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GUIDELINES FOR CIA
FOREIGN INTELLIGENCE ACTIVITIES

The report that follows is organized as an outline of talking points. [redacted] and I discussed this format and agreed that it will serve to highlight the major points. After discussion and revision, I can translate this directly and quickly into a briefing paper or a long memorandum or whatever. The form will depend on how you might want to use it. STAT

The major ideas in this report have been summarized in the cover memo. Here they are presented in a more logical and ordered form.

This report is organized as follows:

I. THE SETTING

-- why should the United States engage in any clandestine activity that clearly violates other nation's laws?
-- can any action the U.S. takes against non-U.S. citizens abroad harm important U.S. values and objectives?

II. A CODE OF ETHICS

-- the importance of guidelines
-- the possibility of useful guidelines
-- the role of guidelines and a code of ethics
-- should the intelligence community be defensive about guidelines and a code of ethics?

III. ELEMENTS OF A SYSTEM OF GUIDELINES

IV. RULES

-- general principles
-- specific guidelines

V. A PROCESS FOR APPLYING THE RULES

VI. A PROCESS FOR ENFORCING COMPLIANCE WITH THE RULES

VII. A PROCESS FOR OVERSEEING PRACTICE IN RULE-WRITING, APPLICATION, AND ENFORCEMENT

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I. THE SETTING

For any broader presentation of these issues to Congress, the public, or even within the Agency, one needs a short preamble that puts the problem in context. A concise, all-purpose preamble is very hard to do well. People come to this issue with such varied backgrounds and prejudices:

-- some wonder why the U.S. should engage in any clandestine action at all;

-- others are skeptical about any restrictions whatever on U.S. clandestine actions abroad;

-- still others are confused: offended by Soviet electronic eavesdropping on U.S. citizens' phone calls or Korean payments to U.S. Congressmen, but uncomfortable about the basis for their outrage if CIA engages in equivalent practices in the Soviet Union and Korea.

A good preamble should establish a common frame of reference within which to address specific issues. For most interested parties, it can serve as a reminder of the scope of the problem and some widely-accepted conclusions. For people who are thinking about these issues for the first time, it should serve as a general introduction to major dimensions of the problem. Among the key points to be made are the following.

A. The U.S. government engages daily in clandestine activity abroad that is not acknowledged, that violates the laws of nations against whom it is taken, and that would, if taken against U.S. citizens, constitute a violation of American's rights and U.S. law. Some clandestine activity involves satellites taking pictures of missile silos or wheat fields; some involves electronic devices plucking from the air phone calls or other communications; some is just good old-fashioned espionage where a spy gives the U.S. documents containing a foreign government's secrets or a double-agent passes false documents to officials of a foreign government in the hope of deceiving that government about U.S. intentions or actions.

This activity poses two fundamental questions:

(1) Why should the U.S. engage in any clandestine activity?

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(2) Can any action the U.S. takes against non-U.S. citizens harm important U.S. values and objectives?

B. Why should the United States engage in any clandestine activity that clearly violates other nation's laws? Because actions taken by foreign governments in secret can do major and sometimes irreparable harm to U.S. national security. Because some nations, especially closed societies like the Soviet Union, engage in massive efforts to hide from outside view actions that harm U.S. interests. Because U.S. interests can be advanced by acquiring information that others do not want us to have--so long as they do not know that we have collected it. Because U.S. interests can sometimes be served by influencing events in other countries by instruments other than diplomacy or war, and without acknowledging our role. The recent orgy of revelations has focused on failures, rather than successes. But it has provided a number of examples that make the point:

Clandestine Collection Expand-econ pol

-- without the development of highly sophisticated and reliable clandestine capabilities, the SALT Treaties limiting U.S. and Soviet strategic arms could never have been negotiated. These treaties commit the Soviet Union not to undertake certain actions, for example, not to build an ABM system. Given the closed nature of Soviet society and the Soviet's unwillingness to allow on-site inspections, the U.S. could not have confidence that the Soviets were adhering to the agreement--except for what the treaty refers to as "national means of verification." Effective clandestine collection capabilities are an even more essential prerequisite of any successful conclusion of current SALT negotiations.

