked Judge Bell if he could—and I think he answered me very fairly and honestly—tell us if these sort of abuses were no longer taking place in the FBI. He said he had not been there long enough. I don't expect you to be able to answer that question, although, if you are, I would like you to do so. Are you able to say that these abuses are no longer taking place in the FBI?

Mr. SHAHEEN. Let me answer you honestly and fairly.

Mr. KOSTMAYER. I don't mean to put you on the spot.

Mr. SHAHEEN. No, sir. I am not prepared, and I dare say, I would never want to make the categorical statement like that.

If I were Attorney General for 20 years, I would never make a—that's the one thing I have learned when you are in charge of an agency that is 54,000-strong, and has as a subpart an agency that was dominated by a man who, in death, haunts this Nation with his problems, I just wouldn't come out with a categorical statement that I know for a certainty that none of this is going on now.

Mr. KOSTMAYER. Thank you, Mr. Shaheen.

Mr. SHAHEEN. Yes, sir.

Mr. PREYER. Mr. Quayle?

Mr. QUAYLE. Procedurally, I want to go through a complaint.

Mr. SHAHEEN. OK.

Mr. QUAYLE. A complaint comes—you said most of them are prosecutorial——

Mr. SHAHEEN. A lot of them are.

Mr. QUAYLE. A lot. Let's just take that as hypothetical.

A written complaint comes from John Q. Public that a case is "fixed." You get the complaint; it is a written complaint. What do you do now?

Mr. SHAHEEN. Let's say it probably involves a Criminal Division lawyer. If the allegation is criminal in nature, we will send it to the FBI and ask them to undertake an administrative inquiry and ask the Bureau to prepare an investigative report for our review and recommendation.

Usually they will combine with that. When they are alleging prosecutorial abuse, they will invariably—almost invariably—allege that it all took place in the grand jury.

The procedure there is my office will impanel three seasoned practitioners of the full grand jury to review the transcript of the grand jury. That is the best allegation that a complainant will send in is all the secrecy of the grand jury. They don't think we are going to go to all that trouble.

We call for the grand jury transcript of that man. We ask a panel of three people who are not affiliated with the Criminal Division to review the transcript to see if he was harassed, abused.

Mr. QUAYLE. Do you do this in conjunction with sending the complaint to the head of the Criminal Division?

Mr. SHAHEEN. Yes. And if we didn't find a response—a U.S. attorney's response—to some rather detailed allegations awhile back involving alleged grand jury abuse, we addressed it another way.

It goes to an ongoing matter, so I had better not proceed with it, but we will have a panel of three people. One of my panel members was Judge Tyler in one instance, two seasoned assistant U.S. attorneys not in any way affiliated with or familiar with the subject or the Division, to review the transcript to see if there was abuse.

Mr. PREYER. Will the gentleman yield for just one question?

Mr. QUAYLE. Yes.

Mr. PREYER. At what point in the procedures that Mr. Quayle is asking you about is the man considered, quote, "under investigation"?

Mr. SHAHEEN. After we have established, to our satisfaction, that

the allegation has substance. Then he is under review or inquiry or investigation.

We first review the allegation.

Mr. QUAYLE. You first review the allegation in concert with the report from your three independent reviewers?

Mr. SHAHEEN. If it involves grand jury.

Mr. QUAYLE. Plus the response from the head of the Criminal Division.

Mr. SHAHEEN. His response is, is the memorandum responsive in all details to the memorandum of complaint or the letter of complaint.

Mr. QUAYLE. Does the attorney that is involved have any opportunity also to—before he is quote, unquote, "under investigation"—does he respond?

Mr. SHAHEEN. Usually to the head of the division that he works for. The memo I am talking about is prepared by the attorney who is the subject of the complaint.

Mr. QUAYLE. Oh, so, you take his memo plus your independent review—or the staff's——

Mr. SHAHEEN. Right.

Mr. QUAYLE. And then you will make a decision as to whether it is under investigation.

Mr. SHAHEEN. Right.

Mr. QUAYLE. And then when it is under investigation, it is referred to the Attorney General?

Mr. SHAHEEN. Sure.

Mr. QUAYLE. And then back to——

Mr. SHAHEEN. If there is substance to it, we will make recommendations.

Mr. QUAYLE. Now, can this recommendation go as far as dismissal or criminal prosecution?

Mr. SHAHEEN. We won't make the criminal prosecution recommendation, but we will send—when we send something down to the Criminal Division for their attention and review because of possible criminal violations, they know that we are asking them for their criminal opinion—their opinion on the criminal merits of the case.

Mr. QUAYLE. And how many cases do you send down to the Criminal Division?

Mr. SHAHEEN. A number. I don't know. It's a significant——

Mr. QUAYLE. How many of them are prosecuted?

Mr. SHAHEEN. A few. Less than 10.

Mr. QUAYLE. OK. Thank you.

Mr. PREYER. Thank you, Mr. Quayle.

Mr. Weiss?

Mr. WEISS. Thank you, Mr. Chairman.

I wonder, before we proceed further, would it be possible for you to make available to the committee and the counsel—the subcommittee and the counsel—three of the items, two you have mentioned during the course of your testimony and the third is referred to in the report. In fact, I think you mentioned all three of them.

One of them is Judge Bell's memorandum reporting allegations of wrongdoing.

Mr. SHAHEEN. Yes, sir.

Mr. WEISS. Two, the regulations which I guess supplement the charter or order—Executive order—which created the Office of Professional Responsibility.

Mr. SHAHEEN. There are no regulations. There is just the regulation——

Mr. WEISS. Just the order itself?

Mr. SHAHEEN. Yes, sir. And the committee already has that.

Mr. WEISS. Right.

And finally, there is reference on page 10 to what you have mentioned, the internal audit of six of the components of the Justice Department, their management studies and how they process things.

Mr. SHAHEEN. That we requested the internal audit staff to make.

Mr. WEISS. Now, would it be possible to make that available?

Mr. SHAHEEN. Congressman, let me check with the Attorney General. Speaking for myself, I don't believe he would have an objection, but they are his documents. Let me check with him and get back to you.

Mr. WEISS. Thank you.

On page 13 of the annual report, you make reference to the Cointelpro allegations, and you indicate that as a conclusion of the report—the finding of it—that the total review was almost completed of people who may have been harmed by those investigations.

Questions first: Has that review, in fact, been completed at this point?

Mr. SHAHEEN. The review has been completed. I think it will be closed down next week, and the figure I cited—what was the figure I gave here?

Mr. WEISS. You indicated 282 notifications.

Mr. SHAHEEN. That is going to go up to between 430 and maybe—substantially more than that.

Mr. WEISS. What is the total number of files or individuals who are subject to this review process?

Mr. SHAHEEN. The total number of files, 50,000 files. The number of individuals? I don't know the answer to that. I don't know if any of the people know the answer to that because there were over 2,000 actions. Say, 200 people could be involved in one action or the target of one action, so I don't have the figure of the number of people involved.

Mr. WEISS. You say "50,000 files."

Mr. SHAHEEN. Files.

Mr. WEISS. Is it fair to assume that there would be more individuals than 50,000? Each file would, in fact, refer to at least one individual?

Mr. SHAHEEN. No, sir. Some of them are duplicative. A great many of them are.

Mr. WEISS. OK. Could you——

Mr. SHAHEEN. Excuse me. I am told 50,000 files is an incorrect figure. We don't know the number. I know there are over 2,000 actions that the Bureau took in Cointelpro.

Mr. WEISS. Now, of those 2,000 actions, is it fair to assume that each of those actions involved more than one person?

Mr. SHAHEEN. I should think so. Yes, sir, that would be fair.

Mr. WEISS. And you have no way of gaging at this point what is the total number of individuals who were involved in the Cointelpro as subjects of some action or investigation or surveillance or whatever?

Is it 10 times that 2,000, or 20 times that 2,000, or 30 times that 2,000——

Mr. SHAHEEN. It is much less than that, but I don't have a good answer for you, Congressman.

Mr. WEISS. In any event, the total number of notifications will be——

Mr. SHAHEEN. Between 430 and maybe as high as 200 more.

Mr. WEISS. Can you tell us what were the Attorney General's criteria for notification of individuals affected by Cointelpro?

Mr. SHAHEEN. Yes, sir.

First, that he be the target of an FBI/Cointelpro action. This was a special program.

For instance, Martin Luther King—he was Cointelpro'd more than anyone else, probably. But he was never in the Bureau's counter-intelligence program. That was a program bearing the acronym—Cointelpro—officially recognized now, program with the FBI on disruption and harassment, and certainly of questionable propriety.

It has been discredited by both Attorneys General Levi and Saxbe and Judge Bell as well. All three of them.

The criteria for notification is if there had been harm to an individual and, by the nature of the action taken against them, or if one was unable to determine whether there was harm, but the nature of the action suggested the possibility of harm, or where, from the file, one could not tell, the vote to notify was resolved, in all instances, in favor to notify.

Either harm, or inability to tell whether harm had been caused, warranted notification.

Mr. WEISS. Harm in all of its ramifications, slander, credit, or loss of job——

Mr. SHAHEEN. Right.

Mr. WEISS. Physicial harm, whatever.

Mr. SHAHEEN. Right.

Mr. WEISS. Were those criteria submitted by the Attorney General to your office in writing?

Mr. SHAHEEN. Yes; they were.

Mr. WEISS. Would it be possible for this committee to receive a set of that file?

Mr. SHAHEEN. I believe under Chairwoman Abzug we provided that, but we will be happy to re-provide it.

Mr. WEISS. Getting back again to the processes of determining allegations of wrongdoing. A new agent comes into the FBI; he is hired. Is there any kind of program in your office or the Attorney General's to inform him as to what his obligations and responsibilities are, both as to the performance of his duties and his adherence to the laws and the Constitution of the United States?

Mr. SHAHEEN. I believe so. It starts with the instructions the Attorney General has asked them all to follow and that is the manual, to the letter—the FBI manual.

Mr. WEISS. We have had occasion to have reference to, and we have seen the manual——

Mr. SHAHEEN. Did they give you all the manual, by the way? Just as a matter of personal interest——

Mr. WEISS. I don't have it, but we have had it described and it's

apparently a massive kind of thing. The best description I have gotten —particularly in the areas that the FBI people themselves say—it is unfair for them to be charged now, in retrospect, with allegations of wrongdoing.

The indications are that there is a certain amount of vagueness attached to the manual. The manual does not really describe in a clear-cut fashion what it is that they are pledged to do by way of following out their superiors' dictates if the orders are wrong, for example, or illegal, or what have you.

Mr. SHAHEEN. I think we have reports that some agents are requiring that their orders, when they have a question about them, be put in writing. Some are consulting with counsel. I think this New York problem has gotten a lot of agents in groups, being represented by law firms.

Mr. WEISS. My question is, Mr. Shaheen, wouldn't it make sense—especially given the confusion that is prevalent right now—for there to be a systematic, programmatic approach to briefing and orienting not just new agents but especially new agents, as well as the older employees of the FBI, as to what is expected of them, both in fulfilling their responsibilities and their adherence to the Constitution?

Mr. SHAHEEN. Absolutely. That is one of the most important things we have to address in developing the internal operating controls that the Attorney General mentioned to you in this subcommittee in his last appearance.

Mr. WEISS. The Attorney General indicated—you just referred to it again—that it is his directive to agents that if there ever is any doubt as to an order being received from a superior, that they should get it in writing.

Have you had any indication at all as to whether any agent at all has requested of a superior that he/she give the order in writing?

Mr. SHAHEEN. Personally, no, sir.

Mr. WEISS. Isn't that really again, a remedy or a cure that sounds nice but, in fact, is no cure at all? That the same constraints which would mandate an agent to follow the dictates of a superior would also preclude him/her from saying to his superior, "I'm not going to do that unless you give it to me in writing"?

Mr. SHAHEEN. The answer is a very obvious "yes," sir.

Mr. WEISS. All right. So, we need something, obviously, more than just the directive to get it in writing if you have any doubt about it.

Have you given any thought in your charter considerations to—or guideline considerations—to a specific set of guidelines for agents to follow?

Mr. SHAHEEN. Yes.

Mr. WEISS. In reporting to you or to the Attorney General whenever they have any question of going into a controversial or perhaps prohibited area?

Mr. SHAHEEN. Yes.

Mr. WEISS. Would you care to indicate what those are?

Mr. SHAHEEN. Yes, sir. I would prefer not. I would be happy to come back at a later date and give you those. They are still in the formulative stage, and they haven't even been presented to the At-

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torney General, but we have been asked to consider those, and we have sort of preliminarily started to do so.

But I agree with you to do so. They are needed. We have been asked to come up with something, and we intend to do so.

Mr. WEISS. And finally, the Attorney General indicated, in his appearance before us, that he thought there ought to be a removal of the FBI from domestic intelligence matters, except in those areas where there was a nexus to the crime.

Now, to what extent has consideration of that proposal or approach been followed, and how close are you or the Attorney General to submitting that kind of guideline, or where are we as far as a timetable is concerned?

Mr. SHAHEEN. I don't know where we are. I'm not sure that the Attorney General knows. Perhaps a member of the Guidelines Committee knows.

I don't know the answer to that question.

Mr. WEISS. What proportion of the FBI is, in fact, utilized in following domestic intelligence matters as distinguished from straight criminal kind of investigations?

Mr. SHAHEEN. I don't know the answer to that, either.

Mr. WEISS. Would you have any way of finding out and submitting that information to the committee?

Mr. SHAHEEN. Certainly.

[See testimony of FBI Director Kelley at p. 155.]

Mr. WEISS. I would certainly appreciate your doing so.

Thank you, Mr. Chairman.

Mr. PREYER. Thank you, Mr. Weiss.

At this time, the Chair will ask Mr. Barnes and Miss Sands, counsel of the committee if there are any questions remaining to be asked.

We will invite you to put some question to the witness.

Mr. BARNES. Thank you, Mr. Chairman.

Mr. Shaheen, what is the policy of opening a case if you don't have a formal complaint?

For example, you read a news story that appears to have an allegation of wrongdoing in it, or perhaps a civil action is filed and out of that it appears there may have been some criminal activity involved. Do you go ahead, or do you have to have a formal——

Mr. SHAHEEN. No; it can be oral. We can read about it in the newspaper. It can be in writing. It can be any way.

Mr. BARNES. And on the 150 or so allegations that were covered in your 1976 report, were some of those first investigated by some of the internal units at the six various divisions?

Mr. SHAHEEN. Yes.

Mr. BARNES. And then came to your attention?

Mr. SHAHEEN. Yes.

Mr. BARNES. What is your relationship to those six units? For example, a complaint comes first, say, to the FBI's Internal Inspection Division.

Do they process it with their own investigation before passing it on to you, or do they pass it on to you at the same time they begin the investigation?

Mr. SHAHEEN. First of all, the Internal Inspection Division does not perform the same function that it did 1 year ago or 1½ years ago.

If it is an allegation of a wrongdoing by an FBI person or employee, it goes to their Office of Professional Responsibility. We have asked to be alerted, and we are. When the allegation is significant, where the individual against whom it is lodged is significant, and where there is detonative—for want of a better word—potential, we want to be instantly advised, and we are.

We get monthly reports from those six inspection units, too.

Mr. BARNES. Would you get reports during the course of their investigation of a "detonative" matter?

Mr. SHAHEEN. Yes. But on the very significant ones.

Mr. BARNES. Do you have the authority, if you don't like the way they are conducting their investigation, to simply pull it from them?

Mr. SHAHEEN. Yes.

Mr. BARNES. You find you have sufficient authority to do that?

Mr. SHAHEEN. Yes.

Mr. BARNES. Of the 152 allegations, do you have a breakdown on what components of the Department the employees that the allegations concerned were employed by? Mostly FBI people or—what was the breakdown?

Mr. SHAHEEN. Most of them were people working for those elements of the Department that threatened freedom from jail to the complainant. That would be the investigative agencies and the criminally litigating division of the Department.

The bulk of our complaints involved prosecutors and the people in "collusion" with them—if I can put that word in quotation marks—like the FBI investigating somebody at the request of the Criminal Division.

A lot of our complaints—about 90 percent of them—are inclined to be without substance. We have investigated them nonetheless, and I would say the bulk of those involved those people whose freedom to roam at large was being threatened.

Mr. BARNES. You mentioned in your report the difficulties you encounter because of risk to an ongoing case when a complaint comes in that would relate to that case.

What is the policy there? Do you put off the internal investigation until the case passes a critical period, or do you simply go ahead anyway?

Mr. SHAHEEN. Sometimes—that would vary with the circumstances. When we can go in and surgically review the complaint without impeding the investigation, we will do it. When to satisfy the complainant's request would require the stopping of a criminal investigation, and without more of his allegations to warrant it, we will defer to the litigating component and then proceed with the investigation administratively if warranted.

It varies. What I am trying to say is that it varies.

Mr. BARNES. You could go back later to a criminal aspect of an investigation——

Mr. SHAHEEN. Oh, absolutely. Yes.

Mr. BARNES. What effect on your investigation does the pendency of a civil case have? I can see where you would have a problem where the Government is defending against maybe a tort action or something.

At the same time, if you were conducting an investigation, you could turn up substantiation of allegations that would actually be helpful to the side that is moving against the Government.

Mr. SHAHEEN. Right.

Mr. BARNES. Causing a conflict——

Mr. SHAHEEN. Almost to the same extent that a criminal investigation would be. This might impinge on ongoing civil litigation, but, again, it depends on the nature of the allegations, the circumstances of the ongoing litigation, and what we can do while the litigation is proceeding without affecting either the rights of the Government or the private litigant.

Mr. BARNES. Have you had situations where you have had to make substantial information available to civil litigants under their discovery rights?

Mr. SHAHEEN. No.

Mr. BARNES. Mr. Weiss?

Mr. WEISS. May I?

In line with the Cointelpro program that I asked about before, as a result of your review of the files, has your office made any recommendations as to either administrative sanctions or criminal prosecution of FBI agents involved in those cases where you have concluded that individuals were, in fact, harmed and they were notified by your office of having been harmed?

Mr. SHAHEEN. No, sir. That was done in the so-called Petersen report 2 or 3 years before—that's Henry Petersen, who was asked to do that by Saxbe.

The ones that we would have done administratively, the people have either retired or they are dead now, and were at the time.

Mr. WEISS. So, in essence, the notification has taken the place of administrative sanction recommendations?

Mr. SHAHEEN. I don't think that was the purpose of notification. I think the purpose—no, sir, I don't think that was the purpose of notification.

I think the purpose of notification—by Attorney General Levi and Attorney General Bell—was to say "This was an outrageous activity. And one way to make sure or guarantee against its reoccurrence is that we are going to tell folks about it."

Mr. WEISS. Do you know if there is any civil action instituted as a result of those notifications?

Mr. SHAHEEN. I believe there have been. I know there have been. We were prepared for that before we started to notify. We realized that as a very real likelihood.

Mr. WEISS. Do you have any idea as to how many such cases?

Mr. SHAHEEN. Beyond the word "several," Congressman, I can't give you that.

Mr. WEISS. In essence, the statute of limitations has not really run on all of those cases, has it?

Mr. SHAHEEN. No, sir.

Mr. WEISS. Do you have any idea as to how close the statute is?

Mr. SHAHEEN. No, sir. I don't.

Congressman, we believe it is the plaintiff's theory that the statute doesn't start running——

Mr. WEISS. Until they are notified?

Mr. SHAHEEN. Right.

Mr. WEISS. Will this be a policy in the Department, not just in the Cointelpro cases, but where you have a situation where the sanctions of various kinds are not imposed by the Department, that, in fact, the individuals who have been harmed as a result of these various kinds of abuses, will be notified by the Department?

In other words, are you taking back just the Cointelpro cases?

Mr. SHAHEEN. Our office isn't. But that is a policy consideration that I am sure the Attorney General would want to make, and I defer to him in any response.

Mr. WEISS. Would you think that it would be appropriate to adopt that, again, as a policy position so that the people would know that the Government really stands to suffer in addition to the problems that individual agents may have? That there is a monetary reason for people not being abused citizens?

Mr. SHAHEEN. Yes, sir.

Mr. WEISS. And you would be willing to make that recommendation, that the Cointelpro notification procedure be adopted as policy in other matters?

Mr. SHAHEEN. If it is improper dirty laundry, I think the best way to clear it is to clean it; expose it.

Mr. WEISS. Thank you, very much.

Mr. BARNES. Mr. Shaheen, your report indicates some occasional problems in deciding whether to refer a case to a division for administrative handling or whether to send it to the Criminal Division for treatment there.

What level of initial review do you give a complaint? Do you essentially read the complaint, or do you go back to the complainant and try to get more detail or——

Mr. SHAHEEN. Often we go back to the complainant and ask for more details.

He or she will send a long letter, and there will be just a scribble out of 10 pages that refers to some alleged FBI abuse or an abuse by a U.S. Marshal. We tell them that this office's function is to review and handle and pursue allegations of wrongdoing by Department personnel; since the reference is to the FBI or the U.S. Marshal or to a Department employee, we would be pleased to receive and therefore are requesting that you supply more detail, specific allegations, and all of the backup material that you can, with documents.

That's a very—well, every time we need that information, that is policy. We request it.

Mr. BARNES. You do that before it is farmed out?

Mr. SHAHEEN. Yes.

Mr. BARNES. You mentioned in your report some variance of handling by the divisions or the U.S. attorneys' offices, indicating that some do an excellent job of pursuing matters you send them, and others maybe don't do such an excellent job.

Is that a matter of their priorities perhaps not being made clear to them, or do you have active hostility reaching you from any of these other areas?

Mr. SHAHEEN. I must say that when we wrote the report, we didn't know that I was going to answer questions about it. That quite often reflects—there is no hostility. That, I might add, surprises me as I stay in the job with every passing month.

I have heard that I could expect it, but just the contrary has happened. We get a lot of support and we get it quickly and as often as we need it.

The prodding is for our own purposes. The prodding of certain offices out in the field is necessary when we know and they realize that they have been referred a frivolous complaint but we put the burden on them to follow it out and it is a question of their recognizing that it is not high on their list of priorities and we prod it. It is because we have told them we would like to close our filing on this, and tell us that there is nothing to it. Get us something back on this.

So, it is not a question of hostility. It is a question as you say, maybe, of their recognizing, as we do—we just don't like to keep things open and sometimes they are not as interested in helping us close something as we are. That is why we have had to prod people.

Mr. BARNES. Do you feel it is necessary to send even the frivolous ones out to essentially cover the process?

Mr. SHAHEEN. Well, we do it to place the burden at the first level and that is in the field, if that is where the allegation is leveled, yes.

Mr. BARNES. You mentioned in the report that sometimes there is a problem where agents or Government officers have worked in pairs. Do you ever have one of the pair give you the straight story on what the other one in the pair did, perhaps an improper interrogation, that sort of thing?

What kind of investigative steps do you take in these situations? Do you separately interrogate the partner of an agent?

Mr. SHAHEEN. Sometimes we will, yes.

Mr. BARNES. Where you send a matter to the Criminal Division and they eventually come back with a report that says it shouldn't be prosecuted, or where you send a matter to an administrative unit and their report indicates that the matter is perhaps more serious than originally thought and there is some criminal problem involved, how do you handle the cross-referencing back and forth, and are investigations essentially started all over again to move the problem from one division to another?

How is that efficiently handled?

Mr. SHAHEEN. When we send something to a component of the Department for administrative action, it is usually because we passed the liminal level and determined that probably some is warranted. They come back with their recommendation and we reserve the right to agree or disagree. I don't think there is any confusion about that.

We work pretty much hand in hand with them in developing and implementing administrative sanctions tied up to the individual and what he did wrong.

Mr. BARNES. Are there specific written policies on what kind of active wrongdoing merits an administrative sanction? Is there one level of offense to get fired and——

Mr. SHAHEEN. No, but there is, with the component in the Department, it is not the same in the U.S. Marshals Service or DEA as it is in the FBI, for instance. They are covered by civil service—at least the former two are—and I think INS as well.

So, the procedures to implement administrative sanctions, if that is what we are after, are more cumbersome than, say, to implement something administratively in the FBI or one of the litigating divisions against an attorney.

I can call an attorney and say, "These are the charges, how do you plead? What do you want? Let's have your resignation." And that's that.

It varies with the component of the Department because of the various civil service protections or lack thereof.

Mr. BARNES. Thank you.

Mr. WEISS. Mr. Chairman? Thank you.

I just have one more question—comment—I guess.

When I served in the New York County District Attorney's Office under the late Frank Hogan, he would, every year, gather together his entire staff. At that time we had, I guess, about 75 or 80 assistant district attorneys, 20 or 30 investigative detectives assigned to us in the police department, as well as other supportive staff.

Starting with the premise that the office was there not just to prosecute, but to do justice, he would go through an hour and a half presentation of what he felt was appropriate or inappropriate conduct by members of the staff of the New York County DA's office.

Now I know that the Justice Department has a much larger staff and it is not centrally located, but would you not think it appropriate for the Attorney General, on an annual basis, to prepare that kind of a statement which he could perhaps deliver to the staff immediately in his headquarters, and have the same statement read by the top ranking official at the various district offices—field offices and so on, so that, in fact, there would be an ongoing indication to staff that the Attorney General has certain standards that he is constantly and continually cognizant of, and wants the staff which he has to adhere to?

Mr. SHAHEEN. I do.

Mr. WEISS. You see, the thing that I just find so terrible and abstract about this whole situation is that there doesn't seem to be any clear-cut direction to the staff of a very large department with tremendous powers as to what their responsibilities and obligations are.

I am sorry to say that I don't think that your office—although I have the highest regard for you and the Attorney General and the people you are working with—I don't think your office really meets that problem as of now.

I am pleased to note that you're thinking about expanding the role and the responsibilities of the Department along these lines, but I think you have got a long way to go.

Mr. SHAHEEN. I agree.

Mr. WEISS. Thank you, Mr. Chairman.

Mr. PREYER. Thank you, Mr. Weiss.

Miss Sands?

Miss SANDS. I just have a couple of questions of Mr. Shaheen.

Since the Office of Professional Responsibility has been created, have you made any recommendations to the Attorney General regarding changes in policy or practices of Department employees that you feel should be made?

Mr. SHAHEEN. Yes.

Miss SANDS. What were those recommendations?

Mr. SHAHEEN. I think I have answered the question before, but I will repeat it.

We have been responsible, in part, for reorganizing the FBI, their procurement practices in particular, their vouchering procedures.

That has also been the case in three other components of the Department.

We are working on additional recommendations, but, yes, we submit them as we find them, and they have been implemented.

Miss SANDS. Mr. Shaheen, you feel no one should hold your current position for longer than approximately 2 years.

With the end of your second year quickly approaching, do you have any recommendations on how to improve the functioning of your own office?

Mr. SHAHEEN. Anyone who openly seeks it should not be given the job. [Laughter.]

Other than that, no. But I will by the time I come closer to the end of my tenure, yes. I will have. I have been thinking about it and I have asked my office to think about it.

We try to implement better practices as soon as we come upon the discovery that to do so would be good, but I will think about that more as my deadline approaches.

That is a very good question and, yes, I intend to leave with the Attorney General some recommendations that my successor should at least consider.

Miss SANDS. Thank you, Mr. Shaheen.

Thank you, Mr. Chairman.

Mr. PREYER. I think if you do make some recommendations along that line, if you make a "swan song" presentation, the committee would be really interested in your recommendations.

Let me just ask one final question which we are always interested in in the committee—any oversight committee is.

What would be the extent of access to the files and operations of the Office of Professional Responsibility that the subcommittee would be allowed in its oversight of the office?

Mr. SHAHEEN. Mr. Chairman, I don't know the answer to that question. I am part of a group that has been asked to provide input in a revised policy of disclosure of departmental files.

The Attorney General is supervising that. It is ultimately his decision. He indicated in his last appearance before you that he was working on it. That still is happening.

Whatever he agrees to will be the policy set by the Department for the Department, and I will adhere to it as well.

Mr. PREYER. So, the Department is working on this whole question of access?

Mr. SHAHEEN. Yes, sir.

Mr. PREYER. Access of Congress to information in the Department?

Mr. SHAHEEN. Yes, sir.

Mr. PREYER. Thank you, very much.

We appreciate your being here today, Mr. Shaheen, and your very helpful testimony.

We will leave the record open to receive any further written questions of you which might prove to be necessary after reviewing the hearings, but at this time, we will recess. We will adjourn this meeting and let you get back to your duties.

[The report referred to on p. 65 follows:]

ANNUAL REPORT

1976

OFFICE OF PROFESSIONAL RESPONSIBILITY

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ANNUAL REPORT TO THE ATTORNEY GENERAL
OFFICE OF PROFESSIONAL RESPONSIBILITY

I. OFFICE DUTIES

On December 9, 1975, Attorney General Edward H. Levi created the Office of Professional Responsibility in the Department of Justice "to ensure that Departmental employees continue to perform their duties in accord with the professional standards expected of the nation's principal law enforcement agency". The Office was designed to oversee and, if necessary, conduct investigations of "conduct by a Department employee that may be in violation of law, of Department regulations or orders, or of applicable standards of conduct". 28 C.F.R. §0.39 et seq. (1976).

The Counsel on Professional Responsibility is required to submit an annual report to the Attorney General and the Deputy Attorney General "reviewing and evaluating the activities of internal inspection units or, where there are no such units, the discharge of comparable duties within the Department". 28 C.F.R. §0.39a(f)(4). Counsel is also empowered to "submit recommendations to the Attorney General and the Deputy Attorney General on the need for changes in policies or procedures that become evident during the course of his inquiries". §0.39a(g). This report will attempt to meet both of these responsibilities.

II. COMPLAINTS REVIEWED BY THE OFFICE

In 1976, the Office of Professional Responsibility received, reviewed and acted on one hundred and fifty-two (152) allegations of misconduct against Department officials. Fifty-two matters (approximately 34%) could be categorized as allegations involving abuse of investigative or prosecutorial authority. Fifty-three matters (35%) pertained to various criminal allegations, and another twenty-six (17.5%) involved the unauthorized release of government information or "news leaks" about ongoing Department investigations. The Office categorized seven matters (4.5%) as "morals offenses" and fourteen complaints (9%) as "miscellaneous".

A. Abuse of Authority

1. Abuse of Prosecutorial Authority

In 1976, the Office received thirty complaints concerning prosecutorial misconduct and abuse of power. Only three complaints were found to warrant discipline, but many allegations did not result in administrative action because the Office was unable to develop sufficient evidence to support a finding that the Department employee had engaged in misconduct.

Twenty-two of these complaints involved allegations that Department prosecutors abused the grand jury power; failed to prosecute known criminals; initiated investigations or failed to pursue prosecutions for partisan political purposes; demonstrated extreme abrasiveness in court, and closed criminal cases because of personal ties to the defendants.

It should be emphasized that this list includes allegations only. Seven matters are still under inquiry. The remaining have been closed. One complaint was substantiated by administrative inquiry and led to the prosecutor's dismissal.

The Office reviewed six other matters that could be generally described as allegations of unethical prosecutorial conduct. The complaints included accusations that a Department attorney improperly threatened a witness with criminal prosecution (unsubstantiated), that a Department attorney engaged in ex parte communications with a federal judge (open), and that a Department prosecutor failed to disclose exculpatory evidence to defense counsel (unsubstantiated). Another prosecutor was reprimanded for advocating at a Bar Association function that the Department engage in improper investigative techniques to gain advantage in major criminal investigations.

Private attorneys complained on two separate occasions that Departmental officials had contacted defendants without notifying their attorneys. One of these complaints led to an oral reprimand.

We should point out that the Office found it particularly difficult to investigate these complaints without risking injury to the cases out of which the complaints arose. Few of the allegations against prosecutors appeared, on first impression, to involve violations of law. So they were referred for administrative action to the head of the division or U.S. Attorney's office to which the attorney was assigned, as required under the Office charter. 28 C.F.R. §0.39a(c)(2). The manner in which the division or U.S. Attorneys handled these complaints varied considerably. Some would have preferred an outside unit to investigate the allegations. Others conducted the requested administrative inquiries immediately and thoroughly. A few would not respond without repeated prodding.

This suggests that division heads and U.S. Attorneys should have a precise and uniform understanding of the Counsel's duties and review authority and that new appointees to these positions should be so advised in writing. It might also be useful for the Counsel to attend the U.S. Attorneys' Conferences from time to time so that the U.S. Attorneys will have the opportunity to become familiar with Office operations.

Although we hesitate to draw any conclusions from this list of complaints, especially since we were able to substantiate only three allegations, the number of complaints in this area does indicate that Department prosecutors should be repeatedly reminded of their ethical responsibilities, especially those set forth in the Code of Professional Responsibility.1/

1/ These responsibilities are set forth in the Code, adopted in 1969 by the House of Delegates of the American Bar Association:

Ethical Consideration 7-13

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore

(Footnote continued on page 4)

2. Abuse of Investigative Authority

In 1976, the Office reviewed twenty complaints involving what could be described as "abuse of investigative authority". Two complaints were substantiated and led to disciplinary action. Many of these complaints dealt with unspecific allegations of harassment and intimidation by FBI, DEA,

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(Footnote 1/ continued from page 3)

should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may take decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

Ethical Consideration 7-14

A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

and INS investigators. We found these charges difficult to prove. FBI, DEA, and INS agents almost never conduct investigations alone. When an investigator is accused of "harassing" a witness, his associate virtually always vouches for his good conduct. The complaining witness rarely can muster more evidence than his own word.

In some instances, the Office could not easily determine whether a complaint of this type should be treated criminally or administratively. The complaints rarely contained the detail allowing the Office to make judgments based on sound legal analysis. The Office lacks the manpower to conduct the necessary preliminary inquiry itself, and therefore, can only rely on its collective judgment and experience in deciding whether to refer the matter for criminal or administrative action.

3. Mistreatment by Prison Officials and Parole Officers

The Office received two letters from prison inmates complaining of mistreatment and inadequate security in federal prison. Another prisoner complained that his parole officer improperly revoked his parole and prevented him from attending his mother's funeral. Two of these complaints are the subject of ongoing inquiry.

B. Release of Official Information

Another frequent complaint concerns the improper release of official information. The Office reviewed nine allegations that Department officials released to the press information developed in criminal investigations. The guidelines governing the release of such information are set forth in 28 C.F.R. §502(a) and (b). As stated here:

> While the release of information for the purpose of influencing a trial is, of course, always improper, there are valid reasons for making available to the public information about the administration of law. The task of striking a fair balance between the protection of individuals accused of crime or involved in civil

> proceedings with the Government and public understandings of the problems of controlling crime and administering government depends largely on the exercise of sound judgment by those responsible for administering the law and by representatives of the press and other media. 28 C.F.R. §50.2(a)(2).

It is precisely the "exercise of good judgment" that we find so difficult to review. Several of the news articles which triggered the "leak" allegations did appear to inflict serious damage on the reputations of persons identified as targets of criminal investigations, and in at least one instance, the person identified as a "target" was immediately determined not to be one. The injury done to this individual is, in our view, incalculable.

Disciplinary Rule 7-107 of the ABA Code of Professional Responsibility and the Privacy Act, 5 U.S.C. §552a, also prohibit release of information developed from criminal investigations. The Office lacks the authority to initiate criminal investigations into these allegations and has conducted administrative inquiries into these matters only when directed to do so by the Attorney General or the Deputy Attorney General.

In addition to the above, the Office reviewed three complaints that official information was released to known criminals. Two of these allegations were found to be meritless. The third is still under inquiry.

The Office reviewed one complaint that official information was released to a defense attorney. This also was found to be meritless. The Office has two similar matters in open status at the moment.

The Office of Professional Responsibility received and reviewed four allegations that Department officials gave misleading or false testimony to state or federal grand juries. Three of these matters were closed for lack of evidence. The fourth is under inquiry.

There were four other allegations of a more serious nature which the Office reviewed--namely, that government files were unlawfully destroyed or stolen. Two of these matters remain open. Two were closed for lack of evidence.

C. Morals Offenses

Some of the more troublesome questions we encountered this year arose out of seven matters concerning personal morals offenses. Recognizing that Department attorneys must adhere to the strictest standards of professional integrity and competence, the Office nevertheless agonized over what standards to apply to matters involving aberrant sexual conduct. This question is made more difficult when the conduct is relatively private.

Administrative inquiry substantiated three of these matters and led to admonishment for the attorneys involved. One matter remains open. To avoid unnecessary injury to the attorneys' families, inquiries into such matters must be handled with great care and attention. Moreover, it should be stated that the Office does not intend, or have the authority, to regulate the morals, habits or private lives of Department personnel. When the matter becomes public and reflects adversely on the Department and the administration of justice, however, the Office is compelled, at the very least, to determine the facts.

D. Allegations of Criminal Misconduct

The Office reviewed and referred for appropriate action fifty-three allegations of violations of the federal criminal code. Inquiry substantiated eight allegations and led to administrative action in the cases in which the Criminal Division declined prosecution.

1. Obstruction of Justice and Bribery

Two obstruction of justice charges were found to be meritless. Three individuals complained that they were "framed" and were victims of a miscarriage of justice. Two of these were unsubstantiated. The third matter is still open.

There were ten bribery and case-fixing charges made against Department officials. Investigation has substantiated none of these allegations.

2. Fraud Against the Government

The Office reviewed nine allegations that Department officials engaged in fraud against the government. These charges included complaints that Department personnel submitted fraudulent travel vouchers, authorized the release of improper amounts of relocation witness funds, and paid excessive amounts to suppliers for office equipment. Investigation substantiated two of these allegations and led to disciplinary action. Neither was determined to warrant prosecution.

