

TUESDAY, DECEMBER 9, 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 11:05 a.m., in room 318, Russell Senate Office Building, Senator Frank Church (chairman) presiding.

Present: Senators Church and Schweiker.

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

The CHAIRMAN. The hearing this morning marks a transition in the work of the committee. Heretofore we have been focusing on abuses, unlawful conduct, wrongdoing, which together have constituted the investigative phase of the committee's work.

Today and in future public hearings of the committee we shall be concentrating on remedies.

We have three witnesses this morning. Our first witness is William Ruckelshaus, who under the Nixon administration served as Assistant Attorney General for the Civil Division in the Justice Department, and then as head of the Environmental Protection Administration. Following the resignation of L. Patrick Gray in 1973, Mr. Ruckelshaus was appointed Acting FBI Director for several months, until the nomination of Director Kelley. He then was appointed Deputy Attorney General under Elliot Richardson, and began a full-scale study of the FBI. This was interrupted by his departure in October of 1973 which is sometimes referred to as the Saturday Night Massacre. He is currently in the private practice of law.

Our second witness is Mr. Henry Petersen. He was appointed head of the Criminal Division's Organized Crime Section in the mid-1960's. He served as Deputy Assistant Attorney General in 1969, and Assistant Attorney General in 1972. Attorney General Saxbe directed him in 1974 to head an interdepartmental committee to study FBI COINTELPRO activities that have been heretofore disclosed by the committee in its investigatory work. The Justice Department's Internal Security Division was a bold issue and its function transferred to the Criminal Division under Assistant Attorney General Petersen. He retired from the Department in early 1975 and he is currently in the private practice of law.

Our third witness is Mr. Norman Dorsen who will be here shortly. He is currently a professor of law at New York University and Gen-

eral Counsel of the American Civil Liberties Union, and president of the Society of American Law Teachers. He has written extensively on Government secrecy, executive and legislative powers and their relationship to individual rights under the Constitution.

Mr. Ruckelshaus, I know that you have an opening statement you would like to make at this time. I wonder if you will proceed with your statement and then we will go to questions.

TESTIMONY OF WILLIAM RUCKELSHAUS, FORMER ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION; FORMER ACTING DIRECTOR, FEDERAL BUREAU OF INVESTIGATION; FORMER DEPUTY ATTORNEY GENERAL; HENRY PETERSEN, FORMER DEPUTY ASSISTANT ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL; AND NORMAN DORSEN, PROFESSOR OF LAW, NEW YORK UNIVERSITY, AND GENERAL COUNSEL, AMERICAN CIVIL LIBERTIES UNION

MR. RUCKELSHAUS. Mr. Chairman, I have a short opening statement that I would like to make in order to set the framework for an approach to the problems that the committee is addressing. In the first place, I do appreciate the opportunity to appear before this committee. The approach I would like to take in testifying is not to contribute to the litany of condemnation of past abuses by the FBI. I think, given the committee's investigation to date, we are in a position to stipulate abuse. The question really is what should be done about the abuse now so as to avoid it in the future.

The nature of the problem facing the committee is, I believe, inherent in any free society. It is an examination of tension that exists between individual rights and the common good and it calls for Government to strike a balance between them. How that balance is struck depends among other things on our Constitution, the will of Congress, the individual making the decision, and the historical moment in which the decision is made. These hearings have focused attention on how the FBI has for decades failed to weigh properly individual rights in seeking to protect their perception of the common good. To attempt to place all of the blame for the abuse on the FBI or on J. Edgar Hoover is in my opinion to fail to face the fact that both the Congress and the executive branch ignored a fundamental concern of the Founding Fathers of this country and permitted too much unchecked power to accumulate in one man's hands.

I think the fact that Hoover greatly abused his power is true. But to paraphrase the old adage, when we consider his opportunities we must marvel at this moderation. For more than 40 years he reigned supreme, virtually unchecked by either the executive or legislative branches. This much power must never be permitted again to be possessed by one man in our society. And I am sure that this committee is attempting to act wisely to prevent its reoccurrence. I believe that whatever power we gave to the FBI or any agency to detect and prevent internal subversion must be carefully controlled, monitored, and checked by all three branches of Government. There should be clear statutory authority for the FBI to investigate individuals or groups who may through violence present a threat to other individuals or groups in the society.

The FBI's power, while necessarily general, should be spelled out as carefully as possible in a statute. The statute should provide for the Justice Department to issue guidelines as to how this power will be implemented. These guidelines should be subject to congressional and public review and comment. The guidelines will deal, I think necessarily, primarily with the processes by which individual freedom will be protected as the FBI seeks to protect the common good. The FBI should be under the control and supervision of the Attorney General. The Director should be appointed for a term of years. Eight or 9 years I think is long enough. His appointment should be subject to congressional approval. He should communicate with the President only through the Attorney General.

The Congress itself needs to establish a strong responsible and responsive oversight committee, preferably a joint committee, to review all activity of the FBI, including ahead of time, before the fact, investigative techniques the FBI intends to use in a given class of cases. I am not talking about the specific application of one of these techniques in a given case, but the technique should be reviewed ahead of time as to their application to a general class of cases.

Assuming adequate safeguards to individual rights, and assuming the protection of material the publication of which could adversely affect the internal security of the country, the committee should be privy to all information the FBI has relating to any specific investigation for the purpose of reviewing the general discharge by the FBI of its responsibilities. This extraordinary power of the committee must be very cautiously and selectively exercised for the above purpose alone. And the committee must seek to avoid merely nitpicking or second guessing a given investigation. I think further the committee should avoid injecting itself into an investigation while it is ongoing if at all possible. The committee should operate as openly as possible, given the strictures above mentioned.

It is my judgment that all wiretaps should be subject to court order. The standards for so-called foreign wiretaps will be different from the probable cause standards that apply to criminal wiretaps. But these standards can be developed.

Mr. Chairman, these process changes are not impossible nor overly complicated. They will not insure the total elimination of abuse by the FBI or any agent given the nature of the power. Granted, they will only lessen the likelihood of abuse. We must remember that whenever we are dealing with the grant of power to institutions created and run by human beings, we are subjecting that power to potential abuse. All a free society can do is attempt to create processes to minimize that potential, or in the alternative, not locate the power anywhere.

I believe we have an obligation to the common good in this country to protect the public against violence. This necessitates the careful placing of that protective power and subjecting its exercise to rigorous control and review. That is this committee's charge. As a citizen I certainly wish you well.

Mr. Chairman, one final word. As you mentioned in your opening statement, I spent 80 days as an Acting Director of the FBI. And I left the FBI with two dominant impressions: one, that the Director possessed too much unchecked power. Your committee is attempting

to help the country and the executive branch in remedying this problem. The second impression that I left the FBI with was the incredible dedication and devotion to duty that the individual agent of the FBI has. It is in my experience unmatched in any other institution in this country. And I think that properly channeled and controlled this *esprit de corps* that the FBI has is a priceless asset of our country, and we ought not to fritter it away if we can avoid it. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Mr. Ruckelshaus. We have a vote. Mr. Petersen, do you have an opening statement of any kind?