Covert Action

-- when Black September terrorists hijacked an Air France 707 with 100 Israelis aboard, took the plane to Uganda's Entebbe Airport, and threatened to kill the hostages unless an equivalent number of Arab prisoners in Israeli jails were released, what alternatives to clandestine action existed? President Amin and the terrorists would not permit "legal" surveillance of the situation. Actions that observed local Ugandian law were not likely to free the hostages. Should the U.S. deny itself a capability for covert action like the Israeli raid on Entebbe?

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-- if terrorists were diverting plutonium or enriched uranium from a nuclear reactor in any of a large number of countries, U.S. security and interests could require a covert capability to identify the fact and, if necessary, to take action.

C. Can any action the U.S. takes against non-U.S. citizens abroad harm important U.S. values and objectives? This is the other extreme. I have been surprised to discover how many people are candidly skeptical of any restriction on U.S. intelligence agency's covert actions abroad--beyond the traditional calculation of whether the value of product outweighs the costs and risks. My reflection on this question has identified at least three ways in which U.S. intelligence action against non-U.S. citizens abroad can harm important American values and objectives:

-- The power of the U.S. example is greatly underestimated by most Americans. George Washington's contention that the force of our example is our most powerful instrument abroad overstates the point. But the opposite view is even less tenable. As the most open society in the world, the U.S. is most vulnerable to international lawlessness: terrorist activities, terrorist technologies like plastique, and even assassination. Weak as it is, one of our strongest defenses against such action is to be found in international legal and moral taboos. Our nation's role in weakening rather than strengthening such restraint on political assassination will, I believe, stand as one of the blackest marks on our record of the late 1950s and early 1960s.

-- Foreign intelligence activities can contravene and even undermine U.S. foreign policy objectives. U.S. foreign policy objectives are a multi-faceted and often not entirely compatible amalgam. Because the instruments of American foreign policy include many large organizations, it is not possible to achieve a finely-tuned consistency. But where an agency engaging in covert actions is given wide discretion, the likelihood of actions contrary to the prevailing thrust of American foreign policy increases. The most celebrated recent example--Chile--in fact illustrates just the opposite. There, CIA actions were consistent with direct Presidential order.

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-- While the U.S. Bill of Rights does not apply to non-U.S. citizens, the U.S. government has always asserted the concept of "human rights." President Carter has made this a higher priority in our foreign policy and penalized governments that regularly and systematically violate their own citizens' human rights. If U.S. intelligence activities were to engage in regular, systematic violation of the rights of those same individuals, our position would not only be inconsistent, our actions would belie the very values that the President's policy proclaims. Moreover, revelations that the U.S. has engaged in certain categories of action, e.g., political assassinations, raise deep questions in many Americans' minds about their own government.

Accidental involvement of US citizens abroad or communicating with others abroad

II. A CODE OF ETHICS

Productive discussion of a "code of ethics" requires a similar preamble that clears away a number of unhelpful preconceptions:

-- the widespread view at the Agency and elsewhere that it is not possible to devise useful guidelines for intelligence activities abroad;

-- the view--prevalent in Congress and the intelligence community--that the overriding purpose of guidelines and a code of ethics is to tie down a rogue elephant so as to prevent abuses;

-- the suspicion--in the Agency and elsewhere--that anyone who advocates a code of ethics must be a naive moralist with unrealistic expectations about the effect of such codes on the actual behavior of members of an organization.

Among the points to be made here are:

A. The Importance of Guidelines. The special importance of guidelines for intelligence professionals abroad and at home emerges from the juxtaposition of two irreducible facts: (1) the necessity for clandestine activity to guarantee U.S. national security and advance important foreign policy objectives; and (2) the likelihood that clandestine activity will violate important U.S. values and interests.

(3) Protect/guide the intell professional who otherwise must assume risks w/o guidance.

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The inherent conflict between the important values that can be served by clandestine activity and the important values that can be violated by clandestine activity must be addressed by a system of guidelines that determines how competing values are to be weighed in specific cases.

