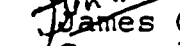





Washington, D.C. 20530

May 10, 1996

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM:  James G. McAdams, III
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RE: SSCI Proposed Provision of Intelligence Authorization
Act for Fiscal Year 1997

I. Introduction

You have asked us to consider a provision included in the FY 1997 Senate Select Committee on Intelligence (SSCI) proposed Intelligence Authorization Act that would permit law enforcement to ask members of the Intelligence Community (IC) to collect information about non-U.S. persons overseas. That provision, set forth at § 715 of the bill as reported out of the Committee, states as follows:

AUTHORITY TO PROVIDE ASSISTANCE.--Notwithstanding any other provision of law, elements of the intelligence community may, upon the request of a United States law enforcement agency, collect information outside the United States about individuals who are not United States persons. Such elements may collect such information notwithstanding that the law enforcement agency intends to use the information collected for purposes of a law enforcement investigation or counterintelligence investigation.

Under § 715, IC members would be allowed, at the request of law enforcement, to engage in the collection of intelligence notwithstanding the fact that law enforcement would use the collected information for a law enforcement or counter-intelligence investigation. In effect, this provision would eliminate, in the narrow instance of foreign collection on non-U.S. persons, what some members of the IC believe to be the threshold requirement that the primary purpose of such collection be the acquisition of foreign intelligence.

For reasons elaborated below, we believe the Department should support § 715. In our view, the section is consistent

with the letter and spirit of the National Security Act of 1947 and the Church Committee Report of 1976, poses no constitutional or other legal difficulties, and offers policy benefits that substantially outweigh any disadvantages. The discussion below first addresses the legal issues raised by § 715 and then discusses the policy issues the proposal presents.

II. Legal Issues

A. Primary Purpose Test

The primary mission of IC members is to collect foreign intelligence and counterintelligence¹ for analysis and publication to U.S. government agencies, including law enforcement agencies. Some of this collection is undertaken in direct response to requests for collection by those agencies. In responding to such requests from law enforcement agencies, the IC has looked to the statutory and constitutional restrictions imposed upon it. For the CIA, these restrictions are reflected primarily in the "law enforcement proviso" of the National Security Act of 1947, as amended, which states that "the [Central Intelligence] Agency shall have no police, subpoena, or law enforcement powers or internal security functions."² This proviso was developed to address the incongruity inherent in a secret intelligence service operating in an open democratic society: the risk of creating a ". . . potential Gestapo or NKVD in the Central Intelligence Agency."³

Restrictions on the legal authority of the National Security Agency (NSA) to engage in certain collection result from constitutional limitations, restrictions contained in Executive Order 12333, and policy considerations. For example, although NSA has affirmative authority under E.O. 12333 to collect and process signals intelligence for foreign intelligence purposes, it is prohibited from engaging in foreign intelligence collection for the purpose of acquiring information on the domestic

¹ Except as otherwise noted, the term "foreign intelligence" is used throughout this paper to include both "foreign intelligence" and "counterintelligence" as those terms are defined in Executive Order 12333, 46 Fed.Reg. 59941 ("United States Intelligence Activities," December 4, 1981).

² 50 U.S.C. § 403-3(d)(1).

³ *Hearings on H.R. 2319, 80th Congress., 1st. Sess. 454 (1947)* (statement of Brigadier General M.A. Edson, USMC).

activities of U.S. persons.⁴

Historically, the IC has measured its authority to collect intelligence in response to a request from a law enforcement agency (LEA) under the primary purpose test. The primary purpose test was first articulated in 1975 in the report of the Rockefeller Commission on CIA Activities in the United States [hereinafter the Rockefeller Report], and later adopted by the courts in a body of Fourth Amendment case law on the use of intelligence information in criminal prosecutions.⁵ Under this interpretation, an IC member may provide particular assistance requested by a law enforcement agency if the IC member's principal or overall purpose in engaging in the activity would be a foreign intelligence purpose. The IC has adhered to this test, regardless of whether the collection in question would have targeted non-U.S. persons overseas.

The Rockefeller Commission examined whether the CIA's prolonged participation in a domestic mail opening program was legal, concluding that it was not. The Commission measured the legality of the mail opening project by determining what had, over time, become its principal purpose, concluding:

The nature and degree of assistance given by the CIA to the FBI in the New York mail project indicate that the primary purpose eventually became participation with the FBI in internal security functions. Accordingly, the CIA's participation was prohibited under the National Security Act.⁶

⁴ Executive Order 12333 at § 2.3(b). A United States person includes: 1) a U.S. citizen, 2) an alien known by the intelligence agency concerned to be a permanent resident alien, 3) an unincorporated association substantially composed of United States citizens or permanent resident aliens, or, 4) a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments. *Id.* at § 3.4(i). Procedures implementing the Executive Order create a rebuttable presumption that a person located in the U.S. is a U.S. person.