Mr. PETERSEN. No, I do not, Senator.

The CHAIRMAN. All right, since we have a vote on at the moment and we are waiting for Mr. Dorsen, why don't we take a brief recess so that the committee can vote.

[Recess.]

The CHAIRMAN. The hearing will please come back to order. Another vote is anticipated in a few minutes. So we will move along in between. Mr. Norman Dorsen has arrived since the hearing began. I understand, Mr. Dorsen, you have an opening statement you would like to make.

Mr. DORSEN. I do. It will be very brief. I don't know if you introduced me before. I would like to say that I am general counsel to the American Civil Liberties Union and president of the Society of American Law Teachers, but I am speaking here as an individual and expressing my own personal views.

This committee, of course, is very familiar with the widespread evidence of systematic interference with constitutional rights under the first and fourth amendments that has occurred pursuant to the program of domestic surveillance. There are three broad questions. First, should such domestic surveillance be carried out at all? Second, if so, to what extent, in what way, pursuant to what guidelines? And third, what control can Congress provide, what oversight, and what other forms of maintenance of public control are there over this important and dangerous activity?

I will make just two preliminary comments before getting to these issues specifically. One is that the aspect of domestic surveillance that disturbs me the most is that since the public and the Congress are frequently unaware of what is being done in the people's name, there is no opportunity for public discussion, there is no opportunity for public debate. Certain activities are conducted which I am sure many members of Congress were appalled at when they became publicly known. What I infer from those facts are, (a) to the greatest extent possible there must be public discussion and open government on these issues; and (b) in a sense even more important, the ultimate power to control must be in the Congress, and Members of Congress must not be timid or they must not be fearful or they must not be apologetic in exercising this responsibility. Second, on a much more detailed level, most of the public debate in this area has centered around wiretapping an eavesdropping and other forms of electronic or mechanical surveillance.

Personally, I am much more concerned about informers and informants who are infiltrated into private groups, frequently without any control, and certainly without any knowledge of these groups.

in a way that is bound to interfere with their rights of association. I will refer to only one decision of the Supreme Court that is very important in evaluating and appraising those activities, *NAACP v. Alabama*, where the court in 1958 unanimously held that the State of Alabama did not have the constitutional right to acquire the private membership lists of the NAACP. Now, if one has informants, secret informants in organizations all over this country, one of the obvious purposes is to acquire those membership lists. This is a way, very simply, of evading a clear, unanimous decision of the U.S. Supreme Court, written by Mr. Justice Harlan, and carefully considered within the court itself. I don't think it is telling tales out of school, because I was a law clerk to Mr. Justice Harlan that year, to say that this was regarded as one of the Court's most important decisions in that year.

The vacuum cleaner of informants picking up all kinds of information is not only inconsistent with the decision of the Supreme Court but is inconsistent with the very power of the fourth amendment. A major purpose of the fourth amendment, with precedent going all the way back to the British *Lilburne* case, is to deal with what is known as general warrant. General warrants do not identify specifically what the seeker after information wants. It permits the seeker after information to roam at large, pick up any kind of information that he or she can acquire, and then do what he wants with that information. An informant is the modern equivalent of the general warrant. I believe it is vital that that particular form of infiltration be given careful scrutiny and controlled by the Congress.

Let us turn now to what I suppose may be a key question before the committee—should covert domestic infiltration and surveillance be conducted at all? The very easy answer to that question, and I am sure it is an answer that many people will express is—well, this is a very bad idea in general, constitutional rights are involved, but constitutional rights are not absolute, and it is very important to the security of the country that certain types of information be obtained. We want to be very careful in the way we go about it; we therefore must use the kind of balancing test that the Supreme Court has said is relevant to some other first amendment and fourth amendment cases, we therefore must have guidelines and we must have some specific form of control. But—here is the key—we don't want to abolish covert activities and domestic surveillance of the kind that has been conducted in the past.

If I may say so, that sounds like a very reasonable position. It is a very easy position to take. But I question whether it is the correct position. At the very least it seems to me that a heavy burden of proof should be placed upon those who want to conduct anticonstitutional surveillance in the future. The reasons for this are very simple, stemming from the record as I understand the record to be. That record shows one important thing—large scale violations of constitutional rights. It does not show another thing. It does not show what the value of the infiltration has been, what crimes have been prevented, the nature of the success that the Bureau and other law enforcement officials have obtained. In other words, one side of the balance is completely empty as far as the public record is concerned and the other side of the balance shows severe restrictions on constitutional rights.

What does that mean? In answering this question, I recognize I am not privy, as my colleagues in the panel have been, to some of the secret information which might explain what has happened in the past. But there are two inferences that I think can be drawn. One is that there is a heavy burden of proof on anyone who wants to justify any kind of surveillance of this character. This burden of proof is the product of a constitutional mandate, not only the constitutional mandate that I have already expressed, the fact that there has been admitted violations of individual rights, but a constitutional mandate as recently and frequently expressed by the U.S. Supreme Court in some of the most conspicuous decisions of the past generation.

I will mention several right now. One is *Youngstown Sheet & Tool* in which the Supreme Court rejected President Truman's claim of inherent power to seize the steel mills during a time of hostility in the Korean war. President Truman argued that his action was necessary to protect national security. Here we had an opponent with which we were at all but formal war. The Supreme Court rejected that line of argument, and rejected quite decisively the claims of inherent authority. A second aspect of that case is this. Whatever one may think about the validity of certain forms of covert action, whether domestic or foreign, that opinion, I think, almost unanimously had been read to mean that the Congress has the ultimate authority to decide how much of it to permit and how much not to permit, and that ultimate power is not in the executive branch but in the Congress. The key opinion in that case, although not the formal opinion of the Court, was by Mr. Justice Jackson. He pointed out that congressional power is at its lowest ebb when Congress has acted inconsistently with what the executive wants to do. A very recent decision is the *Keith* case, a unanimous decision of the Supreme Court rejecting a claim of implied power to wiretap domestic groups thought to be a threat to national security. Once again the Court has made it very clear that not only is there a heavy burden, a compelling burden on the executive, but in that case although the executive claimed that the wiretapping was essential, the Court unanimously rejected the claim.

In *United States v. Nixon*, the *Pentagon Papers* case, and in other decisions, the Court has refused to buy diehard executive claims. I participated as *amicus curiae* in both the *Pentagon Papers* case and *United States v. Nixon*. The executive said in briefs and oral argument, in both cases, that the power was essential for national security. The Court, as we all know, rejected the claims.

I have discussed the first inference I draw from the proven record. And that is the heavy burden of proof on the Government. The second inference I draw is that whatever is allowed, whatever types of covert domestic surveillance are ultimately approved, if any, they must be tied as tightly as possible to specific violations of law, and that broad mandates to infiltrate particular groups, whether they are the Weathermen or the Minutemen, are no substitute for explicit relationships to particular crimes that individuals are accused of performing. We cannot allow the kind of limitless infiltration of groups that are in political disfavor or labeled as extremists. I don't have to repeat now what the consequences of such infiltration have been, and what injustices have been done in the Government's name.

