16 OCT 1978

MEMORANDUM FOR: Director, National Foreign Assessment Center

FROM: John F. Blake
Deputy Director for Administration

SUBJECT: Records About Drug Experimentation

REFERENCE: Multiple adse from DDA, dtd 16 Aug 78
Subject: MKULTRA - Program to Identify
Subjects of Agency-Sponsored Drug Testing
(DDA 78-2930/2)

1. The Agency is committed to identify, find and notify persons who may still suffer adverse effects from drugs that were administered to them without their knowledge as part of Agency sponsored drug testing programs. People who have been involved in searches pertaining to known projects (MKULTRA/MKSEARCH, BLUEBIRD/ARTICHOKE, and OFTEN/CHICKWIT) are confident that all records relating to those projects have been found. Nevertheless, a nagging uncertainty lingers in some quarters that there may yet be some unidentified project buried somewhere in the archives that no one knows anything about. To begin with, we need to be as certain as it is possible to be that all records pertaining in anyway to any drug testing program sponsored by the Agency have been surfaced.

2. During the past year or so, for one reason or another, components of the Agency have conducted exhaustive searches through all of their records, in their offices as well as at the Agency Archives and Records Center. In order to avoid repeating research that has already been done, we need to know what has been done and how confident we can be that all records pertaining to drug activity have been found. Accordingly, you are requested to submit to the Deputy Director for Administration by 1 November 1978 a report describing the records search as it has been, or is being, conducted in your office. We are particularly interested, of course, in the attention given to drug related activities and the degree of certainty you feel that if there were any records pertaining to such activities, they would have been found. It is requested specifically that you include in your report a statement of the degree of confidence you feel that no records pertaining to drug activities remain undisclosed. If you feel further search

is required to give comfortable assurance, your estimate of the volume of records that will have to be reviewed and the man hours that will be needed to complete such a search should be included in your report.

/s/John F. Blake

John F. Blake

Distribution:
Orig - Addse
1 - DDA Subj
1 - DDA Chrono
1 - JFB Chrono
1 - SA/DDA

STAT SA/DDA [redacted] (16 Oct 78)

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EO/DDA 10/16

TO	NAME AND ADDRESS	DATE	INITIALS
1	John F. Blake (DDA 18 OCT 1978)	10/16/78	
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	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
	CONCURRENCE		INFORMATION		SIGNATURE

Remarks:

The call for reports on records searches sent out a couple of weeks ago overlooked NFAC. The attached will fill that void. Probably OSI would be the only NFAC office that might have anything related. Your signature is requested.

STAT

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FROM: NAME, ADDRESS AND PHONE NO.	DATE

Approved For Release 2003/07/31 : CIA-RDP81-00142R000200070001-5

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FORM NO. 237 Use previous editions (40)
1-67

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27 SEP 1978

TO	NAME AND ADDRESS	DATE	INITIALS
1	Deputy Director for Administration	27 SEP 1978	
2	7D 24 Hqs		
3	OGC		
4			
5	7D01 Hqs.		
6			

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	CONCURRENCE		INFORMATION		SIGNATURE

Att: DDA 78-2930/4

Remarks:

Tony,
Suggest you read
then you, Bob, myself
& anyone else of your choosing
sit down & chat

FOLD HERE TO RETURN TO SENDER

FROM: NAME, ADD		DATE
Special Assistant 4E 27 Hqs		26 Sep 78
UNCLASSIFIED	CONFIDENTIAL	SECRET

FORM NO. 1-67 237 Use previous editions (40)

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STAT

"Tony,
"Suggest you read & then you, Bob, myself & anyone else of your choosing sit down & chat.
/s/Jack Blake"

DDA:JFB:kmg (27 Sep 78)
Distribution:
Orig RS - OGC w/Orig Att
1 - DDA Subj w/att
1 - DDA Chrono
1 - JFB Chrono

Att: Memo dtd 26 Sep 78 to DDA fr SA [redacted]
Subj: Drug Experimentation - The Problem
(DDA 78-2930/4)

STAT

DDA Registry
File Legal

DDA 78-2930/4

26 September 1978

MEMORANDUM FOR: Deputy Director for Administration

STAT FROM: [redacted]
Special Assistant

SUBJECT: Drug Experimentation - The Problem

REFERENCE: Multiple addressee memo fr DDA dated 16 Aug 78, subj: MKULTRA - Program to Identify Subjects of Agency-sponsored Drug Testing