3. Misuse of Official Position

The Office reviewed ten allegations that Department employees misused their official position for private gain. Five of these charges were substantiated through investigation. Yet in all but one case, because the amounts involved were essentially de minimis and because of an absence of evidence indicating willfulness, prosecution was declined. One employee was found to have engaged in a small bartering business in his office. He was dismissed. Two other matters involved furnishing the private apartments of two Department officials with government property. The fourth allegation that was substantiated involved the use of Department stationery for the private purposes of a Department employee. In the fifth case, a Department employee plead to a misdemeanor charge under 18 U.S.C. 641 and 642 for converting government property to his own use.

4. Conflict of Interest

Twelve conflict of interest matters were brought to our attention in 1976. A U.S. Attorney refused to investigate a corporation on fraud charges, it was alleged, because his assistant had served in private practice as the corporation's attorney. The matter is under inquiry. A former Department attorney was accused of filing a class action against a defendant the attorney had allegedly investigated while employed by the Department. This was closed, after inquiry, and found meritless.

The Deputy Attorney General ordered the Office to investigate the relationship of one Department prosecutor to a private defense attorney. We discovered that the prosecutor had hired the defense attorney as his

divorce lawyer and owed him a considerable sum of money while the same defense attorney and prosecutor were litigating three separate criminal cases. This indiscretion, not the prosecutor's first, led to his separation from the Department.

The other conflict of interest matter warranting administrative sanction involved an Immigration Service official who went into a restaurant business with several attorneys who handled numerous immigration cases in proceedings before the same official.

5. Political Activity

There were three allegations that Department officials engaged in unlawful political activity. Administrative inquiry substantiated none of these charges.

6. Larceny

We reviewed two allegations that Department employees converted to their personal use small amounts of private property. Neither led to administrative action.

E. Patently Frivolous Charges

The Office took pains to treat each complaint against Department officials in as even handed and fair a fashion as possible. Nevertheless, the Office did receive a number of complaints which could be described as "patently frivolous". These charges, such as the woman who claimed she had been secretly "wired" and surveilled by the intelligence agencies for most of her adult life and whose demeanor suggested she was suffering from paranoiac delusions, were generally referred to the appropriate Department agencies for summary review and disposition.

F. Miscellaneous

On three occasions Department attorneys were accused of violating court orders. These charges were found to be meritless.

Two litigants complained that Civil Division attorneys were treating them unfairly in pending lawsuits. These were also unsubstantiated. Another citizen complained that a U.S. Attorney used IRS records to investigate the backgrounds of prospective jurors. We treated this as a policy matter and referred it to the Deputy Attorney General for appropriate policy review.

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We reviewed four complaints concerning the improper use of informants. Two of these matters remain under inquiry. The third led to administrative action, and the fourth was found to be meritless.

Lastly, four complaints alleging improper employment and recruitment practices were reviewed, investigated and closed for lack of evidence.

III. OTHER RESPONSIBILITIES

Since its creation in December 1975, the Office has served the Attorney General in essentially two ways, first, as overseer, and second, as investigator. During 1976, the Department's internal inspection units conducted numerous "integrity investigations". The Office has undertaken the responsibility for overseeing the "major" investigations conducted by these inspection units and is just beginning to comprehend the varied procedures by which misconduct allegations are investigated by the Department's offices, divisions, bureaus and boards. At our request, the Internal Audit Staff of the Office of Management and Finance has prepared an analysis of the internal investigative procedures followed at the six major Department agencies.2/

The Office has also been called upon to investigate particularly serious allegations of misconduct or to supervise such investigations.

To assist the Counsel in this capacity, the Attorney General and Deputy Attorney General have decided to delegate investigative duties to special task forces, reporting directly to the Counsel on Professional Responsibility. The task forces are made up of investigators and attorneys temporarily reassigned from other bureaus or divisions within the Department. Whenever the Attorney General or Deputy Attorney General decided that a serious allegation of misconduct deserved an independent investigation, a task force was formed.

2/ Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Prisons, Marshals Service, Immigration and Naturalization Service, and Law Enforcement Assistance Administration.

A. Inspection Units and Prosecutors

The Criminal Division ordinarily supervises criminal prosecutions of corruption within the Justice Department. But its jurisdiction does not encompass all criminal misconduct by Department personnel. The Criminal Section of the Civil Rights Division prosecutes violations of the civil rights statutes such as, for example, 18 U.S.C. 241, 242, and 594. The Office's responsibilities differ substantially from those of the Criminal and Civil Rights Divisions.

First, the Office inquires into improprieties and ethical lapses which fall short of a criminal offense. Departmental integrity means more than compliance with the law. It means strict adherence to the highest professional standards.

Second, the Office has oversight duties with respect to Departmental inspection practices going beyond specific cases. The Counsel is required to submit an annual or semi-annual report "reviewing and evaluating the activities of internal inspection units within the Department", and he may recommend "changes in policies and procedures that become evident during the course of his inquiries". 28 C.F.R. §0.39a(f)(4) and (g).

Third, and perhaps most important, the Office of Professional Responsibility serves as a check against prosecutorial and investigative conduct. The Special ABA Committee to Study Federal Law Enforcement Agencies stressed the need "to assure that decisions in criminal cases are made professionally and untainted by politics". It recommended appointment of a special assistant to the Attorney General or the Deputy to "investigate allegations of conflict of interest, improper activities, or misuse and abuse of power by Departmental employees".

The ABA Committee praised creation of the Office of Professional Responsibility as "an important first step in providing a place to which individuals, in government or out, may go with complaints or allegations of abuse or misuse of power by employees of the Department of Justice". Although the ABA Committee went on to propose a mechanism for triggering appointment of a temporary Special Prosecutor, its overall objective was to place primary responsibility for enforcement of the law in the Attorney General's office and

to "create those conditions within and outside the Department which will encourage the meeting of such responsibility". Preventing Improper Influence on Federal Law Enforcement Agencies, pp. 53-57, 105-106, Report of the Special ABA Committee, Chairman, William Spann, Jr., (1976).

The Criminal Division and the Office of Professional Responsibility complement each other in maintaining these conditions. For example, Assistant Attorney General Thornburgh of the Criminal Division conceded that the federal effort to prosecute official corruption has provoked accusations that these prosecutions are "undertaken for partisan interests by a particular administration to embarrass its political opponents". Priorities in Federal Law Enforcement, September 24, 1976. And although our inquiries uncovered no such conduct, it is important, in our view, to have a separate channel within the Department where complaints can be addressed and where both prosecutorial and investigative practices and standards can be reviewed with a degree of detachment.

B. Investigating the Investigators

During its first year the Office of Professional Responsibility devoted much of its time to the Justice Department's investigative agencies. The Office's most visible work involved the FBI, including the formation of task forces to investigate alleged financial improprieties (the U.S. Recording investigation), to review the FBI's activities with respect to Dr. Martin Luther King, Jr., and to notify victims of FBI COINTELPRO action.

In these instances, a critical issue was whether FBI personnel should participate in the inquiry. The answer varied from case to case. The Martin Luther King task force was composed exclusively of Department attorneys. The panel to notify COINTELPRO victims included a representative of the FBI's Legal Counsel Division.

The U.S. Recording task force needed even greater investigative resources. Moreover, Attorney General Levi desired an arrangement that would give the FBI an opportunity to show it was capable of impartial inquiry into its own activities. This was particularly important because we found the FBI Inspection Division's initial investigation of the U.S. Recording matter to be inadequate.

FBI agents were carefully selected for their record as field investigators. A senior Criminal Division attorney was placed in day to day supervision of the investigative team, which was headed by an Assistant Director and Special Agent in Charge of a field office, neither of whom had close associations with the FBI officials under investigation.

There was some concern with the FBI agents' ability to investigate their colleagues within the Bureau. We thought it conceivable that a special agent could damage his career prospects at the Bureau by appearing too aggressive in his investigations of misconduct allegations, especially if directed at prospective superiors. However, our experience with the U.S. Recording investigation indicated that the task force agents responded energetically and without fear of retribution.

C. Notification of Victims of FBI COINTELPRO Action

On April 1, 1976, the Attorney General announced that the Department would notify individuals who may have been harmed by the Federal Bureau of Investigation's domestic Counterintelligence Program (COINTELPRO). To carry out this notification effort, a panel of attorneys working under the supervision of the Counsel on Professional Responsibility reviewed FBI files to determine which individuals met the Attorney General's criteria for notification.

This review, which is nearly complete, has resulted in 282 notification letters being given to the United States Marshals Service for personal delivery to the targets of COINTELPRO. Each individual is informed that he may receive additional information about the COINTELPRO action taken against him if he wishes. To date 49 individuals have requested and received such information.

D. Martin Luther King, Jr., Review Task Force

On April 26, 1976, the Attorney General authorized the Office of Professional Responsibility to form a task force to complete a review, initiated by the Civil Rights Division, of the Federal Bureau of Investigation's activities relating to the late Dr. Martin Luther King, Jr. The task force was asked to determine (1) whether the FBI investigation of Dr. King's murder on April 4, 1968, at Memphis,

Tennessee, was thorough and honest; (2) whether there was any evidence of FBI involvement in Dr. King's death; (3) whether any new evidence had come to the attention of the Department bearing on the assassination which should be dealt with by the proper authorities; and (4) whether the relationship between the FBI and Dr. King called for criminal prosecution, disciplinary proceedings or other appropriate action.

After eight months the task force of five attorneys and two research analysts completed its report and submitted it to the Attorney General on January 11, 1977. This report and its voluminous appendices involved the review of more than 200,000 documents from FBI Headquarters and Field Office files and interviews of some 40 witnesses.

The review force concentrated first on the sufficiency and honesty of the FBI's investigation of the assassination of Dr. King. They concluded that a massively painstaking, thorough, and successful investigation had been conducted. They found no evidence of Bureau complicity in the murder. The only new evidence uncovered related to details which did not affect the ultimate conclusion that James Earl Ray was the properly convicted murderer. There was no evidence of conspiracy.

After reviewing the murder investigation the task force turned to the pre-assassination security investigation of Dr. King. All pertinent FBI files were examined. The review staff agreed that there may have been an arguable basis for the FBI to initiate a security check on Dr. King in 1962. King relied heavily on the advice of an advisor who was tabbed by the FBI as a ranking Communist Party member. But the task force concluded that the FBI's own reports in 1963 showed this advisor to have left the Party; that King received no "Party line" advice; and that King did nothing or said nothing indicating communist influence. The task force concluded that the security check should have been terminated early in 1963, and should not have continued until his death five years later. The Bureau's COINTELPRO type harassment of Dr. King and efforts to drive him out of the civil rights movement were found to be clearly improper.

The task force report concluded that any criminal action against Bureau participants in the harassment campaign was time barred. No disciplinary action was recommended since the responsible officials are dead or retired.

The task force submitted recommendations for tighter supervision of the Bureau's domestic intelligence activities and praised the Attorney General's guidelines in this area. They also proposed outright prohibition of COINTELPRO type activities against domestic intelligence subjects.

IV. RECOMMENDATIONS

With the assistance of the Internal Audit Staff, Office of Management and Finance, we have attempted to "review and evaluate the activities of internal inspection units within the Department". 28 C.F.R. §0.39a(f)(4). Pursuant to this authority, on October 8, 1976, we requested six Department agencies3/ to submit reports reviewing and evaluating their own inspection units. Relying on our own experience, our review of these submissions and the Internal Audit Staff's follow-up survey,4/ we submit the following recommendations:

1. Counsel is required, under 28 C.F.R. §0.39a(f)(4), "to review and evaluate the activities of internal inspection units or, where there are no such units, the discharge of comparable duties within the Department". The Office, now consisting of three attorneys, is simply unable to meet this responsibility without additional staff and office space. The present staff

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3/ Drug Enforcement Administration, Federal Bureau of Investigation, United States Marshals Service, Immigration and Naturalization Service, Bureau of Prisons, and the Law Enforcement Assistance Administation.

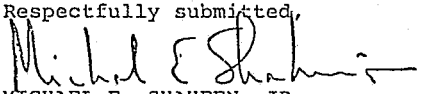
4/ The OMF survey included a review of each agency's policies and procedures relating to standards of conduct and employee integrity, interviews with the heads of each inspection unit, and a limited review of case files.

is barely able to monitor and coordinate the numerous ongoing internal investigations within the Department and its agencies. We recommend the addition of three attorneys to meet our "review and evaluation" responsibilities.

2. To assist the Office in preparing future reports and monitoring agency internal investigations, the reporting system must be improved to provide the Office with appropriate information on the activities of each internal inspection unit within the Department. The Office has the authority to modify the current procedures without seeking the approval of the Attorney General. However, it is important from the standpoint of the Office's effectiveness for the Attorney General and the Deputy Attorney General to continue to support Counsel's efforts to obtain additional information from agency inspection units and comparable units within the divisions and offices.

3. To ensure that each has a precise and uniform understanding of the Counsel's duties, review authority and reporting responsibilities, the Attorney General should send a memorandum (prepared by this Office) to all division, office, board, bureau and agency heads.

Respectfully submitted,



MICHAEL E. SHAHEEN, JR.
Counsel, Office of Professional Responsibility

[Whereupon, at 11:30 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

JUSTICE DEPARTMENT INTERNAL INVESTIGATION POLICIES

THURSDAY, JULY 21, 1977

HOUSE OF REPRESENTATIVES,
GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2203, Rayburn House Office Building, Hon. Richardson Preyer (chairman of the subcommittee) presiding.

Present: Representatives Richardson Preyer, Peter H. Kostmayer, Paul N. McCloskey, Jr., and Dan Quayle.

Also present: Timothy H. Ingram, staff director; Richard L. Barnes, professional staff member; Maura J. Flaherty, clerk; and Catherine Sands, minority professional staff, Committee on Government Operations.

Mr. PREYER. The subcommittee will come to order.

We are glad to have Mr. Lowe, Mr. Harris, Mr. McGraw, and Mr. Ols with us this morning.

The subcommittee is continuing this morning with its hearings into the policies and procedures by which the Department of Justice investigates allegations of wrongdoing involving Department employees. Today we will focus on the internal investigation mechanism of the Federal Bureau of Investigation, which is the largest component of the Justice Department.

During the 94th Congress, the subcommittee asked the General Accounting Office to examine the Inspection Division of the FBI, which at that time was the unit handling internal investigations at the Bureau. Last September, during the course of the GAO examination, the FBI reorganized in this area and established an Office of Professional Responsibility. It should be made clear that the FBI's Office of Professional Responsibility is different from the Justice Department's Office of Professional Responsibility, or OPR.

Last month we heard testimony from Michael Shaheen, who heads the Justice Department's OPR.

Today we will hear from Mr. Victor Lowe, who is Director of the General Government Division of the GAO. Members of Mr. Lowe's staff have been examining the FBI's OPR and other aspects of the Bureau's internal investigation system.

The GAO has been good enough to accept our invitation to testify on their findings to date, although their final written report on this examination will not be published until later this year.

Next Wednesday in this room at 9:30 a.m. we will hear from FBI Director Clarence Kelley concerning the Bureau's reactions to the GAO's findings, and other matters related to the FBI's internal investigations.

Mr. Lowe, it is a tradition of this committee that we swear all of our witnesses. We will ask at this time that you and any of your staff who may be answering questions, which I assume may be everybody with you, stand and be sworn.

Do you swear the testimony you are about to give in this matter to be heard by the subcommittee to be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LOWE. I do.

Mr. OLS. I do.

Mr. HARRIS. I do.

Mr. MCGRAW. I do.

Mr. PREYER. Thank you.

I believe you have a prepared statement that you have distributed to us ahead of time. We will ask you to proceed in any way that you would like, Mr. Lowe.

STATEMENT OF VICTOR L. LOWE, DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY JOHN OLS, ASSISTANT DIRECTOR; AND DANIEL HARRIS AND ROBERT McGRAW, SUPERVISORY AUDITORS

Mr. LOWE. Thank you, Mr. Chairman.

Normally I like to prepare a brief of the longer statement. However, in this case that would be a little difficult to do because it covers quite a bit of territory. Therefore, if you do not mind, I will proceed with the statement, subject to interruption at any time.

Mr. PREYER. That will be fine.

Mr. LOWE. As you requested, our testimony today will focus on how the FBI conducts internal inquiries concerning allegations of impropriety or misconduct by FBI employees. We have been reviewing these activities as part of an overall audit of the FBI's internal review operations. Therefore, I would first like to briefly summarize the status of our overall review before addressing your specific interest.

Prior to September 1976, the FBI's internal review functions were scattered among three different independent entities—Inspection Division, Office of Planning and Evaluation, and Finance and Personnel Division. We have included in appendix I an organization chart and a brief description of the internal review responsibilities of each entity.

In the past, little emphasis was placed on comprehensive financial, efficiency and effectiveness, and program results reviews. Primary emphasis was put on the Inspection Division's annual inspection of each FBI field office and headquarters division. These inspections were compliance oriented and the resulting findings and recommendations related only to the specific field office or headquarters division reviewed.

In September 1976, the FBI began revising its internal review policies and procedures and reorganized its internal review functions under the Planning and Inspection Division with three separate

offices—the Office of Inspections, the Office of Planning and Evaluation, and the Office of Professional Responsibility. Appendix II includes a current organization chart and a description of the internal review responsibilities of each office.

The FBI's reorganization and continual efforts to improve its internal review operations have resulted in several improvements. These include: Making those responsible for internal review functions reportable directly to the Director of the FBI, thus making them more independent; facilitating coordination among the various internal review groups; making inspections more efficiency and effectiveness oriented; increasing financial audit capabilities; and initiating program results reviews.

These changes are a step in the right direction.

However, the FBI could further strengthen its internal review operations by: Improving its staffing and planning of internal review operations; providing more adequate audit-related training to its internal auditors and inspectors; and coordinating more closely with the Department of Justice's internal audit.

Mr. Chairman, I would like to stress that the FBI has solicited our views and ideas for improvements in its internal review functions and has willingly listened to our suggestions for improvements. Additionally, we have been provided access to the information needed to conduct our review.

I will now discuss our observations on the FBI's handling of internal inquiries concerning allegations of impropriety or misconduct by FBI employees.

The 19,000 FBI employees, like all Department of Justice employees, are required to conduct themselves in a professional and proper manner both on and off the job. Regulations concerning the standards of conduct are provided to all FBI employees upon entering duty. They are advised that as members of the law enforcement community they must obey not only the letter of the law, but the spirit of the law as well in actions of both a personal and official nature.

Under the September 1976 reorganization, the FBI's Office of Professional Responsibility became centrally responsible for monitoring and coordinating the handling of violations of the standards of conduct. The Office is responsible for supervising and/or investigating all allegations of "criminality, moral turpitude, or serious misconduct" on the part of FBI employees. It monitors all disciplinary actions taken against FBI employees and acts as liaison with the Department of Justice's Office of Professional Responsibility.

In the past, the gravest allegations were investigated by the Inspection Division. All other matters were investigated by the heads of field offices or headquarters divisions under the supervision of the Finance and Personnel Division. This Division retained its responsibilities for recommending and administering all disciplinary actions and for supervising the investigation of minor infractions.

In announcing the establishment of the FBI's OPR, Director Kelley reemphasized that the heads of field offices and headquarters divisions are responsible for insuring that the standards of conduct are followed. They are also responsible for assuring that allegations of misconduct against persons assigned to them are properly investigated and administered.

Whether an allegation is considered major or minor, and how and by whom it is handled, depends on its nature and gravity, and the position of the FBI employee involved. The extent of liaison with the Department's Office of Professional Responsibility and of disciplinary action imposed also depends on these factors.

The FBI has not developed specific written criteria for the types of allegations which should be referred to the FBI's OPR and treated as a major inquiry. The Bureau considers allegations of "criminality, moral turpitude, or serious misconduct" as major.

According to headquarters instructions to field offices, any serious allegation against an FBI official—generally at the GS–15 level and above—is to be handled or supervised by FBI's OPR as a major inquiry, as are any serious allegations against other FBI employees.

FBI officials said that they would prefer to set broad standards rather than specific standards and require that all major allegations be reported to FBI's OPR. They believe broad standards provide greater assurance that FBI's OPR will be advised of all serious allegations.

Allegations of misconduct by FBI employees are usually made by private citizens. However, some are made by other FBI employees, and the news media, or referred by other law enforcement agencies, other Federal executive agencies, or Members of Congress.

Upon receiving an allegation, FBI's OPR determines whether it should investigate the matter or let the appropriate field office or headquarters division handle it. FBI's OPR will normally conduct the inquiry if it involves any allegation against a special agent in charge or assistant special agent in charge of an FBI field office, or an FBI headquarters official at the grade GS–15 level and above. It would also conduct the inquiry if the allegation involves more than one organizational entity or if it could have major implications for the FBI as an agency.

FBI's OPR may notify the FBI Director or the Department of Justice's Office of Professional Responsibility depending upon the seriousness of the allegation or the individual involved. Generally, if the allegation involves a criminal matter, the administrative action, if any, would be held in abeyance until the criminal investigation is completed. If the Department of Justice's Office of Professional Responsibility elected to handle the allegation, the FBI would take no further action until the Department referred the matter back to it.

Generally, matters are assigned to the special agents in charge of field offices or the assistant directors in charge of headquarters divisions for investigation and are personally handled by them or their supervisory personnel.

The FBI does not have specific procedures or instructions on how to conduct an inquiry. It relies on the investigative experience and ability of its personnel.

FBI officials told us that no standard procedures exist because most inquiries are unique and the circumstances will determine how it should be conducted. They told us that, depending on the nature of the allegation, the subject of the allegation may be the first person to be contacted, or he or she may be the last person to be contacted.

Upon completion of an inquiry, the field office or headquarters division forwards the results to FBI's OPR, together with various affidavits

concerning the allegation. The special agent in charge or assistant director also includes any aggravating and/or mitigating circumstances about the allegation, and his recommendation for disciplinary action, if warranted.

FBI's OPR reviews the facts concerning the inquiry to determine if it was conducted completely and logically. It can direct the investigating office or division to do additional work or it may perform its own investigation. When satisfied with the completeness of the investigation, FBI's OPR forwards the matter to the Administrative Summary Unit within the Finance and Personnel Division.

FBI's OPR said it does not comment on the recommended disciplinary action. In order to keep the investigative and adjudicative processes separated, FBI's OPR does not recommend disciplinary action on inquiries it handles.

The Administrative Summary Unit reviews the recommended disciplinary action to determine if it is appropriate and consistent with actions taken previously. If the Unit disagrees with the recommendation, both its and the investigating unit's recommendations are forwarded to the Assistant Director of the Finance and Personnel Division for a decision and implementation.

Although the Assistant Director will implement recommendations on all minor matters, decisions on serious matters, including those involving FBI officials, will quite often be forwarded up the chain of command.

Recently, the Bureau has decided to establish ad hoc "review boards" in cases involving FBI officials which would recommend administrative actions to the Director. Members of the boards would be appointed by the Director.

Until recently the FBI did not maintain a statistical reporting system for inquiries of major allegations. FBI's OPR maintained a card index containing information on each inquiry it supervised and/or conducted, but it had not utilized the cards for statistical reporting purposes.

FBI's OPR compiles a monthly report for the Department of Justice's Office of Professional Responsibility, but at the Department's request these reports include only the "most serious" of the major allegations plus a sampling of all other allegations handled.

In June 1977, we requested a listing of the types of major allegations handled by FBI's OPR as well as information on the sources of the allegations, the positions of the subjects of the allegations, and any disciplinary action administered as a result of the inquiry. FBI's OPR has since decided to continue to produce this listing periodically for its own management purposes.

The listing provided to us showed that FBI's OPR supervised and/or investigated 162 major allegations during the period January through May 1977. About one-third of the allegations involved more than one FBI employee. The allegations were made against employees at all levels of the FBI—clerks, special agents, special agents in charge of field offices, and FBI headquarters officials. However, the vast majority affected special agents having direct contact with the public.

Our analysis of the types of allegations showed that:

Seventy-four allegations concerned abuses of investigative authority, such as special agents being disrespectful or harassing or intimidating individuals in the course of an investigation.

Thirty-two allegations related to work performance, such as not conducting an adequate investigation.

Twenty-seven allegations concerned a wide variety of personal misconduct, such as driving while intoxicated or sexual misconduct.

Twelve allegations concerned criminal misconduct either while on or off duty, such as allegations of bribery or shoplifting.

Seventeen allegations related to a wide range of other types of allegations.

Of the 162 allegations, 92, as shown in appendix III, were made directly to FBI headquarters or field offices through telephone calls or letters by private citizens or agents or as a result of an FBI criminal investigation. The remaining 70 allegations were brought to the Bureau's attention by the Department of Justice, State or local police, other Federal agencies, the news media, the President, or Members of Congress as a result of allegations originated by private citizens.

Fifty-six of the 162 allegations were still pending as of the end of May 1977. However, of the 106 allegations on which inquiries were completed, 21 resulted in disciplinary action and the remainder were proven to be unfounded.

Appendix IV shows the types of actions taken against the 30 individuals in these cases. Disciplinary actions taken varied from an oral reprimand to dismissal. No individuals were prosecuted as a result of these allegations.

We reviewed 10 major inquiries to determine the overall adequacy and completeness. It appears from our review of the documentation that the inquiries were conducted in a complete and thorough manner. It also appears that the subjects of the allegations were provided adequate opportunity to respond orally and in writing to the allegations.

The following are synopses of three of the inquiries we reviewed. We did not request the names of individuals involved in cases reviewed because we did not believe they would serve a useful purpose.

An FBI official was stopped by police for speeding and driving while intoxicated. Because he was close to home and was a law enforcement officer, the police did not arrest him but reported the incident to the FBI. The official responded to the charges in two affidavits. FBI's OPR requested the second affidavit since it did not feel the official fully addressed the charges in the first affidavit.

The official stated he did not report the incident to his superiors because he had not actually been arrested.

The Finance and Personnel Division recommended that the official be censured, placed on probation, suspended for 5 days, and transferred. Various recommendations from higher officials, including the Director, concurred with this but also debated whether the individual should be demoted one or two grade levels. The official was censured, placed on probation, transferred, and demoted one grade level.

A special agent voluntarily admitted having an extramarital relationship. He stated the facts of the case in an affidavit. The agent's field office initially recommended censure, probation, and 5-days suspension. The matter was reviewed by FBI's OPR which was satisfied and forwarded it to the Finance and Personnel Division. The Division agreed with the field office recommendations but added that the agent should be transferred to another field office and be relieved of his supervisory duties. These recommendations were implemented.

A special agent was accused by an informant of extramarital relations, physical abuse of his wife, falsifying expenses, and several breaches of security, including revealing to an unauthorized individual the sensitive nature of his assignments. The agent denied all allegations except for revealing the nature of his assignment.

The agent's field office recommended censure, probation, and the transfer of the agent to another field office. The matter was reviewed by the FBI's OPR and forwarded to the Finance and Personnel Division, which concurred with the censure, probation, and the transfer of the special agent.

Just as with major inquiries, the FBI has not defined in writing criteria for those allegations or infractions to be handled as minor inquiries. Generally, they involve minor personal misconduct or substandard work performance. The inquiries are generally conducted by the appropriate field office or headquarters division. The Administrative Summary Unit within the Finance and Personnel Division reviews the documentation relating to the inquiry to insure that it is complete, and that the recommended penalties are consistent with those imposed in the past.

It either agrees with the recommended penalty or refers it and an alternative to the Assistant Director in charge of the Finance and Personnel Division. The Unit also handles the preparation and processing of letters of censure—the instrument for imposing penalties for infractions.

As with major inquiries, the FBI did not gather routine statistical information on the investigation of minor allegations of misconduct. We requested a listing of the numbers and types of minor inquiries conducted during the period June through September 1976. We later requested the same information for the period January through April 1977, a period following the reorganization.

The total number of inquiries could not be determined without reviewing all personnel files. The Administrative Summary Unit, therefore, prepared a listing for us from a temporary file of letters of censure.

The listing showed the FBI handled 557 allegations or infractions involving letters of censure during the two 4-month periods. The listing did not cover all inquiries, but only those cases in which disciplinary actions were imposed. Likewise, it did not include cases in which individuals resigned or were dismissed since a letter of censure would not have been prepared. Included in this listing would be major inquiries where a disciplinary action was imposed through a letter of censure.

As shown in appendix V, 350 of these allegations and infractions related to poor work performance. This includes such infractions as the erroneous identification of fingerprints by a clerk or failure to meet established levels of productivity in the fingerprint area. It also includes instances where a special agent did not conduct a particular criminal investigation in accordance with established regulations.

Of the remaining allegations and infractions, 75 involved personal misconduct, both on or off the job; 47 involved the loss of Government property, such as credentials or a weapon; 21 involved tardiness; 16 involved "serious indiscretion;" and 48 involved a variety of other allegations.

We have reviewed 12 of the minor inquiries included in the two 4-

month periods to determine how they were handled. The cases were simple and straightforward because they involved one of the specific standards of conduct to which FBI employees are informed they must adhere when they start employment. Our review of case documentation did not reveal any major discrepancies in the way the matters were handled.

The following are synopses of four of the minor matters we reviewed. We did not request the names of individuals involved in cases reviewed because we did not believe they would serve a useful purpose.

A fingerprint examiner failed to meet the minimum production level for the third time in 9 months. The employee replied in writing that he would concentrate more on his production. The Identification Division recommended the employee be censured since this was the third offense. The recommendation was implemented.

An unmarried clerk and her boyfriend were temporarily living together and had engaged in numerous physical fights which affected her attendance at work. The employee signed an affidavit stating the facts of the case and agreeing to discontinue the relationship. Her employing division recommended she be censured and placed on probation for her violation of Bureau rules. The Finance and Personnel Division recommended censure, probation, and suspension for 5 days, particularly because of the physical fights. The latter recommendation was implemented.

A fingerprint examiner failed to meet minimum accuracy standards for identifying fingerprints within a 6-month period. The employee responded in writing that she had no explanation for failing to meet the standards. The Identification Division recommended the employee be censured, placed on probation, and suspended for 3 days. The recommendation was implemented. The employee was advised she would be removed from fingerprint work if no improvement was shown.

Over a 5-year period, an overweight special agent changed the record of his weight on a medical report to a weight that would meet FBI standards for his height. The special agent explained that he had great difficulty losing weight, that he was in good health, and that his weight did not affect his job performance. However, he regretted making the changes and would take steps to reduce his weight. The Finance and Personnel Division recommended that the special agent be censured, be placed on probation, and take measures to correct his weight problem.

As indicated earlier, FBI's OPR is responsible for coordinating with the Department of Justice's Office of Professional Responsibility on matters involving allegations of impropriety and misconduct on the part of FBI employees. There are no specific written guidelines concerning the types of matters about which the Department's Office of Professional Responsibility wants to be informed. Rather, the two offices have a mutual understanding that the Department's Office of Professional Responsibility should be informed on matters which by their very nature are "serious," or those matters involving a high field office or headquarters official.

The Department's Office of Professional Responsibility then has the option of conducting the inquiry itself, although it generally has not exercised that prerogative since the creation of FBI's OPR.

Upon completion of each inquiry reported to the Department, FBI's OPR provides a written report summarizing the inquiry. Of-

ficials of the Department's Office of Professional Responsibility said that they have been extremely satisfied with the completeness of the reports and have not had to request FBI's OPR to obtain additional information.

Since August 1976, just prior to the creation of its OPR, the FBI had provided the Department's Office of Professional Responsibility a summary report on all serious allegations plus a sampling of all other allegations received during the month. However, the report does not provide a totally complete picture of all the allegations categorized as major and handled by the FBI's OPR.

For example, during the period February through April 1977, FBI's OPR reported to the Department that it opened 25 "serious" inquiries. However, during the same period of time, it actually opened 105 of what we categorize as "major" inquiries.

Officials of the Department's Office of Professional Responsibility stated that the current report provides enough information for their purposes without being too voluminous and believed that they are being advised of the most significant allegations.

However, on the basis of information provided to us, we believe the FBI's OPR should have included additional allegations in its report to the Department's Office of Professional Responsibility because they appeared to be as serious as some of those reported. Thus, we believe that summary statistical information on all major inquiries handled by the FBI's OPR should be provided to the Department-level OPR to insure that the FBI is fulfilling its responsibility of advising the Department of all serious allegations of misconduct on the part of FBI employees.

In summary, the FBI has improved its system for handling allegations of impropriety and misconduct by FBI employees by creating its Office of Professional Responsibility and making it centrally responsible for overseeing and controlling the investigation of major allegations, coordinating with the Department of Justice, and monitoring related disciplinary actions. Placing these functions in one office within a division directly reportable to the FBI Director should provide greater control over the handling of alleged improprieties.

However, the FBI has not established detailed written criteria for categorizing major and minor allegations or procedures for assigning and conducting the inquiries. Nor has the Department of Justice developed written criteria and standards governing the types of inquiries which should be referred to and handled by the Department. Such procedures and criteria are important to assure that allegations are handled fairly, promptly, and uniformly, and to prevent any possible abuse.

Finally, we believe better statistical information on the number and types of major and minor allegations and the related disciplinary actions would give both the FBI—and the Department-level Offices of Professional Responsibility a better basis for monitoring and controlling internal inquiry activity.

This concludes my prepared statement, Mr. Chairman.

We would be pleased to respond to any questions you may have.

Mr. PREYER. We appreciate your comments.

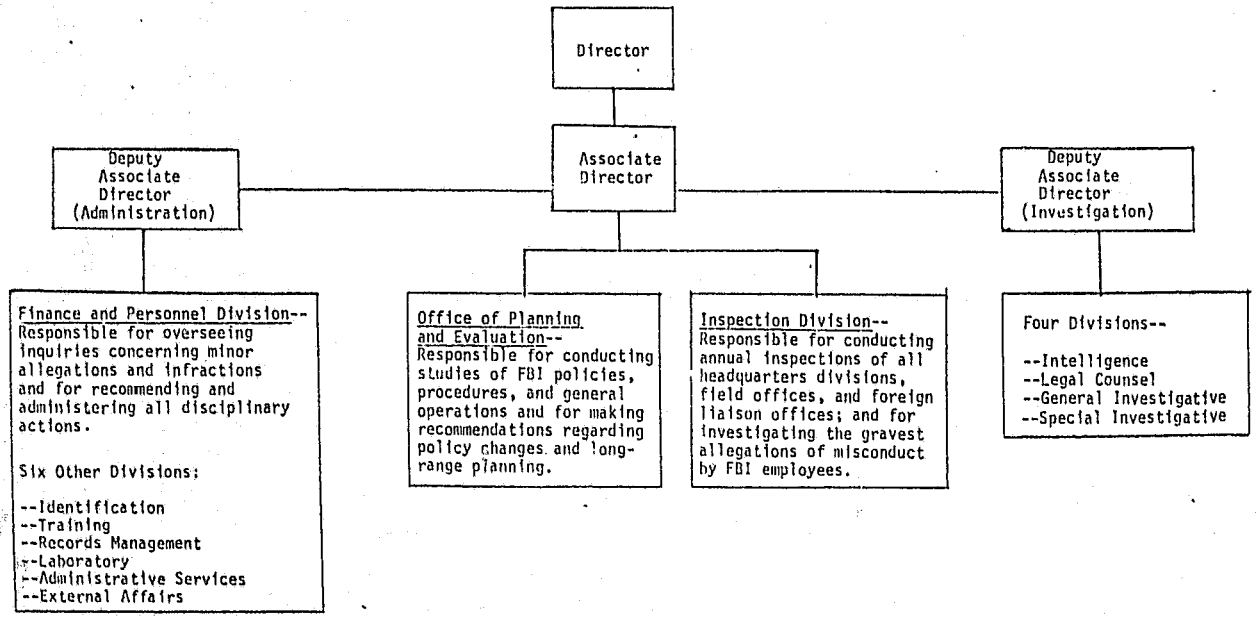
The appendixes which were mentioned in your statement will be made a part of the record.

