

THURSDAY, DECEMBER 11, 1975

U.S. SENATE,
SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS
WITH RESPECT TO INTELLIGENCE ACTIVITIES,
Washington, D.C.

The committee met, pursuant to notice, at 10:10 a.m., in Room 318, Russell Senate Office Building, Senator Frank Church (Chairman), presiding.

Present: Senators Church, Hart of Michigan, Mondale, Morgan, Hart of Colorado, Baker, Mathias, and Schweiker.

Also present: William Miller, staff director; Frederick A. O. Schwarz, Jr., chief counsel; Curtis Smothers, counsel to the minority.

The CHAIRMAN. Our witness this morning is the Honorable Edward H. Levi, Attorney General of the United States. Mr. Levi has appeared before this committee on previous occasions and this committee is most happy to welcome him back again this morning.

He has been asked to testify today about the future of the Federal Bureau of Investigation, and especially its domestic intelligence operations.

This morning's hearing marks both an end and a beginning for the select committee. It is the end of a series of hearings on domestic intelligence which began in September with an examination of the so-called Huston plan. Those original hearings explored the relationship of the White House to the FBI and other intelligence agencies in the development of a specific plan for using illegal techniques against domestic groups.

At that time the committee learned the details of FBI "black bag" jobs against domestic targets which continued at least until 1968. We learned of a "do not file" procedure in the FBI for destroying the records of these operations and the committee was told that the FBI expanded its intelligence investigations along the lines of the Huston plan, even after the President withdrew his approval.

Our next hearings in this area dealt with improper activities that overlapped foreign and domestic intelligence operations. The Director of the National Security Agency testified that the sophisticated surveillance operations of that Agency had been targeted against the international communications of American citizens for domestic intelligence purposes. This was done in direct cooperation with the FBI, which supplied names of citizens for the NSA watchlist. Present and

former FBI officials also testified that until 1966 the Bureau undertook programs for illegally opening the mail of innocent citizens in the search for espionage agents and foreign intelligence. The FBI used the CIA's mail opening program after 1966 for domestic intelligence purposes, again sending over lists of names of American citizens who were to be watched.

The committee's recent hearings on the FBI itself have raised some of the most fundamental questions that any democracy must face. We have placed on the record deeply disturbing information about the FBI's COINTELPRO activities over a period of 15 years, the attempts to discredit Dr. Martin Luther King, Jr., the broad surveillance of law-abiding citizens and lawful activities, the practices of infiltration and disruption by informants, and the political use of FBI resources by Presidents of both parties.

The committee's work in this area has been aided substantially by the cooperation of the Justice Department. I would like to take this opportunity, Mr. Attorney General, to express the appreciation of the entire committee and the staff for your assistance in making available the materials needed for this investigation. Our experience has demonstrated that the constitutional principle of separation of powers has enough flexibility to allow close cooperation between the Congress and the Executive in a matter of the greatest public concern.

While our investigation is coming to an end, the task of making constructive recommendations is beginning. We have heard this week from former officials and from Director Kelley. We are exploring a wide range of proposals, including those being developed by the Justice Department. And we look forward to working closely with you on these issues.

One of the best statements of the problems we confront was made last summer by Philip Kurland, professor of constitutional law at the University of Chicago. Professor Kurland spoke of the threats to an open, democratic society from what he called the perversion of our intelligence agencies into political police forces. He rejected the proposition that we should be satisfied that these agencies will exercise self-restraint. Professor Kurland did not deny the importance of the individual qualities of the officeholder. But he stressed the greater importance of confining our intelligence and counterintelligence agencies to the limited functions they were created to deal with.

The crucial responsibility lies with the Congress. "If oversight by Congress is not to be the answer," Professor Kurland declared, "it is hard to conceive of an answer." The essential requirement for congressional oversight is information about intelligence operations, and the greatest barrier is executive secrecy. Consequently, Professor Kurland and others have urged that we establish procedures which require the Executive to provide this information to the Congress. This may be the only way to insure the responsibility of the executive branch to the people through the Congress.

Therefore, we especially hope that you, Mr. Attorney General, can help this committee and the Congress develop not only standards for the FBI, but also procedures for effective congressional oversight to assure regular accountability.

**TESTIMONY OF HON. EDWARD H. LEVI, ATTORNEY GENERAL OF
THE UNITED STATES**

Attorney General LEVI. Thank you, Mr. Chairman.

Before I begin, let me say that I don't suppose that your statement is meant to indicate that I am committed to agree with my friend, Professor Kurland, who may not be wrong as often as many people are, but occasionally is not correct.

The CHAIRMAN. No, it was only meant that I agree with him.

Attorney General LEVI. Then I hope the matter can be explored in more depth.

Senator MATHIAS. Mr. Chairman, I think that's one of the most graceful declarations of independence I have ever heard.

Attorney General LEVI. Mr. Chairman, the committee has asked me to talk with you today about the future of the FBI. I thought it might be helpful if I outline quite briefly some of the points I would like to make, some of the problems I think ought to be considered, and some of the steps we have taken.

The first point is that the statutory base for the operations of the Bureau cannot be said to be fully satisfactory. The basic statutory provision is 28 U.S.C. 533 which provides that the Attorney General may appoint officials:

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

There are other statutes, such as the Congressional Assassination, Kidnapping, and Assault Act, which vest in the Bureau special responsibilities to investigate criminal violations. In addition, there are Executive orders and Presidential statements or directives which place investigatory responsibilities upon the Bureau.

A number of questions are often asked about this statutory base. It has the virtue of simplicity, but the Executive orders which deal with Government employee investigations are complicated and confusing, and Presidential memoranda, or, perhaps, oral instructions from a President may be difficult to collate. I think it is important, in any case, to separate out the kinds of questions which are asked about the Bureau's authority base. Some questions are constitutional in nature, relating to the inherent power of the President; others go to the interpretation of the statutes and the relationship between the statutes and Presidential directives; others go to the failure of the statutes to define sufficiently the areas of the Bureau's jurisdiction or to spell out sufficiently—and this is partly constitutional—the means and methods which the Bureau is permitted to use in carrying out its assigned tasks.

The second point, related to the first, is a continuing discussion of the role of the Bureau in intelligence investigations or domestic security investigations. The argument is sometimes made that the Bureau's proper role, at least in purely domestic matters, should be limited to investigations of committed crimes. The basic statute for the Bureau is broader than this, as have been Executive orders and Presidential

mandates to the Bureau. The basic statute is broader since it refers to investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General. A disparity is sometimes seen among the different roles of the Bureau in crime detection, in ongoing domestic security matters, and in foreign intelligence or foreign counterintelligence matters.

In recent days a statement by then Attorney General Harlan Fiske Stone, who reorganized the Bureau and chose J. Edgar Hoover as its Director, has been quoted as a relevant warning. Stone warned:

There is always the possibility that a secret police may become a menace to free government and free institutions, because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood. It is important that its activities be strictly limited to the performance of those functions for which it was created and that its agents themselves be not above the law or beyond its reach. The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish.

I should like to suggest that Stone's warning always must be considered relevant to the proper conduct of the Bureau's duties, but it does not necessarily follow that domestic security investigations are, therefore, outside the Bureau's proper functions. The detection of crime in some areas requires preparation and at least some knowledge of what is likely to be going on. What is at issue, I think, is the proper scope, the means and methods used, the attention paid to conduct and not views, and the closeness of the relationship of the conduct and that which is forbidden by the laws of the United States.

Third, I realize that some proposals, since I was asked about this when I last appeared before this committee, might separate out in some fashion domestic and foreign intelligence functions from the FBI or from one another within the FBI. This is, of course, an issue to be looked at. I assume it is recognized that there may be some relationship between that intelligence which is involved in foreign counterintelligence work. One may lead to the other. And there may be a relationship between foreign counterintelligence and foreign intelligence. If the work were separated out into different agencies, I do not know if the decision about when an investigation should pass from one agency to another always could be made easily. Moreover, even so, information presumably would pass from one agency to the other. I know that one consideration has been that it might be decided that information collected by some permitted means in intelligence investigations under some circumstances should not be used in criminal prosecutions. But if there is an exchange of information, this must always be a consideration, whether there are separate agencies or not, and the basic question then is one of use and not organization. The more active concern, I believe, is that there is a risk that conduct proper for one area may be improper for another, and that the combination can work a contamination. My view on this is that in any case we must decide what conduct is appropriate and is inappropriate for each of the areas, and we must take steps to make sure that proper conduct is lived up to. My hope is that the fact that the FBI has

criminal investigative responsibilities, which must be conducted within the confines of constitutional protections strictly enforced by the courts, gives the organization an awareness of the interests of individual liberties that might be missing in an agency devoted solely to intelligence work. I know the argument can be run the other way. I believe the dangers are greater if there is separation.

Fourth, there is a question as to the proper role of the FBI in crime prevention and whether or not it should be considered authorized to take steps under some circumstances to reduce the likelihood that crimes will be committed or that serious injury to persons or property will occur. Preventive action has raised serious questions and these must be dealt with. I suppose an initial question is whether it should be allowed at all. Yet, I believe under special circumstances and with proper controls, most would believe this to be a proper function.

Fifth, the problem of proper controls, supervision and accountability is all-embracing. By statute the FBI is in the Department of Justice, and also by statute the Attorney General is the head of the Department of Justice. The history is mixed, of course, and we all have a tendency to oversimplify, but it is a fair statement that there have been times in the past when the supervision by Attorneys General, granted that the Bureau must have considerable autonomy, has been sporadic, practically nonexistent, or ineffective.

I hope that is not the case now. The responsibility is a heavy one.

But in any event the problem of proper controls, supervision and accountability goes beyond the Director of the Bureau and the Attorney General. I have already mentioned that in my view the statutory base for the operations of the Bureau cannot be said to be fully satisfactory. I think that better controls and performance can be achieved through statutory means, Executive orders, guidelines, and reporting to appropriate congressional committees.

Sixth, before I come to a résumé of some of the steps which have been taken, let me say I know we all realize that in the past there have been grave abuses. I am uncomfortable with a kind of writing of history, however, which sees it only in terms of the abuses and not in terms of past and present strength. It is very difficult to be fair to the past in which many institutions of government carried a share of responsibility. But more than unfairness is involved, if we are not careful, we will turn to solutions of the moment which a better reading of history might indicate are not the best solutions.

I know we must seize the moment, if I may use such a phrase in this setting. I know also that this committee realizes that a very important agency with dedicated, highly professional, greatly disciplined Government servants is involved. The importance is to the security and domestic tranquility of the United States. Stone's warning was given in an act of creation. He was proud of his creation. In spite of the abuses, there is a proper place for pride. I take it our mutual work should be to nurture that pride and the conditions which justify it.