The purpose of a code of ethics (or system of guidelines) is to motivate, shape, and constrain the behavior of professionals in the intelligence community in ways that will restore public confidence in lawful intelligence and give intelligence officers pride in their profession. More specifically, the purpose of a code of ethics is twofold:

-- positively, to inspire intelligence professionals to courage, inventiveness, and effectiveness in performing one of the most important and critical functions of American government;

-- negatively, to restrain behavior from infringing basic rights and other important values.

The positive and the negative are two sides of the same coin.

B. The Possibility of Useful Guidelines. In talking to people at CIA and elsewhere, I've been surprised to discover how many people believe that it is not possible to devise useful guidelines for CIA. Some base this conclusion on little more than the conviction that if the Agency hangs tough, this wave of reform will eventually pass. But a number of more thoughtful individuals come to this conclusion after hard thought about the extraordinary diversity of circumstance in which clandestine action may be taken, and the inherent ethical ambiguity of activity of this sort. This view was stated pointedly by Ambassador Harlan Cleveland in a speech at the Agency last year when he said: "A written code of ethics can never be comprehensive enough or subtle enough to be a satisfactory guide to personal behavior as a public servant. General prescriptions, whether in the form of dos or don'ts, are bound to be so general as to be useless or so specific as to be unworkable."

Having walked around this problem more times than I like to admit, I can give you an ambiguous answer to at least one question. Ambassador Cleveland and other who argue that it is not possible to devise useful guidelines for the intelligence community's activities abroad are incorrect. Those who answer "no" to the central question have been misled by too narrow a conception of the problem.

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My grounds for confidence about the possibility of devising useful guidelines for CIA are quite simple and clear: such guidelines now exist. Though nowhere stated as such, or assembled in precisely that form, the body of law, executive orders, internal regulations, and informal mores governing CIA do constitute a network of guidelines. These guidelines may not be as clear as they need to be. Nonetheless, in the day-to-day operation of the Agency, these guidelines provide important, useful direction to, and restrictions on Agency activity. For example, why does the Agency not target U.S. citizens for clandestine collection within the U.S. (or when it does so, stand in clear violation)? Because the legislative charter embodied in the National Security Act of 1947, as amended, states "the Agency shall have no police, supoena, law enforcement powers, or internal security functions." Why do station chiefs not use missionaries in foreign countries for cover? Because a DDO log notice declares missionaries off limits. Why do case officers not enter into contractual relations with working members of the media? Because you and your predecessor issued internal regulations prohibiting this. Why are case officers so protective of their agents? Because of their conception of their professional obligation and personal relationship of trust with another individual whose life they have compromised.

C. The Role of Guidelines and a Code of Ethics. Any effort to write guidelines will contain a list of dos and don'ts. But that list of dos and don'ts, whether embodied in internal regulations like DDO log notices, or perhaps even a formal code of conduct for intelligence professionals, will not stand alone. In fact, it will be but one element in a "system of guidelines." This system of guidelines includes not only a clear statement of rules, but also a process for applying the rules to hard cases, a process for enforcing compliance, and an independent process for overseeing the community's practices.

This concept of a system of guidelines serves as the organizing principle for the discussion:

-- Rules (from general principles to specific guidelines, and perhaps even a formal code of conduct);

-- A Process for Applying the Rules;

-- A Process for Enforcing Compliance with the Rules;

-- A Process for Overseeing Practice in Rule-writing, Application, and Enforcement.

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As part of this package, one may want to assemble a working group of intelligence officers and ask them to try to formulate a formal code of conduct. Such a code might articulate a half dozen central values for intelligence professionals and then provide some illustrative examples of hard cases with suggestions about how competing values should be weighed and traded off in these specific instances. While the larger system of guidelines will include many specific dos and don'ts of an ethical nature--laws that say no assassination; executive orders; internal regulations; DDO log notices; etc.--this system of rules cannot be specified to the level of detail of a tax code. Because situations and circumstances differ, the intelligence professional must exercise discretion in applying rules to hard cases. The virtue of the rules is to distinguish between easy and hard cases and to provide some guidance in attempting to weigh the multiple and competing considerations that bear on hard cases.