[The material follows:]

APPENDIX I

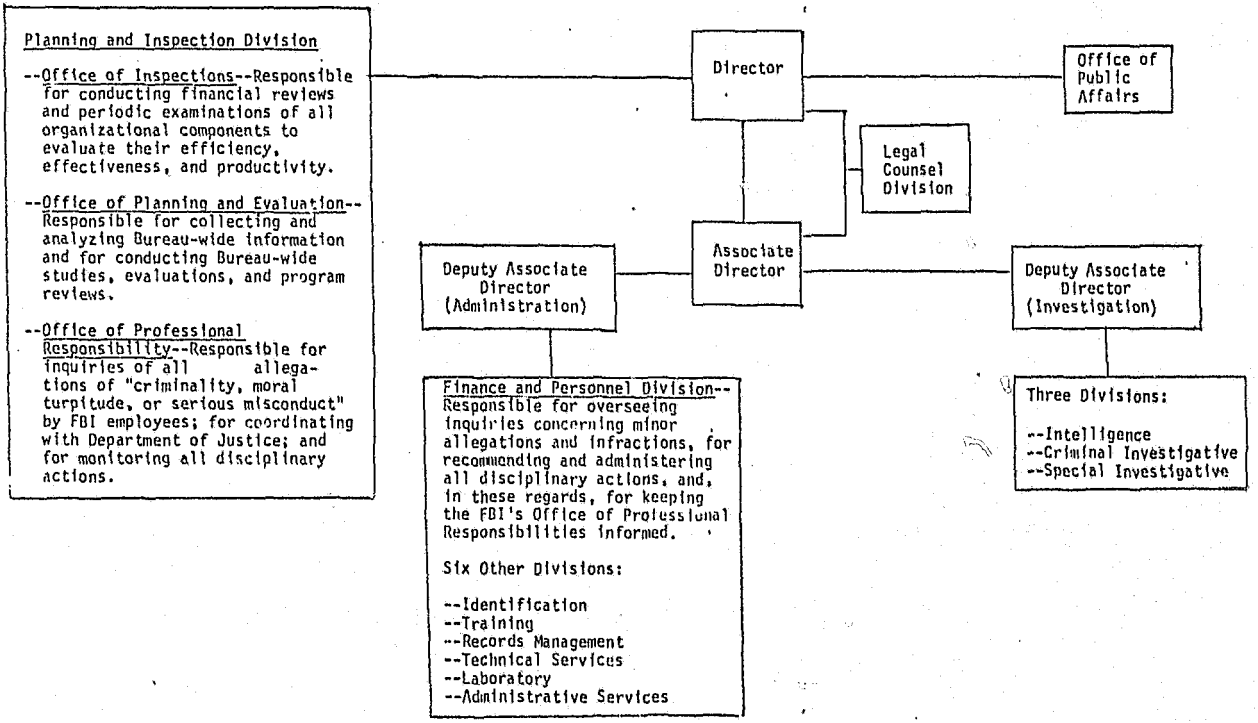
ORGANIZATION OF FBI'S INTERNAL REVIEW OPERATIONS

PRIOR TO SEPTEMBER 1976



APPENDIX II

CURRENT ORGANIZATION OF FBI INTERNAL REVIEW OPERATIONS



APPENDIX III

SOURCES OF MAJOR ALLEGATIONS HANDLED BY

FBI'S OFFICE OF PROFESSIONAL RESPONSIBILITY

JANUARY - MAY 1977

Sources of Allegations	Number	Percent
DIRECT		
Letters and telephone calls to:		
FBI Headquarters	51	31
FBI Field Office	31	19
FBI Agents or Other Employees	7	4
FBI Criminal Investigations	3	2
Subtotal	92	56
INDIRECT		
Department of Justice (including U.S. Attorneys)	23	14
Local or State Police	13	8
Other Federal Agencies	8	5
News Media	8	5
Letters to President	6	4
Congressional Correspondence	6	4
Court Actions	4	3
Other	2	1
Subtotal	70	44
Total	162	100

APPENDIX IV

DISCIPLINARY ACTIONS TAKEN AS A
RESULT OF INQUIRIES HANDLED BY
FBI's OFFICE OF PROFESSIONAL RESPONSIBILITY
JANUARY - MAY 1977

Total inquiries during 5-month period		162
Pending inquiries (as of May 31, 1976)	56	
Closed inquiries proven to be unfounded	85	141
Total inquiries involving disciplinary action		21

Disciplinary Actions:

Oral Reprimand	4
Letter of Censure	5
Letter of Censure, Probation	8
Letter of Censure, Probation, Transfer	2
Letter of Censure, Probation, Transfer and 10-day Suspension	2
Dismissal	6
Resigned	3
Total	30 a/

a/Thirty persons were involved in the 21 cases in which disciplinary action was taken.

APPENDIX V

TYPES OF ALLEGATIONS AND INFRACTIONS RESULTING IN LETTERS OF CENSURE DURING THE PERIODS JUNE - SEPTEMBER 1976 AND JANUARY - APRIL 1977

Types of Allegations and Infractions	Number	Percent
Work Performance		
Clerical performance - Erroneous identification of finger-prints or low productivity	231	41
Result of inspection - Agent performance	73	13
Failure to follow proper procedure/substandard work	46	8
Total Work Performance	350	62
Serious Indiscretion	16	3
Tardiness - abuse of leave policy	21	4
Failure to properly safeguard or loss of:		
Credentials	14	2
Government property	29	5
Weapon (including personally owned weapon for official use)	4	1
Total Loss of Property, etc.	47	8
Other	48	9
Personal Misconduct (on-the-job)	12	2
Personal Misconduct (off-the-job)		
Immoral conduct	33	6
Traffic violations	20	4
Other	10	2
Total Personal Off Duty	63	12
Total Letters of Censure	557	100

Mr. PREYER. I would like to ask one general question.

I regret that I have to leave shortly. I will at that time turn over the Chair to Mr. Kostmayer.

Under the previous versions of the Inspection Division which you outlined in your testimony at the outset, particularly during the tenure of Director Hoover, FBI internal discipline had a reputation for being arbitrary and somewhat nitpicking. Now that the inspection and the internal investigation functions have been reorganized, as you have outlined, what is your general appraisal of how sanctions are administered? Is it reasonable, consistent, and fair? Is the administration of sanctions now less likely to be done by people with a personal stake in finding someone doing something wrong?

I gather from your conclusion here that you feel there has been some considerable improvement.

Mr. LOWE. I think that is true, Mr. Chairman. While we did not go back and look at the past history, that is pretty much our understanding of some of the activities that used to be carried out by the FBI inspection unit previously.

I think under the present system where they have various levels of review that there are some safeguards built into the system now that were not present before. In addition to that, I think FBI Director Kelley has made an effort to set this new outfit up so that they identify ways to improve FBI operations, not just to be people who go out and look to see who did what wrong. I think it is a different approach from what it was in the past.

Obviously this is a very tough outfit. They administer some pretty stiff punishment for what appears to be everyday infractions by human beings.

I do think under the new system that there are some controls set up to make sure that the kind of disciplinary action taken at least meets the standards and that quality control is exercised to see that the investigations are done properly and adequately.

Mr. PREYER. Thank you.

Mr. McCloskey, do you have questions?

Mr. MCCLOSKEY. Thank you, Mr. Chairman.

Mr. Lowe, how many of the 162 major allegations did you examine as part of your inquiry?

Mr. LOWE. I believe that was 10, Mr. McCloskey, that we went into in detail.

Mr. MCCLOSKEY. You have taken up three of those cases that you have reviewed. In any case did you find any evidence or allegations by an FBI employee that he was unfairly treated in an investigation?

Mr. LOWE. Cases where an employee was unfairly treated?

Mr. MCCLOSKEY. Yes.

Mr. LOWE. No, Mr. McCloskey, we did not.

Mr. MCCLOSKEY. You found no case where an employee felt that he was abused, coerced, or given an unfair punishment?

Mr. LOWE. No, sir.

Mr. MCCLOSKEY. With 19,000 employees the number of allegations made against them and the number of disciplinary cases compares very favorably with any professional group of which I know. It is certainly much higher than, say, the bar association or any other professional agency I have seen.

Do you have any standard of comparison of the FBI's self-discipline as compared with other professional organizations you may have observed?

Mr. LOWE. No, I am sorry we don't, Mr. McCloskey. I am not sure there are any that really exist.

I think it is obvious, being in the police business which the FBI is in, that they are in some rough situations constantly. I am sure there are complaints.

Mr. MCCLOSKEY. Do you know of any other case of a Government agency ever censuring, disciplining, and transferring a person who voluntarily admitted having an extramarital relationship?

Mr. LOWE. Not to my knowledge, no, sir.

Mr. MCCLOSKEY. I gather this gentleman was transferred and relieved of his supervisory duties. It is a strange case to me for a man to come forward and voluntarily admit to his superior he is engaged in an extramarital relationship. Do you say this was voluntary?

Mr. LOWE. This was after there was an allegation to that effect. I am sure he was confronted with this. There was an allegation to that effect before.

Mr. MCCLOSKEY. Our primary concern here is the privacy of individuals, including FBI agents. I question the propriety of a supervisor asking an employee on the basis of any allegation whether he has had an extramarital relationship. Isn't an FBI agent entitled to take the fifth amendment in such a case?

Mr. LOWE. I suppose he would be if he were in a court of law. I am not sure he would be in a situation under their standards of conduct in the way they interpret them.

Mr. MCCLOSKEY. Who actually checked this one individual case?

Mr. MCGRAW. I did.

Mr. MCCLOSKEY. In your judgment was this person treated fairly?

Mr. MCGRAW. It appears so, sir. He realized the standards of conduct that they expected of him at the beginning. He did not challenge the fact that he was disciplined for that.

Mr. MCCLOSKEY. Is there anything in the FBI Code of Conduct that makes it a sin to have an extramarital relationship?

Mr. MCGRAW. It does not specifically state extramarital relationships are forbidden. However, it is stated to employees, both clerical and special agents, that this is conduct unbecoming a Bureau official or a Bureau employee.

Mr. MCCLOSKEY. It might be unbecoming but I just wonder about the propriety of a supervisor going into an employee's personal conduct.

I can understand in a special job of this kind where there is a special duty of public trust, but I wonder about whether an individual gives up his right of privacy against inquiry as to his personal life when he is employed by the FBI or any other Federal agency.

Mr. MCGRAW. To a certain extent, sir, they expect the agents to answer the questions fully. We did not run into any examples where the employee did not provide an affidavit concerning the action.

Mr. MCCLOSKEY. The FBI, of course, has a full record of the information they furnished you. To whom should I write in the FBI to get a full explanation of this particular case?

Mr. LOWE. You may write to the Office of Professional Responsibility regarding that. They would have a full record of that.

As you noted in our statement, we had a footnote that we did not request the names and identifications of any of the people making the complaints or the people complained against. We did not think that was necessary.

Mr. McCLOSKEY. The primary concern of the committee when we asked for the GAO investigation was, of course, not the basic human faults that exist. I suppose, in any Government agency, but the question of misconduct by FBI employees in the conduct of their duties, and particularly the five areas mentioned at one time in the so-called Huston plan—mail opening, copying of telegraphic communications, interception of telephone conversations, electronic surveillance, and I suppose more than any of the others breaking and entering without a warrant in the conduct of their duties.

Do you find in the 162 allegations, any allegations of that kind of professional misconduct?

Mr. LOWE. There were some allegations of surreptitious entry, mail openings, and wire tap, which I assume would fall in the intelligence area. We have not looked at those specific cases.

Mr. McCLOSKEY. It is those cases which are the precise nature of this committee's concern. Can you elaborate at all on those?

Mr. LOWE. As you know, last year we did report on the FBI's domestic intelligence operations. That was the first job of any kind of substance we had done in the FBI.

Mr. McCLOSKEY. Was that report to this committee?

Mr. LOWE. That report was to the Congress, I believe. It was at the request of the House Judiciary Committee.

Mr. McCLOSKEY. I would like to get a copy of that report to review before we prepare our own.

Mr. LOWE. I might add that at the present time at the request of the same subcommittee of the House Judiciary Committee we are doing a followup review to see what changes have been made in the domestic intelligence operations subsequent to issuance of new guidelines by the Attorney General for the FBI to follow. That report will be issued soon. That pretty much covers the kinds of things about which we were talking here.

Mr. McCLOSKEY. Of the 162 allegations, the fact that 21 of them resulted in disciplinary action is a pretty good record, is it not?

Mr. LOWE. Off the top of my head, I would have to say yes. However, in any case where you have a law enforcement official dealing with the public on a day-to-day basis, there are going to be some allegations that will not hold water.

Mr. McCLOSKEY. Do we have any comparison with other police statistics or any other investigative agencies as to what percentage of complaints made actually result in the finding of some wrongdoing?

Mr. LOWE. I do not have that, no, sir.

Mr. McCLOSKEY. I cannot recall in 10 years in the Congress any constituents ever complaining about FBI misconduct. I notice you have in roughly 6 months here only six indications of congressional inquiry.

Mr. LOWE. That is right.

Mr. McCLOSKEY. Do any of your other records give us any guidance on whether that one complaint out of eight being found justified is a good or bad record, indicating that there has been an assiduous inquiry by the agency that is investigating or not?

Mr. LOWE. No, we do not have anything to compare with that, Mr. McCloskey. We sure do not.

I am sure that in any police work you would find a lot of allegations of misconduct on the part of police just because they do have so much contact with the public.

Even in the business we are in, while we do not get complaints that I recall about GAO, we do get some weird letters complaining about Government officials. There are a lot of different kinds of characters wandering around out there.

Mr. MCCLOSKEY. I would appreciate it if you would do this for me. When you go back to your office if you can find in the overall scope of past GAO investigations any comparable records to which we could refer, we would like to see those.

This looks to me to bear out your opinion that this is a tightly operated organization and that it is assiduous in following up complaints against its own people.

Mr. KOSTMAYER [presiding]. I thought we might break to vote now. When we return, Mr. Quayle may question the witness.

[Recess taken.]

Mr. KOSTMAYER. The meeting will come to order.

Congressman Quayle?

Mr. QUAYLE. Thank you, Mr. Chairman.

I have one general area of questions. That area is in the relationship between the OPR of the Justice Department and the OPR of the FBI.

I believe, reading through this report, that the OPR in the FBI acts as liaison. Is that the proper word?

Mr. LOWE. Yes, that is correct. It does. It is the Office of Professional Responsibility in the FBI and it acts as a liaison with the Department-level Office of Professional Responsibility.

Mr. QUAYLE. Was the OPR in the FBI established at the same time as the OPR in the Justice Department?

Mr. LOWE. It was established some time after that.

Mr. QUAYLE. When does the OPR of the FBI turn over allegations, inquiries, or complaints to the OPR of the Justice Department?

Mr. LOWE. Any time they feel that a complaint is a serious one or a complaint is against an FBI official above a certain level, then that is called to the attention of the Department-level OPR.

Mr. QUAYLE. How is "serious" defined?

Mr. LOWE. It is really not defined. I think that is part of the problem. As a matter of fact, we have had quite a few discussions among ourselves as to how you would define some of these. Since we do not seem to be able to come up with any better answer, it is serious in the judgment of the people in the FBI. They refer that case for information purposes to the Department-level Office of Professional Responsibility. The Department-level OPR then has the option to either take that case on its own or to continue to let the FBI OPR deal with it.

Mr. QUAYLE. Do you know how many of the 162 cases had been referred to the OPR of the Justice Department?

Mr. LOWE. Twenty-five, Mr. Quayle.

Mr. QUAYLE. Twenty-five?

Mr. LOWE. Yes.

Mr. QUAYLE. Did they accept all 25?

Mr. LOWE. No, they did not. As I recall, they did not undertake their own investigation of any of these 25 cases. They were satisfied to let the FBI's Office of Professional Responsibility oversee the investigations in those 25 cases.

Mr. QUAYLE. Is there any kind of written procedure about referring cases to the Justice Department from the FBI?

Mr. LOWE. There is really no written procedure. There is an understanding between the two offices which are in constant contact with each other as to what kind of cases the Department-level OPR wants referred to it.

Mr. QUAYLE. Of the 25 cases that were referred to the OPR of Justice, none of them were accepted; is that correct?

Mr. LOWE. None of them were taken over by the Department-level OPR for investigation.

Mr. QUAYLE. They were referred back to the FBI. They said, "You can handle it;" is that correct?

Mr. LOWE. Yes. The Department-level OPR does get a report on those cases. They do get the reports after the investigation is finished.

Mr. QUAYLE. That is all the questions I have.

Mr. KOSTMAYER. Mr. McCloskey?

Mr. MCCLOSKEY. Thank you, Mr. Chairman.

On a related matter, inasmuch as you were looking at intelligence practices of the FBI for the Judiciary Committee, I would like to ask this question.

We have a report from the Department of Justice which was submitted in January on the CIA mail opening cases. The Department of Justice chose not to prosecute those cases.

We do have a case now where the Department of Justice is prosecuting an FBI employee for allegedly illegally breaking and entering.

In this Department of Justice report on the mail opening let me read to you this quote. I would like to ask what you have found in the course of your investigation to differentiate between the mail opening by the CIA and the breaking and entering by the FBI—one of which was prosecuted and one which was not. I am interested in the difference in the two cases.

The Justice Department report states:

> A substantial portion of the period in which the conduct in question occurred was marked by a high degree of public concern over the danger of foreign threats. The view both inside and, to some extent, outside the government was that in response to exigencies of national security the President's constitutional power to authorize collection of intelligence was extremely broad-scope. . . . Applied to the present case, these circumstances lead to reasonable claims that persons should not be prosecuted when the governing rules of law have changed during and after the conduct that would give rise to the prosecution. They also would support defenses such as good faith mistake or reliance on the approval of government officials with apparent authority to give approval.
>
> The issue involved in these past programs in the Department's view, relates less to personal guilt than to official governmental practices that extended over two decades. In a very real sense, this case involves the general failure of the government, including the Department of Justice itself, over the period of the mail opening programs ever clearly to address and resolve for its own internal regulation the constitutional and legal restrictions on the relevant aspects of the exercise of presidential power.
>
> The actions of Presidents, their advisors in such affairs, and the Department itself might have been thought to support the notion that the governmental power

in scope and manner of exercise, was not subject to restrictions. That, through a very recent evolution of the law and the Department's own thinking, are now considered essential.

That has also occurred apparently in the FBI with regard to breaking and entering, has it not?

Mr. LOWE. I think that is generally true, yes. I will have to speak just as a layman who reads the newspaper. I personally do not see much distinction in those cases. However, I am not familiar with the full details of the one that is now pending in the FBI to which you refer. I am not familiar with that at all. Nor am I familiar with the CIA case, except for what you read.

Mr. MCCLOSKEY. Your investigation did not cover these two areas?

Mr. LOWE. No, sir.

Mr. MCCLOSKEY. I have no further questions.

Mr. KOSTMAYER. I want to ask you a rather general question which you may or may not be able to answer.

What do you think has gone wrong in the past as far as these regulations being disregarded? I am talking about alleged abuses within the Bureau.

Mr. LOWE. I think it is pretty hard to answer that question. I think it depends on who is heading the FBI and what the official instructions are from the people at the top level of the FBI.

I think times have changed substantially here in the past few years. I think it is along the lines of what Mr. McCloskey just read. I think people have become aware of the responsibilities that the FBI and the CIA have in carrying out investigations, particularly intelligence investigations.

Mr. KOSTMAYER. Despite the attitude of the people in charge, which is important, are there not regulations to take care of these problems, such as when an agent is faced with being ordered to commit an act which he regards as illegal?

Mr. LOWE. I think it should not be just a matter of the attitude of his superiors. There are regulations. I believe there is also a regulation against insubordination. It is my opinion the agent has to weigh those things. In the current climate there is a much greater chance of having those things weighed by each individual than there has been in the past.

Mr. KOSTMAYER. When the Attorney General was here I asked him a question which I will also ask the Director of the FBI when he appears before the subcommittee. The question was what kind of advice he would give to an agent faced with choosing between a charge of insubordination and a charge of violating Federal statutes. What advice would you offer?

Mr. LOWE. I believe I would take the first course, particularly in the current climate.

Mr. KOSTMAYER. If there is no objection, I will ask our counsel, Mr. Barnes, to place some questions on the record.

Mr. BARNES. Mr. Lowe, the Church committee and others uncovered a number of cases of alleged wrongdoing by FBI employees. Did you find the FBI was following up on any of the allegations administratively?

Mr. LOWE. I am really not familiar with that particular circumstance, Mr. Barnes. If you would like us to try to get that information

for the record, we will be glad to do it. I am not familiar with that particular one.

Mr. BARNES. Yes, please do that.

[The material follows:]

The FBI's Office of Professional Responsibility has not followed up on the specific allegations developed by the Church Committee, such as allegations of illegal or improper electronic surveillance, surreptitious entries, mail openings, or COINTELPRO. However, FBI's OPR is aware of these allegations and is conducting full inquires of similar allegations which have recently been made. The Church Committee allegations have been inquired into by various components of the Department of Justice and are being considered by the Department in developing domestic intelligence guidelines.

Mr. BARNES. The sampling cases which are described in the examples you listed in the report are all instances of individual wrongdoing, individual personal conduct, as opposed to some kind of conduct in an official capacity. Did any cases of official capacity misconduct show up in your investigation?

Mr. LOWE. I would classify an allegation of, say, abuse of investigative power as an official act. That would be one that showed up. I think that is something that would be a normal kind of complaint which a citizen might raise.

Mr. BARNES. For the record, would you furnish some additional examples from the cases which you looked into that were in the official misconduct areas as opposed to the personal misconduct areas?

Mr. LOWE. Yes; we will go over the list we have of the 162 to see if there are any that appear to be in that category more than the examples we used.

[The material follows:]

In a letter to the Director, a private citizen accused an agent of disrespectful treatment because he had been hung up on during a phone conversation. The agent conducting the integrity investigation interviewed the complainant and explained this could have happened by mistake. Based upon various statements made by the complainant during this interview, it appeared the complainant's real motive was to meet an FBI agent. There appeared to be no substance to the allegation, and no action was taken against the agent. A letter was sent to the complainant stating the matter had been looked into and no improprieties were apparent.

In a letter to the Director, a private citizen alleged FBI agents unjustly detained and questioned him concerning a bank robbery. An affidavit signed by an agent involved, stated that detention and questioning were proper and necessary under the circumstances. He stated the subject (1) resembled the bank robber, (2) was in the same area as the bank robber, and (3) was identified by another citizen as possibly the suspect. He also stated the complainant voluntarily accompanied him to the field office. No administrative action was taken against the agent and the citizen was informed the matter had been reviewed and no improprieties were evident.

An anonymous letter to an FBI field office alleged a clerical employee was providing advance information to criminals concerning planned raids. The employee denied the allegations but admitted, however, that on one occasion, a relative who had been raided phoned her and requested her to obtain confiscated papers. The employee stated she did not look for the papers but she did search the FBI indicies for references to his name. Her search found no information existed in the indicies and she reported this to her relative.

The SAC recommended censure for the employee and the Special Investigative Division concurred. The Finance and Personnel Division recommended censure and probation since the employee (1) did not inform her supervisor of the relative's request for information, and (2) divulged information, even though the information was negative in nature. This recommendation was implemented.

Mr. BARNES. Did your inquiry include any visits to field offices?

Mr. LOWE. Yes. As I recall, we went to three field offices.

Mr. BARNES. What kind of attitude did you find there, looking from the bottom up, on the subject of internal investigation?

Mr. LOWE. I will let the man who was out there answer that question, Mr. McGraw.

Mr. MCGRAW. Generally, when we visited the field offices, it was right after the OPR had been set up. It was in January and February.

The SAC's in the field offices indicated they thought in theory the new system looked very good, and it was certainly an improvement. They thought it would work well. They had not had experience in utilizing the system and wanted to withhold their opinions on the system until they had actually conducted inquiries into allegations under the new system.

Mr. BARNES. Mr. Shaheen's report on the Department of Justice's OPR indicated that when they sent investigation requests out to the field, there were varying responses. Things might tend to get pigeonholed. There might be delays. Perhaps occasionally there was not an appreciation of what the office was supposed to be doing and the importance of its work.

Did you find any indications of that kind of situation, or was it too early?

Mr. MCGRAW. Since the new OPR had just been set up, it had been too early to make that determination.

Mr. BARNES. Could you briefly describe how big the OPR staff is? Are its people all permanent, or does it add investigators on an ad hoc basis for specific cases it investigates?

Mr. LOWE. Are you talking about the FBI level?

Mr. BARNES. Yes.

Mr. LOWE. There is the Director plus three full-time employees. We understand they have been authorized one additional employee.

Mr. OLS. They are on a 2-year rotational basis. They will be there for 2 years, and then a new staff will be established.

Mr. BARNES. Does the Director rotate every 2 years?

Mr. OLS. No; I do not believe so.

Mr. BARNES. Have they added people on a temporary basis for specific investigations?

Mr. OLS. Yes; they have to supplement their limited staffing. They like to send two of their own people out on a case for interviewing purposes and for obtaining affidavits.

Mr. BARNES. You spoke about the FBI standards of conduct. Does the OPR have any voice in drafting these standards or at least in recommending changes based on its experience in working under them?

Mr. LOWE. I do not think they have up until now, Mr. Barnes. However, I can see in the future where the experience that the OPR gains through going through these cases would be a valuable source of information for revising or adding to the standards of conduct.

Mr. BARNES. When changes in the law occur, such things that would change the requirements under which an agent has to operate other than just a code of conduct change, who has the responsibility for notifying the agents of this? Does the OPR do this?

Mr. LOWE. No; that would be through the regular administrative function of the FBI at the various levels that comes out in the manuals. It would not come through OPR.

Mr. BARNES. Who would have the responsiblity for finding out there had been a change?

For example, there was a circuit court decision in San Francisco a few months ago that held that FBI agents have to retain their original notes after they write up reports. The previous policy has been to throw the notes away and rely on the 302 forms.

Who would start things going through the chain of action to make sure that agents find out these new requirements?

Mr. LOWE. I assume that would be handled by the legal counsel's office and then put into the manual through the regular FBI hierarchy.

Mr. OLS. Their Office of Inspection, when they would make their normal review of operations, would be looking for that.

Mr. BARNES. Do the standards of conduct all originate in the FBI or are some of those passed on from the Justice Department as departmentwide standards? Are the FBI standards tougher than those for other Justice employees?

Mr. LOWE. I do not believe the FBI has put out its own standard of conduct. They rely on the Department of Justice standards.

Is that right, Mr. Ols?

Mr. OLS. They rely on those of the Justice Department. Those are adopted, but they do go into more explicit detail in defining what are violations and what needs to be followed. They are more comprehensive, I would say. They may not define them totally but they do go into a long list of things.

Mr. BARNES. Does that tend to make a tougher standard as well as a more explicitly spelled out standard?

For example, Mr. Shaheen was here. We got on the subject of sexual misconduct. He said his office would be interested in activities that reflected adversely on the Department. Private conduct that did not have any public aspect to it would presumably not have that effect.

Is that the same standard as in the FBI or does the FBI have a tougher standard?

Mr. LOWE. I am not sure. I think the FBI may be a little tougher than the general regulations at the Department level.

The cases we are talking about are where somebody alleged this as happening. It was brought to the attention of officials in that manner.

Mr. BARNES. You said in your statement that you had good cooperation from the FBI in getting access to materials. Did you have any problems initially before you did get to the point of good cooperation? Or were you able simply to get what you wanted right from the beginning?

Mr. LOWE. We have always had some problems up until now. I think we have worked most of those out with the FBI. As you know, nobody had really done any of this type of work in the FBI in the past until we undertook our review at the request of the Judiciary Committee in the domestic intelligence function. There was a long row to hoe before we finally worked out a real solid agreement with the Director of the FBI and the Justice Department.

Since that time, except for minor problems which do get worked out, I think we have had generally good cooperation. I think they have come to understand what type of work we do and that we are responsible people.

We do not get complete access to every file. We do not expect to have that. However, we have not had anything withheld from us that we needed.

Mr. BARNES. Why would you not expect to have that?

Mr. LOWE. We are not talking about files now on information of improprieties.

For example, if a case is still under investigation, we would not get access to that case. Or if a case is pending before the grand jury or something like that, we would not get access to it. We would have difficulty getting access to those kinds of things anywhere else.

For the most part, we have reasonably received everything we requested and that we required.

Mr. BARNES. If the law said you did have access to those things, do you feel you could operate comfortably in that situation and maintain proper levels of security and that sort of thing?

Mr. LOWE. I still do not think we would get it. I have had experience in other agencies—for example, in the Department of Agriculture—where the Inspector General's office quite frequently is engaged in some kind of criminal investigation. Officially and on the record we were never able to get those. However, through cooperative understanding, we were always able to get enough information to know where it stood.

I think in cases where we have a legitimate concern and we agree it is a legitimate concern for an ongoing investigation, we have to wait a while until they are finished.

Mr. BARNES. In the particular sample case files which you examined in this investigation, I believe you said there were 10 out of 162 in the major category and you also had 12 in the minor category. Were those cases where the FBI said, "Here is a random sample of files. You may look at these"? Or did you have some kind of an index list and said, "We want these particular 10"? Or was there some kind of a random selection system, such as every tenth file in alphabetical order or something like that?

Mr. LOWE. They furnished us a listing of all the cases totaling 162. We made the selection from that listing ourselves.

Mr. BARNES. Were the names of the subjects removed by the FBI before you saw that or did you look at it on the agreement that you would not disclose what the names were?

Mr. LOWE. Those were specifically deleted. The name of the complainant was also specifically deleted. We did not believe we needed that particular information.

Mr. BARNES. Was there other information that was also removed because it could be considered to be identifying? For example, maybe a case involved a special agent in charge. In such case would the name of the city have been removed so that you could not take the simple step of finding out who it was?

Mr. LOWE. No.

Mr. BARNES. Did there appear to be any other kind of interrogation material of witnesses or what have you that was removed?

Mr. LOWE. No, sir.

Mr. BARNES. Is there anything else that you would have liked to have seen in the course of this investigation that was denied to you by the FBI?

Mr. LOWE. No, sir.

Mr. BARNES. Was I correct in understanding that your review did not include any look at the past practices of the previous Inspection Division?

Mr. LOWE. Essentially that is true. About the time we were getting underway, they changed the way the thing was set up. We thought it would not be much use in looking backwards.

There are a couple of big cases in the past. As a matter of fact, this subcommittee has had hearings on at least one. We did not go back into those.

Mr. BARNES. I think probably the one troubling aspect of that is that it does not provide a framework of past practices and a situation against which to measure the present situation. You seem to have come away with a pretty good impression of the way things are being done now. However, it seems to be a little difficult to tell how big an improvement that is over what the situation was in the past.

Mr. LOWE. It does, but it is difficult to go back to how things used to operate.

Mr. BARNES. Did you ask to look at any of the earlier case files to compare how a comparable case would look compared to one of the ones you looked at currently?

Mr. MCGRAW. Actually we did get a few limited examples of cases that were handled by the old Inspection Division. Again, this was to put, as you said, some of the things in perspective. Those samples were originally taken prior to the creation of OPR and prior to the change of responsibility. So we did have some limited information on those. We did not follow them up as much as we will follow up on these cases.

Mr. BARNES. In the original letter asking for this examination in 1975, we specifically referred to the investigation into the destruction of the Oswald letter, the destruction of Mr. Hoover's files, and the U.S. Recording Co. matter. Did you examine any of those specific cases? If not, was there a reason why they were not available to you?

Mr. HARRIS. No, Mr. Barnes, we did not, mainly because we wanted to take a random selection. The other reason was because of the tremendous record that had already been established on all of the cases which you have mentioned in that letter, particularly in congressional testimony by this committee and one of the subcommittees of the House Judiciary Committee.

Mr. BARNES. Based on the expertise you acquired during this examination, how long do you think it would take you to review the same kind of process at another law enforcement agency, such as the Drug Enforcement Administration?

Mr. LOWE. We could do it. I think the knowledge we have gained would be helpful. We also need a staff that is familiar with the other operations, such as in DEA. We have a few people assigned to DEA. They would be the ones to carry out any such work there.

Mr. KOSTMAYER. Gentlemen, do you have anything to add?

Mr. LOWE. No, sir.

Mr. KOSTMAYER. Thank you, Mr. Lowe, and thank you to your associates, too, for coming here and visiting with us. We appreciate it.

The subcommittee is adjourned.

[Whereupon, at 10:55 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

JUSTICE DEPARTMENT INTERNAL INVESTIGATION POLICIES

WEDNESDAY, JULY 27, 1977

HOUSE OF REPRESENTATIVES,
GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommitttee met, pursuant to notice, at 9:35 a.m., in room 2203, Rayburn House Office Building, Hon. Richardson Preyer (chairman of the subcommittee) presiding.

Present: Representatives Richardson Preyer, Leo J. Ryan, Michael Harrington, Peter H. Kostmayer, Ted Weiss, Paul N. McCloskey, Jr., and Dan Quayle.

Also present: Timothy H. Ingram, staff director; Richard L. Barnes, professional staff member; Maura J. Flaherty, clerk; and Catherine Sands, minority professional staff, Committee on Government Operations.

Mr. PREYER. The subcommittee will come to order.

I want to thank Director Kelley and his staff for coming here today. We welcome them, including Mr. Mintz and Mr. DeBruler. Is Mr. Long with you today?

Mr. KELLEY. No; we have Mr. Buell, Mr. Clynick, and Mr. Hunsinger here also.

Mr. PREYER. We appreciate your joining us.

This is the subcommittee's fourth public hearing in our examination of Department of Justice policies and procedures for investigating allegations of internal wrongdoing.

We believe it is important to review steps which have been taken within the last year and a half in this area by the Department and its largest component, the FBI. To fully regain the confidence of the American public, these vital law enforcement agencies must convince the public that they are capable of keeping their own houses clean.

We heard last month from Attorney General Bell about his intention to set up a fail-safe system to prevent improper investigative and intelligence activities. Mr. Michael Shaheen told us how the Department's new Office of Professional Responsibility is operating. The General Accounting Office reported to us last week on its examination of the FBI's own, and even newer, Office of Professional Responsibility.

Today we look forward to hearing from Director Kelley and his staff on these questions of self-policing. I do want to again emphasize, as I have at previous hearings, that the subcommittee does not intend to get into the details of individual instances of alleged wrongdoing in

any way which might adversely affect any trials or other proceedings. This includes, of course, the indictment of FBI agent John Kearney in New York. Our interest is in principles, policies, and procedures.

Now, Mr. Kelley, it is the custom with this subcommittee that all witnesses be sworn. Would you and those of your staff who may be testifying or who will answer questions please stand and be sworn at this time.

Mr. KELLEY. I would like to include Frank B. Buell, who is in the Administrative Services Division, and Mr. John J. Clynick, Assistant Chief of Budget and Accounting. I do not know that they will be called upon, but I would suggest they also be sworn in.

Mr. PREYER. Thank you.

Will all of you stand?

[The witnesses stand.]

Mr. PREYER. Do you swear the testimony you are about to give before this subcommittee is the truth, the whole truth and nothing but the truth, so help you God?

[All six witnesses, including Director Kelley, Mr. Mintz, Mr. DeBruler, Mr. Buell, Mr. Clynick, and Mr. Hunsinger responded "I do."]

Mr. PREYER. Mr. Kelley, you may proceed in any manner that you wish. If you have an opening statement that you wish to make, that would be fine. I will advise the committee that on opening rounds of questions, at least, we will adhere to the 5-minute rule.

I recognize Mr. Kelley.

STATEMENT OF CLARENCE M. KELLEY, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE; ACCOMPANIED BY JOHN MINTZ, ASSISTANT DIRECTOR, LEGAL COUNSEL DIVISION, FBI; WILBURN K. DeBRULER, ASSISTANT DIRECTOR, PLANNING AND INSPECTION DIVISION, FBI; FRANK B. BUELL, ADMINISTRATIVE SERVICES DIVISION, CHIEF, NCIC; JOHN J. CLYNICK, ASSISTANT CHIEF, BUDGET AND ACCOUNTING, FBI; AND RICHARD G. HUNSINGER, DEPUTY ASSISTANT DIRECTOR, FINANCE AND PERSONNEL, FBI

Mr. KELLEY. Mr. Chairman, members of the committee, I appreciate the opportunity to discuss with you today what I consider to be one of the most significant administrative changes within the FBI under my stewardship.

That change was the consolidation of all internal review, audit, evaluation, and planning operations within one division—the Planning and Inspection Division.

We are often asked if we can assure the American people there will never again be any recurrence of past actions and policies that have been so soundly criticized.

Our answer is that we have done our best, with the organizational and institutional means at our disposal, to provide that assurance.

I have said before, and I remain firmly convinced, that the basic structure of the FBI is sound; but it would be an affront to your intelligence to tell you integrity can be assured through institutional means alone.

Integrity is a human quality. And the integrity of the FBI, as in any large organization, is dependent upon the character of the FBI Director and every member of the FBI under his supervision.

Through careful screening of applicants, through painstaking background investigation, we strive to bring within the FBI men and women of the highest character and reputation.

Through careful delineation of rules, regulation, and policies attuned to the demands of the American people, we have striven to provide these employees with clearcut standards of professional and ethical conduct.

And by establishing the Planning and Inspection Division, I feel we have maximized our ability to enforce compliance with rules and regulations and to insure conformance to our policies.

The Planning and Inspection Division consists of three offices with distinct but interrelated functions; they are: The Office of Inspections, the Office of Planning and Evaluation; and the Office of Professional Responsibility.

The Division was designed so that all internal review and audit functions, including program analysis and evaluation and planning, would receive coordinated, consistent attention.

The Division reports directly to me.

Briefly, here are the responsibilities of the three offices.

The Office of Inspections sends specialized inspection teams every 18 to 24 months to each of our 59 field offices, our legal attaches and each headquarters division. However, we may inspect an office at any time, if circumstances are such that an inspection is deemed warranted.

Under recently implemented procedural changes, each inspection is tailored for the specific division, based on evaluation of data concerning the division available at headquarters. These inspections are far more customized than they once were, and we feel, much more effective.

Primarily, the inspection process provides a constant, indepth examination of the FBI's investigative and administrative operations to determine whether: (1) financial operations are properly handled; (2) financial reports are presented accurately and fairly; (3) applicable laws, regulations, and policies have been complied with; (4) resources, including personnel, are managed and used effectively, economically, and efficiently; and (5) desired results and objectives are achieved in an efficient manner.

We are governed in these inspections to a considerable degree by the auditing standards of the General Accounting Office—"Standards for Audit of Governmental Organizations, Programs, Activities and Functions," published by the Comptroller General of the United States.

We have redesigned our inspections, particularly with regard to measuring the productivity of an office. Caseload no longer is the main benchmark. We have begun using management by objective and quality versus quantity criteria in selecting and prioritizing our work.

Now, at the outset of an inspection, the field office's programs, priorities, and targets are carefully examined. A determination is made as to whether the field office is adequately addressing major crime problems within its geographic area of responsibility.

White collar crime might be a top priority target in one field office's territory. Organized crime might require the primary attention of another field office. Occasionally, the inspection staff is assisted by supervisors and other officials from headquarters when their expertise is needed for evaluating a particular program.

At the heart of the inspection process is a specialized group of knowledgeable and experienced personnel whom we call the Operational Evaluation Team. This team evaluates the inspection process and inspection staff as the component being inspected.

Members of the team collect and analyze available data at headquarters prior to each field inspection and prepare profiles for the offices to be inspected. At the conclusion of each inspection, they analyze and evaluate the written report of the inspection. This is to insure that problem areas have been identified and referred to appropriate headquarters divisions for remedial action. The team may recommend limited reinspections or a full followup to make doubly certain nothing falls between the cracks.