I turn now to a review of some of the steps which have been taken or are in progress. We have tried most diligently, under safeguards to protect the privacy of individuals and with an awareness of the unfairness of instant history, to give a great deal of information to congressional committees.

Attorney General Saxbe made public and Deputy Attorney General Silberman and Director Kelley testified about the so-called COINTELPRO. When the FBI discovered evidence of several more COINTELPRO projects after I became Attorney General, these were revealed. One of my first acts as Attorney General, my third week in office, was to testify before a congressional committee about possible incidents of political misuse of the FBI by the White House in the past and about the nature of FBI filekeeping systems, particularly the files kept by Director Hoover in his office suite.

Director Kelley has spoken publicly and before congressional committees about incidents in the past in which FBI agents engaged in break-ins to gather or photograph physical evidence in intelligence investigations. On a number of occasions, most recently in testimony before this committee, I have described the history of the use of electronic surveillance by the FBI. We have welcomed such opportunities.

On February 26, 1975, I instructed Director Kelley to report to me any requests made of the Bureau or practices within the Bureau which he deems improper or which present the appearance of impropriety. On February 28, 1975, Director Kelley ordered FBI personnel to report such requests or practices to him. In July 1975, I reaffirmed my February directive and also asked for a report of all sensitive investigative practices.

The Director promptly complied. Director Kelley has regularly provided information on conduct by Bureau agents and programs underway within the Bureau that could raise questions. These matters have been reviewed and discussed with the Department so that a consistent and appropriate policy can be achieved.

This is a continuing process. I do not assert that we are aware of everything about the Bureau. Nor do I suggest that we ought to know everything. Appropriate communication, consultation and supervision at this level has to be selective. I make this point, which I think may sound disconcerting, not in any way to minimize the responsibility of the Bureau to keep the Department informed nor to minimize the Department's duty to find out. Rather I want to be realistic about a learning and organization problem which requires realism if it is to be understood and perfected.

With respect to possible legislation, the Department has in preparation various drafts of possible bills which may be of assistance in the area of what is now warrantless electronic surveillance. Although obtaining a judicial warrant does not automatically eradicate the possibility of abuse, it is perceived to be an important safeguard of individual privacy interests, and we are exploring, as we said we would do, various possibilities and alternatives.

Finally, a committee within the Department of Justice, chaired by Mary Lawton, Deputy Assistant Attorney General in the Office of Legal Counsel, and composed of representatives of my office, the Criminal and Civil Rights Divisions, the Office of Policy and Planning, and the FBI, has been working for 8 months reviewing FBI procedures in many areas and drafting guidelines to govern those procedures in the future. The committee has produced draft guidelines covering White House inquiries, congressional and judicial staff appointment investigations, unsolicited mail, and domestic security

investigations. It is currently at work on guidelines covering counter-espionage investigations and will later consider the use of informants, the employee loyalty program, organized crime intelligence investigations, criminal investigations, and other aspects of FBI practice. The committee's work has been extensive and time-consuming. It has involved not only questions of proper safeguards but also of efficiency in the proper functioning of the Bureau. It has been an effort to translate into words the complicated and important mechanisms for controlling the FBI. I hope the committee's efforts at articulation will be of use to this committee and others as it considers drafting legislation.

You have received copies of the latest drafts of the guidelines that have been substantially completed by the committee. These guidelines do not yet represent Department policy. There is disagreement within the Department on some aspects of these guidelines. I have disagreed with the committee recommendations from time to time, and the FBI has raised substantial questions about other recommendations, particularly with respect to the treatment of unsolicited mail. Some of the proposals in the guidelines could be promulgated as departmental regulations. Congress may feel some ought to be enacted into statutory law. Other provisions would require implementation by executive order.

I would be glad to discuss these draft guidelines with you in detail in response to your questions, but a brief discussion of the guidelines on domestic security may be useful at the outset.

The guidelines begin by attempting to impose some order and definiteness to the domestic security field. To begin with, these guidelines do not deal with FBI efforts to counteract the work of foreign intelligence services operating within the United States. Standards for determining when there is foreign involvement sufficient to place a subject in the category of foreign counterintelligence investigation are now being debated within the guidelines committee. The domestic security guidelines also are not meant to cover security or background investigations of Federal appointees or investigations of ordinary crimes. Under the draft guidelines, domestic security investigations are only to be authorized when there is a likelihood that the activities of individuals or groups involve or will involve the use of force or violence in violation of Federal law. Domestic security investigations are to be limited to activities of individuals or groups intended to accomplish one of five purposes: overthrowing the Government of the United States or of a State; interfering with the activities within the United States of foreign governments or their representatives; influencing Government policies by interfering by force or violence with Government functions or interstate commerce; depriving individuals of their civil rights; and creating domestic violence or rioting when such violence or rioting would necessitate as a countermeasure the use of Federal armed forces. There is also a provision for limited investigation when there is a clear and immediate threat of domestic violence which is likely to result in a request by a State for Federal armed assistance.

Currently there is no procedure requiring the review outside the FBI of all domestic intelligence investigations conducted by the FBI, though the FBI has a long-standing policy of reporting its investiga-

tive findings to the Criminal Division. Under the draft guidelines there would be a comprehensive program of reporting to the Attorney General or his designee of all preliminary and full domestic intelligence investigations. The Attorney General would be required under the draft guidelines to put a stop to any full investigation whose justification did not meet an established standard. The standard would be that there must be specific and articulable facts giving reason to believe that the individual or group under investigation is engaged in the activities I have just listed.

Another feature of the draft guidelines is to place strict controls upon the use of any technique by the FBI which goes beyond the gathering of information. COINTELPRO was the name given the use of some such techniques. As I have said before, some of the activities in COINTELPRO were outrageous and the others were foolish. Nonetheless, there may be circumstances involving an immediate risk to human life or to extraordinarily important Government functions that could only be countered by some sort of preventive action. The guidelines require that any such preventive action proposal be submitted to the Attorney General. He could authorize the preventive action only when there is probable cause to believe that the violence is imminent and when such measures are necessary to minimize the danger to life or property. The preventive action would in all cases have to be nonviolent. The Attorney General would be required to report to Congress periodically and no less often than once a year on the use of preventive action by the FBI.

I make no claim that during this rather difficult but interesting and, I must trust, promising period, we have achieved all that might have been possible. In many ways the work has been disappointingly slow. But I do think we have made advances in nurturing and helping to improve a structure which will be supportive of the best efforts of the men and women in the Department of Justice and in the FBI. No procedures are fail-safe against abuse. The best protection remains the quality and professionalism of the members of the Bureau and of the Department.

The CHAIRMAN. Thank you very much, Mr. Attorney General. It's a very helpful statement, and does summarize the efforts that you are making to give greater, put greater order into the work of the FBI.

One thing that leaves me somewhat baffled is the difference between domestic security action, for which you have set forth the proposed guidelines, which seem to me to be good ones, and what you call preventive action. You state, "Nonetheless, there may be circumstances involving an immediate risk to human life or to extraordinarily important government functions that could only be countered by some sort of preventive action." In that case, why can't the preventive action take the form of an arrest if there are circumstances involving immediate risk to human life or to extraordinarily important government functions?

Attorney General LEVI. If it can, then that would have to be done because the guidelines specifically require that the preventive action is necessary and it can't otherwise be handled.

Now, one can think of incidents—

The CHAIRMAN. Can you give us some incidents?

Attorney General LEVI. If there is the likelihood of a violent confrontation between two marching groups on a State capitol, it is conceivable that blocking off some streets, or directing signs to some other direction in an emergency situation of that kind might be useful, and I take it that is a preventive action, and I would not think unusual, by the way, for people who are properly trained in work of that kind.

The CHAIRMAN. That is a good kind of preventive action.

Suppose that there were two caravans instead of two marching groups, and that you had reason to believe that they were headed toward one another and there would be a violent confrontation once they met. Would permissible preventive action in those circumstances permit putting sand in the gas tanks of the automobiles so that neither caravan could move? I have to ask that kind of a question after what we found out what the FBI was up to in the COINTELPRO.

Attorney General LEVI. The answer is "No." Certainly there's no intention to permit that. Although the guidelines do not spell it out, and we have had discussions about what kind of precise preventive action might be possible or might not be possible under special circumstances.

The CHAIRMAN. This is all very vague, and suppose you had reason to believe that a prominent figure of some kind in a movement was about to or of a mind to incite his followers to violence. Then in that case could you undertake to give him a drug that would prevent him from speaking for 3 weeks?

Attorney General LEVI. No, of course not, but I have to add that what the guidelines do say is that the Attorney General has to give permission, not only does he have to give permission, but he will have to report to the Congress, and since quite naturally this committee believes that reports to the Congress are the most important thing that any agency can do, then it seems to me you must also agree that that is some safeguard.

The CHAIRMAN. Well, that depends upon your view as to the kind of committee that can do the job of surveillance.

Attorney General LEVI. Well, I don't think—this really was my suggestion before. It takes a combination of control, and what we have attempted to do here is to have a guideline which strictly limits—maybe it should limit more—preventive action, but admits that there is an area for it. Now, maybe we should not admit.

The CHAIRMAN. Why couldn't you do it this way, Mr. Attorney General? Why couldn't you say that when preventive action is necessary, it must be an open and public kind of action.

Attorney General LEVI. I don't think that telling people—

The CHAIRMAN. Now, understand what I mean. You gave an open, public way of preventing two groups from meeting and clashing. Well, when that is the case, the means used are likely to be reasonable ones. But when there are secret methods of preventive action undertaken, that's when you get into potential problems, real troubles that we have seen.

Attorney General LEVI. Well, we have to talk that through. It may very well be that no secret ones at least beyond the immediate moment of doing would be required. It may be that one can put it that way, but I think one of the virtues of guidelines should be that they are

sufficiently realistic so that they don't have to be violated under emergency circumstances.

There is a question, then, of how detailed one can make them, but it may be that the line about secrecy beyond a certain point would be good.

I should also say that the Privacy Act would itself prohibit dissemination of lies and deception, I think, to a considerable extent, if one goes back to the old COINTELPRO. So I think we are in somewhat of a different statutory situation for the moment anyway. But we have tried, in the guidelines, in any event, to very much limit the field. Now, whether we have limited it enough, I'm not sure.

The CHAIRMAN. Did you say that with respect to the domestic security activities of the FBI, that before such a project is undertaken, the Attorney General must give his consent, or that he might be informed of prospective ongoing projects in order that he can call a given project that he doesn't find fully justified to a halt?