Another aspect of this point is that whatever infiltration, whatever surveillance may ultimately be approved, it must be strictly limited in time or place. It is not enough to say that if we have a tip that somebody is going to assassinate the President and blow up the Statue of Liberty, and that that person is a member of the Weathermen, we should use that as a formula for infiltrating the organization on a permanent and widespread scale. There must be tight time deadlines, they must be reviewed within the Department of Justice, and there must be a clear commitment to a refusal to go beyond what is absolutely necessary to investigate a crime or the likelihood of a crime. Once again there is a constitutional doctrine that is relevant. You are all familiar with the rule that the Supreme Court has stated on many occasions, that if the Government is trying to achieve a lawful objective by impinging on constitutional rights in some way, the Constitution requires that this be done with the least possible infringement on those rights. Therefore, even those who support domestic infiltration of the kind that has now come to light are bound by Supreme Court decisions, such as *Aptheka* and *Shelton*, that that power must be limited to the narrowest possible means of achieving a governmental end. It is very important also in this connection to realize that criminal laws are not fungible. There are differences in criminal laws. Some criminal laws prohibit acts of violence against property or persons.

Other criminal laws prohibit speech. The most conspicuous of these of course is the Smith Act, which prohibits the advocacy of the overthrow of the Government by force and violence. That law has not only been applied in its own terms, but it has also been applied in tandem with the conspiracy laws. In other words, people have been indicted, convicted and sent to jail for conspiracies to advocate the overthrow of the Government by force or violence—two steps prior to action. Now, if informants and undercover agents and wiretaps and other forms of domestic infiltration can be used against people who are accused of “conspiring to advocate the overthrow of the Government,” that would bring the constitutional intrusion three steps before any possible acts to violate the law. Parenthetically, I might say that some of the troubles many of us are having with the pending S.1 legislation is that it does not give adequate countenance to these constitutional fears, and to the constitutional rights of individuals who would be subject to that law.

When we get to the question of oversight and control, one argument that is made is that no system is any better than the individuals who run it, that ultimately we must rely on the good faith, the intelligence and the honor of the Attorney General, the Director of the Federal Bureau of Investigation, and other law enforcement officers. The danger with that argument is that, if it is carried to its logical extremity, those people would not be subject to controls at all. Therefore, although I agree in part with the assertion, that while the honor of these people, the ability of these people, and the sensitivity of these people to constitutional concerns is vital, it is not all that this country has a right to rely on. We have a right also to rely on explicit controls, explicitly stated deadlines, making sure that particular actions by the Attorney General and the Director of the FBI are subject to review.

What should those controls be? I understand that one of the other members of the panel suggested that proposed guidelines by the Attorney General should be sent to the Congress for comment. I think that is an excellent idea. I think consideration ought also to be given to require the guidelines to be approved by the Congress, as in certain other circumstances—specifically, regulations of the executive branch which must be approved.

I know there will be some questions, so I don't want to go on too much longer. I do want to make one other point that I think is very important—well, two other points. I want to emphasize as explicitly as I can that one cannot accept on faith or syllogistically the argument that the information acquired by domestic surveillance is necessary, important or even valuable. That is a proposition not to be accepted on faith, but a proposition to be proven. I understand that the GAO has filed a study which casts some doubt on the degree to which this information helps our law enforcement officers. I urge the committee not to take anybody's word for it. I remember a meeting with one of the former Directors of the FBI, Patrick Gray, in his office 2 or 3 years ago. Several of us went down to discuss certain problems with him. And he said, I can assure you, there is no such thing as a central file or secret file in the Bureau, there is just no such thing. Well, it would have been very hard at the time to call him either a fool or a knave. But we now know the record. And therefore I urge the committee not to accept the word of anybody that this information is useful and necessary for national security or any other purpose of government.

Finally, I would like to close on this note. I do not know, but I assume that Mr. Kelley, Mr. Levi, and others will be able to show specific cases where covert surveillance has helped law enforcement. I do not think that their ability to do this is the last word on this issue. Even assuming there is a certain value that could be proven for this information, the ultimate question is whether the value is enough to counterbalance the cost in terms of individual rights, in terms of constitutional values. What this means at the bottom, I think, is that the country has to be a little courageous, and the Congress has to be courageous, willing to accept the fact that we are not going to have total security in this country. The best expression I know of that philosophy, which I think should guide this committee, is a concurring opinion by Justice Brandeis in the case called *Whitney v. California*, decided in 1927. This is what he said:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its Government that the liberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and happiness the secret of liberty. They recognized the risk to which all human institutions are subject.

There is a risk in anything less than total security. But those are the very risks that the founders of this country—and Mr. Brandeis was not the only one that took this position—accepted in terms of the overriding value of liberty. I, therefore, urge the committee not to permit even confirmed examples of cases in which national security of some kind has been aided by covert means to be the end of the discussion. It seems to me that that is the beginning of discussion. I hope

that this committee will do what it can to limit unconstitutional interferences with the rights of individuals to the greatest extent possible. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Mr. Dorsen.

Beginning with you first on questions, you have indicated that the committee ought not to overlook the importance of dealing with the whole problem of informants, and not to develop any myopic tendencies to consider only electronic devices, wiretaps, and bugs, so-called. I think that is a very valid position, since 85 percent of the cases involve the use of informants, as compared to only 5 percent of the cases that involve any kind of electronic device. But it isn't as clear to me just what you mean when you say that at the very least a much heavier burden of proof should be required before either informants or wiretaps, I suppose, are used. What burden of proof would you suggest? Do you make a distinction between so-called national security cases and ordinary criminal cases? Is the standard that normally applies in criminal cases; that is, probable cause to believe that crime may be or is being committed, a different standard than that should apply to national security cases? And in addition, I would like you to comment on to whom such a heavier burden of proof needs to be presented. In ordinary criminal cases it is necessary to secure the consent of the court—in order to use wiretaps, at least a warrant has to be issued. Now, would you handle national security cases in the same way? I wonder if you could be a little more specific in connection with that general argument?

Mr. DORSEN. When I used burden of proof, I used it in two senses: first, burden of proof to conduct any kind, to justify any kind of program of infiltration of any sort, the general burden of proof; and, second, as you point out, Mr. Chairman, the burden of proof in a particular case.

Now, first, what should be the standard? The standard should be probable cause, to the greatest extent possible. That is the conventional criminal standard, and it should apply in national security cases as well as in all other cases. The court of appeals in the *Zwieban* case said that no warrant is needed or no warrant may be needed if an individual is an agent or collaborator of a foreign power. It seems to suggest, although this was dictum, that the usual rules would not apply in such cases. It seems to me that, at a minimum, there should be probable cause before that rule is invoked, that a particular person is an agent or a collaborator of a foreign power. One cannot accept that as such. Second, the case itself may even be wrong in drawing that distinction. I want to litigate that issue now. The Supreme Court hasn't spoken on that issue. Third, to whom the showing must be made. My strong preference is that it must be a court—the court is where warrants are approved. The problem with that, of course, is logistic.