The inspection staff, in the course of its review of various FBI operations, places great emphasis on insuring improper and illegal activities are not and have not taken place.

In each field inspection, the special agent in charge of the field office is asked to respond to a series of questions serving as an initial check by the inspector. Closely examined are the types of controls and administrative devices used by an SAC to detect any illegal or improper activities.

In establishing the Office of Professional Responsibility, I sought to increase awareness of the necessity for the highest professional and personal conduct throughout the FBI and to seek a definitive and uniform policy in imposing disciplinary action against employees who err.

This office has three basic responsibilities: (1) to supervise investigations, or actually conduct investigations, of alleged criminality and serious misconduct on the part of FBI employees; (2) to maintain liaison with the Department of Justice Office of Professional Responsibility; and (3) to monitor disciplinary actions taken against FBI employees.

For your information, our Office of Professional Responsibility received 199 allegations between January 1, 1977, and June 30, 1977. Many of the allegations had no basis in fact; however, following appropriate investigation, disciplinary action was taken in some cases.

In the Office of Planning and Evaluation (OPE), we have formalized the vital functions of collecting and analyzing information essential to proper management of the FBI.

OPE is responsible for mid- and long-range planning and a continual evaluation of ongoing policies, programs, and operations of the FBI. These studies extend to every phase of our work and range from complex administrative problems to training, investigative and scientific planning for the future.

We are particularly concerned with planning to meet our future investigative obligations. And now that the Office of Inspections is working more closely with OPE, data derived from field inspections is more readily available to OPE to assist it in that planning.

Through the analysis of inspection results, we are in a better posi-

tion to evaluate our current programs and to develop new programs to meet specific needs.

I suppose you could sum the overall responsibility of the Planning and Inspection Division as being to keep us on the right track—in our investigative thrust and techniques, as well as professionally and ethically.

And I believe it is doing just that.

Thank you for your attention. I would be happy to answer any questions at this time.

Mr. PREYER. Thank you very much, Director Kelley.

I am certainly pleased to see that you are addressing these problems and making institutional changes to meet them.

I agree with you that no organizational or institutional changes or laws can guarantee integrity. It is commonly said that we cannot legislate morality or we cannot change the hearts and minds of people through laws.

But I think we can substantially influence people's conduct and their attitudes through changes in the laws or through institutional or organizational changes.

Anyone who doubts that only has to look at the Civil Rights Act. While you, of course, cannot guarantee integrity, I think you can make changes, as you have done, to affect conduct.

Let me ask you this. Given the temper of the present times, it is hard to imagine that an agent would start right now a mail-opening or a break-in operation. But times change and 5 or 10 years from now these recent abuses might be forgotten and there may be extreme pressure to solve a particular crime by taking some shortcuts.

How effectively can the system which you have outlined and implemented protect against the possibility of agents acting improperly on their own or against supervisors letting it be known in one way or the other that the case has got to be solved regardless of the method and regardless of the means?

Mr. KELLEY. I feel that the procedures we have set up and the followups that we have assure us, to the greatest degree known to us possible to curb and prevent such activities. Yes, time could possibly erase some of the effectiveness of this, were it not for a constant followup, reviews of past problems that we have had, and warnings about the possible reinstitution of some such procedures.

But, I think, Congressman Preyer, that we have done everything we possibly can known to us to establish this preventative type of thing.

Mr. PREYER. I think your emphasis on followup is very appropriate. Sometimes in the flush of enthusiasm we make some changes which we firmly intend to abide by. Then, as time goes by, we tend to put them on the back burner. I am happy to hear your emphasis on that.

The Church committee made a number of recommendations concerning the FBI in its final report. These are recommendations which relate to preventing internal wrongdoing. I want to ask you if you consider that the Bureau has complied with these recommendations or, if not, which ones you did not comply with and why not.

These may be questions that you would rather answer in more detail for the record.

What I am really asking is if you could let us know what has been done by way of following up on the Church recommendations, or your

analysis of those recommendations and whether you think they are good or bad.

Mr. KELLEY. I would like to answer this, if possible, with a written document. We have, however, given great attention to it. It has been the subject that we received by the Department and us, working together, to try to formulate the guideposts for this activity. I assure you they have not been ignored.

Mr. PREYER. We look forward to your comments in more detail for the record on that.

[See app. 4.]

Mr. PREYER. Do you feel that they are good recommendations on the whole?

Mr. KELLEY. I do not feel I can make any overall assessment, but I do feel that a conscientious effort was made to try to develop some guidelines. Even now what we recommend is a charter so that there will be a clear understanding of what should be done.

Mr. PREYER. The GAO examination of the FBI's Office of Professional Responsibility, which GAO testified about last week, found that there were 162 major cases, as they described it, handled by the Office of Professional Responsibility during the first 5 months of this year. Some of these clearly involved individual wrongdoing, such as drunken driving or sexual misconduct.

Were there other instances where the conduct was job-related, where the employee's conduct occurred on behalf of the FBI? That would be such things as improper or undue coercive questioning of a witness or of a suspect where the agent may have throught he was doing his job but went beyond permissible bounds.

Have incidents of this kind occurred and if so, how many?

Mr. KELLEY. May I have my Assistant Director, Mr. DeBruler respond to that?

Mr. DEBRULER. I do not have a number at my disposal. We have had cases of this nature returned to us, such as failure to return evidence in a case which might be involved in litigation and involved with U.S. attorneys. We have had allegations of short-sighted investigations where enough work has not been thought to have been done. It is that type of thing. These are work related. We have investigated them.

Mr. PREYER. What sort of investigation occurs when a work-related allegation is made of this sort?

Mr. DEBRULER. We are going to interview all of the essential witnesses or people who have knowledge concerning the incident, be it the U.S. attorney, all the agents who participated, the supervisory personnel. Everyone who would have knowledge would be interviewed.

Mr. PREYER. Have you had enough allegations of this sort to indicate that the misconduct ever occurs in a pattern so that perhaps a supervisor is permitting too much latitude?

Mr. DEBRULER. No, sir. We have not had any indications of that as yet during our tenure in OPR. It has not been organized too long. Perhaps in October, 1 year from when we began to set up the division, we will have an indication. But for practical purposes OPR was not operative until November 1976. We have not had any repeat activities that have come to our attention on the same type offense during that period of time nor have we had any indications of repeat activities on the part of supervisory personnel.

Mr. PREYER. Would you be looking for that sort of pattern?

Mr. DEBRULER. Yes; we would. We do monitor all of the serious allegations and allegations of criminality in that division. We monitor the punishment that is issued in each of these instances. We do have the capability of making that determination of a pattern developing by continuous review.

Mr. PREYER. I think I have probably gone beyond my 5 minutes.

I recognize Mr. Ryan.

Mr. RYAN. Mr. Kelley, I want to commend you for taking on one of those difficult jobs, not only in your own time but in the history of this country. It is a time when the FBI has been under attack from several different directions by a pretty steady hand under some pretty heavy fire. And through it, you have maintained your high level of performance. I think that is extremely commendable. I think it assures you a permanent place in terms of a great reputation at the Bureau.

I think the FBI has come a long way from the days when it could find time to investigate Helen Keller, Jane Adams, and Felix Frankfurter for radical activity, like helping the poor. The activities that you have engaged in, in the last few months are a long way from that. I hope it will become an institutional matter.

I guess in the time I have I would like to pursue a particular area which has to do with internal monitoring of your own agents themselves.

How many agents are there now in the Bureau?

Mr. KELLEY. About 8,200.

Mr. RYAN. That is an extremely large force of highly trained personnel. From my own experience in this area in simply oversight of police functions, it is inevitable that there be within the organization itself some agents who are more lax than they should be about their own conduct and the way they view their job.

There will be other agents who are straight arrow and who take their job very seriously and are very professional. Inevitably there comes a time when there is a conflict between what they are supposed to do by the letter and what they may feel compelled to do by way of pressures, social pressures.

I am referencing now an agent who either consciously or unconsciously violates the rules of the Bureau itself or more seriously perhaps violates the law itself.

Do you believe that it is possible now for an agent to view his activities on a thoroughly professional basis and be able to report violations in the event that he sees them?

Mr. KELLEY. I believe so, Congressman.

Mr. RYAN. What will happen if he reported a superior for some substantive violation? Who would he report to?

Mr. KELLEY. He would report to his superior or he has an avenue of reporting directly to me, either in person or by letter. And, we have had a number of instances insofar as personnel is concerned. These are not incidents themselves but a number of people have reported matters which they thought were wrong and needed some adjustment. There has been no action taken against the so-called whistle-blower or whatever you might term them. They are felt to be people who are anxious to try to bring us to a higher level of efficiency and productivity and conformance.

Mr. RYAN. Are you saying that the whistle-blower who thinks he

sees a violation—perhaps we will leave that open to question. But is there any understanding in the agency itself, in the Bureau itself, that if an agent writes to you about a matter that is serious—and he has to use some judgment himself—No. 1 that you will read the letter yourself and No. 2, that there will be no penalty assessed on him for making the effort?

Mr. KELLEY. That is true. There is no penalty. It is understood. It is within our rules and regulations. I do not think there is any reluctance by an employee to do so.

Mr. RYAN. I think that is most reassuring to those who are in your organization.

When you became Director, you were told, I believe, that in 1966, or I think you testified before Congress that you knew about no illegal break-ins. Subsequent to that time we found there were illegal break-ins. This was after you were Director.

You just reassured me that there are alternative avenues by which a professional FBI agent may, if he sees fit, take whatever action he feels he must take on an internal matter. You have reassured me. But do you think you have gotten enough control by now to be able to reassure me, with full knowledge, as opposed to what it was 10 years ago?

Mr. KELLEY. There were some instances, allegedly. I must say "allegedly" because I am not privy to the investigation. If they existed, I was not told about them. I was deceived because I asked many times: "Has this happened in the past, during the period 1966 up to the time I came aboard?"

Since that time—and I announced that I had been deceived—I have appeared before all of our offices and the personnel and the agents involved and all of the people in Washington. I have told them this cannot happen again. I have also told them something I feel is very true. There are no secrets anymore. It will come out. No matter what it is, it will come out.

So, I feel that it is highly unlikely that this will happen again.

Mr. RYAN. What happened—did you identify any of those who deceived you, and if you did, can you tell us what happened to any of them?

Mr. KELLEY. I am not privy to the investigation. I have no names given me. The only one I have is that gentleman who has been indicted. I know, of course, of some who have been brought before the grand jury. Maybe they testified as a witness, or maybe as a possible subject. But I have no information. I therefore cannot pinpoint anyone who deceived me.

Mr. RYAN. I do not see how it is possible to be deceived. Somebody has to say something to you which later turns out to be a deception in your mind. Is there some other way?

Mr. KELLEY. They told me that there was no activity of that type.

Mr. RYAN. Who told you that?

Mr. KELLEY. Everyone whom I contacted. That would be the entire staff of the executive conference. There were numerous other people, all of whom I cannot recount.

Mr. RYAN. Who are the executive conference people?

Mr. KELLEY. The Assistant Directors and above.

Mr. RYAN. Is that executive conference still in existence today?

Mr. KELLEY. Yes.

Mr. RYAN. Are members on the executive conference who were there at the time these deceptions occurred?

Mr. KELLEY. Yes, some.

Mr. RYAN. Do you believe, or have you talked with them about the deceptions that occurred?

Mr. KELLEY. I have not.

Mr. RYAN. Do you not think that would be a good idea?

Mr. KELLEY. No, sir, I have talked with the Civil Rights Section which is handling the prosecution. They said there should be no action taken in that regard until the prosecutive steps have been finished.

Mr. RYAN. The reason I asked the question is this—I am back to being a little bit more unsure of myself in connection with your effort to provide the cleanest possible internal check.

If an agent knows, or if someone who is a supervisor or someone here in Washington in a high position knows that he will not be sanctioned for engaging in a deception, then what will prevent him from doing it?

Mr. KELLEY. It may not be that there will be any prosecutive action contemplated in such a matter. In that case I will present it to the Department. I think probably they will permit us to go ahead and take such disciplinary action as is necessary. Or they will have us do the investigating rather than they do the investigating, as has been done in this case.

Mr. RYAN. I would like to pursue this a little further, Mr. Chairman, but I think my time has run out.

The point that means the most to me in all of this is this. There must be confidence on the part of the Congress. There must be confidence on the part of the American people. The FBI must be what it appears to be.

Years and years ago before my time and your time probably the effort was begun to make the FBI the most prestigious, the most illustrious, the most pure, the most perfect kind of police force that any nation could have. Certainly within the Nation itself it was one which any other police force could look at as being an ideal and a model. That is a large order, especially from where the FBI came originally just after World War I.

We still have that impression today. Certainly your own person would indicate that we are trying to make that effort within the FBI. But in order to maintain that confidence, I still say, Mr. Kelley, that there must be some indication that internally, when someone goes wrong—and there is someone bound to be going wrong in the FBI on occasion because human beings are human beings, and even if it is not a violation of criminal law—when those things occur the FBI has put itself in that position and must be in that position—those kinds of errors or transgressions should be open to public view when they happen.

I am concerned about the degree of deception that occurred years ago and what has happened to those who were guilty of those deceptions. Even if they were not guilty in a criminal sense they were guilty in the sense of betraying the standards and the ideals which the FBI claims to have.

So, when there is a violation, when there is someone who makes a mistake, then they should be subject to at least the view by the public

that there is on occasion a transgressor who can be punished and will be punished. This should be if for no other reason that the agents within the agency recognize that they are not above the law and not above being penalized by the Director himself in the event they take actions contrary to the best interest of the service.

Mr. KELLEY. As soon as the information is released to us by the Department, we will take immediate action. It will perhaps be supplemented with our own Inspection Division making some checks, but as quickly as that is released to us we will take the action.

Mr. RYAN. Thank you.

Mr. PREYER. Mr. Quayle?

Mr. QUAYLE. I would like to take a hypothetical case where an agent thinks that an impropriety of a fellow agent has taken place. What is the procedure that he is to follow in reporting this impropriety that he believes has been committed?

Mr. KELLEY. He can report it himself to me or any official in the Bureau. He can do this in person or by letter.

As some do—we cannot prove it—he can report it by anonymous letter. We do, on occasion, find that this avenue is used.

It can be done by reporting it to a Congressman, to a Senator, or to a member of the executive branch of Government, particularly the Office of Professional Responsibility of the Department. All of them are channeled back to us, and we take the action, as outlined in the allegation.

Mr. QUAYLE. All these allegations or complaints would be channeled back to the OPR?

Mr. KELLEY. Yes, they will be.

Mr. QUAYLE. Is this type of procedure written down as far as instructions are concerned or memorandums from you are concerned, that is, to the agents?

Mr. KELLEY. I am confident that it is. Whether it is quite as broad as I have outlined it, I am not sure. I think it is rather broad language that the agent has the avenue of reporting it and that it will come to me. As to whether or not it would be one that was referred to a Congressman or a Senator I do not know whether we have said that in the instructions. But any that comes to us will be acted upon. We do say that certainly. He has a ready access to me.

Mr. QUAYLE. What would be the purpose of taking an allegation to a Congressman or a Senator rather than directly to you or to the OPR?

Mr. KELLEY. I cannot answer that except to the point that where he feels possibly secure it will come to my desk. That is all I can say. This happens on occasion.

Mr. QUAYLE. I am following up on Mr. Ryan's idea about having an understanding among the agents that there would be no sanctions against him if the allegation would be proven to be unfounded or that there would be sanctions against him in his career as an FBI agent.

Mr. KELLEY. There is that assurance given.

Mr. QUAYLE. Of the 199 allegations that have come out in the last 5 or 6 months, give me a rough percentage of how many have come from fellow FBI agents.

Mr. DEBRULER. I do not know if I can give you an exact percentage. The greatest percentage does come from agents assigned to the field who in turn receive them from private citizens and other sources. Many

of these will go straight into the Office of the Director. Some of them come to me personally. Some come to members of my staff. Some come through the agents in charge. But I believe the larger percentage comes from our agents.

Mr. QUAYLE. Probably over 50 percent?

Mr. DEBRULER. I would not be certain of that because I have not compiled the figures in that fashion. I have had no reason to do that. But it is my judgment that the percentage is near that, yes.

Mr. QUAYLE. What other large percentage or second largest percentage of groups of people do these come from?

Mr. DEBRULER. I would say from citizens outside the Bureau, through the Department, the President, the Congress and other sources.

Mr. QUAYLE. They have been under investigation?

Mr. DEBRULER. Yes. The matters referred to OPR in this manner have been the subjects of our investigations.

Mr. QUAYLE. Thank you.

The GAO report from Mr. Lowe who appeared before us a couple of weeks ago said that the FBI had not established written criteria for major and minor allegations. I would like to know if anything has been done in lieu of this recommendation.

Mr. DEBRULER. No, we have not seen fit to do that as yet. It is certainly something that we will consider. The reason is that these investigations are conducted by supervisory personnel in the Office of Professional Responsibility in the FBI who are experienced investigators. They are investigated by the agents in charge or the assistant agents in charge or supervisory staff personnel who are highly familiar with investigative techniques. They fully understand how to investigate cases. But it is certainly something that we can and will consider. We have not done so as yet.

Mr. QUAYLE. This was just handed to me. On sources of allegations in the GAO report it has the FBI agents or other employees. They have a number of seven and only 4 percent. As a majority percent they say it would be letters and telephone calls to FBI headquarters and FBI field offices.

Mr. DEBRULER. That is the type of communication that is used to advise us.

Mr. QUAYLE. It says, "Sources of Allegations Direct" then it has "the FBI agents or other employees" and the percentage mark is only 4 percent. This is from the GAO report.

Mr. DEBRULER. I would not question GAO's report at all because I am sure they went through it. But it is my feeling that the majority do come from personnel within the FBI and citizens. We have never had an occasion to break it down.

Mr. QUAYLE. I would say that this report would reflect not what you are saying.

Mr. DEBRULER. Yes, that is correct.

Mr. KELLEY. Perhaps the answer is this. As I pointed out, in number of people it might well be above that percentage of 7 percent. As for the number of incidents, there is no question about it. The incidents in a majority are reported by outside people.

For example, one case I know of, at least 10 agents joined in that one incident in reporting it.

Mr. QUAYLE. I have one final question. I would like to ask Mr. Kelley to give me a general comment in lieu of all of the criticism in the press reports and so on about the morale of the FBI and the agents and the people who work for you.

Mr. KELLEY. There is some confusion about just where they stand. For example, there is the matter of suits, civil and charged with criminal offenses. There is no aid that can be given in the event of a criminal charge unless possibly by virtue of a not guilty verdict or dismissal of charges. Any legal fees that may have been paid out may be reimbursed to them. But they are in a state of quandry about what is going to happen.

In the civil suits there is also some gray area as to whether or not they can get that support. That causes some difficulty.

There is a general feeling as to what has happened to us. This is 50 years, almost, of a record without any blemish. Then all of a sudden things happen where we are under a great deal of scrutiny. They are wondering what they should do. They are wondering whether or not what they do in their daily work is actually permissible.

I noted one of the questions was this: "If you are asked to do something which you feel is illegal, what would you do?" The answer is: "You should talk with your supervisor or talk with me. You should find out why this is necessary, if it is. If it is not, you should certainly refuse to do it."

This is something that was not even contemplated, I think, in the past. It was thought that you get an order, it is felt automatically that it is an authorized activity.

They are changing insofar as the climate, the atmosphere, of their work habits. Any change is a traumatic thing, particularly when it affects your daily work and your livelihood.

So, yes, there is a lag insofar as morale is concerned. Will it come up? I do not think there is any question about it. It will come back up. It is so because we have a very fine and extremely dedicated group of people. I think there is a better understanding achieved each day. As time goes on, I think these things will be straightened out.

Mr. QUAYLE. Thank you, Mr. Chairman.

Mr. PREYER. We have a vote on the House floor at the moment. It is not a routine vote, such as approving the Journal. It is to approve a conference report on the Agriculture and related agency appropriations.

Therefore, the committee will recess for 10 minutes. We will resume as quickly as we can come back.

[Recess taken.]

Mr. PREYER. The subcommittee will resume its sitting.

The Chair will recognize Mr. Weiss.

Mr. WEISS. Thank you, Mr. Chairman.

Mr. Director, Mr. Ryan asked you about the number of agents. You said roughly 8,200. I wonder if you could tell us what the overall budget for the agency is for the current fiscal year, 1977.

Mr. KELLEY. It is $513 million, I am informed by Mr. Hunsinger.

Mr. WEISS. When the Attorney General appeared before us last month, he indicated that it was his view that the FBI probably ought to be headed in the direction of eliminating the noncriminally related intelligence activities. I think the words he used were: "There

ought to be the nexus of a crime" in order for the FBI to become involved.

First of all, I wonder if you could tell us what percentage of the FBI's staff and/or budgetary allocation is used for noncriminally related intelligence activities? That is the first question.

Mr. KELLEY. That would include, of course, much of the foreign counterintelligence, a total budget of about $70 million.

Mr. WEISS. Is that in this country or overseas?

Mr. KELLEY. In this country. We have no investigative activities overseas. I do not know whether you would include also in that category the supportive part of our jurisdiction which would be the laboratory—which is about 25 percent dedicated to assisting local agencies—the Identification Division—which is supportive of local agencies to a considerable extent.

Mr. WEISS. But local criminal justice agencies; is that correct?

Mr. KELLEY. That is correct.

Mr. WEISS. The question I asked was as to noncriminally related intelligence matters.

Mr. KELLEY. Oh, just noncriminal?

Mr. WEISS. Yes.

Mr. KELLEY. I would have to guess. Mr. Hunsinger, would you say about 10 percent?

About the only one would be the foreign counterintelligence. As for the domestic security, that is connected with some violations statutorially established. So, it would be confined to the foreign counterintelligence.

Mr. WEISS. The kind of things that I am thinking about by way of noncriminally related activities are like these: The information that the FBI had for years been infiltrating and surveilling organizations which were legal organizations in some instances. I think the Socialists' Workers Party is the one that comes to mind. I think for some 30 years the FBI had them involved. I may have the wrong group, but I think that is the group that comes readily to mind.

Mr. KELLEY. That is correct. That is probably correct.

Mr. WEISS. That kind of noncriminally related intelligence work—is that still going on?

Mr. KELLEY. We do not conduct investigations purely for the need of gathering intelligence. The domestic security field is now governed insofar as our activities, by guidelines. Hopefully there will be charters developed in Congress which we will have as further guidelines. The ones that we investigate now are directed toward, in the domestic security field, prosecution.

Mr. WEISS. When did the FBI terminate the domestic surveillance activities, intelligence activities?

Mr. KELLEY. I am informed that it was about a year ago—about April or May of last year.

Mr. WEISS. Let me pursue just a bit a question that Mr. Ryan had asked of you. That is your statement that you felt you had been deceived by staff people at the FBI and others within the agency as to the continuation of activities which had been prohibited by FBI Director Hoover in 1966 as far as illegal surveillance and mail openings and so on.

I want to ask the question in the context of the morale issue that

has been raised as well. I do not want to go into the specifics of the Kearney case. But I want to use the point that you make.

When you learned that, No. 1, you had been deceived, and No. 2, that, in fact, there were very clear-cut violations going on in spite of the representations made to you, did you not think that a way of really restoring morale and the sense of dedication and integrity that the FBI has been known for for years was by cracking down on those who were, in fact, guilty of either deceiving you and/or actually violating directives handed down by the FBI Director before you?

Would you not think that would be the best and quickest way of restoring morale and integrity?

Mr. KELLEY. I think so.

Mr. WEISS. Right. In that context, then, I am perplexed and perturbed by the statement that you made upon the indictment of Mr. Kearney. That, in essence, the indictment itself was a cause for destruction of morale rather than the violation which had been charged. Would you try to reconcile that?

Mr. KELLEY. I merely stated that I thought that this was a time wherein morale was being seriously affected. I meant nothing to indicate that I did not feel that there could be any possibility that we might be laboring under the idea that FBI agents could not be prosecuted for an illegal act. I certainly did not say that. Certainly, it is inherent within my thinking and always within my statements. I feel any violation should be prosecuted, yes.

But I did want to point out that there was a lag in morale and that I wanted to assure the agents that I was well aware of the fact that they are working properly. They are working hard. I feel right now that agents are working within the framework of not only the letter, but the spirit of the law. I do not think there is any question about that. There is no question in my mind whatsoever.

I want them to continue in that category. I want them to realize that I recognize that some of the things in the past which were categorized as an era are past. I have said that many times.

So, I felt it was necessary for me to make that statement. I had not been privy to the investigation. That indictment was the only one wherein I had, by virtue of reading it in the paper, been informed as to the identify of one of the alleged violators.

Mr. WEISS. Again, assuming and granting to anyone charged with criminal wrongdoings, FBI agents or anyone else, the full presumption of innocence, which the Constitution and our laws provide for, do you, in fact, then believe that the Justice Department has an obligation to investigate and to prosecute in those instances where the evidence indicates that there has been a violation by FBI agents of the Constitution or the laws of the United States?

Mr. KELLEY. You said, "Do I feel that the Department has the obligation"?

Mr. WEISS. The Justice Department.

Mr. KELLEY. The Justice Department does have the obligation. I would hope that in the future. we, in the FBI, would be given the charge to investigate. Thereby, I would be kept currently informed about anything that comes up.

I do feel this. Were it to be the FBI or the Department, one or both should look into it and should investigate it.

Mr. WEISS. Do you believe that the action of the agents—I believe there were 200 or 300 of them who massed in silent demonstration on the steps of the Southern District Courthouse in Manhattan was an appropriate action?

Mr. KELLEY. I cannot comment about it. It was discussed with Mr. Bell. He said it was an expression of their first amendment rights. Therefore, there was no action taken in that regard.

Mr. WEISS. Do you believe the acts of those agents were supportive of your efforts to instill a high sense of integrity and commitment to the Constitution of the United States?

Mr. KELLEY. I see no nexus to the matter of integrity in their demonstration. They felt they were supporting a fellow agent and so stated. As to whether or not there was any feeling or utterances indicating that he was falsely charged or something of that sort, I have not heard of anything of that sort.

I do not feel that this bears on the matter of integrity.

Mr. WEISS. When you issued your statement on April 14 of this year following the indictment, one of the things you said was: "I intend to use every means at my command to assure that his"—meaning Kearney's—"current predicament is resolved as soon as possible."

What did you intend to be interpreted by the public and the world by that statement?

Mr. KELLEY. I meant that we in the FBI had a matter which arose in a southern city where it took over a year for this to be resolved. This is widely known throughout the entire organization. I wanted it known that I would do everything I could to expedite it. As a part of that expeditious action, some of our people worked with the Department on this case. They did not report to me. They reported to the Department. I constantly said to these people:

> Let us get this thing over with. Let us get it resolved as quickly as we can insofar as the investigation is concerned. If you need more men or anything that is necessary in order to resolve it, I will give them to you.

It still, of course, is not resolved. I do not know what stage it is in as yet. But it has been going on for many, many months. This is something that does, in itself, affect morale seriously.

Mr. WEISS. At about the time, and prior to that indictment being handed down, there were stories in the press indicating that there was a broader investigation than just the alleged violation of the Constitution and the directives of Mr. Hoover by Mr. Kearney.

Since then there has been very little heard of those other investigations. Do you believe that if, in fact, there is evidence indicating similar types of violations those investigations ought to be pursued?

Mr. KELLEY. I do not know what is the result of the investigations. I do believe that if there be any charge placed it should include those who gave the authority. I have said that many times. I have added to it:

> If it is something that I ordered them to do, then the onus should be, and absolutely will rest on me and not someone else.

Mr. WEISS. Thank you, Mr. Chairman.

Mr. PREYER. The Chair recognizes Mr. McCloskey.

Mr. MCCLOSKEY. Thank you, Mr. Chairman. Mr. Kelley, I do not think there is anything that any citizen in the United States wants

more than to reach your goal of restoring full public faith in the FBI. In the earlier committee, that is, in the earlier hearing that this committee held, the GAO's report indicates that you are pursuing a high degree of professional responsibility and self-discipline as a professional.

The figures we were given were that you had, in a 5-month period, 162 complaints against agents for misconduct. Of those, 21 of those—1 out of 8—ended up in disciplinary action. That compares favorably with any profession I know, including the Bar Association and the self-discipline of its members.

The thing that bothers me is this. There were some unexplained questions about actions taken at the very top of the agency. It is clearly a violation of Department rules to destroy evidence, is it not?

Mr. KELLEY. Unauthorized destruction, yes. It is a violation.

Mr. MCCLOSKEY. Going back to when L. Patrick Gray destroyed those records, did he violate an FBI rule or not?

Mr. KELLEY. Do we have a clear delineation as to what the paper was?

Mr. MCCLOSKEY. I had forgotten what the papers were. They were conveyed to him by a top officer of the United States.

I can understand the difficulty of a Bureau agent as to whether he obeys an order or not. When L. Patrick Gray was faced with that question, as suggested by John Ehrlichman, he destroyed records that were put in his custody. But what I am interested in is what does the FBI have as a code of conduct with respect to the destruction of evidence? What do you do when your top people destroy evidence?

Mr. KELLEY. If there is destruction of evidence, which is unauthorized, we would take action.

Mr. MCCLOSKEY. Did you act in the case of Pat Gray? He was FBI Director.

Mr. KELLEY. I was not in the FBI at that time. He was not my Director.

Mr. MCCLOSKEY. But what did the FBI do as a result of learning that the Director had destroyed evidence? What was the action taken?

Mr. KELLEY. Mr. Mintz can answer that.

Mr. MINTZ. You may recall, Congressman, at the time Mr. Gray resigned.

Mr. MCCLOSKEY. So? A resigned agent is not removed from action by the FBI if one of its rules is violated, is it?

Mr. MINTZ. Yes, he is. There is no further administrative action that can be taken against him by the agency. Possible criminal charges were considered of course by the special prosecutor.

Mr. MCCLOSKEY. Was Gray's conduct known by any other FBI personnel at the time of the destruction of the evidence?

Mr. MINTZ. Not to my knowledge.

Mr. MCCLOSKEY. Was it known prior to his resignation?

Mr. MINTZ. Not to my knowledge.

Mr. MCCLOSKEY. Mr. Kelley, in July of last year you asked for the resignation of your highest ranking assistant, Associate Director Nicholas Callahan. There has never been a public explanation as to why you asked for his resignation. Did he violate any FBI code of conduct?

Mr. KELLEY. The matter that was involved there is known as the U.S. Recording Co. investigation. It is still pending.

Mr. McCLOSKEY. You understood my question, did you not?

Mr. KELLEY. Yes. It is still pending and therefore I cannot comment.

Mr. McCLOSKEY. A year later the investigation is still pending?

Mr. KELLEY. Yes, it is not with us. It is with the Department.

Mr. McCLOSKEY. On that matter, Mr. Mintz, you were the chairman of a committee that looked into the U.S. Recording question; were you not?

Mr. MINTZ. No, sir, I was chairman of the committee that reviewed the investigation results by the Inspection Division.

Mr. McCLOSKEY. When you reviewed the investigation of the U.S. Recording incident, you submitted a report to the Attorney General; did you not?

Mr. MINTZ. I submitted a report to the Director of the FBI.

Mr. McCLOSKEY. Was that report subsequently handed to the Attorney General?

Mr. MINTZ. It was.

Mr. McCLOSKEY. Was it rejected by him as a whitewash?

Mr. MINTZ. Not to my knowledge.

Mr. McCLOSKEY. What happened to the report which you submitted to the Attorney General?

Mr. MINTZ. I do not know, sir.

Mr. McCLOSKEY. It has been reported that in February 1976 the Attorney General sent back the report with the instructions to the Bureau to undertake a more extensive inquiry. Is that a fact?

Mr. MINTZ. I have read that report, yes.

Mr. McCLOSKEY. Is that a fact? What I just said?

Mr. MINTZ. I do not know of my own knowledge. I believe that information is available from Mr. Kelley, not from me.

Mr. McCLOSKEY. Mr. Kelley, what were the instructions of the Attorney General to you when he returned the original report you had made on the U.S. Recording Co. incident?

Mr. KELLEY. He said he felt it had not been conducted in the depth that he desired. My response was that we met the commitment that was given us. It was not that we were loath to go into greater depth, but we felt that we answered the response.

As to whether it was he or members of his staff, they had other information which was not in our possession, of other possible violations and need for other investigations.

Mr. McCLOSKEY. What was the source of this information in the Justice Department's hands that had not been discovered by the FBI?

Mr. KELLEY. Mr. DeBruler possibly will be restrained in answering, but he did not work on that. I would like to ask him to respond.

Mr. McCLOSKEY. Please let me say this. If there is any answer that you want to give that would be comprehensive and complete, but you feel should be in executive session, do not hesitate to request it. We do not want to prejudice any ongoing investigation or invade anybody's privacy in an unwarranted manner.

But this has bothered us. How could the finest investigative organization in the world not be in possession of evidence that some other governmental agency would be? This was a case that involved FBI agents.

Mr. KELLEY. We have had those on a couple of occasions, Congressman. I spoke of the one in the southern city. In that case that involved agents of our office there. It was handled exclusively by the Depart-

ment. We had no knowledge for about a year, as I recall, of what was the gist of the investigation.

Mr. McCLOSKEY. You have stated earlier that it is your hope that the Department of Justice will return to you full authority in any investigations of wrongdoing against your own agents; is that right?

Mr. KELLEY. Yes.

Mr. McCLOSKEY. Is that up for determination at the present time?

Mr. KELLEY. Mr. Bell is considering it.

Mr. McCLOSKEY. Mr. DeBruler, could you go back to that earlier question I asked regarding the US. Recording investigation?

Mr. DEBRULER. I am not sure that I am aware of all of the sources of the Department's additional request for inquiry in the U.S. Recording investigation. I did participate in it. There were a number of broader areas that were investigated beyond the first allegation that was received by the FBI. But I do not feel that I can specifically discuss it in detail here because it is pending in the Department of Justice. We have had no response as yet as to what, if any, action will be taken in that matter.

Mr. McCLOSKEY. Let me ask all three of you this simple question for a yes or no answer.

Were you satisfied with the completeness of the Bureau's internal investigation in the Recording Co. case?

Mr. KELLEY. Yes.

Mr. DEBRULER. I am, yes.

Mr. MINTZ. Yes; I am.

Mr. McCLOSKEY. I have one more question, Mr. Chairman. I do not know what the bell situation is.

Mr. PREYER. The second bell rang at 6 minutes of the hour. I think you have time for another question. We are hoping that we can come right back.

Mr. McCLOSKEY. Mr. Kelley, one problem that has bothered me is this. I want to preface this question with a statement of the opinion that it seems to me that the events that occurred in the investigation of the illegal conduct, mail opening, electronic surveillance without warrants, the interception of telegraphic communications, and the breaking and entering was apparently discussed and considered by top officials of our Government when the Huston report was first made back in 1970.

The report of the Director at that time was that the FBI would not participate further in those illegal activities. It seems to me that it is very difficult to prosecute individual agents for pursuing policies or not disagreeing with orders that they felt were lawful at the time.

What concerns me is that in January of this year, the previous administration released a Department of Justice report stating that they would not prosecute the CIA mail opening violations. They said this, and I want to quote from that report of the Department of Justice.

I want to ask you the distinction between the prosecution of a CIA agent in the consideration of the prosecution for mail opening and the consideration of the prosecution of FBI agents for breaking and entering, both of which are in the same degree of illegality, so far as I can tell under our laws.

The Justice report says this:

In August 1976, the Criminal Division submitted to the Attorney General the report summarizing the evidence that it had acquired and analyzed the legal questions that potential prosecutions would represent.

Although the Department is of the firm view that activities similar in scope and authorization to those conducted by the CIA between 1953 and 1973 would be unlawful if undertaken today, the Department has concluded that a prosecution of the potential defendants for these activities would be unlikely to succeed because—

and then in part—

of the state of the law that prevailed during the course of the mail openings program. * * * It was until recent years by no means clear that the law, and accordingly, the Department's position, would evolve as they have. A substantial portion of the period in which the conduct in question occurred was marked by a high degree of public concern over the danger of foreign threats.

The view both inside and, to some extent, outside the government was that, in response to exigencies of national security, the President's constitutional power to authorize collection of intelligence was of extremely broad scope. * * * Applied to the present case, these circumstances lead to reasonable claims that persons should not be prosecuted when the governing rules of law have changed during and after the conduct that would give rise to the prosecution.

The issue involved in these past programs, in the Department's view, relates less to personal guilt than to official governmental practices that extended over two decades. In a very real sense, this case involves a general failure of the government, including the Department of Justice itself, over the period of the mail opening programs ever clearly to address and to resolve for its own internal regulation the constitutional and legal restrictions on the relevant aspects of the exercise of Presidential power.

In such circumstances, prosecution takes on an air of hypocrisy and may appear to be the sacrifice of a scapegoat.

Under those concepts, why should Mr. Kearney be prosecuted at the present time? What is the difference between declining to prosecute in the CIA case and prosecuting in the FBI case?

Mr. PREYER. May I interrupt the gentleman? I think if he answers that question we will miss the vote.

I have also been called to testify before the House Rules Committee. I will ask Mr. Ryan to take the chair. I do not know whether you want to wait for that answer.

Mr. KELLEY. May we submit it to you?

Mr. MCCLOSKEY. I would be happy to have that in writing and under any degree of confidentiality that you request. I hope we can obey our own principles of ethical conduct as we are asking you to do.

Mr. PREYER. So ordered.

[See app. 6.]

Mr. RYAN [presiding]. Mr. Kostmayer?

Mr. KOSTMAYER. Thank you for being here, Mr. Kelley.