D. Should the Intelligence Community Be Defensive About Guidelines and a Code of Ethics? The ethos of the community is to take a low profile and be defensive. I believe, however, that a strong case can be made for taking the offensive on this front.

-- As the accused--and an agency evidently guilty of some serious abuses--the Agency is the target of many reformers, especially in Congress. Defensiveness usually encourages critics.

-- In fact, the system of guidelines the Agency has been developing, particularly over the last several years--when tidied up and thoughtfully presented--can be shown to be as thorough, thoughtful, and effective a system of guidance as there is for any major agency in Washington--including especially the Congress. If the Agency took the offensive and was aggressive in exploring the hard dilemmas, in making the case for the essential role of intelligence, specifically lawful intelligence in a free society, and in arguing the case that the emerging system of guidelines will guarantee lawful intelligence, it might both restore the standing of the community externally and the morale of its members internally.

-- Today the intelligence community labors under the shadow of revelations of abuse and scandal. Indeed, as Monday-morning quarterbacks, we can now see clearly that the intelligence community's posture in an open democratic society was, through the 1960s, essentially anomalous. You have moved vigorously to

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a posture of greater openness necessary for public support. A complementary and aggressively offensive posture on the importance, possibility, and role of ethical guidelines for the intelligence community (as an example for all major agencies of government) should at least be explored.

III. ELEMENTS OF A SYSTEM OF GUIDELINES

The organizing principle for this discussion is a "system of guidelines." The key elements of this system are:

A. Rules

-- General Principles

-- Specific Guidelines

B. A Process for Applying the Rules

C. A Process for Enforcing Compliance with the Rules

D. A Process for Overseeing Practice in Rule-Writing, Application, and Enforcement *

IV. RULES

A. General Principles.

Rules for the intelligence community consist of both general principles and specific guidelines. Most important are the general principles that establish the context for more specific argument. While it is possible to multiply principles, I have tried to formulate the minimum number that could serve to establish a working context.

*Recall this system of guidelines is one part of a much larger "personnel management system" that includes recruitment, selection socialization, and training through assignment, career development, continuing education, rewards and punishments, to exit. This entire system shapes, motivates, and restrains the behavior of members of the organization.

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1. Espionage is an extraordinary remedy: because of the danger of abuse and violation of important American values and interests, clandestine action should be undertaken only as an extraordinary remedy, and where the benefits of the clandestine action, and the advantage of pursuing the objective through clandestine means rather than overt means, have been clearly identified.

COVERT This principle establishes a presumption against ~~clandestine~~ action. It puts the burden of proof on those advocating clandestine action.

(Contrary to the impression created by recent revelations, clandestine activity has mainly been considered and authorized as an extraordinary act. The most dramatic indicator is budget. Even Marchetti and Marks, whose thesis is that American intelligence is dominated by covert action, estimate the budget for covert action in '75 to be only $750 million. In discussing this subject, I've found that many seemingly informed New York Times readers, and even some writers, believe that the covert action budget must be many billions.)

2. The most fundamental principle is that the President (and government) should not undertake actions in secret that could not in principle be defended to the American public and meet the test of political viability. There is a view that the American people are not sophisticated enough to appreciate the need for covert action, don't understand the exigencies of state, and are naive about the dangers inherent in the world. While there is considerable evidence to support this view, the U.S. government is constructed on a quite different presumption. That presumption is that, on balance, and over time, a process that forces the President and the government to seek and win the support of the American people to sustain a chosen course of action is preferable to any other process yet invented for selecting and sustaining public policy. The record is mixed. But on balance, and overall, this democratic presumption has a better batting average than any competitor. (Recall Churchill's remark: democracy is the worst form of government--except for all the others.)*

*NOTE: Political viability is not measured by a direct poll of public opinion. In our system of government, political viability is determined by an amalgam of views of the President, Congress, courts, and citizens.