There may be tens of thousands of such cases, and it may not be possible to get more than a *pro forma* approval which would have the consequence of legitimating—in other words, if there were an *ex parte*, almost automatic, approval of a surveillance of the kind we are talking about, that would have the effect of a later court decision perhaps legitimating the kind of surveillance that took place. Therefore I am unclear in my own mind about whether to invoke a court at the early stages of an infiltration if an infiltration is to take place. The Attorney General certainly must approve such an infiltration.

But to try to deal with all your questions at once, the national security label should not itself be an excuse for an exception. There must be some concrete—whether one calls it probable cause or not—concrete evidence that a crime has occurred, or that there is a substantial likelihood of a crime.

The CHAIRMAN. Under existing practices, as they have been explained to this committee, any wiretap or any electronic bugging devices in the so-called national security area needs the approval of the Attorney General. Now, that doesn't apply so far as I know to informants in the national security field or in any other field. Neither a court order nor the approval of the Attorney General is required in connection with the use of informants, whether they are used in criminal cases or in national security cases. I believe that is the present state of the law and practice. How would you alter the practice?

Mr. DORSEN. I certainly would require the Attorney General's approval of the informants in both national security and non-national security cases. I am inclined to think, subject to a comment I will make in a moment, that I would also require a court approval of informants, and treat the informants just like what they are. They are eavesdropping through human means. The only question I have about that is that if the situation deteriorated to the point where the volume was so great in terms of requests that the approval would become automatic by courts, it would thereby tend to legitimate the process and diffuse the responsibility. But I think, in principle, there is no doubt in my mind that the use of informants in these situations is equivalent, as I said before, to a general warrant. And for general warrants, you need court approval.

The CHAIRMAN. I wonder if either Mr. Ruckelshaus or Mr. Petersen have any response to the same question?

Mr. PETERSEN. I think, first of all, that the problem of being an informant is indeed a difficult one. I think most people in law enforcement recognize that. And the immediate question at the outset is, can the informant be corroborated to determine whether or not Government action should or should not be taken on the information. But I think first of all you have to distinguish. Informant is a very, very general category. It includes all of us. It includes every citizen of the United States. It is a process that the citizenry should be encouraged to participate in. Support your local police. Call us if you see a suspicious act in your neighborhood. We have to be careful what we are about. So let's distinguish between the unpaid and the paid informant.

The CHAIRMAN. That is what I was going to suggest, that I believe our concern relates to the paid informant who is actually a target to penetrate a given group.

Mr. PETERSEN. I share Mr. Dorsen's concerns in this area. And I think most people in law enforcement do. As soon as you pay an informant for information you open up questions as to his credibility. It is all the more important that he be corroborated and documented. It is an area of widespread abuse. There are two controls there. First, there are the budgetary controls that ought to be imposed, and, frankly, have not been imposed by the Budget Bureau of the Federal Bureau of Investigation. Second, there is control by the criminal

process itself. The lawyers that I know in the Federal system are professionally concerned lest those payments impair the credibility of the witness and jeopardize the Government's cases. And we have seen ample instances of that in the recent past.

Now, those things, I think, are built-in restraints, not only the expenditure of money, but the criminal process itself. Do I go so far as to suggest that there should never be paid informants? No, I do not. The reason is that in many instances there is a great risk involved. And that risk is purchaseable. In many cases there is no other way to obtain the information. The risks are so high in an assassination attempt or threat, the risks are very high in terms of economic impact. I refer you to the recent truckers strike, the wildcat strike, where literally the Congress was up in arms to do something about it, infiltrate, use informants. And the Bureau was subjected to a great deal of pressure. I think it is perfectly justifiable to use paid informants provided those controls are intelligently exercised by the supervisory people in the Bureau, in the Department of Justice, and ultimately in the courtroom when the case comes to trial.

The CHAIRMAN. Do you think it would be impractical to require some kind of court approval before informants were used?

Mr. PETERSEN. Yes, I do.

The CHAIRMAN. Do you think that the restraint is going to have to be exercised within the Bureau or mainly within the Department of Justice?

Mr. PETERSEN. Yes. But I am not satisfied with the way that restraint has been exercised in the past. And I think that this committee's insistence that further oversight within the Justice Department and within the Congress is necessary.

The CHAIRMAN. Do you think that an oversight committee properly empowered to supervise the operations of the FBI and the CIA and other intelligence agencies would be helpful?

Mr. PETERSEN. I recommend it now, and I have recommended it in the past. But I do think, Senator, that it ought to be a single oversight committee. Nothing is more debilitating from a law enforcement and efficiency standpoint than to have the agency responsible responding to the same charges time and time again. It is inefficient. And Congress has the responsibility to be efficient, too.

The CHAIRMAN. Yes, Mr. Ruckelshaus.

Mr. RUCKELSHAUS. Let me try to comment on one aspect of informants that I think could provide an added check. I think that we should look ahead of time, both in the executive branch and in the Congress, at the nature of the individual or group against whom informants might be used, and that the burden of proof should be directed to those who would use informants to show the likelihood of the individual or the group to commit violence of some kind. We could greatly restrict the use of informants simply by restricting the targeted individuals or groups. What we have seen in the past over and over again is that organizations and individuals were targeted with informants who really had nothing but peaceful aims and entirely proper goals in mind. So that if ahead of time, either by statute, but probably more by the use of guidelines and congressional oversight, we could carefully restrict the kinds of organizations and the process

by which a decision was made that there was a likelihood that there would be violence, we could greatly restrict the use of informants.

I think at that point you then look to the techniques, not only of informants, but others that can be used that should be permitted. And again, as I said in my statement, there is no reason that in given classes of cases these techniques should not be discussed and agreed upon with the Congress prior to their use by the FBI, or any other intelligence gathering agency of the Government.

Then I think we need to look at the function that the informant himself plays. What kind of information are we really seeking, what kind of restrictions should be placed on the information that the informant gathers and brings back to the FBI? Then if the informant brings back certain information to the FBI or any other agency of that kind, what should the FBI do with it? Should it be disregarded, should it be stored, or what kind of restriction should be placed on its dissemination? All those kinds of questions can be answered, I think, through the use of guidelines and very careful coordination with the Congress.

I think then we should also look at the distinction between the preliminary investigation between an individual and a group to determine whether or not what they are saying and whether what others have said about them turns out to be true in terms of their being violence prone, and distinguish that from an ongoing investigation. If the FBI decides that because of the evidence of the violent nature of an individual or group that an ongoing investigation is necessary, there must be built into the process a review. Because organizations evolve, they change over time. And again we have seen this happen where once an investigation is launched against a given group in the society, there is no mechanism built in to stop that investigation. All of those things I think can greatly increase the likelihood of better controls being placed over informants, and greatly minimize the potential for abuse, and at the same time adequately protect the society.