I want to ask you this. In response to a question that Congressman Quayle asked a while ago, about the reporting procedures for violations which might have occurred and also the circumstances under which an agent would come to you or a Member of the Congress, to report that he had been instructed by a superior to violate the law, you said, and I quote you directly:

If you are asked to do something which you feel is illegal, what would you do? The answer is: You should talk with your supervisor or talk with me. You should find out why this is necessary, if it is. If it is not, you should certainly refuse to do it.

This implies a necessary test for actions which may be illegal. I am puzzled by that, because if indeed it is illegal, can it in your judgment be necessary, is that possible?

Mr. KELLEY. No, sir. It is a matter of some confusion to some of our agents from time to time as to whether a matter is legal or illegal. In such an event I review it, the legal counsel reviews it, and possibly one or two others review it. We determine if there is illegality. There is no question about it. It is not done if there is illegality. If it is legal, then we tell him it is a legal process.

Mr. KOSTMAYER. So it is possible for something to be illegal and necessary at the same time?

Mr. KELLEY. That has come up many times as to whether or not there could be, under some foreign counterintelligence matter, something which is unusual. That is being addressed by the Senate and the House insofar as intelligence matters are concerned. Frankly, it is a very gray zone as to whether or not there could be such a tremendous national crisis where there could be something that unusual.

But in the event that this arises in the FBI, we will go to the Attorney General and present it to him. It will not be our realm to make any decision in such a matter at all.

Mr. KOSTMAYER. You said in your statement:

> Integrity is a human quality and the integrity of the FBI, as in any large organization, is dependent upon the character of the FBI Director and every member of the FBI under his supervision.

I agree with you and I think part of that is the attitude of the FBI Director. That is why I am somewhat troubled by your statement of April 14, if I may go back to it. I want to ask you a couple of questions about that.

First of all you said, and I do not want to get into specifics of the Kearney case, but you said in a statement at that time:

> I know Mr. Kearney to be an outstanding special agent who was motivated in all his endeavors by the best of intentions.

I am concerned about the question of intentions here. Is that really a mitigating circumstance? Should his intentions if they were good—and I do not know whether they were or were not—have anything to do with it?

Mr. KELLEY. Insofar as a criminal violation is concerned, I think intent could have an impact on it, yes. His record indicates that there is nothing, to this point—and I know nothing about what he has done—he has been shown to be of good intent.

Mr. KOSTMAYER. But then you make a judgment about his intentions in the pursuit of these individuals; is that right?

Mr. KELLEY. I make no judgment insofar as the present charge placed against him is concerned. I merely point out that he has been—and his record so indicates—a man of great personal integrity with a strong intent to do what is proper.

Mr. KOSTMAYER. You said later on in that same statement:

> The thrust of the Department's resolution of that matter was based upon the principle that it was not possible to indict an era.

It seems to me that eras, both bad and good in the history of our country are made of men and women. Do you agree that while it is not possible to indict an era—that sounds almost like not indicting a man who is responsible in part for a bad era, or an excuse for not indicting those who are responsible for an era being bad?

Mr. KELLEY. Of course, this is a quote from the statement made by the Department. I feel that there could well be a situation wherein it is felt by some that they have an approval to do certain things, not that which is clearly legal, but which they thought was approved.

I am not in a position to build any defense. I do not intend to build one. I merely point out that this was the judgment in a similar situation. The statement speaks for itself, I think, as to the matter of an era being something that you cannot indict. The individuals possibly, but they did not in that case.

Mr. KOSTMAYER. How do agents in the FBI react to your statement? Does it not defend Mr. Kearney? Perhaps it is intended to do so.

Mr. KELLEY. It is taken in a different light by some compared to others. Some say that I am not supportive enough and others say that I am too supportive. I assure you there are many occasions when I am right in the middle. I do not think we can categorically say that it is well received or not well received.

Mr. KOSTMAYER. I agree with that.

Mr. Mintz is here with you today?

Mr. KELLEY. Yes.

Mr. KOSTMAYER. I wonder if I could ask questions of him.

Mr. RYAN. Mr. Mintz, would you approach the table?

Mr. KOSTMAYER. Your name has been mentioned as a possible successor to Mr. Kelley. I am interested in your attitude about his statement of April 14. Rather than confining you at this time to specifics, I wonder if you could give me some idea of how you feel about his statement of April 14. I know it is difficult to say whether or not you would have issued the same statement under the same circumstances, but as closely as possible I wonder if you could give us some general impression.

Mr. MINTZ. I think it is impossible, really, to give you an analysis of what went on in the mind of the Director at the time. He was the Director. Many agents were looking to him for guidance. The public was looking to him for guidance as to what the position was. I think really there is no way that I could give you an opinion as to what the Director did or should have done on that occasion.

Only as Director would you be in the position to know that.

Mr. KOSTMAYER. What is your general attitude about the kinds of problems and criticisms which have plagued the Bureau over the last several years, allegations of illegal acts and so on?

Mr. MINTZ. I think there have been too many.

Mr. KOSTMAYER. Too many?

Mr. MINTZ. Too many problems.

I think we have a need today to identify all of those kinds of problems, correct them, and go forward.

Mr. KOSTMAYER. Do you think there is substance to those charges or do you think they are exaggerated?

Mr. MINTZ. I have no way of judging that, obviously.

Mr. KOSTMAYER. Let me ask you about a statement made by former President Nixon because I think it is important insofar as the attitude of the FBI is concerned.

He said in his interview on May 19 with David Frost:

If the President approves something because of the national security, or, in this case, because of a threat to internal peace and order of significant magni-

tude, then the President's decision in that instance is one that enables those who carry it out to carry it out without violating a law.

How do you react? Do you agree or disagree or somewhere in between?

Mr. MINTZ. I can tell you that the courts of the United States have said that is not correct.

Mr. KOSTMAYER. Do you agree with that?

Mr. MINTZ. I agree with the courts.

Mr. KOSTMAYER. What would be your own response if an agent were to come to you to tell you that in his opinion he had been ordered to violate a law?

Mr. MINTZ. I would identify the facts and make a judgment.

Mr. KOSTMAYER. Thank you.

Mr. RYAN. Mr. Harrington?

Mr. HARRINGTON. Let me clarify something that may have been dealt with somewhat more substantively before I came. It is my understanding that you have suggested in responses this morning that you are not familiar with the specific scope and intent of the Justice Department investigation involving alleged wrongdoings on the part of agents of the FBI; is that right?

Mr. KELLEY. In the surreptitious entries and so forth, I am not conversant with those, that is right.

Mr. HARRINGTON. As a matter of your choice or as a matter of Department policy?

Mr. KELLEY. Department policy.

Mr. HARRINGTON. What you learned you learned on the eve of an indictment process that was about to be begun; is that right?

Mr. KELLEY. True.

Incidentally, I will see something in the paper, perhaps.

Mr. HARRINGTON. That strains my credulity about your whole response. It is hard for me to believe, frankly, that that sort of thing, which is common street talk, would not be the subject of your knowledge, both in terms of the agents and the scope of the activity.

I assume that in answering that, that was not something that would have been unknown to you.

Mr. KELLEY. I would have read in the paper about it. But nothing comes to me officially about what has gone on in the investigation.

Mr. HARRINGTON. Let me ask you something that really is the source of my own interest in being here this morning. I think it fits comfortably under the broad definition of the subcommittee's jurisdiction.

It involved the killing of Orlando Letelier, a case that I understand the FBI has been responsible for investigating in general. I think it goes to the broader question raised this morning concerning practices at the highest administrative level of the Department. In the latter part of last year and the early part of this year, there was a disclosure of information which was so inimicable to the interest of Letelier that one can only assume that it was not the result of an initiative taken by his attorneys, who admittedly had access to his personal papers. The information appeared, among other places, in Evans and Novak columns in the Washington Post and wherever else they are syndicated. It also appeared in Jack Anderson's column.

This information suggested that certain activities were carried out by Letelier, one of which was the reimbursement, to me, of travel expenses in conjunction with a trip to Mexico City.

I am curious in terms of that case being of current status. What has been the practice of the Department since this came to your attention? This information was alleged to have been contained in the briefcase of Letelier which was in the possession of the investigative branch of your agency.

What administrative practices were followed to determine what the agency role was in the disclosure of that information? What is your policy in general to this kind of thing?

Mr. KELLEY. I cannot answer you as to what investigation was conducted in that matter. I will have to answer you by a document so that I will be absolutely sure of my response.

Mr. HARRINGTON. I would appreciate that as it specifically applies to this case, but I would like, assuming you do not have that knowledge this morning, for you to comment in general on the general concern of information within the possession of the FBI affecting a pending criminal matter of some magnitude that finds its way into the press in a popularized form. I would like to know what your internal response or reaction to that is, in light of your comments this morning.

Mr. KELLEY. I think it is unfair and illegal. It is a leak which could well present some difficulties as far as prosecution is concerned, but also might falsely accuse and otherwise condemn someone without a proper hearing. It is not proper and it should be investigated.

If there is any indication that a leak stemmed from our FBI, immediate and drastic action will be taken. I can assure you of that.

Mr. HARRINGTON. Is anyone able to comment, of those who accompany you this morning, as to whether or not there has been an effort made on any basis at all to determine the source of that information and whether or not the agency was, in fact, the source of the columns I have referred to?

If not, why not?

Mr. KELLEY. We will respond to that in a document. I do not know myself. The people accompanying me tell me that we cannot respond.

Mr. HARRINGTON. I ask that you do in view of the fact that it attained a degree of widespread prominence. It is current. It is not dated to the era-oriented activity. Something might come within the purview of increased sensitivity on the part of the agency with regard to activities of this kind. I would like a specific response.

Mr. KELLEY. We will give it to you.

Mr. RYAN. So ordered.

Thank you, Mr. Harrington.

[See app. 6.]

Mr. Kelly, I have one other area that I would still like to pursue a little further.

I am concerned about the capacity of any structure, public or private, to police itself whether it is the American Medical Association or the National Education Association, or the FBI, or any other prestigious organization.

Those few deviants who, for some reason or other—I should add the Congress in there as well, particularly the Congress. [Laughter.]

It is a very difficult thing. Maybe the Congress is particularly ap-

propriate here. It is difficult to judge one's own peers, because in doing so, the least you get out of it is often the animosity of many of your peers when this situation is over with.

On the other hand, the FBI certainly, as much as the Congress, is totally dependent upon public opinion to remain what it appears to be. You have to perform that feat of almost lifting yourself by your own bootstraps in identifying internal problems. I am certainly unsatisfied with the past record on internal control and audit. I would like to ask you in the years that you have been Director now if you have ever disciplined an agent for violation of a specific Department rule which would be more than, let us say, misdemeanors as opposed to felonies within the Department itself?

I am not talking about failure to follow up a particular form or procedure, which causes bureaucratic problems, but I am talking about those kinds of things that you and I both consider to be serious as far as violations of the Department rules are concerned.

Mr. KELLEY. I have disciplined people within the Bureau for activities that were first considered by the Department as misdemeanor or felony. It has been decided by the Department that we would not prosecute them. But we have gone ahead and taken administrative action.

Mr. RYAN. What did the discipline consist of?

Mr. KELLEY. In one matter, it was a matter which in money alone was around a $7,000 demotion and a long-term reduction in pension. There was also a reduction in rank where he became just an agent after having been in the category of an official. Yes; on several occasions we have done that.

Mr. RYAN. I will not pursue that any further, but out of respect for personnel matters, this is still an open meeting and we will drop that there.

Have you ever pursued a violation of a civil law or a criminal law within your Department, that is, by an agent?

Mr. KELLEY. Have I ever pursued?

Mr. RYAN. Yes, pursued as opposed to any kind of final action, based upon accusations, either outside or inside the Department itself.

Mr. KELLEY. On all instances involving serious misconduct, we immediately placed the matter before the Department's Office of Professional Responsibility whose chief makes a determination as to whether or not this warrants criminal prosecution.

If you would call that "pursuing" it, then we do pursue it.

Mr. RYAN. How often over a period of the last 3 or 4 years? How often has that occurred?

Mr. KELLEY. I could not answer absolutely, but my estimate would be that it would be numerous times with the possibility of driving while drinking, for example, or a violation of the civil rights of the victim.

Without going just beyond the statement of it being "numerous" it would be several times.

Mr. RYAN. Three or four times?

Mr. KELLEY. More than that. I would say 20 or 30 times.

Mr. RYAN. In the last 4 years?

Mr. KELLEY. Easily; yes.

Mr. RYAN. Do you find that particular incidence is being reduced

because of the action that you have been taking with regard to response to that kind of information?

Mr. KELLEY. I have never entered into a discussion.

Mr. DeBruler?

Mr. DEBRULER. We do not have any records as yet in the Office of Professional Responsibility which will indicate anything to us in the way of a trend.

Mr. RYAN. Do you have any intention of setting up any kind of statistical analysis that would indicate to you what the progress is?

Mr. DEBRULER. Yes.

Mr. RYAN. When would you have an idea so if you pursue it at a later time we might get some specifics from you with regard to that?

Mr. DEBRULER. When?

Mr. RYAN. A year from now?

Mr. DEBRULER. I think it would be adopted by then; yes. We would have our recordkeeping system by then.

Mr. RYAN. This goes back to the question that Mr. Quayle asked about frequency of information from within the Department as opposed to outside the Department.

Are you satisfied, Mr. Kelley, with the number of times you are informed of these problems that you have faced which have come from inside the Department as opposed to outside the Department?

Mr. Quayle referred to 4 percent; is that right?

Mr. QUAYLE. Yes, from the GAO report.

Mr. KELLEY. I am being increasingly satisfied inasmuch as in the very recent past—and I speak of about a 6-month period—there have been more reported from within inside than ever before.

Mr. RYAN. So, you feel that the attitude of the Department itself and the sense of the personnel is such—is it fair for me to draw the conclusion that because of the example and because of the activity and the actions you have taken they feel more confident they can approach you more directly and honestly with their own feelings than they ever could before; is that right?

Mr. KELLEY. I believe so; yes.

Mr. RYAN. I would very much like to see that percentage of internal problems as opposed to external problems. If you are going to have problems, I would rather have my own people tell me first than have it come cold turkey from the outside.

Are there questions by other members?

Mr. Weiss?

Mr. WEISS. Mr. Director, it is my understanding that, pursuant to the Freedom of Information Act adopted by Congress and some court directives, there has been information in the files—in some instances excised—but information that has been made available to appropriate individuals.

I have heard recently that the FBI was in the process of disposing of a vast number of the files which it had in its possession that were the fruits of surveillance of various kinds over the years.

The question is this. Is that, in fact, an accurate rumor or report? Is the FBI in the process of disposing of all those files? And, has that been done even though there may be pending applications by individuals or the families of individuals in relation to information which had been gathered by the FBI and kept in the files of the FBI?

Mr. KELLEY. There is not pending any ponderous destruction of files. There have been matters of this type considered by Congress, by the Department of Justice, and possibly will come out in the future.

But there is nothing there now. We have not had massive destruction.

Mr. WEISS. Okay.

When the GAO submitted its report to the House Committee on the Judiciary in February of 1976, one of their complaints was their incapacity to verify information that had been provided by the FBI to them on cases. This was because of the FBI's unwillingness—in all fairness, I can say the unwillingness extended to the then-Attorney General, as well—to make any of the raw files, original files, available for verification on an on-the-spot basis, even if, as the GAO offered, the names were deleted so that there would be no question about getting their hands on that kind of information.

GAO refers to the statutory obligation that they have and the fact that they have the cooperation of all the other agencies of Government. They point out how difficult, if not impossible, it is for them to really be able to assure Congress that they are forwarding accurate information when they do not have the capacity to verify.

I wonder if you have had occasion to read that portion of the report and if there was any analysis and if there had been any recommendations of new policies derived. Congress could then have verifiable information as to what goes on within the FBI.

Mr. KELLEY. We have a gentleman here who can answer that better than I. I can tell you it is my understanding that there is very little difference between us. Let me just give you as an introduction the fact that this has been something that came about in the last couple of years and was a very traumatic experience. There had been nothing of this type before. We had numerous conferences. I am well acquainted and friendly with Mr. Staats.

As a matter of fact, Mr. Staats and I graduated from the same college the same year. We have a good working relationship. But there was a period when, yes, it was like pulling teeth perhaps. Now it is in a situation where I think there is a complete understanding.

Mr. WEISS. Give us your name for the record, if you will.

Mr. CLYNICK. My name is John Clynick. I am in the Budget Section of the FBI. Since GAO issued its domestic security report, Mr. Kelley and Mr. Staats have arrived at a mutually agreeable set of guidelines which establishes a method of verifying, through copies of file material, appropriately excised, in order to support the findings and observations.

This is not contrary to their standards of audit. Mr. Lowe has testified on two occasions that he has been satisfied.

Mr. WEISS. So, the situation as it existed as of February 1976 has now been remedied to the satisfaction of the GAO. There is, in fact, application and opportunity for the GAO to verify information which is submitted by the FBI; is that right?

Mr. CLYNICK. Yes.

Mr. WEISS. Mr. Director, let me ask you a question as a followup to a response that you gave earlier on the domestic intelligence area that the FBI used to perform. You say they are no longer performing this.

At the time the GAO report was given to the House Committee on

the Judiciary, the substance of it was the FBI domestic intelligence operations. The GAO expressed its concerns thoughout that report about the manner and method and statutory authorization background and so on for those investigations and operations.

When was the formal cutoff date when the FBI no longer engaged in domestic intelligence operations? Was there a transferring of cases which would then open? How did that termination take place? Please, just expand on that a little bit, if you will.

Mr. KELLEY. When I came aboard in July 1973, I immediately instituted a plan of reduction of the domestic security cases. At that time there were about 22,000.

At the time of Mr. Levi's entrance into the Department, he was interested in this. He started a project of developing guidelines for the governing of the investigations of domestic security.

By the time they were instituted, which was in the spring of 1976, we had brought them down to about 7,000. We then started again with additional impetus and now have them down to, I believe, about 200.

We are working under the guidelines which clearly set out what we can do in these matters. We are religiously following those rules, regulations, guidelines. We have even said—and I support—that a charter would be all right. We are willing to do whatever is desired in the framework of domestic security to meet our commitments.

Mr. WEISS. Are you saying, then, that there are still 200 domestic intelligence cases which were alive as of a year ago or so which are still being continued? Is that what you are saying?

Mr. KELLEY. That is true.

Mr. WEISS. I remember seeing at least one article which indicated that although the number of cases has been reduced from the thousands that you mentioned to the hundreds that you mentioned, that to some extent that was achieved by combining individual numbers of people who may have been listed in, let us say, the 20,000 figure.

The 200 cases, in fact, may affect *x* number of thousands of individuals. Is that an accurate report? Would you know how many individuals are, in fact, affected by those 200 live domestic intelligence cases?

Mr. KELLEY. I would say that of that number—and I could give you this exact number if I had it in hand—probably will evolve to about 25 organizations. Am I right about that, Mr. DeBruler?

Excuse me, I am informed that it is 22 organizations and the remainder are individuals. I do remember this statement which appeared in the paper. The statement is not correct. This is not a subterfuge. It was not any effort devised to evade the guidelines. They are all still within the guidelines. They are being reviewed as we go along. We have a committee over in the Department which is in constant contact with them. I do not think there is any question about it. It is in conformance with the guidelines.

Mr. WEISS. Are those guidelines, incidentally, a matter of public record?

Mr. KELLEY. Yes. I think they have been published, yes.

Mr. WEISS. Again, do they, in fact, involve direct criminal acts? What is the basic premise for undertaking or opening one of those investigations? Is there criminality involved in them?

Mr. MINTZ. The principle involved is information that activities may be, or are in fact, currently underway which will involve vio-

lence, the potential overthrow of the Government, and a violation of Federal law. Those are the three principles involved in deciding to open one of those cases. Those elements must be involved.

Mr. WEISS. When you make that determination, is there a board or reviewing mechanism which passes judgment? Who makes that determination?

Mr. MINTZ. Initially it is made by the supervisory people in the FBI. That decision is reviewed by a committee in the Department of Justice.

Mr. WEISS. Thank you.

Thank you, Mr. Chairman.

Mr. RYAN. I will allow the staff director, Mr. Ingram, and Mr. Barnes, who is a member of the staff, to ask a few questions.

We will do this for the purpose of developing some points for the record. Then we will finish the hearing for this morning.

Mr. BARNES. Mr. Kelley, in your statement you noted that 199 allegations of internal wrongdoing have been received during the first 6 months of the year.

How many of these and at what point do they come to your immediate personal attention?

Mr. KELLEY. I get initially, immediately, all allegations of serious misconduct. If there is something wherein there is a clerical error committed by a clerical employee, then it might well be that I will not even see it.

But anything of serious misconduct, I get it immediately and make the assignment to the inspection group, or possibly to have it handled locally first.

In that procedure there is a clear path of conduct that is to be followed. In the final presentation, I make the decision as to the activity, as to the discipline that might be taken.

I am assisted in the case of all those in the category of an official, that being from an assistant agent in charge on through to the top man who is the Associate Director. I am assisted in that by a group of assistant directors. They review it. With their experience, it is then presented to me.

I sometimes follow it. I sometimes do not follow their recommendation.

Mr. BARNES. In addition to making the recommendations on sanctions, do you also review the adequacy of the investigation itself?

Mr. KELLEY. Yes; I do.

Mr. BARNES. Have you found you are seeing more or less of these cases as the recent months have gone on?

Mr. KELLEY. I am seeing more.

Mr. BARNES. Do you think that is a function of increased reporting and better attitude that these things should be reported to you? Or, is it simply a case that perhaps more irregularities are going on?

Mr. KELLEY. I think personally that it is an expression of confidence in the system and that we are getting more of them reported. I am inclined to believe that actually fewer of these types of activities are being committed. We just did not get them reported.

But I think there is a confidence in the system that has been generated in the last several months.

Mr. BARNES. When Attorney General Bell was before the subcommittee last month, he said he would advise an agent who questioned

whether an assignment was proper or legal to get the order in writing.

Do you find in your reports from the field and in the divisions here that agents are increasingly either asking for orders in writing or perhaps calling Mr. Mintz' office to get a ruling on whether an order is proper or not?

Mr. KELLEY. There is a greater tendency to get some sort of a delineation. As to whether or not it is a letter, that is not always the way it is done. But there is more care exercised.

Mr. BARNES. Perhaps Mr. Mintz can answer this question.

On the inquiries that you get, do you find a number of them are in gray areas where the statute or case law does not really give you a clearcut answer as to whether activity is proper or not? If so, what kinds of recommendations do you make in those areas?

Mr. MINTZ. A number of them would be, of course, in gray areas, because law is not entirely clear always. If we have a problem with it, if there has been no case law that gives us guidance, then we talk with the Department of Justice, Office of Legal Counsel, or the Criminal Division for their guidance.

Mr. BARNES. When an agent is told that something that he is asked to do is in this kind of a gray area, is he allowed to refuse the order, or must he comply with the order unless it is flat out illegal or improper?

Mr. MINTZ. I would say that we would be guided in large measure in a case that serious by the advice we get from the Department of Justice.

Mr. BARNES. So you would tell the agent yes or no rather than leaving him in a gray area; is that right?

Mr. MINTZ. Oh, yes.

Mr. BARNES. The GAO, in its report to us, mentioned that you were considering, or have, in fact, set up some ad hoc review boards to assist in advising cases involving FBI officials. Have any of these review boards actually functioned as yet, or is it still something that is in the planning stage?

Mr. KELLEY. We have had five of them.

Mr. BARNES. Are the appointees to those all FBI personnel, or do you include Justice Department people on those kinds of review boards?

Mr. KELLEY. They are all FBI officials.

Mr. BARNES. Do you find that is a problem when you get toward the top of your pyramid, where it is relatively a small group of officials, of having one group of officials review another official? Is there a difficulty in getting a balanced judgment?

Mr. KELLEY. No, sir.

Mr. BARNES. Is there a reason why you decide to go to this kind of an ad hoc review board instead of having the OPR fulfill that sort of function since presumably their speciality is in what rules are proper?

Mr. KELLEY. We felt it was advisable to divorce the assessment penalties from the investigative group.

Mr. DeBruler does not serve on this group. He does not serve on the ad hoc group.

Mr. BARNES. Does the ad hoc group solely recommend what sanction should be employed, or do they also review the adequacy of the investigation or do any investigating of their own?

Mr. KELLEY. They certainly review the entire investigation. They can request, and on occasion have, instructed that more investigation be conducted. They even have the capacity of bringing the official, who is being charged, in for interview.

Mr. BARNES. I have one question on the investigative techniques which OPR uses.

Does it use all investigative techniques that are available to the FBI in handling outside cases, for example, taking sworn affidavits? Or using lie detector tests or that sort of thing? What is the range of techniques?

Mr. DEBRULER. Yes; we would. We would use the full range of investigative techniques.

Mr. BARNES. Does an agent have the option of, for example, refusing to take a lie detector test?

Mr. DEBRULER. Yes.

Mr. BARNES. Is that a viable option or would it prejudice things?

Mr. DEBRULER. It is a viable option.

Mr. BARNES. What about refusing to submit a written affidavit? Is that something an agent can do?

Mr. DEBRULER. Yes; he could refuse to give a signed, sworn statement. But in an administrative inquiry, he is required by regulation to answer the question. Of course, he would have his fifth amendment rights. He could avail himself of the fifth amendment and he would be entitled to do that. He could answer in a memorandum or in a fashion that he so desires. But he would answer.

Mr. BARNES. Would his refusal to answer or his taking of the fifth amendment be considered against him? Would he have the same kind of right that a person in a criminal trial would have?

Mr. DEBRULER. He would have that same right that a person in a criminal trial would have.

Mr. BARNES. Mr. Kelley, when Mr. Schlesinger was appointed the head of the CIA he directed all CIA agents to come forward and personally contact him about any knowledge they had about illegal or improper activties within the Agency.

Did you do anything comparable to that when you became FBI head?

Mr. KELLEY. I did not do it immediately, but I did do it subsequently. I reiterated it on another occasion.

Mr. BARNES. Thank you, Mr. Chairman.

Mr. INGRAM. Mr. Kelley, is the Office of Professional Responsibility in the unit which reports intelligence and improprieties to the Intelligence Oversight Board established by President Ford? Are both units involved in that?

Mr. KELLEY. The Office of Professional Responsibility is responsible for collecting the data and making the report.

Mr. INGRAM. Under the Executive order, it is the Office of General Counsel of each of the components or agencies which is charged with receiving such allegations as well. Is that currently being observed?

Mr. DEBRULER. I, as the Inspection Division head, and John Mintz as Legal Counsel, and Mr. Kelley, as Director, all three of us in the FBI.

Mr. INGRAM. Have any reports been filed with the Intelligence Oversight Board?

Mr. DeBruler. Yes, we file them quarterly.

Mr. Ingram. You file a quarterly report?

Mr. DeBruler. Yes.

Mr. Ingram. Have there been reports or allegations of improprieties filed with the Intelligence Oversight Board?

Mr. DeBruler. Questions are taken up on occasion with the Department for discussion with the Intelligence Oversight Board.

Mr. Ingram. Could you tell us, sir, how you are defining "impropriety" in terms of the definition of the Executive order? It is not defined in the Executive order and I am curious to know your definition as to what impropriety is.

Mr. DeBruler. Those things that would be criminal in nature and that type of thing.

Mr. Ingram. Would it go beyond the criminal violation? In other words, would an impropriety strictly be a violation of domestic law or would it go beyond that in terms of an improper use of intelligence functions?

In other words, the Executive order does not define what impropriety is. I am curious as to how the Bureau is defining it.

Mr. Mintz, could you give us a definition as to what "impropriety" is under the Executive order?

Mr. Mintz. The order talks about things that are questionable. It has been my policy to engage problems that raise questions of possible illegality. Some of the areas appear to be related to the statutes, and some of the areas appear where there are no statutory provisions. So, we make reports involving areas where the activities may be questionable, even though there is no specific statutory or case law prohibition.

Mr. Ingram. So it is a broader definition than simply a legal violation?

Mr. Mintz. Yes.

Mr. Ingram. If, for example, a legal attaché in a foreign embassy were involved in an intelligence-gathering operation against the foreign national, which would not be a violation of American law, would that be the type of thing that would fall within your definition of impropriety that might be reported?

Mr. Mintz. That would be the type of thing that would be considered, yes.

Mr. Ingram. Mr. Mintz, you are an Assistant Director of the FBI, and General Counsel; I am quite concerned that the Office of General Counsel is keyed into and is aware of the activities and operations of the agency. The problem in the past is the General Counsel's Office has often been deliberately or otherwise locked out of the decisionmaking chain.

Of course, this was, I believe, to a large extent, the practice within the Bureau prior to about 1971. Is that correct?

Mr. Mintz. That is correct.

Mr. Ingram. As an Assistant Director you sit on the Bureau's Executive Conference. I presume that you would have been in a position to know what information the Bureau was not telling the Senate Intelligence Committee during its investigation of FBI improprieties.

Could you tell us, sir, when you first learned that the 1966 prohibition against break-ins had not been observed and that many break-ins had occurred in 1972 and 1973?

Mr. MINTZ. I believe it was during the time of our inquiry by the Church committee.

Mr. INGRAM. Could you give us an approximate date as to when you first personally learned of that activity?

Mr. MINTZ. No; but I think we can verify it by looking at the documents. I learned of it from the submission to the committee. If you would find the documents submitted you would learn.

You must understand how that reporting was done. There was a committee established in the Intelligence Division of the FBI to find the answers to questions of the Church committee. We had liaison with the committee and worked only in a liaison capacity. The questions were received by the committee and farmed out to the appropriate source for the answers. The answers were prepared and we delivered them back to the committee.

It was in that chain where I would have learned of it.

Mr. INGRAM. If I understand you correctly, however, your first knowledge that break-ins had occurred after 1966 was at the time that the matter was reported to the Senate Intelligence Committee; is that right?

Mr. MINTZ. That is my recollection.

There is one other possibility. That is, when the General Accounting Office was conducting an inquiry concerning the method of conducting domestic security cases. They found some surreptitious matters involved in some cases they looked at. That was about August or September of 1975, if I recall correctly. I may have been aware of that at that time. That may have predated the response to the Church committee.

One of those two was the one.

Mr. INGRAM. I believe the GAO later complained, not only to this subcommittee, but also to the House Judiciary subcommittee chairman, Mr. Edwards, that during their investigation of the domestic intelligence of the FBI, they had not been apprised of or shown documents which would have laid out a pattern of break-ins after 1966.

So, I assume that this had come out after the close of that investigation.

Mr. MINTZ. You must make a distinction. The General Accounting Office, as I recall in their report, indicated specifically that they did uncover them in particular cases. They might not have said they discovered a pattern of activity, but what they found were indications in particular cases. They conducted a review of particular investigations. They did not conduct a general survey of all investigations.

In those particular cases which they did review they, in fact, found some indications of surreptitious entry.

Mr. INGRAM. Had you participated in the decision by the Bureau as to when the Senate committee would be informed of the information concerning break-ins?

Mr. MINTZ. No, sir.

Mr. INGRAM. You were only apprised after the reporting had taken place to the Senate Intelligence Committee; is that correct?

Mr. MINTZ. The reporting, of course, went forward through our office. We learned of it as it was reported through our office.

Mr. INGRAM. You only learned that after the fact?

Mr. MINTZ. Yes.

Mr. INGRAM. I have one or two final questions.

Mr. Kelley, Mr. McCloskey earlier mentioned that at the time Mr. Callahan was asked to resign there was no public explanation for that firing. Generally when a high Bureau official is fired in such a manner, should there not be some public explanation or reassurances that matters the official had been involved in were in no way tainted by whatever improper actions he or she had been involved in?

Mr. KELLEY. I do not know of any precedent. But in this particular case I was guided by the Attorney General as to what could be said. There could be nothing said because it was a pending investigation.

Mr. INGRAM. I see.

Thank you, Mr. Chairman.

Mr. RYAN. Mr. Weiss?

Mr. WEISS. I have one question as a followup.

When Mr. Hoover issued his directive in 1966, he did it in two forms. He appended a note to a memorandum saying that he did not want any more of this stuff indicating illegal surveillances, surreptitious entries, and so on.

Shortly thereafter he issued a memorandum of his own, again reaffirming his position. Mr. Mintz, subsequent to that, was there anything done by your office, by any office in the FBI, to make sure that the Director's mandate in this thing was being honored?

Mr. MINTZ. Mr. Hoover's memorandum, the first one you described, was dated in 1966. His subsequent memorandum was dated about January 1967. The office to which I am attached was not created until 1971.

Mr. WEISS. All right, but regardless of your own role in it, was there anything done in the FBI at that point to follow through on a directive given in very clear and strong terms by the Director of the FBI?

I ask the question really, Mr. Kelley, because the assurance that you were giving Mr. Ryan becomes sort of questionable if, in fact, directives given by the former Director were so clearly neglected and ignored.

Mr. MINTZ. I think what you are asking is the essence of the problem before the Department of Justice now as to what exactly occurred during the interim of 1966 and whenever the last activity charged occurred.

I do not know the answer to that question and I am not sure that Mr. Kelley does. As far as I am aware, there is no record of activity. We are inquiring into that now.

Mr. WEISS. Director Kelley said in his statement of April 14 that a whole era is being indicted. In some way, this was permissible activity. The Director of the FBI made it very clear it was unpermissible activity.

I do not understand the rationale for saying, "Well, it is OK for this to have been done because everybody was doing it."

Mr. MINTZ. Mr. Weiss, there may be an answer to the question, but it will have to come in with regard to that investigation. I do not know the answer now.

Mr. WEISS. Well, the investigation will go into the operations of the FBI itself and whether, in fact, it is capable of policing itself.

Mr. KOSTMAYER. But you were in the Office of Legal Counsel as

early as 1965; is that correct? You came to the office in Washington in 1971?

Mr. MINTZ. Yes; in 1971. Let me correct that. There was in the Training Division of the FBI an instruction unit that dealt in legal instruction. At that time I was in that unit at Bureau headquarters. It had nothing to do with policy. It only had to do with legal research and training.

Mr. KOSTMAYER. So it was really not the office through which this information would come?

Mr. MINTZ. That is correct. It would not come.

Mr. RYAN. Mr. Kelley, on behalf of the subcommittee, I want to thank you very much for being here and giving this committee the courtesy of your presence and that of your staff.

We appreciate your appearance. We appreciate your assistance in trying to help us work our way through this. We wish you and the Department well.

Thank you very much.

Mr. KELLEY. Thank you.

Mr. RYAN. The subcommittee will now adjourn.

[Whereupon, at 11:55 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—TRANSCRIPT OF MAY 12, 1977, MEETING OF SUBCOMMITTEE TO DISCUSS PLANS FOR JUSTICE DEPARTMENT HEARINGS

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 2247, Rayburn House Office Building, Hon. Richardson Preyer (chairman of the subcommittee) presiding.

Present: Representatives Kostmayer, Weiss, McCloskey, Quayle, and Erlenborn.

Also present: Raymond S. Calamaro, Deputy Assistant Attorney General, Office of Legislative Affairs, Department of Justice; Lawrence M. Baskir, consultant; Timothy Ingram, Staff Director; Richard L. Barnes, professional staff member; and Catherine Sands, minority professional staff.

Mr. PREYER. The subcommittee will come to order.

We appreciate your being here today. I know everybody has two or three other committees where they should be, but I did want to make a progress report to you and get your thinking on how we ought to proceed.

The recent *Kearney-Kelley* case has raised some fundamental problems. Congressman Weiss has pointed these out to us, and many other members of the subcommittee have been interested in them.

It raises questions about Mr. Kelley's role. His reply to Mr. Weiss, I think, in effect admits, perhaps, a mistake in judgment. He has pursued that role and has been rather notably quiet recently.

One question is what our subcommittee should do, if anything, concerning Mr. Kelley's activities. But it would appear that the Attorney General might have a more key role and be of more interest to this committee.

On the Kearney matter, he has said that the rule of law should prevail. He has said the right things. He did express the feeling, as I read his public statements, that there are gray areas in the whole question of what is and what is not permissible in domestic security cases.

He has raised the question of whether or not there is a need for a charter of some kind defining what can and cannot be done in domestic cases.

We have written the Attorney General raising some of the questions about that. We will ask the staff to comment, shortly, on the reply.

[The text of the letter follows:]

APRIL 29, 1977.

Hon. GRIFFIN B. BELL,
U.S. Attorney General, Department of Justice,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: Pursuant to its general oversight responsibility for the Department of Justice, this subcommittee is concerned with matters relating to Department examination of alleged illegal acts by various government investigative and intelligence agencies.

We invite you to testify on this subject at a subcommittee hearing tentatively scheduled for 10:00 a.m. on Friday, May 6, If another date shortly after that would be more convenient for you, I am sure we can arrange a mutually satisfactory time.

The subcommittee will wish to explore with you such points as:

When violations of law or executive branch policy are discovered or charged in situations involving the rights of individuals, what is the chain of responsibility within the Department of Justice for deciding whether and when to open and close investigations and/or proceed with indictments? Please attach all policy statements, regulations and guidelines used by the Department in this regard.

The process used in examining allegations that Department of Justice personnel may have known of or authorized violations of law or Departmental policy or regulations.

The process for dealing with agencies in connection with matters about which they are being investigated.

Department policy concerning what information on investigative matters, opinion and all other department operations is made available to Congress, and the conditions under which it is made available.

As part of your prepared testimony would you please also provide to the subcommittee:

A listing of all such cases of alleged illegal acts by investigative agencies as referred to, found by, or in any other way called to the attention of the Department within the last three years; include in this listing the current status of each such case and the division by which it is or was handled.

To facilitate preparation for this hearing, I would appreciate your making officials of the Department available to the subcommittee staff for such preliminary conferences as they may request through your office.

In accordance with Committee rules, please arrange to have 50 advance copies of your prepared statement delivered to the subcommittee office in Room B-349C Rayburn House Office Building at least 24 hours in advance of the time set for the hearing.