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What does this principle imply for clandestine activity, that is, covert action (the effort of the U.S. to influence events in foreign countries without being known that we are the influencing agent) and clandestine collection (the effort to collect information that others do not want us to have and without anyone knowing that we have collected it)? In the abstract, the implication is clear: the U.S. government should not undertake actions that could not in principle win the support of the American people (if it were possible to have a full, frank public discussion). The practical dilemma is that clandestine activity must by definition be secret and cannot therefore be subjected to the full, open processes of public debate to determine whether it meets the test of political viability. This dilemma poses the institutional challenge: to devise an appropriate surrogate process. That's the point of principle 3.

3. Because clandestine activity cannot be subjected to the normal test of open public debate, it must be authorized and overseen by an appropriate surrogate process: a process that engages surrogates for the interests that would participate in full public discussion; involves them in a serious, disciplined private review of proposed and ongoing covert actions; and requires their support in ways substantially equivalent to the normal democratic test of political viability. No easy task.

The present process for authorizing clandestine activity, for overseeing the process, and for checking abuses represents at least one attempt to meet this principle. The question is how well current procedures meet this test and how they can be improved.

Two slightly more specific implications of this principle are:

(1) that clandestine activity must be consistent with openly announced substantive policies and objectives that have been established by the normal open process of government; and

(2) that the President and Director of CIA should be prepared to defend in public the broad categories of clandestine activity in which the U.S. engages, though not the specific actions themselves. This is clearly controversial; and contrary to the practice of the past. According to this principle, if the U.S. is going to provide clandestine support

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for democratic parties in countries where the opposition parties are being funded by other nations, this general class of action should be defended in public debate. This does not mean, however, that the U.S. government's action in funding any particular party should at the time have to meet the test of public debate (since it will not be possible to make public all the information on the basis of which a full and open debate could take place).

It has sometimes been proposed that we add a fourth principle of publicity,sometimes stated as follows: if a particular clandestine activity were made public, would you be proud of your action? I find this proposed principle unsatisfactory. It is both too loose and too tight. On the one hand, the principle is too loose: individuals' notions of pride differ. [redacted] would be proud to have made public many actions that most Americans find offensive. On the other hand, the principle is too tight and restrictive in that clandestine action is by its nature secret and unacknowledged. The grounds for the decision to engage in clandestine activity in a particular case, and the circumstances that surround that decision, encompass many facts and factors that cannot be made public. Consequently, it is not possible to present the full case in public for any particular action. Absent that full case, the public does not have full grounds for judgment. Consequently, the public test of support and "pride" is not appropriate. That's the point addressed by the surrogate process above.

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B. Specific Guidelines

Each class of clandestine activity presents a juicy target for endless juridical argument--both pro and con. You will recall the lengthy debate about the Harvard CIA guideline requiring professors to inform their dean about any paid work they do for CIA.

As an academic, I find it difficult to resist joining such arguments, for instance, about whether the intelligence community should be permitted to try to overthrow democratically-elected governments, and if so, under what circumstances. I have lengthy notes on both sides of proposed guidelines about a half dozen major classes of clandestine activity.

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For the purpose of a broad view of the forest, however, it seems more appropriate to limit myself to identifying the major issues to be weighed in choosing any specific guidelines, and to offer some general criteria that should be applied in choosing specific guidelines. The major issues to be weighed in devising specific guidelines are four:

(1) the pros and cons of statute v. executive order v. internal regulation;

(2) the relative merits of flat prohibitions v. prohibitions subject to waiver;

(3) the advantages and disadvantages of engaging more external surrogates (courts and Congress) at successive levels of specificity; and

(4) the impact of each guideline in constraining abuse, encouraging undue timidity, and motivating professionals in the intelligence community to the desired mix of initiative, inventiveness, and restraint.

Each of these issues invites lengthy argument. None is easy to weigh in specific cases. But for the sake of brevity, I will propose three general criteria for choosing specific guidelines--criteria that should, I believe, be widely acceptable.