⁵ The Rockefeller Commission adopted the "principal purpose" test as an objective means for assessing the IC's authority to collect information within the United States. Subsequent case law, which focused on admissibility of evidence rather than authority, adopted the same or similar language, referring to the standard as either "principal" or "primary" purpose. For ease of reference, the term "primary purpose" is used in this discussion.

⁶ Rockefeller Report, at 115.

The Commission recognized the difficulty of interpreting the scope of the law enforcement proviso in practice, since "[m]any matters related to foreign intelligence or the security of the Agency also relate to law enforcement or internal security." In view of this problem, the Commission adopted a standard for conducting its evaluation of whether a proposed Agency activity within the United States, including assistance to law enforcement agencies, would be permissible under the law enforcement proviso of the 1947 Act:

The Commission finds that whether the Agency activity is prohibited depends principally on the purpose for which it is conducted. If the principal purpose of the activity is the prosecution of crimes or protection against civil disorders or domestic insurrection, then the activity is prohibited. On the other hand, if the principal purpose relates to foreign intelligence or to the protection of the security of the Agency, the activity is permissible, within limits, even though it might also be performed by a law enforcement agency.⁷

The Rockefeller Commission's "principal purpose test" does not, however, imply that the Agency cannot, in appropriate circumstances and ways, assist federal law enforcement agencies. Indeed, the Commission stressed that its principal purpose test allowed the CIA to provide federal law enforcement agencies with relevant and useful foreign intelligence, as well as information on domestic activities that was "incidentally acquired" in the course of CIA's foreign intelligence activities:

The Commission does not construe the proviso to prohibit the CIA from evaluating and disseminating foreign intelligence which may be relevant and useful to law enforcement . . . Nor do we believe that the CIA is barred from passing domestic information to interested agencies, including law enforcement agencies, where that information was incidentally acquired in the course of authorized foreign intelligence activities.

* * *

So long as the Agency does not actively participate in the activities of law enforcement agencies, we find that it is proper for it to furnish such agencies with the benefits of technical developments and expertise which may improve their effectiveness.⁸

⁷ Id. at 62.

⁸ Id.

The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee") also conducted hearings in 1975 to investigate allegedly ultra vires activities undertaken by the CIA and NSA in the domestic sphere. A central issue was whether and to what extent the CIA could conduct domestic activities. Some of the activities about which the Church Committee expressed concern included the placing of names of U.S. persons on a "watch list" in order to collect intelligence information about drug trafficking, presidential protection, acts of terrorism, and possible foreign support or influence on civil disturbances.

The Church Committee's final report noted:

Congress did take decisive action in the National Security Act of 1947 to prevent the CIA's assuming any police, law-enforcement, or internal security function in the United States. Some of the CIA's activities have been in clear violation of that principle.⁹ (Emphasis added).

Courts applying the "primary purpose" test generally have not done so in order to determine whether intelligence agencies exceeded the scope of their authority (i.e., engaged in prohibited law enforcement conduct), but rather to assess whether, under the Fourth Amendment, a warrant should have been obtained to conduct the electronic surveillance being challenged. E.g., United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982). Other Fourth Amendment cases in which the courts have examined the difference between law enforcement and foreign intelligence electronic surveillance have arisen under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801 et seq. In these latter cases, the court has applied a primary purpose test, or has simply determined that the overall purpose of the surveillance activity was to obtain foreign intelligence, as FISA requires. E.g., United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982), aff'd sub nom. United States V. Duggan, 743 F.2d 59 (2d Cir. 1984).

It is important to note, however, that these cases, as well as the Rockefeller Commission and Church Committee reports, have examined domestic activity that, if conducted for law enforcement purposes, would require a warrant under the Fourth Amendment. Neither the cases cited nor either the Rockefeller Commission nor

⁹ "Intelligence Activities and the Rights of Americans, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities," S. Rep. No. 755, 94th Cong., 2d Sess. 28 (1976) (the "Church Committee Report").

the Church Committee examined whether an intelligence agency may collect intelligence information abroad at the request of a law enforcement agency; thus, they may not stand as an impediment to such collection. Moreover, recent case law offers support for the conclusion that the IC may lawfully collect against non-U.S. persons overseas.