I didn't quite understand your question.

Attorney General LEVI. Well, he has to give, he has to be informed of, I think, of all the investigations. He can terminate them all. The problem is whether he—he doesn't have to authorize the full investigation, but he has to be informed about it and he can terminate it.

The CHAIRMAN. Now, well, you have to authorize wiretaps and electronic devices in such cases. Why shouldn't—why wouldn't it be well for the Attorney General to authorize the initiation of programs in this particular field, new investigatory programs?

Attorney General LEVI. Well, I'm trying to protect, if not myself, at least my successors. I'm not sure that it makes much difference. It makes some difference. If the Attorney General has to authorize all full investigations, he will have quite a lot of work to do. If he has to authorize all of the preliminary investigations, his desk is going to be covered with a great many things which he doesn't know a great deal about.

The CHAIRMAN. Don't you think there should be some outside check in this area, particularly where we are not dealing with criminal law enforcement as such, but we are dealing with potential violence which you referred to as surveillance of citizens and groups of citizens for purposes of domestic security. That's a pretty fuzzy field, and we have seen how great the abuses were for a long period of time, and don't you think there should be some outside check, perhaps not with every case the Attorney General himself, but some outside check on the agency in this general field to be sure that they are following these guidelines?

Attorney General LEVI. But I've already said that I think that there ought to be reports to Congress. I don't want to word the scope of the domestic security investigations, however, quite the way you have worded them, because these guidelines which could be in part put into statute, strictly limit them. For preliminary investigations they limit them to where there is a likelihood that the individuals and groups involved would use force and violence in violation of laws in particular areas.

They are to be authorized for 90 days, and then perhaps another 90 days, and the kind of investigation which can be done in a preliminary investigation is also restricted. When you go beyond that to the full investigation, then we really have the stop-and-frisk standard, so

that we really have come, I think, as close as is feasible. And maybe it is too restrictive; in any event, as close as is feasible to the violation of law kind of penumbra, so that it would seem to me that that was some safeguard.

Now, whether that is sufficient, I don't suppose anything is fully sufficient, but I would assume that in addition, there can be reports to Congress, and there will have to be reports to the Attorney General, and I would think that that and the lessons of history would provide quite a lot of safeguards. If the suggestion is that one should go to a commission or to a court, I must say that I have grave doubts as to whether that is the proper solution, but if that were the case, it would be a statutory matter, and I would hope that my participation in making that decision would not be viewed as having as heavy responsibilities as those who would have to vote for it.

The CHAIRMAN. Don't you think, given the past history you have referred to, that it might be a very good idea to take these guidelines, which represent to me a good faith effort on your part to bring order into this general chaos and write them into the law?

Attorney General LEVI. I think that undoubtedly parts of the guidelines should be made statutory. I think that the problem is, and I am sorry for this, that it has taken so long to draft these guidelines, although I think it has been an extraordinary effort. And the way the guidelines are written one has to—at least it is better to see them all at once because they do relate to each other. But there may not be time for that.

As I said, I know we have to seize the moment, but I do not know how long the moment is. In any event, I agree that part of the guidelines, at least, ought to be in statutory form.

The CHAIRMAN. Well, at the moment, this committee has until February 29, 1976. And we would solicit from you as much cooperation as I know you will give, based upon your willingness in the past, to see what kind of recommendations the committee can make, because clearly the FBI does need a generic statute which it has lacked through the years and that would be the appropriate place for guidelines at this time.

Senator Hart, do you have questions?

Senator HART of Michigan. Mr. Attorney General, good morning.

First, for a number of years in the Judiciary Committee, we have been huffing and puffing with a whole line of Attorneys General in an effort to catch them, and it is against that long period of effort that I want this morning to first of all thank you for developing to the degree that you now have, exactly the kind of thing we have been talking about. And even as we on the committee in those days were urging guidelines and while we might not have sounded it, we understood how incredibly difficult it is to put down in black and white, chapter and verse, how you respond to a whole variety of problems. And for the first time, the Attorney General has come in with a very solid piece of work that all of us appreciate.

Now, in your statement, you indicate that you are working on guidelines as they relate specifically to informants, and you relate that to the Department's general guidelines on intelligence that permit the use of this. Now yesterday, as you know, we discussed with the FBI Director, the possibility of getting judicial approval for informants by you.

I think all of us understand the importance in an investigation of informants. But we have heard some stories, some hair-raising stories, about the way that technique can be abused. And I, and I am sure others, suggested informants are an extremely intrusive form of eavesdropping in terms of what can be reported. I know that the Supreme Court has not said that informants are unconstitutional per se under the fourth and first amendments, unless you get a court warrant, but that does not prevent Congress from requiring that kind of procedure, in order to fully safeguard the rights of privacy and expression. Now, what are your thoughts on such a requirement, the requirement of a neutral, detached third party, rather than the investigating branch of the Government deciding when to use targeted informants?

Attorney General LEVI. Well, I am sorry to say, Senator Hart, that I do not think that the suggestion, on balance, is a good one. And that does not mean that I have a better suggestion. There is no doubt that informants or paid informants can be misused, because there is an area where, if that is done, the courts can step in; and one can have guidelines or statutory restrictions on that if you think of, again, reporting. But the notion that a court would have to authorize the use of each informant and how the informant was to be used, to continue to pass on that, I think would make for maladministration. It would impose an enormous burden on the court, and while I think we always keep looking these days for a third impartial objective person, I do not really believe that it can be the court.

Now, one could think of a board or a committee. After all, the Congress set up, I think, a Subversive Activities Board, did you not? So I suppose you might set up an Informers Permission Board. But my impression is that you would not get very good people to be on that board, and that it would not really provide the kind of knowledgeable review that you would want.

So I recognize the problem, and I recognize why one might turn to that suggested solution. I do not want to take away from your time, but it is sort of interesting that special devices and protections were developed for electronic surveillance because they were said to be different from the use of informants. And now we are running the argument in the other direction and saying, well, they are even more dangerous than electronic surveillance because you have the human ear right there.

So it is just an interesting point.

Senator HART of Michigan. Well, maybe in defense of our earlier attitude, we did not know about the abuse with respect to the human technique, the number of occasions on which it has been used.

Attorney General LEVI. I rather think that the fourth amendment knew more about that than it did about electronic surveillance.

Senator HART of Michigan. The fourth amendment drafters did. But people around now—

Attorney General LEVI. I feel for the objective, but I do not think—I just think it would not work.

Senator HART of Michigan. We are agreed that it is a difficult balance. The national security concern here and the individual's civil liberties there—and to balance these claims is tough. You say you think the court is inappropriate.

Attorney General LEVI. I think that would be a mistake. I think it would also be a mistake to have the court pass on the activities of the agents, of the Bureau's own agents, who have ears and listen and so on. I think we have to trust someone.

Senator HARR of Michigan. But is the Director of the FBI the fellow to trust?

Attorney General LEVI. He is certainly one of the persons that has to be trusted very much, and he has to be put in a position where it is known that he is being trusted and what his obligations are.

And I think if the congressional mandate and the guidelines and whatever else are clear enough, I have enough faith in human nature to think that that would be abided by. I do not think the history of the abuses shows that that kind of a thing really was abused. There was not that kind of spelling out. There was not that kind of direction. There were directions in the other way really; so that I do not think the problem—while I do not mean to minimize the prior abuses which were terrible—but I do not think the problem requires the solution of the interposition at every stage.

Senator HARR of Michigan. If we leave the discretion with the Director of the Bureau, you would agree that there should be—we always use the word effective even though we cannot define how you make it effective—an effective system under which somebody other than the Bureau's Director would be reviewing the decisions he is making, as he affects this balance.

Attorney General LEVI. I think there have to be frequent reviews and I think one has to have a situation in the Department of Justice where the Attorney General, or his designee, can be in a position to make that review. I think one also would hope and require that there be adequate presentation to congressional committees. You do not want to impose so many duties on the Attorney General so that he is—so that he loses some sense of distance and objectivity on the Bureau. That is one reason I said one has to realize that there is not full knowledge and they are different offices. But I do think the Attorney General, I hope, is some protection and the Department is, and congressional committees would be too.

Senator HARR of Michigan. The earlier hearings, which reviewed some of the excesses, found some citing in the FBI handbook regulations which directs field offices and their informants to find out and report all contacts and cooperation between a group under investigation and other groups, even if the other groups are not suspected of being either extremists or subversives.

Now, suppose we have a standard for investigating a group using informants, and suppose a particular group meets the test and the FBI does penetrate. Now that targeted group begins to participate in conferences that we have heard on amnesty, ABM, women's rights, and other things. How would you suggest controlling the traditional vacuum cleaner approach of the informant reporting on the activities of the other groups of participants, and the plans of the coalition, the conference or the association of groups seeking to prevent the ABM? How do you safeguard against them being drawn in?

Attorney General LEVI. Well, assuming that one has met the requirements of the guidelines, either do a preliminary investigation—one would have to go beyond that to really go to the full investiga-

tion—so that one does have facts which give you a reason to think that there are violations involving force and violence. That is when the informants are going to be there, or the infiltrators, as you call them.

If the activities, if the sole activities, are those that you describe, I do not think he belongs there and I do not think the investigation is appropriate. I have worried about the more difficult aspect of the problem, namely, that if you have an organization which is really properly investigated because of its intention and ability to use force and violence in violation of the law, and one has reason to think that they are deliberately using their influence to co-opt other groups, I would think that part of the investigation would be to put that down. And that is really what you are talking about. And I do not know that one should want to limit that.

Senator HART of Michigan. Well, maybe there is not any happy solution to this, but what we would be doing would be reporting on first amendment activities of the other groups that would not be eligible to be targeted.

Attorney General LEVI. I think the report should not be on that. It should be rather on the effort of the group properly being investigated to gain control. And we do have a problem as to what one does with the dissemination or keeping of information, and the guidelines attempt to address that question, whether they have done so sufficiently or not.

One reason the guidelines are not all finished is that when one gets to the counter- or foreign-intelligence guidelines and has to deal with organizations which are under active collaboration with foreign governments, and the question is whether they have extended their influence in such a way as to impose a real threat of force and violence, I do not know how effectively one can impose restrictions. We try to do it. The proposed guidelines have not been worked out. One has to remember that if one goes back to the period when I was first in the Department of Justice, there was considerable concern as to the ability of the Japanese and the Nazis to gain control, beyond those agencies which were clearly collaborating with them, of other agencies. And I just do not know that I want to say to the United States Government that that is the kind of information that you may not get.

The CHAIRMAN. Senator Mathias?

Senator MATHIAS. If Senator Hart has any question which follows right along at this point, I would be glad to yield.