1. The necessity for flexibility. The appropriate course of action will vary substantially with circumstances. For example, measures that should not be undertaken in peacetime or against a democratic state, should be permitted during actual or threatened hostilities or against a totalitarian regime. Circumstances change. Guidelines must therefore preserve flexibility to adjust to circumstances and to modify rules and procedures as conditions change. (This criterion has strong implications for the balance between legislative statute and executive order subject to Congressional veto.)

2. Guidelines should express core values in ways that establish strong presumptions against violation of those values. Clandestine activity runs a constant risk of violating important American values. Guidelines should therefore state these values as clearly as feasible in order to affirm the values and to place the burden of proof on whoever proposes to risk harming the value.

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3. Exceptions should be authorized in exceptional circumstances. Recognizing that values compete, the government should establish a process that allows appropriate individuals to balance one set of values against another and thus make exceptions to the guidelines in extraordinary situations.

The specific guidelines proposed in the Senate Select Committee's charter legislation include flat legislative prohibitions on:

- -- assassination of foreign officials;
- -- special activity that has as its objective or is likely to result in:
  - -- the support of international terrorist activities
  - -- the mass destruction of property
  - -- the creation of food or water shortages or floods
  - -- the creation of epidemics or diseases
  - -- the use of chemical, biological, or other weapons in violation of treaties
  - -- the violent overthrow of the democratic country
  - -- the torture of individuals
  - -- the support of any action, which violates human rights, conducted by the police, foreign intelligence, or internal security forces of any foreign country;
- -- the use for certain intelligence activities of U.S. persons who follow a full-time religious vocation or who travel to a foreign country under sponsorship and support of the U.S. government as part of a U.S. government program designed to promote education or the arts, humanities, or cultural affairs;
- -- the use for certain intelligence activities of journalists accredited to any U.S. media organization.

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In my view, each of these prohibitions does reflect some important American value--however ill expressed. These prohibitions also appropriately leave to the Executive the task of writing specific implementing regulations.

The chief problem with these guidelines is their form. If stated as presumptions rather than flat prohibitions, and accompanied by an appropriate process for authorizing exceptions, a reformulated (and, one hopes, more felicitious formulation of the values) should be acceptable.

Though the draft charter does not state prohibitions or presumptions relating to collection, you might want to propose several presumptions. For example:

-- less intrusive means of collection are to be preferred to more intrusive means (thus gathering information from unwitting individuals is preferred to unobtrusive electronic surveillance which is preferred to breaking and entering)

-- Overt preferred to clandestine

A final point may be more relevant for internal Agency purposes. If one takes each class of clandestine activity, for example, "propoganda" or "economic warfare," and asks what specific guidelines now exist, one quickly discovers an elaborate network of guidelines from charter legislation to NSIDs to DCIDs to DDO Log Notices. For each class of clandestine activity, one could array these guidelines. They could then be explicitly reviewed and refined with careful attention to the major issues identified above.

V. A PROCESS FOR APPLYING THE RULES

The process for authorizing special activities, special collections and counterintelligence is spelled out in Executive Order 12036. A brief sketch of that process and of the surrogates involved at each stage could be provided.

VI. A PROCESS FOR ENFORCING COMPLIANCE WITH THE RULES

The Inspector General, the General Counsel, and the IOB.

VII. A PROCESS FOR OVERSEEING PRACTICE IN RULE-WRITING, APPLICATION, AND ENFORCEMENT

The Senate and House Intelligence Oversight Committees, especially if they would get their acts together.

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Sections V, VI, and VII can be filled out whenever you like.

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ADDITIONS TO ALLISON CONCEPT

I Section on public as an oversight process

- Policy of openness
- Acknowledgement of limitations on sharing with public
  - Limits on FOIA
  - Sanctions against disclosure

II Section on rewards

- Acknowledgement of special role and sacrifice of intelligence professionals
  - System of incentives
    - Medals
    - Retraining program for retirement
    - Retirement program

III Section on domestic activities

- FBI-CIA jurisdiction
- Special concerns for rights of Americans
- Relations with American institutions
  - Press
  - Peace Corps
  - Cover
- Electronic surveillance - domestic

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IV Section on liaision

Limited to intelligence, not security

Need to respect privacy

22 May 1978

cc: [redacted]

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