Mr. PETERSEN. Mr. Chairman, may I suggest that while I agree with Mr. Ruckelshaus, and I applaud the Attorney General's attempt to draw guidelines with respect to types of investigation—from what I have seen I think it is really quite good, but that is an extraordinarily difficult task, to draw guidelines that are sufficiently broad to encompass all that needs to be investigated and yet sufficiently narrow to exclude that which should not be investigated. And while I would hope that that process would continue, I think it is a step in the right direction. The greatest restraint is going to come in the course of ongoing review of the investigations being conducted by the Federal Bureau of Investigation by an outside force, that is, lawyers in the Justice Department. You see, there is always the problem—perhaps you see it in this committee, I certainly saw it with lawyers—when people get immersed in an investigation they take on its coloration, however fine they may be, and however bright, they begin to lose their perspective and they see that which they want to see. Once you step aside and submit that product to someone who is not so immersed, all sorts of problems evolve. Why are you doing this, why are you paying that informant, why are you in this case at all, who said this is an organized crime case or an espionage case, aren't you wasting your time—all

those questions arise. And they are difficult questions and they are curative questions. I think that that is the type of process that is going to have to be employed rather than any total reliance on guidelines or statutory guidelines.

The CHAIRMAN. Before I turn to Senator Schweiker, let me just ask you this. Is there any review mechanism in the Department of Justice today, or was there when you were there, any of you, that filled the role of overseeing ongoing investigations by the FBI in the way that you have described?

Mr. PETERSEN. Certainly in organized crime investigations there is such a program. There certainly is in the run-of-the-mill criminal case where the case is submitted for the approval of an Assistant United States Attorney. But in the security area, no.

The CHAIRMAN. In the security area, no?

Mr. PETERSEN. In the security area, no. The internal security division historically has been a reactive force. They were called upon literally only when the Bureau wanted them. And that is, I think, a difficult thing.

Mr. DORSEN. May I just make one very brief comment?

The CHAIRMAN. Yes sir.

Mr. DORSEN. I think that Mr. Petersen's penultimate comment about taking on the coloration of an investigation is a very important and valid one. But it also relates to a point on which I disagree with him—that there should be only one committee. I think there should be two committees. I think, sure, it would be more efficient to have one committee, but I don't think efficiency is the highest goal here. We are dealing here with the very collection process in which many wrongs have been committed. And I think it is very important that the committee, if there is one committee, not also take on the coloration of the people that they are investigating. And I think it would be a very useful thing in this field to have two different groups reporting to two somewhat different constituencies looking into this matter.

The other thing relates to a comment of Mr. Ruckelshaus. And that has to do with the guidelines, and as he pointed out, the difficulty of setting down precise guidelines. This issue of investigating individuals as distinguished from investigating groups is a very tricky business. Groups do not act. Individuals act. Now, obviously if a lot of people in one group are accused, or in fact are doing something unlawful or improper, it is very easy to say that the group is doing it. But a group does not act. And therefore it is very difficult, it seems to me, to try to come to grips—and it is not an easy assignment, and I would hate to have to do the drafting right here—with this problem and not allow an easy movement away from what people are doing to what people who are in a group, but may not be aware of or part of any particular activity. And finally, very quickly, the guidelines that Mr. Levi is proposing—I was just told about them in a very general way, I think it may be deficient, and if I am wrong about this of course I will stand corrected by the record—are not clear that crimes which are being investigated are crimes that are alleged to be imminent in some way, that you can't or shouldn't be able to infiltrate, and the thought that sometime in the far future a particular individual or group is likely to conduct an illegal activity—the essence of mediocracy, of the clear

and present danger ideal which the Supreme Court on many occasions, most recently in *Brandenburg v. Ohio*, has relied on, is one that I think should not be lost sight of.

The CHAIRMAN. I think that an illustration is that in the Socialist Workers investigation there was no case of violence or tendency toward violence, but there was a thought that maybe 5, 6 or 7 or 8 or 10 years down the track the organization might grow violent.

Mr. DORSEN. That is exactly what I am talking about, Senator.

Mr. PETERSEN. Senator, may I suggest, in fairness to the Bureau, I think it is fair to say that they were ambiguously charged with a responsibility. Their charter, if you like, was, I would suppose, a historically drafted memorandum for the President of the United States in the late thirties.

The CHAIRMAN. That brings up of course the point that there is no generic law where the FBI is concerned. Its authority rests on Presidential directives. And it seems to me that at the very least we ought to establish some basic statutory law for the FBI which will be much more explicit in connection with powers and procedures.

Mr. PETERSEN. I don't really disagree with much of what Mr. Dorsen said. But I do disagree with the implication, if it is there, that that responsibility for nonfeasance, if you like, or inaction, in affairs which touch upon the security of the United States should rest upon the Federal Bureau of Investigation. That ought to rest with the Congress of the United States. If it does not want an organization investigated that says today, in the year 2000 we are going to overthrow the Government, then the Congress of the United States ought to say that and not leave the responsibility to the Director of the FBI or Attorney General, for that matter.

The CHAIRMAN. Yes. Which brings up another question that I would like to pursue. But I have taken my time and I want to turn to Senator Schweiker.

Senator SCHWEIKER. Thank you, Mr. Chairman. Mr. Petersen, when you were head of the interdepartmental committee to study the FBI COINTELPRO activities, were you given full access to the FBI files in that capacity?

Mr. PETERSEN. That is not an easy question to answer yes or no. Let me trace the development of that. Attorney General Saxbe called and said, this is one of the things that Bill Ruckelshaus suggested be done. It hasn't been done. Would you do it? And with a modesty that is unbecoming, I said, why me? Why not Kelley? He is head of the FBI. He is new there, he ought to undertake this responsibility. Well, Saxbe said, he is busy, he doesn't know what is going on over there either, and I would like you to do it for both of us. I said, fine. Since I couldn't wiggle out, I agreed. But I said, call Director Kelley and tell him what you have told me and tell him that there is no way that I can do this without access. And I am going to need your help and assistance to do it. He did indeed do that, I know, because thereafter Mr. Kelley called me. And I reiterated to him what I had said to the Attorney General.

Mr. Kelley assigned a number of people. And because I and nobody else in the Department of Justice had any idea where the information was and because I reasoned that if the Federal Bureau of Investigation were part of it—when you give them a responsibility they dis-

charge it to the best of their ability—if they were part of the inquiry it would tend to guarantee the integrity of the inquiry.

So, the summaries were prepared by Bureau personnel at my direction. The summaries were spot checked by representatives of the Criminal Division of the Department of Justice for accuracy. We did not examine all underlying documents. It was not part of the task to conduct an investigation in the sense a criminal investigation is conducted. The task was to advise the Attorney General of the nature of the problem so that he, as Attorney General, could determine what action ought to be taken. And it was for that reason that we gave two legal opinions, not because we are trying to carry water on both shoulders, but because the committee, while it as a committee, did not feel the agents who did these things ought to be investigated, recognized that they could possibly be charged criminally. Nonetheless, that was a decision for the Attorney General, and we pointed out the law with respect to it and the contrary point of view, in the event he decided to take further action. That was the nature of the study.

When the Attorney General, Mr. Saxbe, got it, he determined that the best thing that he could do to curtail it would be to publicize it. And as a consequence he made a decision to make it available to the Congress, to the oversight committee, and ultimately to the Congress generally, and to the press. And that was the sum and substance of the entire proceeding.