Senator HART of Michigan. No.

Senator MATHIAS. Thank you, Mr. Chairman. I want to join with Senator Hart in thanking the Attorney General for all the help he gives to this committee. Whether we call on him for philosophical treatises or for practical advice, he is always available. I think that is a very real contribution. And the way in which he helps us leads me almost to regret that I did not go to the University of Chicago law school.

Attorney General LEVI. Senator, you are going to go far.

Senator MATHIAS. You have talked a little about the Smith Act, and about the seditious conspiracy clause in connection with the responsibilities of the FBI. And I wonder if you think there is sort of a dated aspect to these.

Attorney General LEVI. Oh, of course there is, and I want to say that when one talks about the looseness of the guidelines, one ought to read the statutes which came out of Congress. That is why I say that it is sort of amusing as we go around flattering each other, we all bear—I mean all of the institutions bear—responsibility.

Senator MATHIAS. I could not agree with you more, and I think I have said repeatedly that I think a lot of the problems that are dumped in the courts and a lot of the burdens that the courts bear have begun right here on Capitol Hill because we have not carefully sculpted the laws to make it clear what the legislative intent was. And in fact, perhaps they have been carefully sculpted to obscure the legislative intent in some cases. And the courts then are left with the burden of finally administering the law rather than either the legislature prescribing it, or the executive enforcing it.

Attorney General LEVI. Not only that, you draft statutes that quite clearly say one thing and the Attorney General is then asked for his opinion which he is required to give as to what it means to a Government department. He gives it. Another House of this Congress then proceeds to make motions to hold the man in contempt for following the opinion of the Attorney General. And Professor Kurland, my good friend, says do not listen to the Attorney General, he is only a lawyer.

There is a responsibility in Congress for having statutes clear and for abiding by what they say, and if they do not like them, change them. I agree with you.

Senator MATHIAS. I would hope that with all the admonitions that we are giving to other people these days that we take that one ourselves, that the laws need to be more carefully written.

Attorney General LEVI. Yes, it is easier to see abuses by others, I know.

Senator MATHIAS. Let me say that I think we need some help in this endeavor, that there are many cases in which the actions taken by Congress are criticized later when the errors might have been avoided by some cooperative action in the process.

Attorney General LEVI. I meant that to be clear when I was referring to all parts of the Government.

Senator MATHIAS. But, specifically in relation to the seditious conspiracy laws in the Smith Act, the courts have talked about the advocacy provisions of the law so strictly as to require incitement of imminent lawless action as a test and I think that does really date these acts.

Attorney General LEVI. I think so. And while I want to say that in the guidelines we tried to emphasize that there is a question of how much one ought to spell out the nature of the evidence, in part, because I think that even spelling it out might have a chilling effect.

Senator MATHIAS. Now you have led me right to my next question, which is whether we should put any limitations on the type of information that is to be gathered in a purely domestic intelligence investigation.

Attorney General LEVI. Well it may be that one has to try one's hand at drafting them. I have.

Senator MATHIAS. It is a tough one, I think, but we have seen as a result of this, investigation of family matters. Is that proper? Can

you prescribe it in a general way that sexual activities, purely legal activities, but perhaps not within the mainstream of what most Americans are thinking of doing, personal relationships, all of this kind of thing—

Attorney General LEVI. Well, one can try. What we did was, as I say, to provide a very tough and maybe too tough standard, because it is specific. And articulable facts, giving reason to believe that an individual is engaged in activities described in the paragraph which is force and violence to do the following things.

Now, that may be too restrictive. Now, if one starts to say what kind of things can one look at which might suggest and lead you to see these things, I do not know. And I suppose we all have to admit that public attitudes about activities and therefore, maybe the activities themselves mean different things at different times. And maybe one has to have a different set of rules created from time to time and one of the notions of the guideline would be, I think, to do that.

I am not in favor of Congress every year deciding whether it is against homosexuality or particular other aberrant sexual conduct. And therefore this can be included or not included as the winds blow. I think that would be probably not legislatively very desirable.

Senator MATHIAS. Let us suppose, however, just for the sake of discussion, that these activities are the proper scope of a domestic intelligence investigation and that that investigation is conducted and its object is obtained and the investigation is closed, then what should happen to this material, given the infinite capacity of the Government today to store and retrieve information?

Attorney General LEVI. Well, the guidelines attempt to go in the direction that, after a period of time, material should be done away with.

Senator. you have often posed questions for me to think about and this is another one that I think we ought to think about together: that is the destruction of information. It is also the destruction of evidence which might be used to show abuses by the Bureau.

Senator MATHIAS. If I knew the answer I would not ask the question.

Attorney General LEVI. If I knew the answer I would give it.

But, I am saying, because I think it is a very important question—

Senator MATHIAS. I think what you suggest is a very pertinent, very current consideration, that if you destroy all the files, you can do more than all the perfumes of Araby in washing out the blood.

Attorney General LEVI. The guidelines do move in that direction. There is an argument about the time for the destruction of information.

Senator MATHIAS. There is a concurrent question: If files are retained for any period of time, are they open for the purpose of name checks during that period, which is a related but really a separate question, for background checks, for employment checks, that kind of thing.

Attorney General LEVI. Well you could have selective sealing of files and I suppose selective destruction of items. But it is a very difficult thing.

Senator MATHIAS. I would like to explore briefly your thoughts on a subject we have discussed with other witnesses at some length. And

that is whether you believe that a warrant requirement for beginning a domestic intelligence investigation would meet the standards in the fourth amendment if it required less than probable cause for the issuance of a warrant, probable cause to believe that a crime has been or was about to occur.

Attorney General LEVI. I think the question really would be what the warrant would enable the obtainer to do.

Under the guidelines, just opening a preliminary investigation, what can be done is not very much. It is so much less than a full investigation. So, I think I would turn the question around.

I think the court would really wonder why you want the warrant. And it certainly would clog the courts.

Senator MATHIAS. The intrusion of an informant, for example, into a political discussion, or any other activities is a much greater intrusion than a bug or a wiretap in that same conversation.

Now, would this be, would the placement of an informant be that kind of activity?

Attorney General LEVI. Well, you see, the preliminary investigation does not really allow new informants, so, as I say, it is quite limited.

And I did respond that I understand there is a problem about the human ear, the human eye, which we discussed last time. But, I doubt that going for a warrant in each of those cases is feasible.

And I think we have to be grown up enough not to feel that we always have to go to the courts. Now, that may make us feel that there is a lack of protection. But I think a greater protection is to curtail the scope of the investigations to make sure that they are held to a high standard and to control dissemination of the information.

Senator MATHIAS. Well, I think that is the proper test: whether you can embark upon what are obviously immature reactions to events. I do not think the fourth amendment itself is subject to a test of maturity or immaturity, but—

Attorney General LEVI. No, I do not think the fourth amendment requires a warrant.

But I understand the argument that it is better, it is sometimes better to put a man on the Moon, because he will know more than a machine. So you are saying the same thing in terms of informers.

Senator MATHIAS. Finally, let me just return to the Smith Act for a minute, which, as I understand it, requires incitement to imminent action to overthrow the Government by violence. If a domestic intelligence investigation can begin with far less, only a theoretical advocacy of some change—

Attorney General LEVI. I do not think it should begin with a theoretical advocacy of change. Now, if you asked me whether it ever does, my answer is I do not know. But I do not think it should begin with that.

Senator MATHIAS. Well, I think that between those two positions, there is a danger of first amendment violations. And I like your position. I am not arguing with you—

Attorney General LEVI. Well, we rewrote this domestic security investigation guideline because I was disturbed by the prior draft as not being tough enough and I think that I may now have come out

with something that is too restrictive. I am not sure. And this is a proper process of discussion back and forth, not only here but with the Bureau and I hope that one can get something from it that is useful.

Senator MATHIAS. Thank you very much.

The CHAIRMAN. Senator Mondale.

Senator MONDALE. Thank you, Mr. Chairman.

Mr. Levi, I think the most fateful question that this committee, our Congress and our Government must face is whether we are going to step beyond the Stone line and permit investigative agencies to go beyond matters of law enforcement, matters of so-called "internal security."

If we decide that we must, then I am persuaded we should only do so based upon unarguable evidence that an exception is needed and then to grant such an exception only under the severest and most closely defined standards, and, if possible, under court supervision.

If we fail to do that, I am convinced that this committee has failed and that in another 50 years, there will be hearings just like this in which the excesses that we have uncovered will have been repeated.

I say that because I think anything we do has to stand the test of what we have learned. And what we have learned is that the power to use the police for politics is a seductive and irresistible one. No President, no Attorney General can resist it. Few have.

But we have now found that it is not a partisan issue. The Presidents of both political parties and a Director who served under Presidents of both political parties were absolutely unable to resist the right to snoop into the private affairs of Americans, not to enforce the law, but in order to gain some political advantage. If you look at human history, this has happened everywhere, which is why we adopted the Bill of Rights. The FBI was set up precisely because it happened in World War I and we had the scandal of the Palmer Raids and all the rest.

When I look at these vaguely defined guidelines, I have to ask, would they stand up under the direct orders to the contrary from a President of the United States? Would they stand up in the face of a willful Director who is angry or hostile or suspicious about some of these political ideas, or about the next Martin Luther King? My feeling is that based upon what we have learned, without any doubt, they would be swept away, as quickly as a sand castle being overrun by a hurricane, they would mean nothing.

What we decide to do cannot be tested by the words, but by our notions of how human nature works when empowered in this way to play God with the American people. That is the test and it has got to be tested by what happens when the Nation is in frenzy and in fear, and it has got to be tested by what people do when they do not think they are going to be caught. And, for that reason, I see the step beyond the Stone line, namely beyond the enforcement of the criminal law, as not a step forward, but a step off a cliff, right back into the morass that we find ourselves in today.

If you look at this record, it is a horrible one. The way Martin Luther King was hounded and harassed is a disgrace to every American. That this country once took all the Japanese and put them in internment camps we now know is one of the blackest pages in American history. It is that kind of record that whatever we do has to be tested against.

For that reason I think we have to draw a line, the line that Judge Stone suggested. If we do grant exceptions, they have to be specifically and rigidly and unquestionably drawn, because there is no point in talking about oversight if the standards are not understandable. And these laws have to be so clear that the Attorney General and the Director of the FBI would have to say when the President calls, "I am sorry, Mr. President, but we cannot do it, it is against the law." If they are not able to say that, I am convinced we will be right back here, someone will, those who follow us, 50 years from now, holding hearings similar to these.

Would you respond to that?