We look forward to discussing these matters with you.

Sincerely,

RICHARDSON PREYER, *Chairman.*

Mr. PREYER. Therefore, I think one thing we want to consider is how we should follow up on these questions.

One of the problems that I think the committee would be concerned with is that we don't want to absorb so much staff time in this kind of investigation that we lose sight of our other goals which we have set for ourselves and are not able to follow those up.

In that respect, I have taken one action with which I hope the subcommittee will agree. We have employed, for a 30 or 60 day period—I'm not sure what the final arrangement was—an expert in this area, Larry Baskir, who is seated here in the front row.

Larry was the head of Senator Ervin's Constitutional Rights Subcommittee for some eight years. He then went to the Clemency Board under Charlie Goodell, and has recently written a book on that.

He has agreed to serve us for a short period of time to help us focus on what areas it might be productive for this subcommittee to move in—what are the right questions to ask.

Another thing I think we want to keep in mind is our relationship with the Judiciary Subcommittee of Don Edwards which is also active in the same area. Where possible, I think we want to avoid needless duplication.

We have been in touch with Mr. Edwards' subcommittee. Perhaps the staff can give us some feelings on that. I think there is a role for both of us.

Apparently, Mr. Edwards' subcommittee is interested in the question of whether a legislative charter should be drawn up.

It has been my feeling that, on hearings, we ought to proceed by calling the Attorney General first, rather than Mr. Kelley. With Mr. Kelley, there is the problem of publicity compromising an ongoing investigation, and also the problem that this investigation is being conducted by the Civil Rights Division of the Justice Department, as I understand it, not by the FBI. Therefore, he is not the most knowledgeable man on the subject.

Therefore, the question we have been working on is to call the Attorney General first. I guess what we really want to discuss now is what areas we want to explore with him.

I think there are two broad areas of interest here. First we should consider what the procedure is for in-house handling of criminal misconduct by the investigative agencies, themselves. That doesn't seem to get into the area of the Edwards subcommittee legislation side at all.

Another area, I think, is: What information is it proper for Congress to have access to? This involves the whole question of who really decides what classified information is seen. Does the Executive Department make that decision, does Congress make it, or how is it resolved? This is a question that has been very much up in the air.

I should perhaps call on the staff at this time, unless any Member would like to comment first.

I would ask Mr. Tim Ingram to give us a summary of what this memorandum

is and what the staff's feeling is as to where we ought to go and how we can get there.

Mr. INGRAM. There are two principal areas that we have tried to sketch out which we thought would be worth pursuing. We struggled initially, Mr. Chairman, with the problems that we felt would be raised directly by the subcommittee's consideration of the narrow question initially raised by several Members: that of an examination of Mr. Kelley's comments on the Kearney indictment.

Our thought was that we probably would not get very far with a narrow consideration of that point alone, but that it did raise some other significant questions that were worth pursuing. They might eventually reflect on the Department's investigation of the FBI break-in cases, in particular. We wish to, however, reserve judgment on that until we have a chance to do some initial groundwork as to the facts involved in that particular investigation and see whether some initial points are not, perhaps in the long run, more important to the subcommittee's interests.

As you have outlined, those are: One, the Department's present policies regarding the providing of information to Congress. There has long been, in fact, no coherent policy by the Department as to when it would provide access to raw investigative files at the Drug Enforcement Administration, at the FBI, the Immigration Department, or within the Department itself.

The distinction is between comment on particular aspects of either a closed investigation or an open case.

The second area that we have outlined, and that we thought would be useful to look at, is the framework within which the Department would approach, or does approach allegations of abuses or wrongdoing by Department employees.

There is now an Office of Professional Responsibility within the Department which serves as a type of Inspector General for allegations involving Justice Department employees. Our thought was to examine their operations.

We received a phone call yesterday from Mr. Ray Calamaro who works in the Office of Legislative Affairs in the Department——

Mr. PREYER. Mr. Calamaro, incidentally, is here in case there are any questions of him.

Mr. INGRAM. I notice that Dick Taylor with the Legislative Office of the Federal Bureau of Investigation is also here. Dick, I am not putting you on the spot, but I would point out that you are in the back of the room there, as well.

Mr. Calamaro advised me that he had spoken to the Attorney General. The Attorney General had indicated that he is trying to keep his personal appearances at somewhat of a minimum these days, and that his initial reaction was that there might be better witnesses for us within the Department to address some of the specific questions raised in the letter sent to the Department.

Mr. Calamaro indicated that their current thinking is that there may be two to three witnesses within the Department who would appear on behalf of the Attorney General before the subcommittee.

These would include Mr. Civiletti, who is head of the Criminal Division of the Department. He is currently reviewing several matters listed in our memorandum which are under investigation now.

It would also include Mr. Drew Days who is head of the Civil Rights Division, and under whom the FBI break-in investigation has been ongoing and Mr. Michael Shaheen who is head of the Office of Professional Responsibility within the Department.

Pat Wald, who is head of the Legislative Office, might or might not also appear.

Again, according to Mr. Calamaro, he indicated that the Department wished a date set for hearing possibly three, maybe four weeks from now to allow them adequate time to prepare for that testimony.

Mr. Calamaro, I think that pretty well sums up your communication of yesterday.

Mr. PREYER. Are there any members for the subcommittee who have any thoughts on this report?

Mr. McCloskey?

Mr. MCCLOSKEY. Mr. Chairman, I would like to ramble a little bit about this, going back to the Huston Plan which was before this committee two years ago.

The Huston Plan, adopted at the White House in the presence of ranking officers of the Joint Chiefs of Staff and the Defense Department, clearly recognized a custom and a history of breaking and entering, and of intercepts of telephone traffic. It is no longer deniable that top officials in the Government, not just the Justice Department, but throughout the intelligence agencies, have for

years, since World War II and the confrontation with the Communist World, been involved in illegal conduct. Breaking and entering, mail opening and intercepts of telephone and cable traffic were accepted as proper methods of gathering intelligence.

The Huston Plan transferred methods of intelligence gathering against foreign nations to gathering intelligence against Americans who opposed the Vietnam War.

It seems clear this investigation is going to bring to light that top officials in the FBI, the CIA, the White House and the Justice Department knew these illegal acts were being performed and countenanced them. Your own investigation of the assassinations indicates the desire of the CIA to prevent disclosure of sources and methods of intelligence-gathering.

What we are investigating—breaking and entering, and telephone and cable intercepts—were intelligence-gathering mechanisms our top people in Government recognized, for given purposes, as lawful.

I, for one, am reluctant to impose retroactively a standard of morality which clearly was not a part of our Government operation for years. I hate to see anybody go to jail now for that.

The problem with this investigation of Lester LaPrade is not that Mr. LaPrade may have countenanced illegal breaking and entering as part of something that the Huston Plan discloses was known to the White House. It is that he denied knowledge of the Plan to an Assistant Attorney General.

Therefore, you have an obstruction of justice question when people followed a policy that existed for years and you have a perjury question which was ultimately the downfall of the Watergate people. The legal question was not what they had done, but that they had lied about it to Federal Grand Juries.

The first thing that comes to mind is that we may have to violate our own rules or principles of open government and hold these meetings in executive session because any accurate testimony is probably going to disclose wrong-doing.

That faces us with the question: Do we hold an executive session of the Government Information Subcommittee? I think we have to. We certainly have to respect requests by any of these witnesses from the Justice Department who feel that, if they are to give us honest, straightforward, and thorough testimony, it's going to involve wrong-doing by one or more individuals.

It is the consciousness and acceptance that there has been wrong-doing, I wanted to point out. We may find that Aassistant Attorneys General, certainly top-ranking Generals, deliberately concealed the knowledge of these procedures.

Once we get into this, we are into a Pandora's Box. If we are going to investigate, we are going to have to do it thoroughly.

The only other think I would add is that I would think the former Deputy Attorney General, Harold Tyler, and Stan Pottinger, the former head of the Civil Rights Division, ought to be called, along with the present occupants of those offices as witnesses if we are to go into it deeply.

It would be helpful if we can work with Don Edwards' subcommittee so that we don't intrude on the jurisdiction. This could be a much broader investigation and will not be a simple matter of a one-day hearing.

Mr. PREYER. Mr. Weiss?

Mr. WEISS. Mr. Chairman, first I want to express my appreciation to you for the very deliberative manner in which you are pursuing this matter. I, of course, share your concerns and agree with Mr. McCloskey's observations about the complexity and profoundness of the inquiry that we are about to undertake.

I would hope that whatever sessions we have that are executive in nature would be only a matter of absolute last resort and absolute necessity. And in those instances where, in fact, there is no request for an executive session or where there is no question that we are not going after individual allegations of wrong-doing, but just general policy pursuits, then those would be held in open session.

I would hope that we would insist on the Attorney General, himself, appearing before us. I don't think that this is simply a matter of the mechanics of the operation of the Office of the Attorney General or of the FBI.

I think what we are really inquiring into is the question of adherence to the Constitution of the United States by the Department of Justice and its sub-agencies and sub-heads. I would not, myself, be satisfied that responses from the deputies or Assistant Attorneys General would or could substitute for the opinion of the Attorney General, himself.

Mr. PREYER. Mr. Quayle?

Mr. QUAYLE. I would just share a thought or two in reference to executive session.

I guess that I am somewhat opposed to going into executive session unless it is a last resort, or maybe even beyond the last resort.

I feel that if we are going to get into an area where we have to have an executive session in order to uncover wrong-doing, which obviously has occurred in the past, maybe even as a hobby for some at times—I don't think that that would be our function.

I would hope that we would be able to have a review of the FBI's present policies in an open hearing.

I guess I have such a reluctance for secret congressional investigations which I have witnessed as a layman. Now that I am a Member of Congress it is going to take me a while to be converted to having this type of inquiry, if it is absolutely necessary.

Sometimes when there are executive sessions we read about what happened in the newspapers the next day.

I, for one, would be very reluctant to go into executive session. I would think that, perhaps, we could work out, with the staff and with whoever it may be—the Attorney General, Kelley, or some of these other people to set up specific guidelines. We would not get into forcing them into the position of taking the Fifth Amendment, or of having breached any confidence from an ongoing investigation that may impede our openness in trying to develop facts so that we can find out what is going on, where we can assist, and what can be done about this.

We don't want to put anybody in that delicate situation.

Mr. INGRAM. Our attempt in the memorandum was to try to frame the issues to, in effect, open a dialogue with the Justice Department on their procedures in terms of their policies for providing information to Congress and their procedures for investigating abuses, such as the ones which have appeared in the press and which have been under investigation by the Department over the last few years.

Mr. MCCLOSKEY. Would the gentleman yield?

Mr. INGRAM. Surely.

Mr. MCCLOSKEY. Let me see if I can focus that problem. We asked in the Chairman's letter to the Attorney General of April 29th, for a listing of all cases of alleged illegal acts by investigative agencies which were referred to, found by, or were in any other way called to the attention of the Department within the last three years.

Any questions about those cases of alleged wrong-doing held in public session clearly invade the privacy of the individual against whom allegations are made.

If we get what we have asked them to produce, we have an obligation to retain in confidence any allegations that may be prosecuted or particularly those that may not be prosecuted because we then blacken the name of an individual listed here, perhaps unfairly.

I am as reluctant as the gentleman from Indiana to have this committee hold executive session, but I don't see any way to get into this without listing a case by the name of the individual against whom the allegation of wrong-doing is made.

Have we received any response to this letter of April 29th?

Mr. INGRAM. No official response, as yet.

Again, though, there are distinctions. Some cases have been closed, such as the CIA mail opening investigation where there is a public statement by the Department as to their reasons for declining prosecution in that case.

As I recall, there are one or two other instances where there have been made public the findings and recommendations of the Department not to prosecute, as in the case of the dissemination of material on Doctor King.

However, Mr. McCloskey is quite right in that some of that information would likely have to be received—again at the committee's option—in executive session.

Mr. PREYER. Thank you. Mr. Kostmayer?

Mr. KOSTMAYER. Mr. Chairman, I just wanted to emphasize one point. Before I do, just let me make a comment about the matter of our committee going into executive session.

I agree with Mr. McCloskey that we should be very careful before we go into executive session, but I think he is right that there is a question here of doing some harm or doing some injury to the reputations of people. I think we have to be very careful about that.

I don't think that Congress is always as sensitive as it ought to be about

people's careers and about their reputations, and about their lives. I think we ought to be careful and sensitive to that.

When dealing with accusations and allegations of wrong-doing, we ought to be concerned with these factors.

I wanted to emphasize that. Apparently the Attorney General indicated he wanted to minimize his personal appearances, and I think it is imperative that he appear before the subcommittee.

I am a little distressed. I don't know whether that was his wording or the wording of his staff, but I don't regard an appearance by the Attorney General before this committee as some sort of a personal appearance such as a speaking obligation.

I think it is an obligation he has to the Congress. I think he ought to come before our committee. And I hope that our committee would be unanimous in insisting that, at one point sooner or later, he does appear before this subcommittee.

Mr. PREYER. Mr. Erlenborn?

Mr. ERLENBORN. I have nothing to add, Mr. Chairman.

Mr. PREYER. Mr. Baskir, have you been on board long enough to have any thoughts or comments that you want to make?

Mr. BASKIR. Mr. Chairman, I think that there may very well be a middle ground or at least a progression of the subcommittee's inquiry which might well be held publicly which would give the subcommittee a fairly good reading of the investigative efforts within the Justice Department of official wrong-doing, and which would not necessarily involve identities of authorities under investigation, but which might give the subcommittee a fairly good reading of how well the Department pursues these questions, what the dimensions are, what the expectations are, and what the results are.

This might well be done in public, and it might well satisfy the subcommittee as to the effectiveness of the Department's efforts. If it does, it would not necessarily have to turn to specific allegations against specific individuals.

I would think if the subcommittee worked in a progressive way it may find it not necessary to go into executive session.

Mr. MCCLOSKEY. May I ask one question? Mr. Baskir, I respect both you and your employer for the work the committee did.

Last year, this committee met in open session and heard testimony from the U.S. Attorney of Chicago, now the Governor of Illinois, a young Deputy U.S. Attorney in his office, and the Assistant Attorney General in charge of the Criminal Division. Frankly we got conflicting testimony from the various witnesses as to who and under what circumstances the decision had been made not to prosecute a CIA agent who had admittedly smuggled heroin into the United States.

Putting these people from the Justice Department and from the CIA's highest level in front of us with conflicting testimony was an extremely sensitive question since, ultimately, it was admitted to us in open session that the only way that a prosecution could be dropped was by the signature of a particular Assistant Attorney General.

In this particular case, his name had been forged by a subordinate employee in the Attorney General's office who testified that this was a common course of conduct.

It was astounding testimony.

I, for one, am not ready to accept any Assistant Attorney General's—or even the Attorney General's—testimony without checking it against the facts of a specific case because when we've checked the testimony against what was actually happening there were great gaps.

I assume that has been remedied. It was a Republican administration. There were very close friends of mine involved.

I am not sure that any investigation can come up with an accurate result, without being assured the precise facts of a given case have been penetrated.

I think the Chairman's other committee, which is looking into the Warren Commission report, has established that information was withheld from the Warren Commission.

The mere fact that the Justice Department says, "We are doing this," or the FBI says, "We are doing this," is not going to remove my doubts until I can check what they are doing against the processes in a particular case.

What bothers me about this kind of an investigation is as we find out what happens in specific cases, we find there has been obstruction of justice or perjury.

We almost impeached a President for that.

The difficulty in going into this is that if we discover crimes or obstructions of justice, the action of this committee almost imposes on the executive branch the obligation to prosecute.

I have this gut feeling I don't want to see any further prosecutions for conduct which was accepted at many levels of government.

I am saying to the gentleman from New York that I withdraw a little from trying to impose standards retroactively. I guess I can't put it any differently than that.

If we get into this investigation, I don't want to see it stop short of the ultimate facts.

Mr. WEISS. Mr. Chairman?

Mr. PREYER. Mr. Weiss?

Mr. WEISS. Again, not by way of debate, but by way of soul-searching with my colleague and friend, Mr. McCloskey, in the original letter that I sent to the FBI Director, I indicated that I was not prejudging Mr. Kearney's guilt or innocence.

I felt that he was entitled to the same presumptions that any other citizen in a similar situation would be entitled to. Here we do have some difference of opinion.

What I was concerned about is the attitude and position of the Director of the FBI who contended, for whatever reasons or whatever motivations, that FBI people ought to be held to be above the law because the CIA, apparently, has—for whatever reasons, good or bad—been held to be above the law.

Given the fact that we have just come out of Watergate, I felt that by the Congress remaining silent and not determining the practices, procedures, and attitudes of the Justice Department or the FBI, we might be condoning the violation of both the Constitution and the statutes enacted by this Congress.

Therefore, again, without prejudging any particular individual, I think that we ought to move forward. I think that Mr. Baskir is quite correct, that we probably can commence wtih a general approach to this question.

If we then get into areas where it becomes apparent that we are treading on grounds where individuals' guilt or alleged guilt may become a matter of question, then I think we would have the good sense to say, "Okay, this ought not to be pursued in public session."

However, I would hope that we would wait until that kind of situation developed, rather than deciding at the outset that we will be pursuing all of this in secret. If we did automatically go into executive session, then the American people would have, I think, cause for further confusion as to what we are really about.

Mr. PREYER. I have a lot of sympathy, personally, with Mr. McCloskey's view about imposing standards today, retroactively, on past conduct which was acceptable conduct then and, in many ways, imposed by the demands of the American people that we fight the Communist menace this way.

Unfortunately, that lapped over, as he said, into domestic cases where it had no business. Therefore, I can understand his feeling that—maybe this isn't your feeling—we would not only not blacken the names of individuals who may have been charged, but never indicted or tried, but also face the question: Do we go into pilloring people who acted by the standards then that are a little different now? I believe that executive session might be one way out of that.

However, I would think the Attorney General would want to testify before this committee to deny the Huston Plan approach and to make clear that these old standards are not applying now, and that we would be able to work out the policy with him.

Mr. MCCLOSKEY. Mr. Chairman, I wonder if I could outline a tentative procedure to see if my colleagues could agree.

I agree with the gentleman from Indiana that the Attorney General should testify before us and that it should be a public hearing.

I think the American people want as few executive sessions as possible, but I think they also respect the right of privacy when an individual is merely charged or matters are under investigation.

If the Attorney General or witnesses from his office came prepared to discuss these matters with the understanding they would be accorded the right of executive session whenever they felt in the interests of privacy and justice a straightforward answer required it. If we were prepared to accord them that privilege it would be a good test for us, too.

In the past, one of the reasons the executive branch has been unwilling to be straightforward with the Congress is the fear that we would leak something

said in privacy. This committee is the guardian of the constitutional right of privacy, as well as the freedom of information.

Therefore, it is a test of the committee to demonstrate, both to the executive branch and the Congress, that we can handle this kind of an investigation properly, and come out with a report affirming the Justice Department and the executive branch currently have the highest professional standards that are being followed in practice.

I would be for proceeding on that basis. I see no problem with it. It, then, puts us to a real test whether we can measure up to our own standards of both privacy and freedom of information.

Mr. WEISS. Would you yield for a moment on that one point?

Mr. MCCLOSKEY. Certainly.

Mr. WEISS. I would like to illustrate the danger I see in pursuing this course by offering a hypothetical situation.

Suppose we have the Attorney General before us and he is asked: Are you still following the same procedures which caused the indictment of Mr. Kearney and for which Mr. LaPrade is now being seriously questioned?

He, then, says, "I would like to go into executive session on this." In executive session, the Attorney General says, "Listen, for the best interests of this country—although publicly we would not acknowledge it—we really have no choice except to follow those same procedures."

Now, at that point, are we then in a position where we have bound ourselves to remain silent about what we know to be a clear violation of the Constitution? That's the danger that I see.

It seems to me that we ought not to be in the position of turning over our right to determine when we ought to be in an executive session to the very people whom we are questioning.

Mr. MCCLOSKEY. I can only respond to the gentleman that that was precisely the position that the gentleman from Massachusetts, Mr. Harrington, found himself in when he became aware of testimony which showed that we had intervened, in his judgment, in the internal affairs of Chile.

We are all under the problem that when we received information in executive session the rules of the committee and the Congress require that it not be revealed except by vote of the committee, as I understand it, except that an individual's own conscience, as a Member of this Congress, has to put him in the position then of determining when, in open debate on the Floor of the House of Representatives, he must make that argument.

Then we go back to the constitutional provision that no Member can be challenged for what he may say on the Floor in any other forum. Therefore, we are then faced, almost on a daily basis—I have the same situation in Merchant Marine. We took executive session the other day and received testimony involving a pending investigation that materially affects the judgment of the Congress in where we go with the maritime authorization.

I have to face that as a conscience question.

Mr. WEISS. If you would yield—but executive session was not convened at the determination of the witness from whom you were seeking the information. That's the part that I object to.

Mr. MCCLOSKEY. Then, would not the chairman of the committee by vote of the members determine whether to release the information it had been given in executive session? Would that not be the proper proceeding under the rules? If a witness who gave information in executive session has a far different idea of what should be secret than we, a vote of this committee should make the determination.

If the committee voted not to release it, we would put the individual into the Harrington position that was so painful for the Congressman last year.

Mr. KOSTMAYER. Then you make the witness aware that anything he says could be released, even though it is in executive session.

Mr. MCCLOSKEY. That is always the case. We have an absolute right to decide to release everything they say, no matter what they ask, if that is our vote. But I do think we are individually bound to the majority vote of the committee as to what given in executive session will be released.

There are great examples of this. Secretary of State Rogers came before one of the appropriations subcommittees and testified, on April 23, 1970, that under no circumstances would we invade Cambodia.

Seven days later, we did invade Cambodia. Rogers called up and asked that his remarks be expunged from the record. The committee voted to do so. But one

senior member of the committee, in good conscience, felt it was such startling information, that he revealed what had been said in executive session.

He was not censured by the House.

The ultimate test is whether public opinion supports the act of conscience. I relate this because it points up the delicacy of this kind of an investigation by the committee charged with both the constitutional rights of freedom of information and privacy.

There are no easy answers.

Mr. PREYER. I think that is a good description of how executive sessions work—that there is no way to guarantee that information is locked in by agreement.

I think that gets back to Mr. Baskir's point that if we get into these delicate areas—who has been indicted by the Department, who has not, and so forth—that you don't need to get into that any deeper than necessary.

If you are satisfied with the policy, then we better leave those alone because there's always the risk that it would leak in some way and damage somebody's reputation and name.

There, again, I think that would be a question of common sense when we get into it.

Mr. MCCLOSKEY. Mr. Chairman, one other question for the record. It is a matter of law on which I am no longer certain.

If a defendant in a pending prosecution is faced with undue publicity, the prosecution may have to be dropped. Can that extend to a leak from a congressional committee as well?

For example, if the LaPrade case came up and the Attorney General released information in open session or subsequently one of us released information, what is the test of law about the amount of publicity and under what circumstances that might give Mr. LaPrade the right to have the prosecution dropped?

Mr. BASKIR. I can't give you a precise answer to that question. It turns on a judgment by the court that the defendant's rights to a fair trial have been damaged. That is really a judgment of the court.

In the most notorious cases, individual judges who have sat on that question as the case has gone up through the stages have different judgments. Essentially it turns out to be a judgmental thing for four or five members of the Supreme Court, if it gets that high, as to whether or not the publicity was so excessive that the defendant would have lost his right to a fair trial.

Mr. MCCLOSKEY. I want to qualify my former comment, Mr. Chairman. I said that I was reluctant to enter in an investigation which we did not conclude thoroughly and comprehensively.

However, if a witness should suggest the possibility that a prosecution would have to be dropped because an answer he gave might become public, I feel, at that point, we should not inquire into the situation and so jeopardize a pending or possible future prosecution.

Mr. PREYER. If we get that far, also, in getting at names, we will run into questions about prosecutorial discretion, too, which will be difficult questions.

I don't really think we want to get into prosecutorial discretion. We want to know enough to make a judgment about the policy, I think, not second guess whether everybody ought to be prosecuted.

Mr. Calamaro had sought recognition. Since this is an informal sort of a gathering, we will be glad to hear from him.

Mr. CALAMARO. Thank you, Mr. Chairman. I am not really here to respond to the inquiry, but I would like to amplify one thing that I talked about with Tim Ingram yesterday. I think Tim has quite correctly set forth the subject of our conversation.

There is something else that came up, and this gets to the heart of what many of the committee members are saying. I would like to re-emphasize it.

As you said, sir, and as Congressman Weiss said, the individual cases—getting into the individual cases is what, at this point, presents the most difficulty for the Department of Justice.

Simply put, on the second page of that letter is that with which the Department would have the most difficulty coming forth with. In fact, the questions raised on the first page raise the question of when the Department can make responses to questions like those on the second page.

I guess the comment that I made to Tim yesterday is similar to the point made by Congressman Weiss and by yourself, Mr. Chairman, that to proceed on the general questions of what the Department's procedures are or would be is where we think we could make the most contribution.

CONTINUED

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I am genuinely impressed with the seriousness of this inquiry and I think that the Department can match that seriousness on those terms and make a response which I think will meet the committee's questions.

Mr. PREYER. Thank you, Mr. Calamaro.

I know your background led you to be concerned with civil liberties, constitutional processes, and protection of individuals. Therefore, I think your assistance in this area would be very helpful.

I don't think that the purpose of the committee is to call the Attorney General or anybody else up here just to berate them or to lecture them. I think we will genuinely want to know what the policy is now. There have been a lot of problems.

What should the policy be?

The adequacy of the response will probably determine how much further we need to go on page two questions, as you put it. I think we can judge how deeply we want to get into it once we begin to get into it.

Let me suggest that we attempt to absorb what has been discussed here. I think we have a general consensus of how to proceed.

Let me ask Tim: How do you think we are going to relate with Don Edwards' subcommittee along the lines of what has been discussed? Is there any merit in doing what is not very often done—and maybe what does not have much merit—and having joint hearings with his subcommittee?

Mr. INGRAM. I talked with Tom Breen yesterday, who is the counsel to Mr. Edwards' Judiciary Subcommittee. We had supplied a copy of our letter to the Attorney General to Mr. Edwards. Tom said that he had talked with Mr. Edwards about the letter and that he had, in terms of their jurisdiction, no difficulty with our inquiry.

Their primary interest this year will be to look at the guidelines promulgated earlier in the year by the Department with regard to the FBI, particularly their domestic intelligence gathering activities and limitations on the procedures by which that intelligence is obtained.

I think that that will be the primary focus of their examination of the FBI and the Justice Department's oversight of the FBI.

In terms of a joint hearing, that was not something that he and I had broached in earlier discussions. I assume that that would be a subject which could certainly be raised with the subcommittee.

Mr. PREYER. If you don't feel that there is any overlap, there is not much point in joint hearings. I am not sure they are such a good idea, anyway.

Mr. MCCLOSKEY. Mr. Chairman, could I direct a question to the Justice Department representative?

Are you going to be able to give us the information specified in the letter? All that is necessary is just a simple yes or no answer. [Laughter.]

Mr. CALAMARO. We are going to try, Congressman, on the first page. We are going to make a very good-faith effort to try on the first page.

Mr. MCCLOSKEY. The only paragraph you might have difficulty with would be the first on page 2. I am wondering if that would be relieved by listing the cases in some form other than names.

When we received CIA testimony last year, all the names were deleted and "X", "Y", and "Z" used instead.

Of course, there may be circumstances which make it clear who "X", "Y", and "Z" are. Would it be possible to give us the information without any specific names?

Mr. CALAMARO. I have pretty much told you what I have been authorized to say to this point. I will be glad to convey that suggestion.

I might just say that I think that first page is a big job and, as I say, it is something that we are taking quite seriously, especially the last item on the first page.

Mr. PREYER. In considering whether or not to make the information available that Mr. McCloskey has mentioned, I think the other suggestion that had been raised here could be conveyed, also—that it would be the intention of the committee chairman that, if we got into those areas of naming names, a request by the Attorney General for executive session would be honored in the areas that Mr. McCloskey and the other Members had mentioned here earlier.

Mr. MCCLOSKEY Mr. Chairman, could I direct one more question?

In the last paragraph of page 1, I don't see any problem at all in identifying what we have asked for. The question is one of judgment. Should we be told the criteria used for releasing information to Congress.

I can understand the embarrassment to any honorable Attorney General tell-

ing Congress what criteria are used to determine what information Congress will get. That's like waving a red flag in front of many of us.

There is no difficulty in identifying all this information. It is a judgment question as to whether you want to give it to us. Is that not the problem?

Mr. CALAMARO. First, I don't think that Judge Bell, the Attorney General, feels any embarrassment about these things. I think that there are some very important principles involved. I don't think that he is particularly embarrassed about those.

Mr. MCCLOSKEY. We may accept the principles he urges for executive privilege. The difficulty is that former Attorneys General, Mr. Kleindienst, notably, said that executive privilege extended to everything the executive branch might want to claim.

Presumably, the Justice Department now has a specific and precise definition of when it will exercise executive privilege on these matters. We may accept it, but I think it is important we have the information requested in the fourth paragraph.

Forcing you to make these judgments and tell us why is part of our process.

Mr. CALAMARO. As I said, sir, we feel it is something of a considerable job.

Mr. MCCLOSKEY. It shouldn't be, should it?

Mr. CALAMARO. It is because there is more than just executive privilege involved. There are a lot of other questions.

Mr. MCCLOSKEY. There is no basis on which you would withhold information from Congress other than executive privilege, is there?

Mr. CALAMARO. I don't want to prejudge our response by getting into the subject, but the answer is that there are a number of other considerations that matter quite a bit.

Mr. MCCLOSKEY. But the fact is this is now May 12th and we have not received a response to the Chairman's April 29th letter. This is indicative of the difficulty of your problem, but when might we expect a comprehensive response?

Mr. CALAMARO. I think there was an informal response in my telephone call to Tim. The letter came last week when the Attorney General was out of town.

As a matter of course, we simply need a little time to actually put together the response to that inquiry.

Mr. MCCLOSKEY. I have immense respect for the manner in which the Attorney General has handled his job thus far, and I have no preconviction that he won't handle this beautifully. But, I think it would be helpful if you carried the message back that if the Justice Department can't respond within 30 days of receipt of the letter we are in real trouble in this country.

Thirty days should be considered a reasonable time for a precise response.

I don't know any way to proceed on this, Mr. Chairman, until we have that response to the letter. It is the foundation and the basis for all the questions we would ask.

If we do nothing more than resolve the extent and limits of executive privilege, we have done more than any committee in Congress in the ten years I have been here. That issue has never been resolved.

Mr. CALAMARO. That is quite a good point, sir.

I was saying that we intend to respond to those questions within about 30 days. Hopefully, we could set a time, but I am saying it is going to take more time.

I have provided Tim with the informal response of when we think we can get all those questions answered.

Mr. MCCLOSKEY. I hate to think that in the same time limits we often impose on the courts and other witnesses, our own Department of Justice couldn't answer any question known to man within 30 days.

The request of this committee might provide the stimulus to give it a little higher priority.

Mr. QUAYLE. Are you just trying to answer the questions on the first page, and not the second. You acknowledge them, but you are just going to answer those on the first page; right?

Mr. CALAMARO. As I have said before, it is the ones on the second page with which the Department would have great difficulty.

Mr. QUAYLE. This particular paragraph right here:

A listing of all such cases of alleged illegal acts by investigative agencies as referred to, found by, or in any other way called to the attention of the Department within the last three years; include in this listing the current status of each such case and the division by which it is or was handled.

Mr. PREYER. "Listing of all such cases."

Mr. QUAYLE. Yes, I agree with you.

Mr. CALAMARO. Sorry, I don't have the letter in front of me.

Mr. PREYER. I am glad you were here and able to hear this discussion today. I hope that, perhaps, it will help encourage you to a more prompt answer. Perhaps you understand a little bit more what we are driving at than just the cold letter indicated.

Mr. KOSTMAYER. I wonder if I could just make one brief comment before we adjourn.

The Chairman and Mr. McCloskey both—and I think with some justification—have made a point over whether we may be jeopardizing or prosecuting people for operating under standards which are no longer in effect.

I think that is one of the issues involved in our inquiry whether or not those standards are, indeed, still in effect. I think there are people in Congress and people in the country who believe that the standards under which Mr. Kearney may have acted are still, indeed, in effect, that they have really not changed.

I hope that that could be one of the things with which we could concern ourselves. It certainly concerns me and I know it concerns other people in the country and in the Congress.

Mr. PREYER. That's a good point. I would hope the Attorney General would address himself to that as a major point.

Mr. WEISS. Mr. Chairman, could we perhaps set a tentative timetable for when we would expect the letter from the Justice Department in response, and when we would schedule this subcommittee—say within a week after receipt of that letter?

Such a schedule would make very clear to the Department that, in fact, we are going to be pursuing this matter expeditiously.

Mr. PREYER. The best estimate we have right now from Mr. Calamaro is 30 days. I hope he will go back and give that some careful consideration and see if we can't speed that up a little bit.

Shall we consider that 30 days is an outside limit?

Mr. WEISS. Thirty days from the date of the letter?

Mr. PREYER. I think you are talking about from today, are you not?

Mr. CALAMARO. Yes.

I viewed that letter as an invitation to testify. Rather than responding to the letter, we were going to respond by testimony to what the committee had in mind. That is what we are hoping to put together in this 30 days.

Mr. MCCLOSKEY. Mr. Calamaro, I know you don't have the letter before you but it contains the gentle language of the Chairman, as follows: "As part of your prepared testimony, would you please provide the subcommittee with . . ." and then lists the information.

I think you might consider that more than an invitation.

"Will you please provide to the subcommittee . . ." But, I don't want to take advantage of you because you don't have the letter in front of you.

Mr. KOSTMAYER. Mr. Chairman, as a member of the majority, I want to associate myself with the remarks of the gentleman from California. I agree with him.

Mr. PREYER. For the timetable, before we recess right now, we have discussed 30 days as an outside limit, but we would want to work with you, Mr. Calamaro, to try to shorten that period.

I think Mr. McCloskey has been articulate on the point that the Justice Department ought to be able to respond earlier than that.

Therefore, we will be in touch with you sooner than that.

We will stand recessed until further notice.

[Whereupon, at 11:25 a.m., the meeting was adjourned.]

APPENDIX 2.—28 C F R 45.735, STANDARDS OF CONDUCT FOR EMPLOYEES OF DEPARTMENT OF JUSTICE

PART 45—STANDARDS OF CONDUCT

Sec.

AUTHORITY: The provisions of this Part 45 issued under 80 Stat. 379; 5 U.S.C. 301, Reorganization Plan No. 2 of 1950, 64 Stat. 1261; 3 CFR 1949–1953 Comp., E.O. 11222; 3 CFR, 1964–1965 Comp.; 3 CFR Part 735, unless otherwise noted.

SOURCE: The provisions of this Part 45 contained in Order No. 350–65, 30 F.R. 17202, Dec. 31, 1965, unless otherwise noted.

CROSS REFERENCE: For Attorney General's "Memorandum Regarding the Conflict of Interest Provisions of Public Law 87–849", see appendix to this chapter.

§ 45.735–1 Purpose and scope.

(a) In conformity with sections 201 through 209 of title 18 of the United States Code (as enacted by Pub. Law No. 87–849) and other statutes of the United States, and in conformity with Executive Order No. 11222 of May 8, 1965, and Title 5, Chapter I, Part 735, of the Code of Federal Regulations, relating to conflicts of interest and ethical standards of behavior, this part prescribes policies, standards and instructions with regard to the conduct and behavior of employees and former employees (as defined in § 45.735–3 (b) and (d) respectively) of the Department of Justice.

(b) This part, among other things, reflects prohibitions and requirements imposed by the criminal and civil laws of the United States. However, the paraphrased restatements of criminal and civil statutes contained in this part are designed for informational purposes only and in no way constitute and interpretation or construction thereof that is binding upon the Department of Justice or the Federal Government. Moreover, this part does not purport to paraphrase or enumerate all restrictions or requirements imposed by statutes, Executive orders, regulations or otherwise upon Federal employees and former Federal employees. The omission of a reference to any such restriction or requirement in no way alters the legal effect of that restriction or requirement and any such restriction or requirement, as the case may be, continues to be applicable to employees and former employees in accordance with its own terms. Furthermore, attorneys employed by the Department are subject to the canons of professional ethics of the American Bar Association.

(c) Any violation of any provision of this part shall make the employee involved subject to appropriate disciplinary action which shall be in addition to any penalty which might be prescribed by statute or regulation.

§ 45.735–2 Basic policy.

Employees shall:

(a) Conduct themselves in a manner that creates and maintains respect for the Department of Justice and the U.S. Government. In all their activities, personal and official, they should always be mindful of the high standards of behavior expected of them;

(b) Not give or in any way appear to give favored treatment or advantage to any member of the public, including former employees, who appear before the Department on their own behalf or on behalf of a nongovernmental person; and

(c) Avoid any action which might result in, or create the appearance of—

(1) Using public office for private gain;

(2) Giving preferential treatment to any person;

(3) Impeding Government efficiency or economy;

(4) Losing complete independence or impartiality;

(5) Making a Government decision outside official channels; or

(6) Affecting adversely the confidence of the public in the integrity of the Government.

(d) Be guided in all their actions by the Code of Ethics for Government Service adopted by House Concurrent Resolution No. 175 of the 85th Congress (Appendix).

(e) Employees should discuss with their immediate superiors any problems arising in connection with matters within the scope of this part. Supervisors should ascertain all pertinent information bearing upon any such problem coming to their attention and shall take prompt action to see that problems that cannot be readily resolved are sub-

mitted to the Department counselor or deputy counselors referred to in § 45.735–26(b) to provide guidance and assistance with respect to the interpretation of this part.