Senator SCHWEIKER. You were given summaries of the FBI files, and the raw files were spot checked for accuracy as to the summaries by whom again?

Mr. PETERSEN. By the attorneys on the group who were assigned to the Criminal Division. It was not done by FBI personnel, that is what I am saying.

Senator SCHWEIKER. And what was the rationale for not giving you people the raw files?

Mr. PETERSEN. I don't think there was any rationale. We are doing a survey rather than conducting an investigation. One of the things that was involved—I mentioned the responsibility for participation—the other was available manpower.

Senator SCHWEIKER. Did your survey uncover the kind of things that this committee just uncovered in terms of COINTELPRO activities. Were you aware of the things that had been going on that this committee just recently disclosed?

Mr. PETERSEN. Senator, I am not sure that I can answer that. The summaries were prepared without respect to the name of an individual. So that I can't tell you at this moment whether X or Y was or was not included. I am aware, from the newspapers since I have left there, that subsequently the Bureau turned over additional information.

Senator SCHWEIKER. One of the informants, for example, in COINTELPRO said that part of his job was to sleep with the wives of the Klan leaders. Was that the kind of thing that was deleted from the summaries, or were you aware of that kind of thing?

Mr. PETERSEN. I don't recall that, to be perfectly honest with you.

Senator SCHWEIKER. I respect what you said. But I don't see how anyone can properly oversee it or approve it or rectify it in some way without getting the flavor of some of the things that come out here.

I guess it leads me to my next question—

Mr. PETERSEN. May I interject, Senator. I think the flavor was there. I think the report pointed out that there were apparent violations of first amendment rights, that there was conduct that the committee found abhorrent. The recommendation was that it should be absolutely prohibited, and standards and guidelines set up. There was not, if you are suggesting such, any rationalization for the Bureau's conduct.

Senator SCHWEIKER. The other part, for example—which wasn't brought out—was that there were a number of cases where material about possible violence came to the attention of someone further down the chain of command and no action was taken, and that informers alerted the fact that action could be taken to prevent it, but no action was taken. Did you get into the summaries?

Mr. PETERSEN. I am not sure, Senator. I can't answer that.

Senator SCHWEIKER. It leads me to my next question about setting up an inspector general for the FBI. I know you are on record, and I even have a memo here indicating that you strongly favor an inspector general procedure. Is that still your position?

Mr. PETERSEN. Yes, sir. I do, Senator. But may I add that I am not sure, at least in my concept of an inspector general's responsibilities, that this type of detail would be picked up. I think that that type of detail has to be picked up in a more routine fashion, if you like, by day-to-day supervision, bring attorneys in the Department of Justice, into ongoing investigation, so that actions which appear questionable can either be curtailed or justified.

Senator SCHWEIKER. But if access to the raw files isn't given, and if that isn't a standard situation, then they wouldn't have that opportunity?

Mr. PETERSEN. Senator, it is also my opinion that in the course of their duties, contrary to the practice in the past, that attorneys of the Department of Justice, in the discharge of their responsibilities, ought to have access to the raw files. And there are instances when, frankly, one of your staff, while employed in the Department of Justice, was embarrassed by what the Bureau said was an oversight. Now, that oversight would not have occurred had the attorney had access to the entire file.

Senator SCHWEIKER. I think you also went on to recommend that the Inspector General's office shouldn't be limited just to the FBI—I believe you suggested that it should cover the whole range of activities.

Mr. PETERSEN. I think it ought to cover the whole range of the activity of the Department of Justice, for this reason, first of all, that is an ongoing responsibility of the Attorney General and the Deputy Attorney General at this time. And second, either the Attorney General or the Deputy Attorney General really have the opportunity to give that task the time and attention that is needed. So they need some sort of a staff.

On the other hand, the staff should not be so large that it becomes a bureaucracy that has to feed upon itself. That staff I think ought to be relatively small, so that it can accept the responsibility with manpower drawn from whatever investigative agency seems appropriate at the time to conduct the necessary investigations. I do not think that that Inspector General's responsibility ought to entail administrative review of the manner in which responsible officials discharged their functions.

In other words, I don't think you ought to go in and say, well, Mr. Director, we have bought too many pencils. That is a function of internal management and perhaps a function of the Budget Committee. But I don't think that that type of responsibility ought to be assigned to the Inspector General.

Senator SCHWEIKER. Mr. Ruckelshaus, what is your position on an Inspector General, from your experience?

Mr. RUCKELSHAUS. Senator, I was in charge of that committee that was investigating the setting up of the Inspector General when I left the Government. My own feeling is that you have got to again be careful about what functions you are giving the Inspector, what is it that you want him to do. The idea of the establishment of the Inspector General when Elliot Richardson was the Attorney General was to provide within the Department the capacity to look into outside allegations of corruption within the Department itself, and set the Inspector General's office apart from the Department, so as to insure that whatever investigation took place had public credibility, that the public would believe there was a complete and thorough investigation, and particularly if the allegations proved to be false.

This was the result of many, many charges that had been brought against the Department of Justice during the preceding several months before Mr. Richardson was appointed Attorney General. And I think there is an example within the Department of Justice of a first-rate inspection division that is as good as any I have ever seen at investigating its own agency, and that is the Inspection Division in the FBI. When I was the Director of the FBI I gave them the charge to find out what happened to the records involving the 17 wiretaps of newsmen and public officials. They launched a complete, thorough and highly professional investigation, and found the records eventually in the White House. I think that if that division is given a clear charge by the Director, and given the kind of authority to discover derelictions within the Bureau, without any restraints being put on it it discharges its function well. There are a number of restraints set up within the Inspection Division to insure its objectivity, and to insure that the functions assigned to it are properly carried out.

Senator SCHWEIKER. You have a lot more faith in it, you might say, Mr. Ruckelshaus, than I as a member of this committee have. Just a week or so ago we came across wording in the FBI manual to proceed on an investigation unless it was embarrassing to the Bureau, and then some other procedure was automatically set up, which the FBI explained as something different than how I would have read it, but that was the fairness in this recommendation, that the criteria—proceed unless it would embarrass the Bureau.

Second, I guess you are not familiar with the "black bag" memorandum in which the Inspection Division was instructed during its annual inspection procedure to go into a safe of a special agent in charge and destroy any legal memos that the special agent might have filed about "black bag" jobs.

So, I have a hard time comprehending how you can say that they have done that kind of job or should be utilized in this job when the evidence we found is just the contrary. Maybe this wasn't available to you in the position you held, and if it wasn't, that is the fault of the system.

Mr. RUCKELSHAUS. Senator, you misunderstood what I said. What I said was that we have an excellent example of an Inspection Division in terms of the process by which it works. I also said that if it were given clear instructions it would carry them out. And that includes wrong instructions as well as proper instructions. That Division was very responsive to the Director, and if the Director told them to do something wrong, they were just as inclined to do that as something else. And the examples you cite were those of such instructions being given. When I was there, in the example I gave you, they were instructed to find out what those wiretap records were and find out what had happened to them. And they did it thoroughly and professionally. And I think that what we need is to distinguish between bad processes and bad people not only running those processes, but giving instructions to those who do.