Attorney General LEVI. Well, I think, like the Stone statement, it is a good admonition. As I tried to say in my statement, I do not think the Stone standards indicate that there should not be domestic security investigations because the Stone standard talks about items within the proper jurisdiction of the Bureau and violations of law and if you are going to have an investigating agency which is going to be at all responsible in those areas, they have to know some things which are related, closely related to violations of particular kinds of law. And I do not believe that the standards that have been drawn up are as vague as your statement, perhaps, suggests, because, when one uses the standard of the stop and frisk case, that is the standard, very close and perhaps too close.

So, I think in terms of the Stone standard, it probably meets it. I am not sure that there is this big gap, because this says specifically, "specific and articulate facts giving reason to believe that an individual or individuals acting in concert are engaged in activities" described in that paragraph. Those are activities of force and violence in violation of the criminal statutes.

So—and I should remind you, as I know I do not have to, that, as we said before, Congress has passed some rather broad criminal statutes.

Senator MONDALE. Oh, yes.

Attorney General LEVI. And the Stone standard is not very meaningful if you do that.

Senator MONDALE. The question now is once we know what has happened, and we know the abuse that arises when people have this unlimited, ill-defined power, what do we do, if possible, to try to prevent its recurrence? That is the issue that faces you. That is the issue that faces me, and I am convinced that guidelines written by the executive can be rewritten by the executive, and if not by you, by those who follow. And they will mean absolutely nothing against the will of a willing President, a willing Attorney General, or a willing Director—absolutely nothing, because they do not have the force of law.

Attorney General LEVI. There's no disagreement. I don't think I should apologize for having ventured into the drafting, into having the guidelines drafted. It seems to me that that had to be done. I certainly do not take the position that parts of them should not be put in statutory form, and I certainly do not take the position that some of them should not be put in Executive order form. I think we ought to use all the devices, those devices where more permanence is wanted and those devices where there might have to be changes from time to time.

Senator MONDALE. Now, Mr. Levi, are you persuaded that you have personally reviewed the specific instances of abuses by enforcement agencies, particularly the FBI? Are you personally confident that your guidelines fit and meet and prevent a recurrence of those abuses?

Attorney General LEVI. The guidelines are not completed.

Senator MONDALE. Have you personally looked through those materials?

Attorney General LEVI. At all the abuses? Certainly not.

Senator MONDALE. Well, certainly not, you say. Mr. Schlesinger, confronted with a similar problem, sent a wire to all of his CIA facilities and said, "Give us all the examples that you know of in which our laws and our authority have been abused." Have you done anything like that?

Attorney General LEVI. I have done several things.

Senator MONDALE. Have you done anything like that?

Attorney General LEVI. I am trying to answer.

Senator MONDALE. All right, proceed.

Attorney General LEVI. We have an investigation going on of the COINTELPRO and COINTELPRO-like activities. We have several communications from me to the Director, directing that he report to me what he thinks are sensitive or irregular requests or practices. So that I think that we have done both things that were done by Mr. Schlesinger.

I assume that Mr. Schlesinger's behavior has purified the CIA. I really do not know.

Senator MONDALE. Well, let us take the most celebrated case of abuse, Dr. King. Has someone in your Department read the FBI's whole file on this?

Attorney General LEVI. I cannot answer that question. Three people now are going through the entire file.

Senator MONDALE. FBI file?

Attorney General LEVI. Yes.

Senator MONDALE. The entire FBI file?

Attorney General LEVI. So far as I know; yes.

Senator MONDALE. Are you sure of that?

Attorney General LEVI. So far as I know, yes. If the question suggests that they cannot get at the file, that is really not the problem. The problem might be that there are so many files which may be in a variety of other files and references that it may be difficult, but there is not a problem about their getting access to the files, and they tell me they are doing it. I have not myself done it.

I have some feeling myself that I do not want to read the Martin Luther King file. I wanted to regard it, in fact, out of the sense of proprieties and privacy as sealed because it seems to me that it was appropriate for the sake of the privacy of Dr. King to have that material disposed of, and I saw no point in my personally reading it.

Senator MONDALE. In other words, you are of the understanding that all of the FBI and other investigative Justice Department files of Dr. King have been reviewed?

Attorney General LEVI. No. I am saying that I was sufficiently disturbed about it so that I am having them all reviewed.

Senator MONDALE. You said you asked the Director of the FBI, Mr. Kelley, for improprieties. Have you gotten a report on that?

Attorney General LEVI. We have had some reports on where he thinks there are sensitive matters.

Senator MONDALE. Do you have a complete report on improprieties?

Attorney General LEVI. I do not know that I would put it that way because there is a problem of what is an impropriety; where there are sensitive issues which he thinks may raise a question, my belief is that he now brings them to me.

Senator MONDALE. What was your request to him?

Attorney General LEVI. Well, I do not have the precise statement.

Senator MONDALE. I mean, what were you trying to get from him? Evidence of FBI improprieties? A record of what had happened?

Attorney General LEVI. Well, there are problems of misbehavior, of what I would regard as misbehavior, or might regard as misbehavior, and when one deals with matters of this kind, it is a learning process because the words do not always carry the same meaning.

I was told when I came to the Department that the COINTELPRO project had been completely reviewed and exposed. After I was in the Department, I discovered—and I think partly as a result of miscommunication to the Director—that they had found other items in the COINTELPRO project, and those were reported to this committee and to other committees, but the point is that you might have projects which go beyond the confines of COINTELPRO, which might still involve similar behavior.

Senator MONDALE. Was it your testimony, if I heard you correctly just now, that this committee has received the reports given you by Director Kelley in response to your request?

Attorney General LEVI. No; I did not say that. I said that this committee received, I believe, a letter from me describing the additional COINTELPRO projects.

Senator MONDALE. Not just COINTELPRO. As I understand your statement, "I instructed Director Kelley to report to me any requests made of the Bureau or practices within the Bureau which he deems improper or which present the appearance of impropriety," and then, "on February 28, Director Kelley ordered FBI personnel to report such requests or practices to him," and I think you indicated that you have received some in response to that inquiry.

Attorney General LEVI. I say here, the Director promptly replied he has regularly provided information on programs underway within the Bureau which could raise questions.

Senator MONDALE. Did you get a report to him in response to that request?

Attorney General LEVI. I have gotten reports from him. That is what this sentence says. He has provided information on conduct that could raise questions.

Senator MONDALE. Ordered FBI personnel to report such requests or practices to him. Now, has that been done?

Attorney General LEVI. Yes; he did report them.

Senator MONDALE. He ordered it? Did he get the report?

Attorney General LEVI. Well, I believe he did because I think that was one of the reasons that the additional COINTELPRO items surfaced.

Senator MONDALE. Was this just limited to COINTELPRO?

Attorney General LEVI. No.

Senator MONDALE. Can we have those reports?

Attorney General LEVI. I do not think there are very many of them, but I assume you can have them. The only thing is that it is hard to, it is a continuing process, and there are—I would probably not think they would raise questions of misconduct but more be a matter of sensitive questions.

Senator MONDALE. Well, I would like to have the reports that came to Director Kelley in response.

Attorney General LEVI. Well, that I do not know about.

Senator MONDALE. I am asking you, as the head of the Justice Department, if we could get those reports?

Attorney General LEVI. Well, I do not know if you can or not, but we will certainly consider it.

Senator MONDALE. Why not?

Attorney General LEVI. Because I think that it is one thing to give reports of that kind in confidence to a committee of this kind and another thing to make them public.

Senator MONDALE. The CIA gave theirs to us. Why can't you?

Attorney General LEVI. Well, I am not in the CIA. I do not care to be. I do not wish to be.

Senator MONDALE. Do you consider that a good answer?

Attorney General LEVI. I—yes; I consider the answer as good as the question.

Senator MONDALE. Well, I think that kind of arrogance is why we have trouble between the executive and the legislative branch. Thank you, Mr. Chairman.

The CHAIRMAN. I understood Senator Mondale's question to be whether you would furnish certain documents to the committee, not if you wished them to be made public or not that he was asking that the committee make them public. I do not know that we had any problem in the past with the Department in getting information of this kind.

Attorney General LEVI. I apologize to Senator Mondale if I appeared arrogant. I thought that somebody else was appearing arrogant, but I apologize.

The point is that if you ask agents to report on what they may think is misconduct, if they think that that is going to be made public, that would, I believe, be very chilling. I, personally, have no reason to not want to give it to a committee if it is to be kept in confidence. I do not know what the Bureau's position on that would be, and my relationship with the Bureau is that I like to discuss these matters with them before giving a definitive answer because I am not that arrogant.

The CHAIRMAN. Well, leaving all personal references aside, I think that you know that when this committee has asked and received information in confidence, it has kept the confidence.

Attorney General LEVI. And we have tried very hard to give you information.

The CHAIRMAN. So that ought not to be any problem, and I would appreciate your following up Senator Mondale's request because I regard it as an important one and not a frivolous one, and in that

connection let me say, just before we move on to further questions, that some time ago, in early August, you sent a letter to me in which you requested from the committee—this seems appropriate now because it is a request in reverse—you requested of the committee information that was contained in our files, transcripts, and testimony which might bear upon investigations currently being conducted by this Department. You did not get a written reply to that letter, but, as I think you will recall, we met shortly later—and I think Judge Tyler was present, and I was present at the time—and this subject was touched upon, and I said that the committee wanted to cooperate in making available whatever information we could that would be helpful to the Department and that there would be a followup in which Mr. Schwarz and Mr. Smothers would collaborate with representatives of your Department to find out the best way for proceeding to implement the Justice Department's request.

Since then you have sent several more letters. Just recently we have received more letters relating to more targeted matters, including the Dr. Martin Luther King matter and the Chilean matter.

I simply want to assure you, as a matter of public record, that the committee, having considered this earlier request, is fully willing to cooperate in any way, and we will see to it that procedures are now worked out so that there will be no further delay. Our preoccupation with the assassination investigation and the issuance of the committee's report has preempted our time, but we think that these requests are important, and we stand ready to work with the Justice Department in making all relevant information available.

Attorney General LEVI. I am delighted to have that assurance.

The CHAIRMAN. Now, Senator Schweiker.

Senator SCHWEIKER. Thank you very much, Mr. Chairman.

Attorney General Levi, I am pleased to see that you have announced this week the establishment of the Office of Professional Responsibility to aid in the oversight of the investigations or allegations of misconduct by different employees within the Department of Justice. I have been interested in something along this line for some time, and I commend you for taking the lead in this area. I would just like to really ask you a few questions about the kind of concept that this is.

Originally, Attorney General Saxbe had something that, at one point, was labeled the Office of Special Review. I just wonder briefly how it differs and what the difference might be in terms of structure or organization?