In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Supreme Court held that the Fourth Amendment was intended to protect "the people" of the United States, but was not intended to restrain the Federal Government's actions against aliens outside United States territory who lack a "significant voluntary connection with the United States". 494 U.S. at 266-267, 271. Thus, collection of foreign intelligence against non-resident aliens overseas, **even at the request of law enforcement**, would not be subject to the Fourth Amendment. Nor would such collection violate the proviso that the CIA "shall have no police, subpoena, or law enforcement powers or internal security functions," 50 U.S.C. § 403-3(d)(1) (emphasis added), as this proviso was not intended to protect non-U.S. persons located outside the United States (see § III(A) below).

B. Section 715 Would Merely Codify Collection Activities the Intelligence Community is Already Authorized to Perform by Executive Order.

Moreover, Executive Order 12333 explicitly authorizes members of the IC, "[u]nless otherwise precluded by law or this Order," to, inter alia, "participate in law enforcement activities to investigate or prevent clandestine intelligence activities by foreign powers, or international terrorist or narcotics activities" and "render any other assistance and cooperation to law enforcement authorities." Exec. Order 12333, §§ 2.6(b) and (d). (Emphasis added.) The collection of information by IC members against non-resident aliens outside the United States is not "precluded" by the Fourth Amendment or the National Security Act of 1947, nor does any provision of Executive Order 12333 preclude such activity. Accordingly, IC members are already affirmatively authorized to engage in the very activity covered by § 715. (While some members of the IC dispute this interpretation of the Executive Order, § 715 would render that dispute moot.)

C. Protection of Sources and Methods

A separate but related legal concern for the IC, in responding to collection requests from a law enforcement agency, is the requirement that the "Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-3(c)(5). The U.S. Supreme Court observed that "[i]n order to carry out its mission, the Agency was expressly entrusted with protecting the

heart of all intelligence operations -- 'sources and methods.'" C.I.A. v. Sims, 471 U.S. 159, 167 (1985). The Court continued:

Plainly, the broad sweep of this statutory language comports with the nature of the Agency's unique responsibilities. To keep informed of other nations' activities bearing on our national security the Agency must rely on a host of sources. At the same time, the Director must have the authority to shield those Agency activities and sources from any disclosures that would unnecessarily compromise the Agency's efforts.

Id. at 169.

Nor did the Court believe that the judiciary should be left to decide whether and how to shield intelligence sources and methods: "There is no reason for a potential intelligence source, whose welfare and safety may be at stake, to have great confidence in the ability of judges to make those judgments correctly." Id. at 189.

Executive Order 12333 also obliges the Director of Central Intelligence not only to protect the CIA's sources and methods but also to "ensure that programs are developed which protect the intelligence sources, methods, and analytical procedures" for the entire IC. Section 1.5(h).

To meet the foregoing requirement, an IC member must analyze whether an activity requested by an LEA would unnecessarily risk the disclosure of sources and methods. To assess this risk, the IC entity must be fully cognizant both of the operational environment within which the activity would take place as well as of the intentions of a requesting LEA and the probable demands of the judicial system in the particular case.

III. Policy Discussion

A. Section 715 Is Consistent With The Church Committee Report and the Policy Concerns Underlying The National Security Act Of 1947.

In the Church Committee Report's discussion of the law enforcement proviso of the National Security Act of 1947, the Report observed that "[b]y codifying the prohibition against police and internal security functions, Congress apparently felt that it had protected the American people from the possibility that the CIA might act in any way that would have an impact on their rights." Church Committee Report, Bk. I at 138 (emphasis added). Consistent with this assessment, the Committee's inquiry and report were concerned with the extent to which IC members had adopted an unduly narrow interpretation of the law enforcement proviso and an unduly broad interpretation of their own

authorities, leading to the unlawful, invasive targeting of Americans by IC members, and to the performance of internal security functions "in clear violation" of the principle codified in the law enforcement proviso. Id. at 128.

As indicated above, these policy concerns are not implicated by § 715, because that section by its terms authorizes only the collection of information outside the United States concerning non-U.S. persons. In the words of the March 1, 1996 Report of the Commission on the Roles and Capabilities of the United States Intelligence Community (the Brown Commission Report):

The law enforcement proviso of the National Security Act was intended to prevent the CIA from infringing on the domestic jurisdiction of the FBI and from becoming a national secret police that might be directed against U.S. citizens. These concerns are not present when the Intelligence Community collects against foreign nationals overseas.