§ 45.735–3 Definitions.

(a) *Division.* "Division" means a principal component of the Department of Justice, including a division, bureau, service, office or board.

(b) *Employee.* "Employee" means an officer or employee of the Department of Justice and includes a special Government employee (as defined in paragraph (c) of this section) in the absence of contrary indication. Presidential appointees shall be deemed employees for the purposes of this part. In situations in which this part requires an employee to report information to, or seek approval for certain activities from, the head of a division, an employee who is the head of a division or who is an appointee of the Attorney General not assigned to a division, shall report to, or seek approval from, the Deputy Attorney General, and the Deputy Attorney General shall report to, or seek approval from, the Attorney General.

(c) *Special Government employee.* "Special Government employee" means an officer or employee of the Department of Justice who is retained, designated, appointed, or employed to perform, with or without compensation, for not more than 130 days during any period of 365 consecutive days, temporary duties either on a full-time or intermittent basis.

(d) *Former employee.* "Former employee" means a former Department of Justice employee or former special Government employee, as defined in paragraph (c) of this section.

(e) *Person.* "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

§ 45.735–4 Conflicts of interest.

(a) A conflict of interest exists whenever the performance of the duties of an employee has or appears to have a direct and predictable effect upon a financial interest of such employee or of his spouse, minor child, partner, or person or organization with which he is associated or is negotiating for future employment.

(b) A conflict of interest exists even though there is no reason to suppose that the employee will, in fact, resolve the conflict to his own personal advantage rather than to that of the Government.

(c) An employee shall not have a direct or indirect financial interest that conflicts, or appears to conflict, with his Government duties and responsibilities.

(d) This section does not preclude an employee from having a financial interest or engaging in a financial transaction to the same extent as a private citizen not employed by the Government so long as it is not prohibited by statute, Executive Order 11222, this section or § 45.735–11.

§ 45.735–5 Disqualification arising from private financial interests.

(a) No employee shall participate personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, unless authorized to do so in accordance with the following described procedure:

(1) The employee shall inform the head of his division of the nature and circumstances of the matter and of the financial interest involved and shall request a determination as to the propriety of his participation in the matter.

(2) The head of the division, after examining the information submitted, may relieve the employee from participation in the matter, or he may submit the matter to the Deputy Attorney General with recommendations for appropriate action. In cases so referred to him, the Deputy Attorney General may relieve the employee from participation in the matter or may approve the employee's participation in the matter upon determining in writing that the interest involved is not so substantial as to be likely to affect the integrity of the services which the Government may expect from such employee.

(b) The financial interests described below are hereby exempted from the pro-

hibition of 18 U.S.C. 208(a) as being too remote or too inconsequential to affect the integrity of an employee's services in a matter:

The stock, bond, or policy holdings of an employee in a mutual fund, investment company, bank or insurance company which owns an interest in an entity involved in the matter, provided that in the case of a mutual fund, investment company or bank the fair value of such stock or bond holding does not exceed 1 percent of the value of the reported assets of the mutual fund, investment company, or bank.

(18 U.S.C. 208)

§ 45.735–6 Activities and compensation of employees in claims against and other matters affecting the Government.

(a) No employee, otherwise than in the proper discharge of his official duties, shall—

(1) Act as agent or attorney for prosecuting any claim against the United States, or receive any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim;

(2) Act as agent or attorney for anyone before any department, agency, court, court-martial, office, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which the United States is a party or has a direct and substantial interest; or

(3) Directly or indirectly receive or agree to receive, or ask, demand, solicit or seek, any compensation for any services rendered or to be rendered either by himself or another, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission, in relation to any matter enumerated and described in subparagraph (2) of this paragraph.

(b) A special Government employee shall be subject to paragraph (a) of this section only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or (2) which is pending in the Justice Department: *Provided*, That paragraph (b)(2) of this section shall not apply in the case of a special Government employee who has served in the Justice Department no more than 60 days during the immediately preceding period of 365 consecutive days.

(c) Nothing in this part shall be deemed to prohibit an employee, if it is not otherwise inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person in a disciplinary, loyalty, or other Federal personnel administration proceeding involving such person.

(d) Nothing in this part shall be deemed to prohibit an employee from acting, with or without compensation, as agent or attorney for his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary, except in those matters in which he has participated personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which are the subject of his official responsibility, as defined in section 202(b) of title 18 of the United States Code, provided that the head of his division approves.

(e) Nothing in this part shall be deemed to prohibit an employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

(18 U.S.C. 203, 205)

§ 45.735–7 Disqualification of former employees in matters connected with former duties or official responsibilities; disqualification of partners.

(a) No individual who has been an employee shall, after his employment has ceased, knowingly act as agent or attorney for anyone other than the United States, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, or other particular matter involving a specific party or parties in which the United States is a party or has a direct or substantial interest and in which he participated personally and substantially as an employee, through decision, approval, disapproval, recommendation, the rendering of advice,

investigation, or otherwise, while so employed.

(b) No individual who has been an employee shall, within 1 year after his employment has ceased, appear personally before any court or department or agency of the Government as agent, or attorney for, anyone other than the United States in connection with any matter enumerated and described in paragraph (a) of this section, which was under his official responsibility as an employee of the Government at any time within a period of 1 year prior to the termination of such responsibility.

(c) No partner of an employee shall act as agent or attorney for anyone other than the United States in connection with any matter enumerated and described in paragraph (a) of this section in which such Government employee is participating or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or which is the subject of his official responsibility.

(18 U.S.C. 207)

§ 45.735–8 Salary of employees payable only by United States.

(a) No employee, other than a special Government employee or an employee serving without compensation, shall receive any salary, or any contribution to or supplement of salary, as compensation for his services as an employee of the Department of Justice, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality.

(b) Nothing in this part shall be deemed to prohibit an employee from continuing to participate in a bona fide pension, retirement, group life, health, or accident insurance, profit-sharing, stock bonus, or other employee, welfare, or benefit plan maintained by a former employer.

(18 U.S.C. 209)

§ 45.735–9 Private professional practice and outside employment.

(a) No professional employee shall engage in the private practice of his profession, including the practice of law, except as may be authorized by or under paragraph (c) or (e) of this section. Acceptance of a forwarding fee shall be deemed to be within the foregoing prohibition.

(b) Paragraph (a) of this section shall not be applicable to special Government employees.

(c) The Deputy Attorney General may make specific exceptions to paragraph (a) of this section in unusual circumstances. Application for exceptions must be made in writing stating the reasons therefor, and directed to the Deputy Attorney General through the applicant's superior. Action taken by the Deputy Attorney General with respect to any such application shall be made in writing and shall be directed to the applicant.

(d) No employee shall engage in any employment outside his official hours of duty or while on leave status if such employment will:

(1) In any manner interfere with the proper and effective performance of the duties of his position;

(2) Create or appear to create a conflict of interest, or

(3) Reflect adversely upon the Department of Justice.

(e) A professional employee may, in off-duty hours and consistent with his official responsibilities, participate, without compensation for his services, in a program to provide legal assistance and representation to poor persons. Such participation by professional employees of this Department shall not include representation or assistance in any criminal matter or proceeding, whether Federal, State, or local, or in any other matter or proceeding in which the United States (including the District of Columbia Government) is a party or has a direct and substantial interest. Notice of intention to participate in such a program shall be given by the employee in writing to the head of his division or (in the case of an Assistant U.S. Attorney) to the U.S. Attorney in such detail as that official shall require.

[Order No. 350-65, 30 F.R. 17202, Dec. 31, 1965, as amended by Order No. 379-67, 32 F.R. 9066, June 27, 1967]

§ 45.735–10 Improper use of official information.

No employee shall use for financial gain for himself or for another person, or make any other improper use of, whether by direct action on his part or by counsel, recommendation, or suggestion to another person, information which comes to the employee by reason of his status as a Department of Justice employee and which has not become part of the body of public information.

§ 45.735–11 Investments.

No employee shall make investments (a) in enterprises which it is reasonable to believe will be involved in decisions to be made by him, (b) on the basis of information which comes to him by reason of his status as a Department of Justice employee and which has not become part of the body of public information or (c) which are reasonably likely to create any conflict in the proper discharge of his official duties.

§ 45.735–12 Speeches, lectures, and publications.

(a) No employee shall accept a fee from an outside source on account of a public appearance, speech, lecture, or publication if the public appearance or the preparation of the speech, lecture, or publication was a part of the official duties of the employee.

(b) No employee shall receive compensation or anything of monetary value for any consultation, lecture, teaching, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs or operations of the Department, or which draws substantially on official data or ideas which have not become part of the body of public information.

(c) No employee shall engage, whether with or without compensation, in teaching, lecturing or writing that is dependent on information obtained as a result of his Government employment except when that information has been made available to the general public or when the Deputy Attorney General gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

§ 45.735–13 Misuse of official position and coercion.

(a) No employee shall use his Government employment (1) for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, or (2) to coerce, or give the appearance of coercing, a person to provide financial benefit to himself or another person.

(b) No employee shall accept free transportation for official or unofficial purposes from persons doing business with the Department of Justice when the offer of such transportation might reasonably be interpreted as an attempt to affect the impartiality of the employee.

§ 45.735–14 Gifts, entertainment, and favors.

(a) Except as provided in paragraph (c) of this section, an employee other than a special Government employee shall not solicit or accept, for himself or another person, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the Department;

(2) Conducts operations or activities that are regulated by the Department;

(3) Is engaged, either as principal or attorney, in proceedings before the Departmental or in court proceedings in which the United States is an adverse party; or

(4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duty.

(b) Except as provided in paragraph (c) of this section, a special Government employee shall be subject to the prohibition set forth in paragraph (a) (1) of this section.

(c) Paragraphs (a) and (b) of this section shall not be construed to prohibit:

(1) Solicitation or acceptance of anything of monetary value from a friend, parent, spouse, child or other close relative when the circumstances make it clear that the motivation for the action is a personal or family relationship.

(2) Acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting.

(3) Acceptance of loans from banks or other financial institutions on customary terms of finance for proper and usual activities of employees, such as home mortgage loans.

(4) Acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars and other items of nominal intrinsic value.

(5) Receipts of bona fide reimbursement, unless prohibited by law, for actual expenses for travel and such other necessary subsistence as is compatible with other restrictions set forth in this part and for which no Government payment or reimbursement is made. However, an employee may not be reimbursed, and payment may not be made on his behalf, for excessive personal living expenses,

gifts, entertainment, or other personal benefits, nor may an employee be reimbursed by a person for travel on official business under Department orders.

(6) Participation in the affairs of or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal or nonprofit educational, recreational, public service or civic organization.

(d) No employee shall accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution (Art. I, sec. 9, cl. 8) and in Public Law 89–673, 80 Stat. 952.

(e) No employee shall solicit a contribution from another employee for a gift to an official superior, nor make a donation as a gift to an official superior, nor accept a gift from an employee receiving less pay than himself (5 U.S.C. 7351). However, this paragraph does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement.

(5 U.S.C. 7351) [Order No. 350–65, 30 F.R. 17202, Dec. 31, 1965, as amended by Order No. 383–67, 32 F.R. 13217, Sept. 19, 1967]

§ 45.735–15 Employee indebtedness.

The Department of Justice considers the indebtedness of its employees to be essentially a matter of their own concern. The Department of Justice will not be placed in the position of acting as a collection agency or of determining the validity or amount of contested debts. Nevertheless, failure on the part of an employee without good reason and in a proper and timely manner to honor debts acknowledged by him to be valid or reduced to judgment by a court or to make or to adhere to satisfactory arrangements for the settlement thereof may be the cause for disciplinary action. In this connection each employee is expected to meet his responsibilities for payment of Federal, State, and local taxes.

§ 45.735–16 Misuse of Federal property.

No employees may use Federal property for other than officially approved activities. Each employee is responsible for protecting and conserving Federal property, including equipment and supplies.

§ 45.735–17 Gambling, betting, and lotteries.

No employee shall participate, while on Government property or while on duty for the Government, in the operation of gambling devices, in conducting an organized lottery or pool, in games for money or property, or in selling or purchasing numbers tickets.

§ 45.735–18 Conduct prejudicial to the Government.

No employee shall engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or other conduct prejudicial to the Government.

§ 45.735–19 Partisan political activities.

(a) While certain political activities are prohibited by the criminal statutes of the U.S. (see 18 U.S.C., Ch. 29), the basic restrictions on political activity of employees are set forth in Subchapter III, Chapter 73, title 5, U.S.C. Code. An explanation of the restrictions are set forth in U.S. Civil Service Commission Pamphlet No. 20 and in the Federal Personnel Manual.

(b) Most employees are subject to both statutory and Civil Service restrictions upon partisan political activities although employees of the Federal Government in some geographical areas may take part in certain local political activities. Employees have the right to vote as they choose and to express opinions on political subjects and candidates. Detailed information may be obtained through administrative and personnel offices.

[Order No. 350–65, 30 F.R. 17202, Dec. 31, 1965, as amended by Order No. 383–67, 32 F.R. 13217, Sept. 19, 1967]

§ 45.735–21 Miscellaneous statutory provisions.

Each employee should be aware of the following statutory prohibitions against:

(a) Lobbying with appropriated funds (18 U.S.C. 1913).

(b) Disloyalty and striking (5 U.S.C 7311, 18 U.S.C. 1918).

(c) Employment of a member of a Communist organization (50 U.S.C. 784).

(d) (1) Disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) disclosure of confidential information (18 U.S.C. 1905).

(e) Habitual use of intoxicants to excess (5 U.S.C. 7352).

(f) Misuse of a Government vehicle (31 U.S.C. 638a).

(g) Misuse of the franking privilege (18 U.S.C. 1719).

(h) Use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(i) Fraud or false statements in a Government matter (18 U.S.C. 1001).

(j) Multilating or destroying a public record (18 U.S.C. 2071).

(k) Counterfeiting and forging transportation requests (18 U.S.C. 508).

(l) (1) Embezzlement of Government money or property (18 U.S.C. 641); (2) failing to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 US.C. 654).

(m) Unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(n) Acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

[Order No. 350-65, 30 F.R. 17202, Dec. 31, 1965, as amended by Order No. 383-67, 32 F.R. 13217, Sept. 19, 1967]

§ 45.735-22 Reporting of outside interests by persons other than special Government employees.

(a) Each employee occupying a position designated in paragraph (c) of this section shall submit to the head of his division a statement on a form made available through the appropriate division administrative officer, setting forth the following information:

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions with or in which he, his spouse, minor child or other member of his immediate household has—

(i) Any connection as an employee, officer, owner, director, member, trustee, partner, adviser or consultant; or

(ii) Any continuing financial interest, through a pension or retirement plan, shared income, or other arrangement as a result of any current or prior employment or business or professional association; or

(iii) Any financial interest through the ownership of stock, stock options, bonds, securities, or other arrangements including trusts, except those financial interests described in § 45.735-5(b).

(2) A list of the names of his creditors and the creditors of his spouse, minor child or other member of his immediate household, other than those creditors to whom any such person may be indebted by reason of a mortgage on property which he occupies as a personal residence or to whom such person may be indebted for current and ordinary household and living expenses such as those incurred for household furnishings, an automobile, education, vacations or the like.

(3) A list of his interests and those of his spouse, minor child or other member of his immediate household in real property or rights in lands, other than property which he occupies as a personal residence.

For the purpose of this section "member of his immediate household" means a resident of the employee's household who is related to him by blood.

(b) Each employee designated in paragraph (c) of this section who enters upon duty after the date of this order shall submit such statement not later than 30 days after the date of his entrance on duty or 90 days after the effective date of this order, whichever is later.

(c) Statements of employment and financial interests are required of the following:

(1) Employees paid at a level of the Executive Schedule in subchapter II of chapter 53 of title 5, United States Code.

(2) Employees occupying the following positions:

(i) Office of the Attorney General

Administrative Assistant to the Attorney General
Assistant to the Attorney General
Director of Public Information
Assistant Directors of Public Information

(ii) Office of the Deputy Attorney General

Associate Deputy Attorneys General
Director, Office of Justice Policy and Planning
Executive Assistant
Director, Executive Office for U.S. Attorneys
U.S. Attorneys

(iii) Office of the Solicitor General

Deputy Solicitors General

(iv) Office of Legal Counsel

Deputy Assistant Attorneys General

(v) Office of Legislative Affairs

Deputy Assistant Attorneys General
Chief, Legislative and Legal Section

(vi) Office of Management and Finance

Deputy Assistant Attorney General
Staff Directors
Director, Justice Data Center
Director, Department Publication Services Facility

(vii) Office of Watergate Special Prosecution Force

Deputy Special Prosecutor
Counsel to the Special Prosecutor
Public Information Officer
Chiefs of Task Forces
Information Systems Manager

(viii) Antitrust Division

Deputy Assistant Attorneys General
Director of Economics
Director of Operations
Deputy Director of Operations
Director, Office of Planning and Budget
Section Chiefs

(ix) Civil Division

Deputy Assistant Attorneys General
Section Chiefs

(x) Civil Rights Division

Deputy Assistant Attorneys General
Special Assistants
Executive Officer
Section Chiefs

(xi) Criminal Division

Deputy Assistant Attorneys General
Section Chiefs

(xii) Land and Natural Resources Division

Deputy Assistant Attorneys General
Section Chiefs

(xiii) Tax Division

Deputy Assistant Attorneys General
Executive Assistant
Deputy for Refund Litigation
Section Chiefs

(xvi) U.S. Marshals Service

Director
Deputy Director
U.S. Marshals

(xv) Community Relations Service

Deputy Director
Associate Director
Chief Counsel
Regional Directors

(xvi) Board of Parole

All members

(xvii) Drug Enforcement Administration

Assistant Administrators
Directors
Chief Counsel
Chief Inspector
Controller
Chief Chemists
Regional Administrators
Chief, Administrative Services Division
Contract and Procurement Officer
Contract Specialist, GS–13 and above
Chief, Compliance Division
Section Chiefs, Compliance Division
Project Officers, GS–13 and above

(xviii) Federal Bureau of Investigation

Assistant Director, Administrative Division

(xix) Federal Prison Industries, Inc.

Associate Commissioner

(xx) Immigration and Naturalization Service:

Deputy Commissioner
Associate Commissioner, Management
Assistant Commissioner, Administration
Regional Commissioners for Northeast, Southeast, Northwest, and Southwest Regions
Deputy Regional Commissioners for Northeast, Southeast, Northwest, and Southwest Regions
Associate Deputy Regional Commissioners, Management, for Northwest, Southeast, Northeast, and Southwest Regions

(xxi) Law Enforcement Assistance Administration

Special Assistants to the Administrator and the Deputy Administrators
Director, Executive Secretariat
General Counsel
Director, National Institute of Law Enforcement and Criminal Justice
Director, National Criminal Justice Information and Statistics Service
Director, Office of Regional Operations
Inspector General
Comptroller
Director, National Scope Programs
Director, Office of Public Information and Congressional Liaison
Director, Operations Support
Director, Planning and Management
Regional Administrators
Director, Office of Civil Rights Compliance
Director, Office of Equal Employment Opportunity
All Deputy Directors of the above offices
Employees classified at GS–13 or above who are in positions involving: (1) Contracting or procurement or (2) administering, auditing or monitoring grants and contracts

(d) Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported in a supplementary statement as of June 30 each year. If no changes or additions occur, a negative report is required. Notwithstanding the filing of the annual report required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a viola-

tion of the conflict-of-interest provisions set forth in this part.

(e) If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his behalf.

(f) Paragraph (a) of this section does not require an employee to submit any information relating to his connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement of employment and financial interests.

(g) The Department shall hold each statement of employment and financial interests in confidence, and each statement shall be maintained in confidential files in the immediate office of the division head. Each division head shall designate which employees are authorized to review and retain the statements and shall limit such designation to those employees who are his immediate assistants. Employees so designated are responsible for maintaining the statements in confidence and shall not allow access to, or allow information to be disclosed from, a statement except to carry out the purpose of this part. The Department may not disclose information from a statement except as the Civil Service Commission or the Deputy Attorney General may determine for good cause. Upon termination of the employment in the Department of any person subject to this section, statements which he has submitted in accordance with paragraph (a) of this section shall be disposed of in accordance with established Department procedures applicable to confidential records. In the event an employee subject to this section is transferred within the Department, statements which he has filed pursuant to paragraph (a) of this section shall be transferred to the head of the division to which the employee is reassigned.

(h) The statements of employment and financial interests and supplementary statements required of employees are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order or regulation. The submission of a statement by an employee does not permit him or any other person to participate in a matter in which his or the other person's participation is prohibited by law, order, or regulation.

(i) Any employee who believes that his position has been improperly determined to be subject to the reporting requirements of § 45.735-22 may obtain review of such determination through the grievance procedure set forth in 28 CFR Part 46.

(28 U.S.C. 509, 510) [Order No. 350-65, 30 F.R. 17202, Dec. 31, 1965, as amended by Order No. 383-67, 32 F.R. 13217, Sept. 19, 1967; Order No. 412-69, 34 FR 5726, Mar. 27, 1969; Order No. 567-74, 39 FR 16444, May 9, 1974; Order No. 572-74, 39 FR 26023, July 16, 1974; Order No. 576-74, 39 FR 31527, Aug. 29, 1974]

§ 45.735-23 Reporting of outside interests by special Government employees.

(a) A special Government employee shall submit to the head of his division a statement of employment and financial interests which reports (1) all other employment, and (2) those financial interests which the head of his division determines are relevant in the light of the duties he is to perform.

(b) A statement required under this section shall be submitted at the time of employment and shall be kept current throughout the period of employment by the filing of supplementary statements in accordance with the requirements of § 45.735-22(d). Statements shall be on forms made available through division administrative officers.

(c) This section shall not be construed as requiring the submission of information referred to in § 45.735-22(f).

(d) Paragraphs (g) and (h) of § 45.735-22 shall be applicable with respect to statements required by this section.

[Order No. 350-65, 30 F.R. 17202, Dec. 31, 1965, as amended by Order No. 383-67, 32 FR 13218, Sept. 19, 1967]

§ 45.735-24 Reviewing statements of financial interests.

(a) The head of each division shall review financial statements required of

any of his subordinates by §§ 45.735-22 and 45.735-23 to determine whether there exists a conflict, or possibility of conflict, between the interests of a subordinate and the performance of his service for the Government. If the head of the division determines that such a conflict or possibility of conflict exists, he shall consult with the subordinate. If he concludes that remedial action should be taken, he shall refer the statement to the Deputy Attorney General, through the Department Counselor, with his recommendation for such action. The Deputy Attorney General, after such investigation as he deems necessary, shall direct appropriate remedial action if he deems it necessary.

(b) Remedial action may include, but is not limited to:

(1) Changes in assigned duties.

(2) Divestment by the employee of his conflicting interest.

(3) Disqualification for a particular action.

(4) Exemption pursuant to § 45.735-5.

(5) Disciplinary action.

§ 45.735-25 Supplemental regulations.

The heads of divisions may issue supplemental and implementing regulations not inconsistent with this part.

§ 45.735-26 Publication and interpretation.

(a) The Assistant Attorney General for Administration shall provide that the provisions of this part and all revisions thereof shall be brought to the attention of and made available to:

(1) Each employee at the time of issuance and at least annually thereafter; and

(2) Each new employee at the time of employment.

(b) The Assistant Attorney General in charge of the Office of Legal Counsel, designated as Department Counselor in accordance with § 735.105 of Title 5 of the Code of Federal Regulations, and, subject to his supervision, such deputy counselors as may be designated to assist him in accordance with the aforesaid regulation, shall provide legal advice, guidance and assistance with respect to the interpretation of this part and in matters relating to ethical conduct, particularly matters subject to the provisions of the conflict of interest laws and Executive Order No. 11222 of May 8, 1965.

Appendix

[H. Con. Res. No. 175, 85th Cong.]

CODE OF ETHICS FOR GOVERNMENT SERVICE

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that the following Code of Ethics should be adhered to by all Government employees, including officeholders:

CODE OF ETHICS FOR GOVERNMENT SERVICE

Any person in Government service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.

3. Give a full day's labor for a full day's pay; giving to the performance of his duties his earnest effort and best thought.

4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.

5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.

6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.

7. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties.

8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.

9. Expose corruption whenever discovered.

10. Uphold these principles, ever conscious that public office is a public trust.

Passed July 11, 1958.

APPENDIX 3.—INTERNAL DOCUMENT CONCERNING CONDUCT AND ACTIVITIES OF EMPLOYEES OF THE FBI

Regulations concerning the conduct and activities of employees are published in the Code of Federal Regulations (CFR), Title 28, Section 45.735. Their source is found generally in Departmental Order 350-65 dated 12-28-65 which provides that employees shall:

(1) Conduct themselves in a manner that creates and maintains respect for the Department of Justice and the U. S. Government. In all their activities, personal and official, they should always be mindful of the high standards of behavior expected of them.

(2) Not give or in any way appear to give favored treatment or advantage to any member of the public, including former employees, who appear before the Department on their own behalf or on behalf of a nongovernmental person.

(3) Avoid any action which might result in, or create the appearance of--
- (a) Using public office for private gain
- (b) Giving preferential treatment to any person
- (c) Impeding Government efficiency or economy
- (d) Losing complete independence or impartiality
- (e) Making a Government decision outside official channels; or
- (f) Affecting adversely the confidence of the public in the integrity of the Government

Departmental Order 350-65 further provides that an employee shall not have a direct or indirect financial interest that conflicts, or appears to conflict, with his Government duties and responsibilities. Such a conflict exists whenever the performance of the duties of an employee has or appears to have a direct and predictable effect upon a financial interest of such employee or of his spouse, minor child, partner, person, or organization with which he is associated or is negotiating for future employment. A conflict of interest is deemed to exist even though there is no reason to suppose that the employee will in fact resolve the conflict to his own personal advantage rather than to that of the Government. The order also provides that no Department of Justice employee shall participate personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, unless authorized to do so by the Deputy Attorney General. This prohibition includes such financial interests as ownership of securities of corporations or other entities which may become involved in Bureau investigation. The prohibited actions include supervisory decisions and recommendations, as well as investigative activities. Any employee receiving an assignment involving any matters in which he has a direct or indirect financial interest as defined in the departmental order shall immediately advise his superior and shall be relieved of such assignment. Should there be a strong reason for requesting the Department's approval for the employee to participate in the assignment, the matter should be submitted to the Bureau for consideration regarding presentation to the Department. In any event the employee should not participate in such assignment until the Department's authorization has been received. The departmental order specifically exempts from the above prohibition the stock, bond, or policy holdings of an employee in a mutual fund, investment company, bank, or insurance company which owns an interest in an entity involved in the matter provided the fair value of the employee's holding does not exceed one percent of the value of the reported assets of the mutual fund, investment company, or bank.

In furtherance of the above, the Bureau expects its employees to so comport themselves that their activities both on and off duty will not discredit either themselves or the Bureau. Copies of Departmental Order 350-65 are furnished to employees during their indoctrination on entering the Bureau's service.

SECTION 1. CONDUCT AND ACTIVITIES OF EMPLOYEES

Failure by an employee to follow these regulations will result in appropriate disciplinary action including possible dismissal.

A. MISCONDUCT

There are actions the commission or omission of which, considered in light of the Bureau's work and its responsibilities to the American people, is prejudicial to good order and discipline. These are other actions which, either by commission or omission, are contrary to law.

1. Personal Misconduct

Employees should never cause themselves to be mentally or physically unfit for duty. They are not permitted to consume alcoholic beverages during working hours, including that time allotted for meal periods or any period of leave taken if the employee intends to return to work before the termination of working hours. They must not, at any time, engage in criminal, dishonest, immoral or disgraceful conduct or other conduct prejudicial to the Government.

2. Misuse of Government Property

All Government property, automobiles, supplies, equipment, telephones, and facilities are to be used solely for official purposes and are not to be converted to an employee's personal use. In this regard, however, the use of equipment such as cameras for training and practice during nonwork hours shall be considered "official purposes." Any loss, misplacement, theft or destruction of Government property issued to an employee must be reported to his superior immediately.

In connection with the use of Bureau vehicles, transportation and related services for other than Bureau employees are to be restricted to individuals and their families, or aides accompanying them, who are traveling to attend Bureau sponsored or related functions or have other direct business to transact with Bureau officials and officials of the Department of Justice traveling on official business. In no instance should such services be rendered to individuals traveling on personal business or on business not related to that of the FBI.

Special Agents attending school under the Government Employees' Training Act as an official assignment may avail themselves of stenographic and typing facilities in connection with their studies and preparation of assignments provided the request for such assistance is specifically approved in advance by the SAC or the ASAC. This authorization does not extend to employees attending school at their own expense or under Law Enforcement Assistance Administration grants.

Employees are expected to take proper care of any Bureau property issued to them or used by them. No Bureau property, other than that normally associated with maintenance or use of the vehicle, may be left unattended in a personally owned or Bureau automobile under any circumstances even though the outside doors of the car are locked. Personally owned weapons authorized to be carried on official business are to be treated in same manner as Bureau property.

Employees are responsible for complete security of credentials, identification cards and badges at all times. These items must be kept under the employee's control, should be immediately available, are to be displayed for official purposes only and are not to be photographed. The Bureau's name or the initials "FBI" shall not be indiscriminately or improperly used by any employee in either oral or written form. [Bureau officials and Special Agents are permitted to use business cards for official business as needed. The cards should contain the following: name, official title, Federal Bureau of Investigation, office address and telephone number. ASACs, SACs, Inspectors, Assistant Directors, Assistants to the Director, the Associate Director and the Director may have the FBI Seal inscribed in the upper left corner. Expenses incurred for printing the cards must be borne by the employees who elect to use them.]

SECTION 1. CONDUCT AND ACTIVITIES OF EMPLOYEES

Employees are not to make copies for themselves of any reports or correspondence they prepare in the course of their official duties except copies of expense vouchers, Form CA-1 (Employee's notice of injury or occupational disease), nor should they make or maintain possession of copies of official Bureau documents if they have no justifiable need to know the information contained in them. On separation from the Bureau, every employee must return any official documents made or received while in the Bureau's service except for items such as those enumerated above and originals of letters of appointment, commendation, censure or promotion. (See also Bureau rule on disclosure of information set out in Section 1, B, 2, below and regulations set out in Part II, Section 4M, [4g,]of this manual on disclosures of classified information).

3. Illegal Activities

Illegal activities on the part of any employee, in addition to being unlawful, reflect on the integrity of the FBI and betray the trust and confidence placed in it by the American people. Furthermore, unlawful activities can disqualify him for employment by the Government of the United States. It is, therefore, expected that employees will obey not only the letter of the law but the spirit of the law as well whether they be engaged in transactions of a personal or official nature. With respect to investigative activities, this admonition particularly applies to entrapment or the use of any other improper, illegal, or unethical tactics in the procurement of evidence. In this regard, it should be especially noted that, in securing information concerning mail matter, the Bureau will not tolerate a violation of law (Title 18, USC, §§ 1702, 1703, 1708, and 1709). Furthermore, employees must not tamper with, interfere with, or open mail in violation of law nor aid, abet or condone the opening of mail illegally by any employee of the U. S. Postal Service.

As members of a Federal investigative agency, FBI employees must at all times zealously guard and defend the rights and liberties guaranteed to all individuals by the Constitution. Therefore, FBI employees must not engage in any investigative activity which could abridge in any way the rights guaranteed to a citizen of the United States by the Constitution and under no circumstances shall employees of the FBI engage in any conduct which may result in defaming the character, reputation, integrity, or dignity of any citizen or organization of citizens of the United States.

Employees must not install secret telephone systems or microphones without Bureau authority.

No brutality, physical violence, duress or intimidation of individuals by our employees will be countenanced nor will force be used greater than that necessary to effect arrest or for self-defense.

All of the foregoing prohibitions, including those pertaining to illegal surreptitious entries, are applicable to all phases of the FBI's work, criminal, civil, domestic security, and foreign counterintelligence.

SECTION 1. CONDUCT AND ACTIVITIES OF EMPLOYEES

4. [Prohibited Activities]

a. Membership or Participation

Employees may not act as parole or probation officers. [They may serve as officers of law enforcement organizations only when to do so would in no way affect the conduct of official duties or present a situation wherein a conflict of interest or a lessening of Bureau efficiency would result. Should such occur the situation must be resolved in favor of terminating the officership. In all cases prior Bureau approval must be requested, accompanied by SAC analysis and recommendations. It is permissible to serve on a committee of a law enforcement organization.

The Bureau is exempted from Federal Labor-Management Relations programs and requirements by Executive Order 11491 and will not recognize, or negotiate with, labor organizations. Labor organizations are defined as those which exist, in whole or in part, for the purpose of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees. Bureau employees are prohibited from engaging in labor activities such as, but not limited to, strikes, picketing, organizing and campaigning. Additionally, they must not use government time or property for such purposes nor permit the use of same by others.]

Specific prior Bureau authority is necessary in order for an employee to serve as an officer of a civic or other type of organization. It must also be obtained for participation as a judge, sponsor or speaker in any public contest, debate, forum or similar gathering in which the theme of the meeting involves a controversial to[illegible].

Prior Bureau authority must be obtained before any FBI employee agrees to serve on a promotional or selection board for a local or state law enforcement agency. The SAC's analysis and recommendations should accompany any such request.

No employee shall serve as range master or as a range officer at a competitive firearms match unless the match is part of a training program in which the FBI is officially participating and the instructor's assignment in the match has been specifically approved by the Bureau in advance.

In addition, prior Bureau approval is needed for an employee to attend, serve as an instructor, or assist in conducting seminars, classes, or similar gatherings where his FBI affiliation is known with the exception of attendance as a student at a college, law school, school of accounting or other recognized institution of learning. This rule applies to all nonduty time, including leave, and in any case in which a question arises as to the desirability of such participation.

Employees are forbidden to visit trials, hearings or court sessions in any court out of personal curiosity.

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b. Gifts and Emoluments
Employees may not accept rewards or gratuities resulting from their FBI employment nor shall they accept fees from an outside source on account of public appearances, speeches, lectures, or publications, if such public appearance or the preparation of the speech, lecture, or publication was part of an employee's official duties. Also, no employee shall receive compensation or anything of monetary value for any consultation, lecture, teaching, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs or operations of the Department, or which draws substantially on official data or ideas which have not become part of the body of public information. Further, in this regard, no employee shall engage, with or without compensation, in teaching, lecturing, or writing that is dependent on information obtained as a result of his Government employment except when that information has been made available to the general public or when the Attorney General gives written authorization for the use of nonpublic information on the basis that such use is in the public interest (see also Item c below).

Bureau officials or other employees who speak or otherwise represent the FBI at conferences, training sessions, banquets, meetings and similar affairs given by outside groups are in official duty status when making such appearances and are entitled to claim payment through the Bureau for travel, subsistence, or other reimbursable expenses incurred. Any payments offered by sponsoring groups to such officials or employees as reimbursement for such expenses should be declined (see also Item c below).

Employees should not solicit contributions from other employees for gifts to official superiors nor may an official superior accept gifts from other employees.

c. Monetary Matters and Financial Dealings
An employee who is an official superior may not borrow money from or give or receive endorsements of promissory notes of other employees working under him or of lesser rank.

All employees must meet their financial obligations and, in addition, are expected to abide by the laws of the U. S. and of the several states with respect to filing proper tax statements. Any controversy arising with taxing authorities must be brought to the attention of the Bureau immediately. Although employees will not be required to pay unjustified claims, these matters should be resolved with reasonable promptness. In this respect it should be noted that the U. S. Internal Revenue Service may attach salaries of Federal employees who refuse to pay delinquent taxes.

No employee shall use his Government employment (a) for a purpose that is or gives the appearance of being motivated by the desire of private gain for himself or any other person, or (b) to coerce, or give the appearance of coercing, a person to provide a financial benefit to the employee or any other person.

An employee shall not participate in any transaction concerning purchase or sale of corporate stocks or bonds or of commodities for speculative purposes as distinguished from bona fide investment purposes; nor shall any employee use, for the financial gain of himself or another person, or make any other improper use of, whether by direct action on his part or by counsel, recommendation, or suggestion to another person, information which comes to the employee by reason of his status as an employee and which has not become part of the body of public information. Further, no employee shall make investments (a) in enterprises which, it is reasonable to believe, will be involved in decisions to be made by him, (b) on the basis of information which comes to notice as the result of his employee status and which has not become part of the body of public information, or (c) which are reasonably likely to create any conflict in the proper discharge of his official duties.

Employees must have sufficient funds at all times for current travel. No employee shall accept free transportation for official or unofficial purposes when the offer of such transportation might reasonably be interpreted as an attempt to affect his impartiality. He shall not solicit or accept, for himself or any other person, directly or indirectly, any gift, favor, entertainment, loan, or any other thing of monetary value from a person who has or is seeking contractual or other business or financial relations with the Department, is engaged either as a principal or attorney in proceedings before the Department or in court proceedings in which the U. S. is an adverse party, or has interests that may be substantially affected by the performance or nonperformance of his official duties. This prohibition does not, however, prevent: (a) solicitation or acceptance of anything from a friend, parent, spouse, child, or other close relative when the circumstances make it clear that the motivation is a personal or family relationship; (b) acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner

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meeting or other meetings; (c) acceptance of loans from financial institutions on customary terms for normal and ordinary activities such as home mortgage loans; (d) receipt of genuine reimbursement, unless prohibited by law, for actual expenses for travel and such other necessary subsistence for which no Government reimbursement is made and provided the reimbursement is not excessive and employee is not traveling on official business under Bureau orders; (e) acceptance of an award for a meritorious public contribution or achievement.