Attorney General LEVI. Well, the differences may not be as great as I thought they were when I drafted out this new order, but there are, I think, these differences. In the first place the Counsel would be in the Office of Special Responsibility and, unlike the person who would be in the Office of Special Review, he would be in a position to directly receive complaints and then to directly refer them or to make a recommendation to me about them.

As I read the Office of Special Review, the holder of that office would not have been in a position to receive complaints unless the complaint was given to him by the Attorney General or the Deputy Attorney General.

Now, I thought that additional channel, while I hope it will not be the major channel, was an important thing to keep open, and, there-

fore, I wanted to make that clear. I also wanted to embody in this new order the experience that we have had. We have called in special groups to do investigating as we did with the DEA when we organized a special team, and I wanted to reflect in this order that there would be occasions when the ordinary investigative practices would not be sufficient. I wanted to have the Counsel put in the position where he could recommend that a special kind of review would be necessary through a different kind of a group, perhaps through a group assembled by him, perhaps going outside of the Department.

I think this spells it out better, although my belief now is that one could have found that probably in the prior order. It was not as clear to me.

Finally, I wanted to be sure that there was a memory in the Department and a continuation and a continual review of practices and procedures and ability to get the material from any part of the Department. I wanted to spell that out and frequent reporting, and I also wanted to have an advisory committee from the whole Department to this Counsel.

Now, as I say, as I have thought about it since, I wonder, is it that different? I think it is different. In some respects it is stronger, and I felt we should make it stronger.

Senator SCHWEIKER. Will this office have the authority to go into a program review like the GAO program audit, or will it be primarily focused on allegations of misconduct or both?

Attorney General LEVI. Well, I think it will be focused on allegations of misconduct and it will also focus on the procedures and effectiveness of review, but it is set up so that it can recommend beyond that, and if it wishes to recommend for the Department such other kinds of review then it is within the Counsel's prerogative to do that.

Senator SCHWEIKER. And what kind of staffing is anticipated?

Attorney General LEVI. I anticipate a small staff because I do not want to build up another bureaucracy with a large investigative staff. I think that, by and large, if the Counsel makes such suggestions we will then have to find out where to go and how to deal with it. I do not want to set up another large investigating staff, which will have to be investigated.

Senator SCHWEIKER. One of the things that came out this week—and I am not sure that this would be subject to this new committee or office procedure or not—but there has been a lot of discussion about the personal files of Mr. Hoover that Helen Gandy had, and I would just like to read one paragraph from the latest issue of Time magazine that seems to show a little bit of a twist, if I understood it, because up until now there were mainly personal files that Miss Gandy went through. This latest edition says:

Before secretary Gandy could look at Mr. Hoover's office, the files, the most sensitive papers were carried off in an FBI truck to West Virginia's Blue Ridge Mountain Club, a Shenandoah Mountain hideaway used by innermost FBI officials for regular poker games with the CIA and other cronies. The papers were burned in the club's large fireplace. Precisely who ordered this destruction and carried it out has not been disclosed. The three-story club worth \$300,000, was burned down in a fire of unknown cause December 23. No evidence of arson has been discovered.

This indicates to me, if it is true, and I do not know if it is true at all, some FBI participation in terms of separating out files so that even Miss Gandy could not see some of these files and obviously, if the

story is accurate, they were destroyed. Can you shed any light on that, and is this something that the Office of Professional Conduct would be looking into?

Attorney General LEVI. I have asked the Criminal Division to investigate any and all of the items relating to the Department of Justice which have come before this committee. And, of course, they are rather anxious to get this material, and this certainly will be part of it.

Senator SCHWEIKER. Can you give us any indication whether this account is accurate at this point?

Attorney General LEVI. Well, I really cannot because I have to say that it does not—it does not conform to my memory of the documents that I have seen. But I cannot really answer that question.

Senator SCHWEIKER. On the matter of the Office of Professional Conduct, will it have the right to go in anywhere it feels it should go, in terms of pursuing its job, as I understood what you said? Would there be any restraints?

Attorney General LEVI. I think it will not be subject to restraints. I think it may have to be subject to negotiation.

Senator SCHWEIKER. And it would have access to all of the material in its original form, if need be?

Attorney General LEVI. I think the negotiation might be whether, if need be, I can understand that there might be some sensitive information which there would be resistance to giving and so on. But I think that anything it needed it would get.

Senator SCHWEIKER. Would you envision that a new joint committee of Congress charged with overseeing intelligence activities might have access to information such as their reports?

Attorney General LEVI. Well, I think that is going to be dependent—that is a touchy subject because if it is going to be public, then the way the material is obtained and the way it is written about will be in a certain way. If it is going to be kept confidential, and we know it is going to be confidential, then there are less problems. I am not sure.

Senator SCHWEIKER. So as far as you are concerned, that is open to negotiation at this point in terms of working something out that would meet the guidelines you have in mind?

Attorney General LEVI. Well, I think so. There is no joint committee at present, and of course, that is one of the problems. Certainly one would hope that a reasonable exposure to what was being done would be available. But I do not really believe—I do not really think that it is appropriate for a joint committee to be on top of exploring the files of the Bureau.

Now I know there is a great difference of opinion between some members of the committee at least on that. I think that is close to the line of managing the Bureau and I think its management really is not a legislative function. But certainly to be advised, to have that kind of appropriate oversight to be helpful on that, I think would be fine.

The CHAIRMAN. Would the Senator yield?

Of course it is not an appropriate function of the Congress to mandate the FBI or to second guess their investigation of ongoing cases. But assuredly, it is part of the responsibility of the Congress to investigate wrongdoing and if we have reason to believe that there is wrongdoing, within the Bureau, it may be necessary to get to the raw files in order to ascertain that. If that does not go to the heart of the oversight function, I do not know what does.

Attorney General LEVI. Well it is like many of the questions that we have discussed earlier. One has to be very sensitive to the limitations because if you have an open investigation and there is the possibility of any political influence, either to act or not act, then I get very upset at the notion of those going to a congressional committee.

And I think everyone can understand that kind of problem. So it has to be balanced.

Senator SCHWEIKER. Well, Mr. Attorney General, I can understand protecting informants and protecting raw files. I think that is legitimate. That is something that we would have a responsibility in the Congress to do. But I do have trouble, assuming that can be worked out, and I think that is a very important point, particularly from the administration of the Department of Justice and the FBI. But assuming that can be worked out, I do not see how you can possibly be protected; that what we just saw happen in the last 30 years will not happen again, and that your inspection force will work, or that any oversight committee will work unless we do have that kind of prerogative.

On the basis that I outlined, it just seems to me we are sort of deluding ourselves in view of what has happened, not to have that access, first for you, but secondarily for some responsible element of the Congress that would be guided by certain restrictions protecting that.

Attorney General LEVI. My only suggestion is that it may be that the Attorney General should be able to see things which the congressional committee ought not to see. And I just think we have to think that through. There are stages. They are all problems of privacy. They are all problems of exposing individuals to obloquy. I think we have to take all that into consideration.

Senator SCHWEIKER. That is all I have.

The CHAIRMAN. If we had not had access to the raw files, we would never have discovered the FBI's plan to discredit Dr. King and pick his successor. And you recognize the responsibility of this committee and we have worked out procedures which have enabled us to reach this basic evidence in ways that did not reveal informants or did not reveal agents. And I think that guidelines of this kind could be worked out between a permanent oversight committee and Attorneys General so that the committee could get its job done. So I really do not believe that the problem is insuperable, and the fact that we have been able to get to the raw files when we needed to demonstrate that it can be done.

Senator Hart?

Senator HART of Colorado. Mr. Attorney General, I would like to pursue this last question 1 minute further, and that has to do with raw files. It is my understanding that in the recent GAO inquiry into Bureau activities, they worked almost exclusively, if not totally exclusively, from Bureau or Departmental summaries. Is that correct, in their investigation?

Attorney General LEVI. Well, that is what I understand.

Senator HART of Colorado. And what you are saying here today is that in the future, if there is established an oversight, a permanent oversight congressional committee, that your recommendation would be that raw files, reporting under some restrictions, would be available:

that it would be the same guidelines and the same kinds of investigation that the GAO does.

Attorney General LEVI. I did not mean to assert that it would have to be based on summaries. No, I did not. I just think we have a problem as to the proprieties of what the joint committee—if there is a joint committee—would want, and what we should appropriately give.

I have to say that there might be a temptation on the part of our Department of Justice to give more than it wanted to, and in later years that might be a problem. So one has to balance that.

Your committee, this committee did not ask for all of the King files. And I rather suspect that this committee had the same, to some extent at least, the same feelings of sensitivity and propriety which I had when I said I did not want to look at them because there are materials there which I really think should be regarded as secret. And that is the kind of problem one has to get into.

Senator HART of Colorado. But as a basic proposition, you are willing to go beyond that to some degree?

Attorney General LEVI. Yes; I am. Of course the Bureau might not like the idea.

Senator HART of Colorado. Oh, I am sure they will not.

Yesterday I asked Director Kelley about the letter we received from one of your assistants, Mr. Pottinger, in connection with investigation of the King case internally. And he asked us for FBI records and documents, "all materials" was the phrase I think he used. The Director seemed somewhat puzzled by that, but I guess my question is: Why is the Justice Department contacting this committee for FBI records?

Attorney General LEVI. Well, I cannot imagine why, unless you were given the only copies.

Senator HART of Colorado. I would be surprised if that happened.

Attorney General LEVI. But if the suggestion is that he can only get them that way, and not directly from the Bureau, I think that is really incorrect because it just happens that I have specifically asked Mr. Pottinger whether he had access to all the materials and he said yes. But it may be that our form of record keeping is such that you have things where we do not know where the copies are, and you have a great deal of material.

Senator HART of Colorado. But you have no doubt that you will get everything the FBI has on this matter?

Attorney General LEVI. I have no doubt that people investigating it for me will get everything the FBI knows that it has. As you know, it is possible that there are materials in other files somewhere.

Senator HART of Colorado. Well, I am talking about conscious withholding.

Attorney General LEVI. I do not believe there will be conscious withholding.

Senator HART of Colorado. If or when you depart from the Department of Justice, will you so do with any degree of fear of an overly independent FBI in the future? Leaving aside the question of the relationship that exists now, but is it a matter of concern to you about your successors; that the Bureau is too independent of the Attorney General?

Attorney General LEVI. Well, I have already said that I think that there is a certain amount of distance and independence. It is probably desirable. But, of course I am concerned, of course I am concerned. I am concerned not only about the future but of today.