Brown Commission Report, at 44.

The Brown Commission went on to observe that "the need to combat global crime most effectively requires that the capabilities of the Intelligence Community be harnessed to support law enforcement agencies as efficiently and effectively as possible." Id. The Commission therefore recommended that there be "clarification of existing law" to provide that the IC be "permitted to collect information overseas at the request of a law enforcement agency so long as a U.S. person is not the target of the collection or the subject of the potential prosecution." Id. (footnote omitted). The sectional analysis accompanying § 715 makes plain that the section is a direct result of the Brown Commission's recommendation.

That recommendation itself is very much in keeping with the Church Committee's recognition that "[c]oordination between the CIA and FBI counterintelligence units is especially critical" because both agencies are responsible for monitoring "the movements of foreign spies." Church Committee Report, Bk. I, at 170. The principle underlying this conclusion -- that law enforcement and the IC must cooperate on areas of common concern -- has, appropriately, been picked up by the Brown Commission and applied to today's world, where the two communities' areas of common concern have increased dramatically to include collection on such matters as international organized crime and economic espionage, where state sponsorship is not necessarily present.

B. The Practical Advantages of § 715, If Properly Implemented, Would Substantially Outweigh Any Disadvantages

The practical advantages of § 715 are obvious and substantial. First, by clarifying that IC members are authorized to collect information about non-U.S. persons outside the United States for law enforcement purposes, the section should lead the IC to provide an increased amount of intelligence information to law enforcement. Stated otherwise, § 715 should have the effect of mandating more productive cooperation between the two communities, since any confusion or disagreement about the scope of the IC's authority to perform such collection for LEAs would be dispelled. Moreover, in addition to potentially leading to more arrests and convictions of terrorists, narcotics traffickers, arms exporters, alien smugglers, and members of other international organized crime groups, § 715 should lead to a more efficient use of resources by the two communities, each of which currently has representatives stationed abroad often pursuing information on the same subjects and targets but operating at times in isolation from one another. Were § 715 enacted, LEAs should be able to identify overseas collection resources that would become duplicative of available IC resources, and then make the appropriate resource allocation decisions.

The only potential practical disadvantage presented by § 715 that we can identify concerns the enhanced risks to intelligence sources and methods potentially presented by LEAs' increased reliance on intelligence information. The Brown Commission, however, described how such risks can be neutralized:

Allowing intelligence agencies to engage in collection for a law enforcement purpose would not necessarily subject them to discovery requests that might jeopardize sources and methods. If the information collected is used for "lead" or "tip-off" purposes only, and is not used as a factual element in support of a search warrant, arrest warrant, or indictment, the intelligence agency would generally not be considered part of the "prosecution team" whose files are subject to discovery searches.

Brown Commission Report, at 44 n.6.

Further, we note that an LEA would be in a position to submit the type of collection request contemplated by § 715 only in the context of a lawfully authorized law enforcement or counterintelligence investigation that had been opened in accordance with Attorney General guidelines. This should ensure

that such requests would not be made promiscuously by LEAs conducting "fishing expeditions," as sometimes maintained by members of the IC. To add another level of protection against such potential abuse, and to ensure that U.S. persons are not targeted as a result of a § 715 collection request, we should consider suggesting that § 715 be modified to require that a request by an LEA for an IC member to collect information under the authority of § 715 should itself be subject to and conducted in accordance with a separate set of Attorney General-approved guidelines.

Specifically, the bill should require LEAs to develop and submit to the Attorney General for approval a set of guidelines governing the circumstances under which an LEA would be permitted to ask a member of the IC to undertake the type of collection described in § 715. Similarly, as an additional check against the targeting of U.S. persons, the bill should provide that each member of the IC must develop and submit to the Attorney General for approval guidelines governing the member's implementation of § 715 requests received from LEAs.

In addition, in the event classified information were put at issue in a criminal case as a result of a collection conducted under § 715, the Classified Information Procedures Act would, of course, be available to protect intelligence sources and methods from disclosure to a criminal defendant or the public.

Finally, the DCI, pursuant to his statutory responsibility to protect intelligence sources and methods, would, at the time a § 715 request is submitted to an IC member, have the authority to deny that request if he concluded that the risk to a particular collection source or method was too great and the value of that source or method too high to undertake the risks associated with performing the collection.