1. This memorandum attempts to ascribe a dimension to the problem of notifying subjects of Agency-sponsored drug testing. In order to do that it is necessary first to answer a few questions.

a. Are we concerned only with MKULTRA; are we concerned with MKULTRA, MKSEARCH, BLUEBIRD/ARTICHOKE, and OFTEN/CHICK-WIT; or are we concerned with all of these plus any that may not yet have been surfaced?

b. Are we concerned only with notifying unwitting subjects where there is reason to believe that they may still be adversely affected by their involvement in the drug testing program, or are we concerned also with persons who may have been subjected to testing with drugs not likely to produce long-term aftereffects?

c. Are we concerned with all CIA-sponsored drug testing on human subjects or only those programs where CIA involvement was so direct as to clearly establish an Agency liability for putting the subjects into danger?

d. Who should conduct whatever program is undertaken?

2. What records must be searched?

a. The Attorney General opinion mentions only the MKULTRA project, but probably the opinion was being responsive to our request which was couched in MKULTRA terms. The General Counsel's summary of the Attorney General opinion says:

> "All Agency documents relating to drug testing on human subjects which are available should be reviewed. This would include BLUEBIRD/ARTICHOKE, MKSEARCH, OFTEN/ CHICKWIT, and other drug testing conducted without regard to specific project designations, not just those specifically related to MKULTRA which were discovered last summer."

b. The record of Congressional hearings leaves open to interpretation the question of whether Congressional interest relates only to MKULTRA, the other named projects, or goes beyond all of these. The Congress apparently now believes it has heard all there is to hear about drug experimentation involving human subjects that has ever been undertaken by CIA. CIA witnesses are as confident as they can reasonably be that they have told Congress everything known about the named projects, and that these projects do in fact represent all of the drug related activities ever undertaken by the Agency. Nevertheless, a nagging uncertainty lingers in some quarters that there may yet be some project buried somewhere in the archives that no one knows anything about.

c. When the MKULTRA records were surfaced last summer there was undertaken a concerted search through the Records Center. A major effort was made by the Operations Directorate to ensure that nothing relating to drugs, or other potentially embarrassing activity, would remain undiscovered. Exhaustive searches have been, and continue to be, made in response to FOIA requests. Total record searches have been in progress for some time directed toward bringing Agency records holdings into conformity with schedules approved by the Archivist of the United States. Instructions given to the searchers in these efforts include specific guidance about particular subjects to be surfaced if encountered during any of the reviews. These guidelines identify specifically the projects known to have been related to drug activities, but they also include drugs as a generic subject to be immediately surfaced and reported upon.

d. Efforts that have been or are being made to review exhaustively the record holdings of the Agency appear to be sufficient to ensure that nothing relating to drug activities remains undisclosed. Any further or separate effort by a

Task Force concerned exclusively with drug activity would be duplicative and potentially conflicting with efforts already made or under way. The possibility of honest human error can never be eliminated absolutely no matter how many reviewers may review the reviews of reviewers. To relieve whatever nagging uncertainty may continue to linger, however, it may be useful to call for a progress and status report on record searches from the Deputy Directors giving their assurances that there are no records that have not been or will not be reviewed, and that they are as confident as they can reasonably be, short of absolute certification that no human errors have been committed, that all records relative to drug activity have been surfaced.

e. If it is agreed that any perceived need for a general records search has been or is being satisfied, it remains to be determined what additional searches through the records of the named projects may be necessary. This question will be considered in later paragraphs in conjunction with discussing the method of proceeding.

3. Who do we have to notify?

a. In his summary of the Attorney General Opinion, the CIA General Counsel notes that an earlier draft of the Justice opinion favored notification of unwitting persons who were subjected to tests of drugs not likely to produce long-term aftereffects. The General Counsel observes that discussion of this aspect of the problem was removed from the final version of the Justice opinion, reportedly at the instruction of the Attorney General. The General Counsel suggests that the question of whether to notify people who were administered drugs that could not be reasonably expected to produce harmful long-term aftereffects should be answered by the Agency as a matter of policy.

b. The Attorney General opinion says that there is no law known to the Department of Justice that would require notice "for the sort of surreptitious intrusions which occurred in the MKULTRA drug-testing program." Nor is there any common law principle or constitutional provision requiring notification. Moreover, "the passage of time, coupled with the availability of defenses against any actions that might be filed, suggest that notice in most cases would be a hollow act." Despite these conclusions, however, the Attorney General opines that a different situation exists where an individual's involvement in the program can reasonably be determined to have resulted in continuing adverse effects on his health. The basis for imposing this qualification

on the previously stated conclusions is an elusive guiding principle of the law of torts which states that "a duty exists where reasonable men would recognize it and agree that it exists," or, stating the same principle in another way, "a duty arises where, in the general level of moral judgment of the community some action ordinarily ought to be done."