Senator HART of Colorado. And therefore you would suggest that Congress ought to also be concerned about that?

Attorney General LEVI. I have said so. I agree.

Senator HART of Colorado. In connection with these guidelines that we are talking about, one of the very puzzling areas that this committee is engaged is the Huston plan, Operation CHAOS and so on, back in the 1960's and early 1970's; the tendency on the part of both the Department and the Bureau and many in the White House to fear that domestic protest groups, particularly in connection with matters of race or the Vietnam war, had some outside or foreign domination or guidance or direction or support.

What do you think these guidelines should say for the future about separating genuine domestic, domestically oriented and controlled protest that is legitimate and constitutional, from the kind of official governmental harassment that did in fact go on with very, very little substantial support for the proposition that it was foreign dominated? What can be done about that in the future?

Attorney General LEVI. It is terribly difficult for the very reason of your last phrase, in which you correctly emphasized that we do not have the guidelines on the foreign dominated organizations. The question is how close one can come to barring evidence of that domination when the purpose of the investigation in some sense has to be to obtain that very data. So I suppose what one would try to do is to use some kind of a likely standard or something of that sort as one approaches it and then a reason to believe or some such thing which we have come to temporarily on the domestic security ones, the stop and frisk standard which is a pretty stringent standard for investigation.

But I think there is a problem.

Senator HART of Colorado. But not with judicial approval; I think that is your strong recommendation?

Attorney General LEVI. I do not know whether it is strong or not.

Senator HART of Colorado. It is consistent.

Attorney General LEVI. I just do not think that is the most desirable path. I think it puts an enormous burden on the court. I do not know how the court will exercise it. I doubt if it is the best way. But it may be one way.

Senator HART of Colorado. In a hypothetical situation, where you are the ultimate decision-maker as to whether a wiretap should be implanted, and the rights of the individual would be jeopardized, the constitutional rights of that individual or that group would be clearly jeopardized by the proposed surveillance, wiretapping or whatever, what would be your own personal judgment on that, where there was an absolutely even question; there was no question constitutional rights would be infringed upon, and yet the balancing consideration was that there might be some evidence of criminal activity or subversion or whatever?

Would you come down on the individual or group's side, or the other way?

Attorney General LEVI. Well, I must believe that there is a misunderstanding between us because I do not authorize anything where I think there is a violation of constitutional rights. So I think I must be misunderstanding.

Senator HART of Colorado. Well, I am trying to get inside the mind of an individual who is going to have this authority; that you do not want an officer of the court to have, about what outweighs what, where you do not know what information you are looking for, and the Bureau agent is recommending a wiretap or a mail search and he is just saying I think there may be some evidence here that we might need, and so on and so forth.

So I have to put it in a hypothetical—

Attorney General LEVI. You see—

Senator HART of Colorado. Do you resolve differences in favor of the individual?

Attorney General LEVI. I do want to say something about the hypothetical. In this first place, under title III, the wiretaps require judicial approval and the legislation that we are drafting concerns electronic surveillance which is not a title III matter. We are suggesting because of reasons which I think I stated before to the committee, our view that judicial approval might be desirable.

As to mail openings, it seems to me that, at the present time at least, that would require a warrant so that—

Senator HART of Colorado. Well, I am talking about a national security area where there is no judicial—

Attorney General LEVI. I do not know of any national security authorization. I do not want to get into that area. But I do not know of a present authorization which would permit me to, without a warrant, authorize the opening of mail. So I think one has to weigh the individual rights very seriously and obviously give them emphasis. But I do not like to be suggesting by my answer that in those particular hypotheticals that the decision would be made without—or could be made or would be made without judicial review because I think in those particular examples there would be a warrant—there would have to be a warrant.

Senator HART of Colorado. Well, I am talking about the area where there are no warrants. But I cannot frame the hypothetical clearly enough.

Attorney General LEVI. Well, it has been framed in terms of the use of informants; and where I do not think there should be a warrant, and there is not a warrant, as far as I know, and there does not have to be, in terms of constitutional requirements, at least at the present time. I think one does have to be very sensitive. I think Stone was correct and if you are going to have an agency of this kind, and it is going to survive with the proper discipline and so on, it has to be extremely sensitive to individual rights.

The CHAIRMAN. Senator Hart, do you have further questions?

Senator HART of Michigan. Yes, Mr. Chairman, on specifics really.

On this business of congressional oversight, we have been going back and forth with you and with others earlier on the standards and guidelines of investigations. This morning you indicated that some of the guidelines might well be in statute and others in regulation, and you suggested executive orders, and that gets to the point that

even in the area where statutory definition of guidelines is appropriate, no matter how skilled the drafter, it will leave unanswered certain things. So it also will have to be implemented by departmental orders and guidelines, making even more explicit the do's and don'ts and safeguards.

Should not those regulations, which you, or you and the Bureau, or the Bureau issue to implement or elaborate on whatever we do by statute, be subject to debate and approval, at least by the Oversight Committee, which everybody assumes we will have, if not by the Congress? Is not that really the starting point for a useful oversight?

Attorney General LEVI. Well, I think a useful oversight can involve debate and, hopefully, it will involve approval, but if you mean by that, formal approval by a committee as a new form of additional legislation, I think it raises constitutional questions, and I really do not know why one would want to raise those questions because it does not seem to me essential.

Senator HART of Michigan. Well, it may be unconstitutional to require the elections commission to come in and tell us what they propose to do to implement the rules of criminal procedure.

Attorney General LEVI. Well, Senator Hart, I had been asked how constitutional I am in various ways, and I think the Constitution applies and should be followed, and I think there is a constitutional question. It may be that we should change the Constitution and have a form of subsequent legislation through congressional committees.

I think there is a problem. There is an abuse. I happen to think that the affirmative action legislation, if you trace affirmative action legislation by the Congress to Executive orders and then to the Labor Department, you have a horror story. It happens to be a horror story that some people like, but I regard it as a horror story because the deviations are quite great. So, it is possible that here, if you have very general legislation and then you have Executive orders and then you have other orders, the deviation may be very great. I understand the problem, and I would hope that an oversight committee could look at it, but to have the oversight committee then have a veto power or a new subsequent enactment power seems to me to be a strange creation of a subhouse of, I do not know what, the Congress, and I regard it as probably not legislation, but rather an Executive function.

If it is going to be legislation, I think it should be legislation.

Senator HART of Michigan. I am not wise, but I am wise enough not to pursue a constitutional issue with you. I am almost tempted to have you ask the Department and the Bureau who does those things to give us a memo on why it might be unconstitutional with respect to the point I am suggesting, reviewing and approving guidelines, interpreting statutory direction with respect to the Bureau, but not unconstitutional for us to claim, as we do and have, the right to veto rules of criminal procedure, but the Director has been burdened enough.

Attorney General LEVI. We could put it back and require enactment. You could have a procedure in which after the statute, the regulations would be put before the Congress and require enactment in order to be effective.

Senator HART of Michigan. That would certainly be oversight. This follows up an earlier point of discussion. When we do pass a statute, we can see how the courts and the agencies are applying them because of the agencies' actions and the courts' decisions are public. It would not really affect safeguards in this area, require that the oversight committee be able to see the kind of documentation that had been given to you, or if it is a case of going to a court, seeking a warrant, that underlying material really would be the best basis for an oversight committee making the judgment as to whether the Attorney General appropriately was supplying what was intended.

Do you agree that oversight, how the statute or your guidelines or others' guidelines requires that kind of access? I know this looks way down the road.

Attorney General LEVI. Yes, I think it does. Well, the facts of life are that you cannot look much because you will not have the time, and the facts of life are that at least I do not think it is good administration to have congressional investigators plowing through an agency. So I think one has to think about those questions. I do believe that with proper safeguards of confidentiality a committee could get such material.

Senator HART of Michigan. As my question implied, it would seem to me that unless we knew the kind of argument and evidence that an Attorney General is finding adequate to meet that standard, we would not know whether our standards were—

Attorney General LEVI. That is right. There might be some problems. Every once in awhile there is something of such sensitivity that it might be in a special category, I am sure.

Senator HART of Michigan. On the matter of electronic surveillance you said some weeks ago the standards to be used with a citizen, with an American citizen, would be, would depend on whether he is here or overseas. Perhaps that does not fairly summarize what you said.

Attorney General LEVI. No, it does not.

Senator HART of Michigan. All right. I will be a little bit more fair. You said the different standards would apply when the citizen was an agent of a foreign power, which is what you said. Is it your view that the same standard which really is to say does the fourth amendment apply equally to an American citizen, whether he is operating at home or abroad, in terms of the electronic surveillance that can be used by our Government, or at the request of our Government?

Attorney General LEVI. I do not think it is absolutely clear, but my answer would be yes, but I do not think it is clear in the decisions.

Senator HART of Michigan. What are the present policies regarding dissemination of the product of electronic surveillance when it is targeted on an embassy or a foreign diplomat, but the device picks up noncriminal communications as to Americans? Specifically, suppose an American is talking on the phone to an embassy of a Middle Eastern country, and he is discussing plans for political activities to lobby Congress for support of action which he and other Americans plan. They might even be discussing legislative plans of Senators who disagree with the administration.

If you have a national security tap on an embassy and pick up that conversation, is that fair game for sending to the White House simply because the tap was legal?

Attorney General LEVI. The answer is no.

Senator HART of Michigan. On the matter of future deterrence of unauthorized activity, we have been talking about what should be authorized and how to set up procedures. No matter how brilliantly we draft our statutes and guidelines, the problem of human frailty will be there. The best system will not eliminate temptation or occasional succumbing to temptation or transgression. Should there be specific criminal penalties for Government officers who take or approve unauthorized action in this area?

Attorney General LEVI. In the areas of what?

Senator HART of Michigan. A Government official who ignores, averts, or violates a guideline.

Attorney General LEVI. Well, there are all kinds of penalties now, and all kinds of threats of damage suits, and whatnot. I think it is a question of how serious the violation is, how willful it is. I think I would have to know more about it.

Senator HART of Michigan. Would a good stiff penalty on the books serve as a deterrent for possible abuse?

Attorney General LEVI. It depends upon the kind of abuse one is talking about, and, as I indicated before, the privacy statute in itself imposes penalties now. If we are talking about the grosser acts of some Presidents, let us say, or others making illegal, unauthorized operations or uses, well, I do not know what the penalty would be on the President, and somehow or other I have a feeling that I am not sure that is where a great penalty would make a difference.

Senator HART of Michigan. Let us look at it from the point of view of the fellow whose privacy has been invaded, and violations notwithstanding, statutory or guideline rule, should he be given standing to sue for damages?