Senator SCHWEIKER. But don't we have institutionalized safeguards so that if we get a bad process or a bad situation or a poor administrator in this regard, that we have some checks and balances? And to leave it all to the FBI after what we have seen in 30 years I think would be the wrong way to proceed. I understand FBI agents knew about COINTELPRO. And yet we used agents to do more than that.

Mr. RUCKELSHAUS. Senator, I did not suggest that we make the inspection function internal to the FBI. I said we had an example of a good process established in the FBI that could be used by the Department as a whole. Even the Department as a whole might get some bad instructions from the Attorney General, which is where the Congress comes in in terms of its oversight responsibility. There is no process that I can think of that we can set up that will avoid human nature, that will avoid every bad person that comes along to be in charge of it. And what I am suggesting is that the model, if properly used, in the FBI is not a bad one.

Mr. DORSEN. May I comment just very briefly on that?

There is another model—I spent 2 years in the Office of the Secretary of the Army, and I thought that the Inspector General model in the Army had at least one advantage over what I understand to be the process that Mr. Ruckelshaus was describing, and that was, complete independence from orders of the kind that led to the misfortunes that he and you were just discussing. I think it is very important, whoever is the Inspector General, that that person be given broad and independent authority of the kind that Mr. Petersen was describing, and not be subject to "bad orders." Now, obviously there has got to be one person at the top, and that is the Attorney General. But I would hate to see any Inspector General set up in the subject of the direction of the Director of the FBI. I think the person has to be independent and able to get access to raw files and be able to do the job untrammelled by "bad orders".

Senator SCHWEIKER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Schweiker. Mr. Schwarz, do you have questions?

Mr. SCHWARZ. I would like to pick up on something Mr. Dorsen said and ask both Mr. Ruckelshaus and Mr. Petersen about it. And this goes to the issue of the value of domestic intelligence. And if you would, leave out the consideration of catching Soviet spies and just concentrate on the domestic intelligence function of the Bureau. Can

you from your experience come up with any cases where clearly useful results were obtained through a domestic intelligence investigation that could not have been obtained by investigating an actual criminal act or a planned criminal act?

Mr. RUCKELSHAUS. Henry, you may have more examples than I do. I am not sure I understand your distinction. If there was an informant system set up on an organization, say, the Weathermen or something of that nature, and out of that informant system came information in the possession of the FBI or the Justice Department that certain crimes were planned short of that kind of avenue of information, I don't know where else the information would come from. It may well come from some voluntary disclosure by an individual concerned about the crime that was planned.

Mr. SCHWARZ. I am not thinking of technique. But the justification put forward by the Bureau for general intelligence doesn't turn on a predicate of a crime having been committed or planned. And, they say, there is a necessity to have general intelligence about subjects with broad labels like subversion and extremists. What I am driving at is whether, from the experience of either of you, you know of any instances where useful information relating, for example, to violence was obtained from a domestic intelligence investigation that could not have been obtained if the standard for such investigations was actual cause or probable cause that a crime had been committed or was being attempted.

Mr. PETERSEN. First of all, I have to say—and I think in this respect I speak for Mr. Ruckelshaus, too—we in the Justice Department, and perhaps he in his brief tenure as Acting Director of the FBI, did not have an opportunity to scrutinize the domestic intelligence investigations. Only when they were developed to the point of probable cause was the Department of Justice prosecutorial force brought in. So we speak not as experts. But I do suggest, Mr. Schwarz, that the Weathermen is a classic example. If you speak about a reasonable basis for suspicion to initiate an investigation, or a more stringent standard, which I happen to think is unreasonable as a predicate for initiating an investigation of probable cause, you would have to wait until the laboratory at the University of Wisconsin was blown up. Now, it is true enough that the Bureau's actions in investigating the Weathermen could not prevent that any more than they could prevent the bomb being placed in the Capitol. But they did not start the investigation at that point with the explosion, they started with the self-proclaimed intention of a group and the members of that group, and they further determined what members of that group espoused acts of violence, and they determined from their infiltration where members of the group happened to be at the time. So there was a process of elimination as a process of focus. And I think the Weathermen is a classic example of an instance where you cannot rely wholly upon the act itself. There has to be—and it is indeed being very shortsighted if there is not—some responsibility to look forward, particularly when you deal with crimes of violence.

Mr. SCHWARZ. It seems to me, though, that you haven't answered the question of whether you can think of an example where some useful result was in fact obtained that you couldn't have obtained by using as a predicate the likelihood of violence.

Mr. PETERSEN. I am suggesting the Weathermen indictment.

Mr. RUCKELSHAUS. What do you mean by that?

Mr. SCHWARZ. Preventing something from happening. How about you, Mr. Ruckelshaus, can you think of an example where something was prevented as a result of a domestic intelligence investigation that could not have been prevented by having as a predicate not only a bomb going off, but some predicate that says, picking up Mr. Dorsen's concept, present and clear likelihood that the group is going to engage in such conduct, criminal conduct?

Mr. PETERSEN. I can cite you two instances which I have informed about in the organized crime program where x was targeted for a killing. And the Bureau's response was to go 1, to the individual, and 2, to the local police, and suggest that preventive action might be taken, stationing guards around the man's house, or forcing the man to move, or something of that nature.

Mr. SCHWARZ. But what was the predicate for the investigation? Was the predicate not in that case the likelihood of violent action?

Mr. PETERSEN. The predicate was the existence of a group who earned for themselves the right to be called members of organized crime who were engaged in all types of illegal activity. But the significant thing is, it is not illegal to be a member of an organized crime group, it is only illegal when they do something in violation of a specific statute.

Mr. RUCKELSHAUS. I think your question is difficult to answer. And that doesn't mean it isn't a good one. I think what you are driving at is that there ought to be a very strong standard burden of proof on the individual or the person in the Government who would suggest that certain investigative techniques be used. And I am questioning that the validity of the assumptions behind the use of the given techniques is something that very much needs to be determined. And that is one of the chief functions, I think, that an investigative oversight committee of the Congress could perform, and that is, where the FBI would say, we need x number of agents to engage in surveillance of group A or group B of these individuals. There should be systematic—if you assume at the outset that this investigation is undertaken pursuant to investigative techniques approved by the Congress—there ought to be a review of the results of that investigation. Are you really getting something for that invasion of individual liberty? Because there is an invasion of time it takes place. And so I think that the difficulty in answering your question is that in our minds there are organizations like the Weathermen and so many groups that existed in the late sixties and the early seventies who used the rhetoric of violence and often didn't carry it out, and how you distinguished between those who are simply talking about it and those who intend to do something about it in some form of surveillance.

Mr. SCHWARZ. Mr. Chairman, there are in the books nine examples of real cases or hypothetical cases which are susceptible of reaction. And rather than putting the nine cases to the witnesses, I would like with your permission to ask the witnesses to respond in writing to these nine cases and give their reactions on whether the predicate in the cases was sufficient to open an investigation.

The CHAIRMAN. Very well. Are you gentlemen willing to do that, to respond in writing?

Mr. RUCKELSHAUS. Yes.