Failure on the part of an employee without good reason and in proper and timely manner to honor debts acknowledged by him to be valid or reduced to judgment by a court or to make or adhere to satisfactory arrangements for settlement thereof may be cause for disciplinary action.

d. Administrative Matters

(1) Present Employees

Recommendations for the promotion of any employee shall come only from the official superior of the employee. This procedure shall be followed, too, concerning any recommendations tending to initiate, retard, or rescind any order or administrative action of the Bureau. Failure to abide by these regulations will result in severe administrative action as well as possible removal from the service.

No employee is to be advised of any pending, contemplated, or recommended personnel action (promotion, reassignment, transfer, commendation, incentive award, disciplinary action, and the like) until action thereon has been taken and he is officially notified. In this regard it should be understood by all employees that the matter of promotions, demotions, transfers, and any other similar official personnel action must be decided solely on the merits of the individual case. The welfare of the Bureau must take precedence over desires and convenience of the employee involved, particularly with respect to transfers of investigative personnel who are expected to be available for service wherever the needs of the Bureau may require their assignment. Any attempt, either directly or indirectly, to bring outside influence to bear on the Bureau to promote, rescind, or alter official actions in any manner is contrary to the above-stated policy.

(2) Former Employees

Under no circumstances should any Special Agent in Charge or other FBI personnel become involved in any matter directly or indirectly concerning a present or former employee who has been arrested or is otherwise in difficulty with a law enforcement agency; nor should any Bureau employee attempt to mitigate the action of any arresting officer, agency, or prosecuting officer, or in any way try to minimize publicity concerning such employee or former employee or incident. Any incidents of this nature regarding present or former employees should be reported immediately to the Bureau.

Employees must not vouch for any person or give testimonials, affidavits, or letters of recommendation for anyone without prior Bureau approval except that SACs or division heads may approve letters of recommendation prepared by employees in their offices

concerning individuals who are not present or former employees of the FBI. However, employees preparing such letters should state therein that any recommendation is based on the personal knowledge of the writer and should not be construed as an official endorsement or recommendation of the FBI. All other letters should be sent to the Bureau for approval. (See Part I, Section 16, Subsection O, for detailed instructions concerning inquiries, including those from duly accredited investigators.)

e. Investigative Operations
Employees should not conduct joint investigations with other Bureau personnel without official permission; when such joint operation is justified, required (as in certain civil rights cases), or desirable (as, for example, in sensitive or security-type interviews), the appropriate supervisor may give permission for Agents of his squad to work together. If the circumstances require Agents from different squads to work jointly, approval must be obtained from each squad supervisor whose personnel are involved. In a resident agency, such permission must be secured from the senior resident Agent. When employees receive such permission, they should show the joint investigation on their #3 cards and daily reports (when such daily reports are required) by showing the name of the other Agent or Agents and the file number of the case. Approval of #3 cards and daily reports by the supervisors and senior resident Agent shall signify that such permission was granted by them.

An Agent, whether assigned to a resident agency or the field office headquarters city is not to visit his home during official working hours without specific supervisory approval. Any such visit and reasons therefor must be clearly shown on his #3 card and daily report when prepared.

Employees must not participate indiscriminately in matters with local law enforcement officers where no FBI jurisdiction exists. Further, they must tactfully decline to witness signed statements obtained by local law enforcement officers where no FBI jurisdiction is involved. In addition, no one other than persons officially connected with an investigation or whose services are needed, should be permitted to accompany our personnel on an investigation. In this regard, prior [SAC]authority is necessary for members of law enforcement agencies to accompany Agents during the course of security-type investigations.

f. Outside Employment
(1) In addition to Bureau Employment.
Employees shall not engage in other work, employment, occupation, profession, business, or partnership without receiving prior Bureau approval. This rule applies whether the outside employment is self-employment or employment by a third party. No Special Agent is to act as a salesman in the commercial sense. Any case of doubt should be referred to the Bureau for decision (See Part I, Section 16G, of this manual for further details). Furthermore, no employee, even though having Bureau approval to engage in part-time outside employment in a sales capacity, may solicit

business on Bureau premises at any time, whether during the workday or on his own time before or after working hours or during lunch or rest periods. In no case may Bureau premises by used for storage or display of merchandise.

(2) [Seeking of Other Full-Time Employment
If it comes to the attention of supervisory personnel that an employee is seeking other employment, the employee is to be interviewed to determine the circumstances surrounding such action. In the interest of good personnel management, the interview of the employee should be conducted with the intention of reversing unfavorable trends and correcting any problem areas should it be evident that such is the case.]

g. Active Participation in Military Reserve or National Guard Units (Ready Reserve Status)
According to Department of Defense directive 1200.7, heads of Federal agencies should:

(1) Make determinations identifying key agency positions and key personnel occupying such positions.

(2) Take the necessary action to assure that agency key employees holding key positions are not permitted to hold conflicting mobilization assignments with military Ready Reserve. If employees are permitted to hold conflicting mobilization assignments, the agency's emergency operating capabilities may be seriously eroded, which is contrary to the purpose and intent of preparedness planning.

Due to the key Federal employee status of Special Agents and certain clerical personnel, a request is made of the appropriate branch of military, when such a position is reached, and when applicable, that the key employee be reassigned from an active or ready reserve to the Standby Reserve, or discharged from Reserve or National Guard obligation. Due to availability requirements of Bureau Special Agents and in order to permit adequate contingency planning in the event of an emergency which might necessitate the mobilization of the Ready Reserve Unit, Bureau policy precludes any Special Agent or other designated key Federal employee from enlisting, reenlisting, or reactivating into an active or Ready Reserve Unit without prior Bureau approval.

5. Political Activities
In general, Bureau employees are prohibited from engaging in any form of political activity except the right to vote. They should avoid any undertakings which may have any tinge of a political nature or which could be construed to indicate the FBI favors any political party. If any doubt exists, prior Bureau approval must be obtained. No advertisements supporting any candidate for public office or for any unauthorized purpose may be placed on official cars or Government property.

SECTION 1. CONDUCT AND ACTIVITIES OF EMPLOYEES

Under the Subversive Activities Control Act of 1950, it is unlawful for: (a) any member of the Communist Party of the United States of America to hold any nonelective office or employment under the U. S. or, in seeking, accepting, or holding any nonelective office or employment under the U. S., to conceal or fail to disclose the fact that he is a member of such organization; (b) any officer or employee of the U. S. to contribute funds, or services to the Communist Party, USA, or to advise, counsel, or urge any person known to him to be a member of such organization to perform or omit to perform any act if such act or omission would violate any provision of the Subversive Activities Control Act of 1950; (c) any Federal officer or employee to disclose classified security information to an individual he knows or has reason to believe is a member of the Communist Party, USA, is an offense punishable by fine of not more than $10,000, imprisonment for not more than 10 years, or both. Upon conviction of such offense, the officer or employee becomes thereafter ineligible to hold any office or place of honor, profit or trust created by the Constitution or laws of the U. S. (See also Bureau rule on disclosure of information set out in Section 1, B, 2, below, and regulations set out in Part II, Section 4M,[4i,]of this manual on disclosure of classified security information).

B. CONFIDENTIAL NATURE OF FBI OPERATIONS

1. Employees must afford confidential orders involving special assignments and, in some instances, transfers appropriate secrecy in accordance with the exigencies thereof. Should there be any doubt in these matters, the advice of the SAC or ASAC should be sought.
2. Employees are required to keep strictly confidential all information secured in their official capacity. Failure to abide by this provision violates Department of Justice regulations and may violate certain statutes providing severe penalties. (See also Section 1, item A, 2 and 5, above and regulations set out in Part II, Section 4M,[4i,]of this manual on disclosure of classified security information).
3. Employees are directed to refrain from expressing either orally or in writing, except to official superiors, any opinion bearing upon the efficiency or standing of former or present employees of the Bureau. Individuals making these inquiries shall be advised of this rule and referred to FBI Headquarters for such information; FBI Headquarters should be apprised in advance, if possible, of any inquiries of this nature.

C. PRIVACY ACT OF 1974

According to the Privacy Act of 1974, it is necessary for each agency that maintains a system of records to inform each individual whom it asks to supply information the authority which allows the solicitation of information, the purposes and uses to be made of that information, and the effects on that individual if he does not provide this information. Each applicant for employment with the FBI is furnished Form FD-481 which accompanies our Application for Employment. This form contains the FBI authority to conduct personnel investigations pursuant to Title 28, Part O, subpart P, paragraph 0.85, Code of Federal Regulations, the reasons and uses of the solicitation of information which was to determine the suitability for employment, and willfully making a false statement or concealing a material fact would be the basis for dismissal if an applicant received an appointment. In addition to the above, each employee should be aware that he or she may be asked to furnish information concerning themselves by completing various forms during their tenure with the Bureau in order for the Bureau to carry out its many administrative duties and responsibilities.

All employees are expected to abide by the standards of conduct set forth in Departmental Order 350-65 and rules and regulations of the FBI pursuant to the above-mentioned authority set forth in the Code of Federal Regulations.

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According to these regulations, investigations will be conducted in connection with violations of the standards which will include the interview of the employee involved. If an employee refuses to cooperate during an interview regarding work-related matters, that employee could be disciplined for insubordination. Should an employee decline to furnish information relating to other activities, he or she could be subjected to administrative action being taken without the benefit of having furnished a personal explanation. Administrative action will be based on the activity and not on employee's failure to provide an explanation. Failure by an employee to follow all regulations will result in appropriate disciplinary action including possible dismissal.

The Privacy Act of 1974 sets forth the following provisions which you should be aware of regarding criminal penalties which may be imposed under certain circumstances:
(i)(1) Criminal Penalties. Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.
(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e) (4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.
(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

D. INTELLIGENCE OVERSIGHT BOARD
The President by Executive Order 11905 of February 18, 1976, established the Intelligence Oversight Board. The Board, composed of three members appointed by the President from outside the Government, is charged with reviewing activities of the Intelligence Community that raise questions of legality or propriety. The activities to be reviewed by the Board are those conducted by the Intelligence Community as part of Government business. With respect to the FBI, activities to be reviewed by the Board are those conducted under Section 4 of Executive Order 11905 relating to foreign intelligence and counterintelligence. In this regard, the Board will receive and consider reports from Inspectors General and General Counsels of the Intelligence Community concerning activities that raise questions of legality or propriety. In the FBI the Inspector General is the Assistant Director,[Planning and]Inspection Division, and the General Counsel is the Assistant Director, Legal Counsel Division. It is important to emphasize that the Board is not to review illegal or improper personal activities of Government employees.

Pursuant to provisions of the Executive Order, each employee is instructed to cooperate fully with the Intelligence Oversight Board. Further, the Intelligence Oversight Board has advised that the Executive Order does not explicitly establish a system by which employees of the Intelligence Community would report to the Board. The Board was not established as a substitute for the FBI's normal procedures for receiving complaints and allegations from employees. Nonetheless, the President has made it clear that he expects the Board to accept information from individual employees which falls within the Board's jurisdiction. Although the Board does not feel an obligation to investigate all allegations received, it will, as it deems appropriate, follow up on serious allegations received from employees bearing on activities conducted by the Intelligence Community as part of Government business. Accordingly, although only a fraction of the Bureau's work relates to foreign intelligence and counterintelligence, employees are advised that with respect to foreign intelligence and counterintelligence they do have the ability to report directly to the Board on matters coming within its purview.

APPENDIX 4.—SURVEY OF DEPARTMENTAL INTERNAL INSPECTION UNITS PREPARED BY INTERNAL AUDIT STAFF, OFFICE OF MANAGEMENT AND FINANCE, DEPARTMENT OF JUSTICE, JANUARY 1977

INTERNAL AUDIT REPORT

SURVEY OF DEPARTMENTAL INTERNAL INSPECTION UNITS

OFFICE OF MANAGEMENT AND FINANCE

INTERNAL AUDIT STAFF

JANUARY 1977

CONTENTS

SURVEY OF DEPARTMENTAL INTERNAL INSPECTION UNITS

INTRODUCTION

The Internal Audit Staff, Office of Management and Finance (OMF), has completed a survey of the investigation units, or comparable units, in six agencies of the Department of Justice (DOJ). The six agencies are Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), United States Marshals Service (USMS), Immigration and Naturalization Service (INS), Bureau of Prisons (BOP), and the Law Enforcement Assistance Administration (LEAA).

The Office of Professional Responsibility (OPR) in DOJ is required by 28 CFR Section 0.39 a(f)(4) to submit to the Attorney General an annual report reviewing and evaluating the activities of internal inspection units within the Department. OPR, by memorandum dated October 8, 1976, requested the six agencies to submit reports reviewing and evaluating their internal inspection units. The reports were to cover the period October 1, 1975, through September 30, 1976. The memorandum recommended that the Internal Audit Staff review the submission of each agency to monitor their accuracy and completeness. In addition, OPR asked the Internal Audit Staff to evaluate the need for periodic reports from the agencies to OPR and the content of such reports.

The survey included review of the reports submitted by each agency, review of policies and procedures of the Department and of each agency concerning standards of conduct and employee integrity, discussion with the representatives of each agency responsible for the internal investigations, and a review of some case files and information systems.

This is the first time that OPR has requested this type of information. The information systems in the six agencies were not designed to capture all of the information requested. Because of the lack of adequate information systems and time constraints, test checks of case files and information systems were minimal. However, the test checks conducted indicate that the data reported by the agencies are reasonably complete and accurate.

SUMMARY OF RECOMMENDATIONS

In order for OPR to meet their responsibility to the Attorney General, we recommend that:

1. OPR consider having serious nonsupervisory misconduct investigations included in the reports. (Page 11)

2. OPR issue guidelines:

   a. Defining the term "supervisory-level employees" for OPR reporting purposes.

   b. Defining the classes of misconduct included in the term "integrity."

   c. Outlining the content of information to be included in monthly and annual reports from agencies. (Page 11)

INTERNAL INVESTIGATION UNITS

Each agency covered by this survey has established its own system for investigating allegations of misconduct made against their employees. The total number of employees in each agency and the number of investigators assigned to the internal investigation function are:

	Total Employees	Investigators Assigned
DEA	4,068	51
FBI	19,994	5
USMS	2,196	6
INS	9,669	15
BOP	8,740	0
LEAA	889	3

The number of investigators assigned to an internal investigation unit is augmented in some agencies. The FBI and INS used field personnel to investigate some allegations of misconduct and BOP has field personnel or ad hoc committees conduct all its investigations. A synopsis of the organization and operation of the internal investigation function of each agency illustrates the divergent approach used in each agency.

DRUG ENFORCEMENT ADMINISTRATION

The internal investigation function of DEA is in the Office of Internal Security (IS). This office is responsible for all security and internal inspection matters within DEA. The office consists of a group at Headquarters and personnel stationed at six field offices. Each field office has jurisdictional responsibility for two or more DEA regions. The field offices are located separate and apart from other DEA facilities and are not dependent on them for administrative support. The Headquarters group is divided into three divisions, with the Operations Division being responsible for integrity investigations and unannounced inspections of all DEA facilities.

The Operations Division is the control point for all integrity investigations and unannounced inspections. All allegations of misconduct concerning integrity are reported to this division. Allegations received that require investigation are assigned a case number and sent to the field office for investigation. The investigation is conducted by personnel in the field office and when completed, the case file is sent to the Operations Division for review. The case file is reviewed by employees in the Operations Division, Legal Counsel, and Personnel. At any stage of the review process, the case may be returned to the field for additional investigation.

The investigators serve as fact finders and they do not draw conclusions or make recommendations in their reports. The Personnel Section analyzes the case file, delineates the charges, if any, and provides information on the range of penalties that may be administered by the official responsible for the employee charged with misconduct. The responsible official determines the penalty and issues a letter of proposed action to the concerned employee. When personnel in the IS receive a copy of the proposed action, they close their case file.

The IS has recently initiated a 60-day time frame for completing an investigation. The time period includes investigation, the review process, and issuance of the letter of proposed action. The purpose of the time frame is to ensure that prompt action is taken on all allegations. It is not intended to encourage quantity at the expense of quality. Officials of the IS believe that between 70 and 90 percent of their investigations can be completed within the 60-day time frame without sacrificing quality.

FEDERAL BUREAU OF INVESTIGATION

In a recent reorganization, the FBI established the Planning and Inspection Division. The Office of Professional Responsibility (OPR), which started functioning in October 1976, is one of three offices that make up the Division. This office is responsible for investigating all allegations against employees concerning criminality, moral turpitude and serious misconduct.

Allegations against FBI Headquarters officials, Special Agents in Charge (SAC's), Assistant Special Agents in Charge (ASAC's) and Legal Attaches will normally be investigated by the FBI-OPR staff. Allegations against other FBI employees will normally be referred to the appropriate Assistant Directors, SAC's or Legal Attaches for prompt investigation and the FBI-OPR will monitor the progress of these investigations. The investigators develop and report facts concerning the allegations and draw a conclusion on whether action should or should not be taken in the case. The investigators do not recommend what action should be taken.

The completed case is reviewed by the Chief, FBI-OPR, and will be returned to the field or the FBI-OPR investigator if the Chief feels that additional investigation is necessary. After the case is approved by the Chief, FBI-OPR, it goes to the Assistant Director, Planning and Inspection Division, for his approval and then to the Finance and Personnel Division. The Finance and Personnel Division initiates whatever disciplinary action they feel is appropriate. FBI-OPR closes the case when they receive a copy of the final action from the Finance and Personnel Division.

The FBI has not established a time frame for completing an investigation of alleged employee misconduct, however, the FBI-OPR monitors all investigations and takes follow-up action if they are not promptly investigated.

The FBI-OPR has two additional functions. They are to maintain liaison with the Office of Professional Responsibility, U.S. Department of Justice, and to monitor disciplinary action taken concerning all employees of the FBI. This monitoring function covers disciplinary action taken as a result of investigative substantive delinquencies, personal misconduct matters and work-related deficiencies. The purpose of the monitoring function is to attempt to standardize disciplinary action initiated by the Finance and Personnel Division. The FBI-OPR will review the disciplinary actions and inform the Director if they find that disciplinary action is too harsh or too light for certain offenses.

Prior to the reorganization, integrity investigations and unannounced inspections were conducted by the Inspection Division. The reorganization separated these functions. Unannounced inspections have been eliminated. Announced inspections are now conducted by the Office of Inspection.

The period covered by the annual report to be sent to the Attorney General actually preceded the FBI reorganization. During the report period, allegations of misconduct were received in the Administrative Division. The Administrative Division referred the matter to either the SAC or the Inspection Division for investigation. When the investigation was completed, it was returned to the Administrative Division and disciplinary action, if necessary, would be initiated. No centralized records of disciplinary actions were maintained. Thus, the FBI was not able to provide information on disciplinary actions in its annual report.

UNITED STATES MARSHALS SERVICE

The Internal Inspection Unit (IIU) of the USMS is responsible for investigating allegations of misconduct against USMS employees. The unit is located in USMS Headquarters and does not have field offices. There is, however, a deputy in the Northern District of Illinois with investigative experience who is utilized when needed.

Allegations of misconduct are received in the IIU. The IIU refers a small number of allegations (about 2 or 3 percent) to the regional offices for investigation. The allegations referred to the regions concern matters that are minor in nature. The remainder of the allegations are investigated by the IIU staff.

The investigators serve as fact finders and do not draw conclusions or make recommendations. The Chief, IIU, reviews all investigative case files to assure completeness. When satisfied that the investigation is complete, the Chief, IIU, forwards the case file to the Deputy Director for his review and approval. The case file then goes to the Personnel and Training Section. Employees of the Personnel and Training Section review the case file, determine which charges, if any, are founded and establish what penalties should be administered. The

case is then sent to the appropriate Regional Director for action. IIU closes their case file when the Deputy Director approves the case.

No time frame has been established for completing an investigation. The Chief, IIU, believes it would be difficult to establish a time frame because of the different nature and complexity of each allegation. He believes that most of their investigations required about 5 man-days to complete.

The USMS does not have investigator (GS-1811) positions except for those in IIU. Positions in the IIU have been filled by deputies with prior investigative experience. All of the investigators have had investigative training.

IMMIGRATION AND NATURALIZATION SERVICE

The Office of Internal Investigation (OII) is responsible for investigating allegations of misconduct made against INS employees. The bulk of the OII office staff is located in Headquarters, but three investigators are located at the Western Regional Office.

Allegations of misconduct are received at OII Headquarters. Allegations against high ranking officials and serious allegations against all employees are investigated by OII. Allegations of a minor nature are referred to the four regional offices for investigation. The Regional Director assigns an investigator from within the region to conduct the investigation. OII monitors the cases and receives a copy of the investigative report for review before any adverse or disciplinary action is initiated.

Cases investigated by the OII staff are under the direct supervision of the Chief, OII, who reviews all case files for completeness. After review by the Chief, OII, the case is forwarded to Personnel. If the charges are founded, a three member panel is established to determine the disciplinary or adverse action. OII closes their case file when it is approved by the Chief, OII.

The investigators serve as fact finders and, in addition, they reach conclusions in their reports as to whether or not the allegations are founded.

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No time limit has been established for completing an investigation. The Chief, OII, stated that as long as his investigators are following good leads, he does not worry about the time spent on the investigation. All investigations of allegations of misconduct are approached as possible criminal violations and are presented to a U.S. Attorney for his determination on whether prosecution is warranted.

BUREAU OF PRISONS

The BOP does not have a unit for investigating allegations of misconduct against employees. Allegations of misconduct are normally handled by a Warden who will appoint someone to conduct the investigation. Allegations against Associate Wardens or higher level officials are referred to Headquarters. The Director will appoint a board of inquiry to investigate these allegations.

No distinction is made in the reporting of integrity matters and administrative matters. Many of the allegations in BOP concern possible violation of criminal statutes and are referred to the FBI for investigation. Reports of the FBI investigations are sent to the Director and subsequently forwarded to the Regional Director for action.

BOP has an Inmate Grievance Procedure that allows inmates to have their grievances investigated. The grievance is investigated at the local level and the determination made at the local level can be appealed to Headquarters for review. Inmate complaints against correctional officers are handled under this procedure.

Personnel specialists are assigned to each region and initiate disciplinary or adverse actions in the regions when allegations are founded. The Labor Management Relations Section in Headquarters has recently begun receiving a Quarterly Report from the regions on disciplinary actions. Case files are maintained in the field on matters in which disciplinary actions are initiated. In cases where adverse actions are initiated, parts or all of the case file are sent to Headquarters. BOP officials stated that their reporting system needs to be improved, however, they do not feel that they need an internal investigation unit.

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

The Office of Audit and Inspection (OAI) in LEAA is charged with responsibility for investigating allegations of misconduct by LEAA employees. They are also responsible for investigation of allegations of possible fund misuse, criminal activity or conflict of interest against recipients of LEAA funding. This latter responsibility generates nearly all of OAI's workload. At the present time, all 130 investigations being conducted concern recipients of LEAA funds.

OAI investigates allegations concerning possible criminal misconduct or integrity matters. Administrative matters are the responsibility of management.

The investigators serve as fact finders and do not draw conclusions or make recommendations. Case files are reviewed by the Assistant Administrator, OAI, and forwarded to the General Counsel for review. The case file is then sent to officials in the Personnel Division for initiation of disciplinary or adverse action, if warranted.

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In all agencies when an allegation or subsequent investigation discloses potential violation of criminal statutes, the investigating agency will refer the matter to the agency having jurisdiction over the criminal statute. That agency can accept the matter for investigation or defer to the referring agency. These matters will also be presented to the U.S. Attorney for his consideration of criminal prosecution.

FINDINGS AND RECOMMENDATIONS

NEED FOR INTERNAL AUDIT

The Department of Justice has been publicly criticized about its handling of internal investigations of allegations of misconduct. Before formation of the OPR, each agency in the Department conducted internal investigations with little or no review or supervision from the Department. Thus, the Attorney General had little knowledge of the adequacy or effectiveness of internal inspection units in the agencies.

The OPR was established by the Attorney General to oversee the internal inspection activities of the Department. One function assigned to OPR is to, "Submit recommendations to the Attorney General and the Deputy Attorney General on the need for changes in policies or procedures that become evident during the course of his inquiries."

Since its formation, OPR has been primarily concerned with overseeing the investigation of specific allegations of misconduct and has not had the opportunity to study the organization, adequacy or effectiveness of internal investigation units in the Department. The synopsis of internal investigation units in the six agencies presented earlier in this report shows that differences exist in the organization and operation of the various units within the Department. Two of the agencies, DEA and FBI, have recently reorganized their internal investigation units and one agency, BOP, does not have a unit charged with this responsibility.

In order for OPR to meet its responsibility to submit recommendations to the Attorney General on the need for changes in policies or procedures, an evaluation of the organization, adequacy, and effectiveness of the internal investigation function in all six agencies is needed. Accordingly, the IAS will coordinate with OPR to establish a schedule for conducting audits of the internal inspection function of each agency of the Department.

NEED FOR OPR REPORTING SYSTEM

OPR is required to submit an annual report to the Attorney General (28 CFR 0.39a(f)(4)). To prepare its first report, OPR requested each agency to submit a report reviewing the agency's internal investigation activities for the year. To assist OPR in preparing future reports and in monitoring agency integrity investigations, a reporting system is needed to provide OPR with data on each agency's activities during the year.

Supervisory Level--Seriousness of Allegations

The October 8, 1976, memorandum requested that agency reports include a summary of all misconduct allegations made against supervisory-level or above personnel.

The auditors believe there may be instances that OPR would want reported even though the employees did not meet the supervisory definition. For example, DEA has informally initiated the practice of immediately informing the Administrator when certain types of allegations are received. The allegations include (1) any shooting incident, (2) criminal activity by DEA employees, and (3) those involving notoriety or great publicity. The purpose of this DEA practice is to inform the Administrator of significant allegations of misconduct.

The OPR should consider having investigations of certain enunciated types of allegations of misconduct included in the reporting system in addition to summaries of investigations of allegations against high level employees.

Supervisory Personnel

The October 8, 1976 OPR memorandum to the agencies requested that the report "include a brief summary of all misconduct allegations * * *."

Some confusion existed among the agencies over the definition of supervisor. Each agency has a different organization and grade structure--supervisory positions in some organizations begin at higher grade levels than in other organizations. In addition, the grade structure

of supervisory positions for professional personnel and clerical personnel often differ. Discussions were held with representatives of the agencies in an attempt to define the term "supervisor" for use in preparing the first report.

The OPR needs to issue guidelines clearly defining the term "Supervisory-level employees" so that all agencies include the proper information in their future reports.

Integrity v. Administrative Matters

The OPR is concerned with allegations of misconduct that involve matters of integrity rather than matters that are administrative in nature. Each of the six agencies makes some distinction between integrity and administrative matters. Only DEA, however, has a detailed listing of the classes of misconduct that should be reported to the Office of Internal Security as integrity matters. To ensure that all agencies are reporting comparable information, and that all agency employees know what classes of misconduct to report, OPR needs to issue guidelines defining the classes of misconduct allegations to be included under integrity and reported.

Periodic Reports

The October 8, 1976, memorandum from OPR to the six agencies outlined the information to be included in the report. Some of the information requested by OPR was not readily retrievable from the agencies' information systems. The agencies did, however, supply the information requested to the extent possible, and have agreed to modify their information system to capture the data needed for future reports.

OPR has been receiving monthly reports from FBI and INS and has recently requested a similar report from DEA. These reports contain a brief description of the allegation, the position of the alleged offender, and the status of the matter. INS also includes a brief summary of the investigation.

To ensure that OPR receives sufficient information to monitor allegations of misconduct in the Department, a reporting system including monthly reports and an annual report is needed. The reports should include statistical data to allow monitoring of the number of allegations and narrative information on allegations against high-level officials or serious matters.

The exact format and content of the reports will depend on the amount of information OPR wishes to accumulate. However, the monthly reports for each agency should include:

1. The number of cases opened and closed during the period, cases in progress at the end of the period, and the number of allegations found to be without a substantial factual basis.

2. An entry for each allegation against supervisory-level and above officials including the agency file number, the position of the alleged offender, a description of the allegation, and the status of the case.

The annual report should include:

1. A description of any significant structural or policy changes in the inspection unit during the year.

2. The number of employees in the unit.

3. Copies of any changes in procedures implemented during the year.

4. A brief summary of all misconduct allegations (without mentioning the name of the individual accused) made against supervisory-level or above personnel that were found to have a substantial factual basis, and a brief description of how the matter was disposed of.

5. Statistical information for the year on the number of cases opened, number of cases closed, cases in progress, and number of cases found not to have a substantial factual basis.

Guidelines outlining the content of the reporting system should be issued as expeditiously as possible so that the agencies may modify their information systems to capture the necessary data.

Recommendations

To enable OPR to receive the information needed to monitor internal investigation activities and prepare future annual reports, the auditors recommend that OPR consider having serious nonsupervisory misconduct investigations included in the reports and that OPR issue guidelines:

1. Defining the term "supervisory-level employees" for OPR report purposes.

2. Defining the classes of misconduct included in the term "integrity."

3. Outlining the content of information to be included in monthly and annual reports from agencies.

APPENDIX 5.—LETTER OF MAY 9, 1977, FROM ATTORNEY GENERAL BELL CONCERNING REPORTING REQUIREMENTS OF JUSTICE DEPARTMENT ORDER ESTABLISHING OFFICE OF PROFESSIONAL RESPONSIBILITY

UNITED STATES GOVERNMENT

memorandum

DATE: MAY 9 1977

REPLY TO ATTN OF: OPR

SUBJECT: Reporting Requirements of Departmental Order Establishing the Office of Professional Responsibility

TO: Heads of All Offices, Boards, Bureaus and Divisions
All United States Attorneys

The Department's Office of Professional Responsibility was created to oversee investigations of allegations of misconduct by Department of Justice employees. As head of that Office, the Counsel's function is to ensure that Departmental employees continue to perform their duties in accord with the professional standards expected of the Nation's principal law enforcement agency. The Office is responsible for reviewing allegations against Departmental employees involving violations of law, Departmental regulations, or Departmental standards of conduct. To this end, the Office of Professional Responsibility serves as a special review and advisory body, reporting directly to the Attorney General or, in appropriate cases, to the Deputy Attorney General or the Solicitor General. See §0.39 et seq., Departmental Order No. 635-75, 40 Fed. Reg. 58,643 (1975). For this Office to perform its function properly, it must be notified promptly whenever someone makes an allegation of serious misconduct against any employee of the Department.

Section 0.39a(f)(1) and (2) of the Department Regulations require the Counsel to submit to the Attorney General and the Deputy Attorney General "an immediate report" concerning any matter which appears to involve a violation (1) of law, or (2) of Departmental regulations or orders, or applicable standards of conduct which "should be brought to the attention of a higher official". Section 0.39a(f)(3) requires the Counsel to submit a monthly report summarizing the matters under the Counsel's review.

I wish to remind you that it is your responsibility to inform the Counsel on Professional Responsibility of all such allegations which come to your attention and to advise

him when inquiries into these allegations have been completed. In addition, the internal inspection units of the Department (or where there are no such specific units, any units or offices discharging comparable duties) should continue to submit monthly reports to the Counsel detailing the status and results of their current investigations.

Griffin B. Bell

Griffin B. Bell
Attorney General

APPENDIX 6.—LETTER OF AUGUST 15, 1977, FROM FBI DIRECTOR CLARENCE M. KELLEY, RESPONDING TO QUESTIONS FOR THE RECORD FROM JULY 27 HEARING

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

August 15, 1977

BY LIAISON

Honorable Richardson Preyer
Chairman
Subcommittee on Government Information
and Individual Rights
House Committee on Government Operations
United States House of Representatives
Washington, D. C. 20515

Dear Chairman Preyer:

During my appearance before your Subcommittee on Government Information and Individual Rights, House Committee on Government Operations, on July 27, 1977, there were certain questions asked of me, answers of which were to be submitted for the record. The following are responses to those questions.

You asked what action the FBI took concerning the recommendations relating to the FBI made by the Select Committee on Intelligence Activities (Church Committee).

The Church Committee recommendations appear in its report entitled, "Intelligence Activities and the Rights of Americans," Book II, and many of them pertain to the FBI. As I am sure you are aware, many of the recommendations cannot be implemented absent legislative action. Examples of such recommendations would be Recommendation 84, which limits the term of the Director of the FBI to eight years, or Recommendation 75 calling for each agency to have a General Counsel nominated by the President and confirmed by the Senate. There are other general recommendations concerning mail opening, electronic surveillance, and other investigative techniques, which would, of course, as recommended require legislative initiative. The FBI in

conjunction with the Department and other Executive Branch representatives, as well as congressional staffers, has drafted legislation concerning foreign counterintelligence electronic surveillances. This legislation has been the subject of hearings before the Senate Judiciary Committee and the Senate Committee on Intelligence. The Attorney General has testified in prior congressional hearings that other investigative techniques such as mail opening and surreptitious entries are under review with the view towards developing legislation.

Many of the recommendations also involve legislative guidelines concerning domestic security and foreign counterintelligence investigations. This subject is the topic of discussion between congressional committee staffers, representatives of the FBI and the Department of Justice; the intended result is to draft a legislative charter for the FBI governing these investigations.

Other recommendations call for action by the Attorney General. Examples of these recommendations are contained in Section F of the aforementioned report captioned, "Attorney General Oversight of the FBI," and would more properly be responded to by the Attorney General; however, I may note that Recommendation 69 which pertains to Departmental review of FBI domestic security investigations is being complied with and this has been the case for over a year under the provisions of the Attorney General's Domestic Security Guidelines.

In some instances where statutory authority was necessary, such authority has already been embodied in either a congressional resolution and/or statute. In particular, Recommendation 89 suggests the FBI and other intelligence agencies be required to seek annual statutory authorization for their programs. We are now required to do so before the Senate Select Committee on Intelligence pursuant to Senate Resolution 400 of the 94th Congress, and the House Judiciary Committee, by legislation, has authorization responsibilities. The newly created House Permanent Select Intelligence Committee will also have authorization authority under House Resolution 658 of the 95th Congress. This authorization authority will be similar to that currently being carried out by the Senate Committee on Intelligence.

Some of those instances where I had the authority to implement the recommendations, they have so been implemented. Examples of these would be Recommendation 70(a) which asks that the "General Counsel and Inspector General of the FBI" should have unrestricted access to all information in possession of the agency and should have the authority to review all agency activities and that the Attorney General and the Office of Professional Responsibility should have access to all information which in the opinion of the Attorney General is necessary for an investigation of illegal activity. Another example is the recommendation concerning the General Counsel of the FBI reviewing significant proposed agency activities to determine their legality and constitutionality. Where there is a question of legality or constitutionality of an FBI proposed program or investigative activity, the Legal Counsel Division conducts a review of that matter. In summary, I would like to state that those recommendations by the Senate Select Committee on Intelligence, which are within my authority to implement, have in many instances been implemented and others are under consideration.

Congressman Paul N. McCloskey, Jr., asked whether the Department of Justice decision not to prosecute CIA employees involved in the mail opening matter could be compared to the indictment of former FBI Agent John Kearney.

I have considered this question, and I am not able to comment or compare the Department of Justice decisions in the CIA mail opening matter to the indictment of former Special Agent John Kearney. This is prompted by the fact I am not in possession of the facts surrounding the indictment of Mr. Kearney which would be essential to any comparison to the Department's decision in the mail opening matter.

Congressman Michael Harrington inquired whether there was an effort made to determine the source of information on which a series of articles was written based on personal documents belonging to Orlando Letellier which were recovered by the Metropolitan Police Department, Washington, D. C.

I have determined that the FBI interviewed personnel who had information which was later disclosed in the news media relating to our investigation into the death of Mr. Letellier. This inquiry was not limited to the news columns alluded to by Congressman Harrington, but rather to determining whether FBI personnel were the source of any of the series of leaks of information relevant to this investigative matter. I am satisfied based on the results of this investigation that there was no FBI involvement in these disclosures. I understand similar inquiries were conducted by the Department of Justice, Criminal Division, and the Executive Office for United States Attorneys. I want to reiterate that improper disclosure of information derived from investigative matters is against FBI rules, and personnel involved in such conduct would be subject to severe administrative action.

Sincerely yours,

Clarence Kelley

Clarence M. Kelley
Director

APPENDIX 7.—DEPARTMENT OF JUSTICE NEWS RELEASE OF APRIL 1, 1976, ANNOUNCING ESTABLISHMENT OF PROGRAM TO NOTIFY VICTIMS OF FBI'S COINTELPRO OPERATIONS

Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, APRIL 1, 1976 AG

Attorney General Edward H. Levi today announced that he has established a special review committee to notify individuals who may have been personally harmed by improper COINTELPRO activities that they were the subjects of such activities, and to advise them that they may seek further information from the Department if they wish.

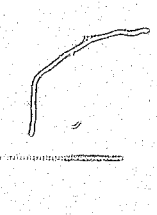
Notification will be made in those instances where the specific COINTELPRO activity was improper, actual harm may have occurred, and the subjects are not already aware that they were the targets of COINTELPRO activities.

The Attorney General stated that although he realized there might be difficulties in carrying out the program, his instructions to the committee set forth a mandatory general rule, and that any exceptions recommended by the committee would have to be taken up with an advisory committee and then presented to him personally. Special care would be taken to preserve rights of privacy. Notification would be given as the Committee's review of COINTELPRO files progressed.

The special review committee has been set up within the Office of Professional Responsibility, which is headed by Michael E. Shaheen, Jr. Members of the committee are Richard M. Rogers, of the Department's Freedom of Information Unit; Susan N. Wachtel, of the Civil Division, and Paul V. Daly, of the Office

of Congressional Affairs of the FBI.

The advisory group with which the committee will consult will be chaired by Peter R. Taft, Assistant Attorney General in charge of the Land and Natural Resources Division, and will include Michael M. Uhlmann, Assistant Attorney General in charge of the Office of Legislative Affairs and John Mintz, Legal Counsel for the FBI.



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