Attorney General LEVI. Well, as to whether he has standing and should be able to sue, where the conduct is illicit, there is no doubt that there will be suits. There are suits.

Senator HART of Michigan. But my notes say that the court has held that unless you can show specific damages, which is a tough thing under the first amendment, that you are barred from challenging investigation.

Attorney General LEVI. But I think that were there is not, really is not, any real damage, I am not sure that damages should be given. I really do not think that is the way one can—

Senator HART of Michigan. How about standing to seek an injunction? Even though there is not reason for damages?

Attorney General LEVI. An injunction so that the court would be operating that segment? I would think that would be another problem as to the separation of powers, really; an injunction related to that particular person maybe. I do not think a class action telling the Department of Justice that they could never use this, that or the other device toward this group—

Senator HART of Michigan. Well, there is nothing novel about seeking injunctions against the Attorney General or other departments from doing something, so I am curious about what we do about someone who is being tailed.

Attorney General LEVI. Well, I thought that you were not thinking about the problem of damages so much, as to the problem of controls

on the operation of the Department, and I was looking at it from that standpoint. I think there is a problem about damages. There is a problem about the rights of people who may have been injured and whether they should be notified, and I, frankly, do not know the answer to that question.

Senator HART of Michigan. And you do not know the answer yet on that one?

Attorney General LEVI. I think it is a very mixed question, and it may be that they should be notified. I do not know how they would be notified, what the basis would be. It is not something about which I care to express myself.

Senator HART of Michigan. Well, the mechanics of notifying somebody whose mail has been opened, that is not complicated.

Attorney General LEVI. I am not talking about mail openings. I am talking about such things as in the COINTELPRO, possibly.

Senator HART of Michigan. Let me read you the full question to make sure we have covered this. I really thought that you had under study methods which might respond to the abuses in terms of, at least alerting American citizens whose privacy had been invaded upon.

Attorney General LEVI. We do, but I am just saying that I do not know what the answer is.

Senator HART of Michigan. You are studying and seeking the right answer?

Attorney General LEVI. Yes.

Senator HART of Michigan. Well, why is there a problem? Why is the search for the right answer so complicated in terms of those who have the subject of COINTELPRO files? Now, maybe they will read about it through these hearings, but there are a whole slew of them.

Attorney General LEVI. There has been a lot of reading about it. There are Freedom of Information Act requests which, obviously, reflect a knowledge on the part of some people, but all I am really saying is that that is one of those matters which I think one has to explore. The first reaction, and certainly my reaction, is that in some way they should be notified. Then I come to the question of how do we know who they are. Suppose nothing actually occurred. Is then the person to be notified? Or suppose it is the kind of case where if the person is notified, there might be embarrassment to the person, which is conceivable, and so on? Is it appropriate for the Department, itself, to make a tentative judgment as to whether there was any injury or not, or is that inappropriate?

There are lots of questions in there, and my own inclination is that they should be notified in some way, but I think it is worth some thought.

Senator HART of Michigan. And that thought is being given?

Attorney General LEVI. Oh, yes.

Senator HART of Michigan. So that Martin Luther King, who would have known about a lot of things that were going on, and a lot of people whose names will never surface in connection with this committee, who have had similar—well, not similar, but experiences which might very well give rise to a claim—how soon do you have to be able to figure out what, if anything, the Department's obligation is toward them?

Attorney General LEVI. Senator, I really do not know. I have called together a group on that, in fact, two groups. I think whatever answer is given by the Department may well have to be the same answer that is given by other parts of the Government. That seems to me to require some further discussion. And one has to try to think through, as I say, the consequences. To notify a person that he or she was the subject of COINTELPRO at this time many years later may actually cause, perhaps, it is strange to think this, but it might actually cause embarrassment to that person now who would rather not know it, and if they had no consequence, if it had no consequence, is that a good thing to do?

Let me tell you, I was told when I came down to the Department—I do not know if you believe this or not—but I was the recipient of a COINTELPRO letter, but more recently, since I have ordered a review of all the COINTELPRO files, I have had this letter confirmed to me.

When I was president of the University of Chicago, apparently an anonymous letter was written, I gather, claiming that some professor was a Communist, and I do not know what was supposed to follow from that, but, in any event, there was, and I do not know whether the letter was anonymous, but it probably was. If I got the letter, I would have thrown it away. It would have had no consequence, and I have no recollection of it. Now, if there is such a letter and persons exist, then notification of that person, is that desirable? I just do not know.

Senator HART of Michigan. I would suggest that the Department ought not to make the judgment as to whether, to use your expression it had no consequence to the subject. I think that that would be a decision that more correctly should be made by the subject in his mind, and not the Department of Justice, as you go through that file.

I would hope there could be a resolution of which you would say to be the right answer.

Attorney General LEVI. I have thought of suggesting the Congress establish some kind of a claims division. But, in any event, it is something we are thinking about.

Senator HART of Michigan. Well, I hope we can come out of this with some teeth in what we do because you suggested perhaps criminal penalties would not be very effective, and you describe the difficulties that attach to civil remedies, and you suggest that no matter how carefully drafted—

Attorney General LEVI. Well, there are civil penalties now, but I hate to think that, if guidelines are drafted and if there is a violation of one of the guidelines, that the consequence is a criminal penalty. Somehow or other that seems to me an inappropriate way.

Senator HART of Michigan. It would not be a criminal penalty unless the person knowingly took action in violation of the guidelines. And if you are paid by the taxpayer, why should you not be subject to sanctions of that kind?

Attorney General LEVI. I do not really see why payment by the taxpayer—

Senator HART of Michigan. Well, why should you not be subject to sanctions if you knowingly break the rule?

Attorney General LEVI. I think my problem is that I think you have problems of discipline in any organization, and I think one ought to be careful not to cover the field of administrative discipline in a gov-

ernment with criminal penalties which I think is self-defeating. So, that is the only reason.

The CHAIRMAN. Just two subjects, Mr. Attorney General, and then I am finished, and I will conclude the hearing.

Yesterday I asked Director Kelley about the amount of time and money and general imposition on the overall resources of the FBI that was represented in the many investigations they routinely make that deal with appointees or nominees, and people being considered for Federal employment. And he said he would supply those figures and give us some idea of how much of the workload this represented.

It is my understanding that the FBI does these investigations only for sensitive civilian jobs, and wherever a name check digs up information from FBI files indicating a possible security risk. In other words, the FBI name check is there if there is an allegation in the FBI files that a person might have once been associated with a subversive or extremist organization or something like that, or if the position to which the nominee is to be appointed is regarded as sensitive. Then the FBI does the investigation of the nominee. Otherwise, it is done by the Civil Service Commission.

I am wondering if when it comes to guidelines, that not ought to be a good place to look pretty carefully to see how much of this is really necessary. My impression in the past has been that there are many FBI checks being done for positions that could not possibly be regarded as sensitive as far as national security is concerned, and maybe we just have overdone this back in the period when we were terribly frightened, in the McCarthy years, and it has never been looked at sufficiently since to see if it still is all that necessary.

Attorney General LEVI. Well, I agree, and a good place to begin is with executive order that has been modified many times on suitability for employment.

The CHAIRMAN. I do not know whether it is feasible to try to legislate here, or whether there could be a way that legislation might be helpful as a part of the basic or generic FBI law that we hope to draw up concerning this phase of the FBI's activities. But I wish you would give some thought to that, would you please?

Attorney General LEVI. Surely.

The CHAIRMAN. The other matter that I want to deal with is that time and time again in our investigation of the intelligence agencies, including the intelligence aspect of the FBI's work and the counter-intelligence aspects, we are up against the problem of accountability. And with the FBI, of course, we have had the additional question of the President putting the agency to his personal or political use; and a difficulty which I think Senator Mondale rightly referred to—the difficulty, no matter what the regulations may be, and even perhaps contrary to positions of the law, of refusing to do the President's bidding. You know, the order of the President or the desire of the President can be easily rationalized or some kind of plausible excuse can be given for it that sounds like it might fall within the purview of the law. And neither an Attorney General or a Director of the FBI is in very much of a position to argue with the President. And then there is a feeling of who is going to find out about it anyway.

I asked Director Kelley yesterday if he thought that orders should be transmitted to him from the President through the Attorney General; and second, if orders are transmitted to him to undertake an

investigation in which the President has expressed some interest, they ought to come in writing and a permanent file be kept so that the accountability is there for review of a congressional committee or for whatever.

He said that he thought that such directives should be in writing and that a file, a permanent file of them should be kept. I would like to ask you how you would respond to those questions. And I put the questions in this order: First, do you think that if the President wants the FBI to go out and make an investigation for him and report back to him, that that order should be transmitted through the Attorney General? And second, whether you think orders of that character coming from the President should take the form of a written order and permanently maintained in the files of the Bureau?

Attorney General LEVI. Well, I think the orders probably should be written. Now as to the first part of your question, the hypothetical case might be that the President has decided that he wishes to appoint a certain person to the Cabinet and he wishes a full field investigation. Under the guidelines, the President, the counsel to the President or associate counsel could ask the Bureau to do that. I would think, unless there is some particular reason, that the Attorney General should be notified as to what is going on. I think any suggestion of any other kind of investigation of an organization or something of that sort, which I thought you were suggesting, should not come from the President to the Director, in any case, and if it did come, it certainly should come in writing and the Attorney General should be notified.

I certainly do not want to say that the President cannot speak to anybody he wants to speak to and there is no reason why he should not be talking to members of the Department of Justice. I do think it is a desirable thing when that occurs, unless it is discussing the criminal activity of the Attorney General, that the Attorney General be notified.

Now I think in fact, at the present time, and maybe I would be the last one to know, but I think the communications are through the Attorney General, except for the kind of investigations for appointments which might or might not come to me.

The CHAIRMAN. But it is possible that that too might be the subject of that kind of procedure, the very kind you have outlined can be the subject of a statute. And if it were, do you think the President would be bound by it?

Attorney General LEVI. Oh, he might not be, but in fact he would, I would think, wish to adhere to it and it would make it easier for others to suggest that there was kind of a propriety about it.

The CHAIRMAN. Before you leave, and I want to express the gratitude of the committee for your testimony today and for your continued cooperation in this joint endeavor, but I also want to say that Michael E. Shaheen, Jr., who has been the liaison with the committee staff, has done an excellent piece of work and the staff wishes for me to express its appreciation to him.

Attorney General LEVI. I would thank the committee and thank you, and I hope that—you can tell Senator Mondale that I am not half as arrogant as he thinks I am.

The CHAIRMAN. Thank you, Mr. Levi.

[Whereupon, at 1 p.m., the committee adjourned, subject to the call of the Chair.]