Mr. PETERSEN. Yes.

Mr. DORSEN. May I make one comment on an aspect of the answer Mr. Ruckelshaus gave which I thought was correct in connection with the oversight? Once again I think it is very important to button these things down. And it has been suggested that this committee ought to recommend to the Congress as a whole that it be a crime for a Government official willfully to deceive Congress and the public about activities which violate the kind of rules that are set up, because one thing we have learned is that not everybody has told the truth, and sometimes it has not been under oath. And there is another, which has been one step further, and that is, it should be a crime for a public official not to report violations of law that he or she may have seen in the course of this area.

Mr. RUCKELSHAUS. Not to be an informant?

Mr. DORSEN. Yes; that is right. The problem, of course, is how do you get into the process. And as Mr. Petersen and also Mr. Ruckelshaus I suppose have both explained, even though they were senior officials, it was hard for them even to get into it in detail and in depth. And, therefore, there has got to be some pressure put on people not to close one eye or both eyes to things that are being done, and not to deceive Members of Congress and the public about some of these matters.

The CHAIRMAN. Your suggestion might be, make a report to a court of crime. To whom is the report to be made?

Mr. DORSEN. That could be part of the investigation.

The CHAIRMAN. To the New York Times?

Mr. DORSEN. That would certainly do the job.

The CHAIRMAN. To your immediate superior?

Mr. DORSEN. Certainly that. It is admittedly a remedy that has problems with it. But at the same time the difficulty of getting these things out into the open is clear.

The CHAIRMAN. What about if this Office of Inspector General would be created, let's say, in the Justice Department, would that be the logical place to put—

Mr. DORSEN. That is the idea, of course.

The CHAIRMAN [continuing]. Unlawful activities by the FBI and other subsidiaries in the Department? What do you think about that?

Mr. RUCKELSHAUS. Aren't we by law, Mr. Chairman, establishing a system of informants in the Federal Government if we do that?

The CHAIRMAN. I am not endorsing it, I am just trying to figure out what it is that is being recommended.

Mr. PETERSEN. May I suggest something—I don't mean to be unduly elementary, but times have changed—and may I suggest that in whatever procedure this committee decides to set up by statute they incorporate a provision for ratification contemporaneous, a reasonably contemporaneous ratification. With all deference to this committee, I charge the committee with no more than I, myself, have indulged in as a result of all these exposures. I am sometimes fearful that there is a touch of revisionism involved in all this. Perhaps not. But the only

way that criticism could have been answered is if these matters in which the Bureau took action, which now all think to be immoral, had been submitted to a ratifying group at or about the time. And I suggest, Senator, that in many instances their conduct might have been approved by the Congress. And there are some who suggest that the oversight committee did indeed approve it. But whether they did or did not it would certainly prevent an agent who acts in good faith from being charged 10 years hence with covering up an illegal activity.

Now, that is, I think, a terribly important point. And, of course, from the viewpoint of the Federal Bureau of Investigation they feel, I think, badly put upon, because they feel that they were doing what they were charged to do, what nobody else was interested in doing.

The CHAIRMAN. I take it what you really suggest, Mr. Petersen, is that had there been an adequate congressional surveillance at the time it would have acted to protect those engaged in those activities if they had been thought by such a committee at the time to be necessary and proper.

Mr. PETERSEN. I don't want to point the finger at Congress, Senator. No President ever supported any Attorney General up until 2 years ago with respect to supervision of the Federal Bureau of Investigation.

The CHAIRMAN. I think that the remarkable thing is that this committee has conducted the only serious investigation of either the FBI or the CIA since their creation, one-half a century ago, and the other one 30 years ago. And we ought not to be astonished that abuses have crept into the system when no one has been looking at it. And I think that it might even be said that in the Department of Justice itself there was precious little oversight of the FBI.

Mr. PETERSEN. That is right.

The CHAIRMAN. So that everyone stands guilty, looking back over the years, of a failure to do the proper supervisory work. But for the free press we would never have had this investigation, because it was the direct result of the charges that were surfaced in the press, following Watergate, that the Congress finally decided that the time had come to investigate the FBI, the CIA, and these other highly prestigious agencies. I suppose I am agreeing with you that there has been a failure of proper oversight in the executive branch at the White House, at the Justice Department, and in the Congress.

Mr. PETERSEN. Let me add one thing more. And it is an endorsement of what Mr. Ruckelshaus said earlier. Even if this committee enacts a statute in its wisdom which is capable of imposing the necessary restraints, unless the political base, which in my judgment stems from the activities of the Federal Bureau of Investigation with the White House, unless that is curtailed, it will build up again. It is awfully awkward for an apparent superior to be unwilling to take on his subordinate because he knows he will not be supported by the President of the United States. And I am sure it is very unlikely that you will have former Attorneys General coming up and saying, the FBI was beyond my control. But that was the fact. It seems to me to be improper for the Congress to mandate by statute that type of administrative control. But it certainly has to be imposed in some fashion.

The CHAIRMAN. I just have one further question for Mr. Dorsen. He first brought up the importance of informants, and the danger of

abuses with respect to the overuse of informants. Has this question ever been tested against the fourth amendment in the courts?

Mr. DORSEN. Mr. Petersen says that the consensual cases are the only ones. There are cases, for example—the Panther 21 case in New York—where there were informants in the Black Panther organization, which was a case where I think it was raised. That case involved an acquittal, and, therefore, it never got to a judicial opinion.

The CHAIRMAN. In other words, you are telling me that as far as judicial review of the use of informants is concerned, as a possible violation of the fourth amendment of the Constitution, the question has hardly been raised, nor has it been tested adequately. There are cases going back to the early thirties, involving entrapment, involving people sometimes who were closely associated with groups allegedly leading individuals or groups to commit a crime, and there has been a very sharp division in the U.S. Supreme Court about what the correct standard is to determine whether people voluntarily committed a crime or whether they were led to do it by someone they were relying on who was secretly a Government informant. But the fact is that the law is not at all developed in this area.

Perhaps one of the reasons is that the national court cases never get into court.

Mr. DORSEN. Right.

Mr. PETERSEN. May I add that in the consensual cases the Court was led to the conclusion that a listening device worn by one of the participants in the conversation was not impermissible, it was predicated on the fact that eavesdropping, unadorned eavesdropping, was not a constitutional violation. So there is some authority in the Supreme Court decisions for that proposition.

Mr. DORSEN. Incidentally, however—this, of course, is a very tough question—Congress, of course, has not attempted to deal with this. If Congress attempted to deal with it the court would then be responding to a specific legislative act, and I would think to a large extent be guided by that, because the words of the fourth amendment, unlike the first amendment, talk about unreasonable searches and seizures, and what Congress decides are unreasonable.

The CHAIRMAN. Congress has never really attempted to define that by statute.

Mr. DORSEN. Exactly. That is correct.

The CHAIRMAN. Well, this has been very helpful to the committee, gentlemen. And I appreciate your appearance this morning. And also we will look forward to the written answers you supply. This hearing is adjourned.

[Whereupon, at 1:05 p.m., the hearing was adjourned subject to call of the Chair.]