c. As presently constructed, argumentation in the Justice opinion would not seem to support a conclusion favoring notification of individuals other than those who can be reasonably expected to be still adversely affected. As stated in the opinion, neither case law, common law, nor constitutional law support a requirement to notify anybody; only the elusive guiding principle that a duty exists where reasonable men agree that it exists, supports the requirement for notification. Moreover, during the Joint Hearing before the Select Committee on Intelligence and the Subcommittee on Health and Scientific Research of the Committee on Human Relations, Senator Chafee said "the second point I am interested in. . . is that the Agency is doing all it can in cooperation with other branches of the Government to go about tracking down the identity of those who were in some way adversely affected, and see what can be done to fulfill the government's responsibilities in that respect." (Emphasis added.) The Justice opinion and the record of Congressional hearings appear to be supportive of a decision in the Agency to limit rather than expand the categories of subjects to be notified. Finally, one wonders what positive good could come from informing someone that he had been administered some harmless drug without his knowledge 25 years ago; how such information could contribute to the current well-being or peace of mind of the individual.

d. On the basis of this discussion, it seems reasonable to conclude that the notification program should be limited to unwitting subjects where it can be reasonably determined that their health may still be adversely affected by their prior involvement in drug testing programs.

4. What programs are of concern?

a. Despite the conclusion that there is a duty to notify subjects who may still suffer adverse effects from the drug-testing program, the Justice opinion notes that "this duty may not attach in certain circumstances," and discusses three such circumstances.

(1) A duty to notify may not exist "where there are sound government reasons for not doing so." The Justice opinion says that it knows of no such reason, and the

summary prepared by the CIA General Counsel says that such an exception would appear to be unavailable because the Director has committed himself to pursue a policy of notification. Moreover, the Congress clearly expects that the Agency will undertake such a program.

(2) A duty to notify may not exist if the subjects already have been given actual notice. The Justice opinion says, however, that "if there is any doubt as to the individual's actual notice of his participation. . . , or of the particular testing he underwent, such information should be conveyed to that individual." The General Counsel's summary interprets "the particular testing he underwent" to mean "the subject was made aware of all relevant aspects of the experiment, e.g., identity of the drugs, dosages, etc." However, this exception may be interpreted, it should be entirely consistent with the interpretation of the overall problem. That is, if an individual was the subject of experimentation with drugs capable of producing long-term aftereffects from which he may still be suffering and there is any doubt about his awareness that he was participating in such experiments, he should be notified.

(3) The Justice opinion says there may be "no responsibility on the government to notify MKULTRA subjects if, under current law, it would not be held responsible for the dangers which might still affect the MKULTRA subjects. This circumstance could come about in light of the fact that most of the MKULTRA programs were not conducted directly by CIA, but by private institutions. As such, the CIA itself could conceivably have been so peripherally involved in a particular project, or so unaware of the tests actually being conducted, that it would not be held liable for putting the MKULTRA subjects into danger; no duty of notification would therefore devolve on the CIA. However, since these issues will most probably present close questions, and since we do not believe that an administrative decision should easily preclude notice, a determination on this matter should be made only after a thorough evaluation of the law and the facts pertinent to a particular project and a decision that the CIA could not arguably be held responsible for that project." The General Counsel's summary of the Justice opinion dismisses the potential applicability of this exception with the words, "By and large, given the nature of the testing programs and the CIA role, this exception would appear to be inapplicable." Just as an administrative decision should not easily preclude notice, neither should such a decision easily require it. The Justice view that a determination on this matter should be made only after a thorough evaluation of the law and pertinent facts seems eminently reasonable. People in the Agency

who have been most thoroughly immersed in the record searches relating to the CIA participation in drug research and experimentation are persuaded that there may indeed be several, if not most, of the MKULTRA projects where this exception might apply. My own review of some sample files suggests at the very least that the potential applicability of this exception should not be dismissed casually.

b. This discussion leads to the conclusion that there is no policy reason for not undertaking a program to notify subjects of the drug-testing program who may still suffer adverse effects from drugs that were administered to them without their knowledge, where there is doubt about whether they were sufficiently informed, and where it can be established that CIA must bear the primary responsibility for putting the subjects into danger.

5. Who should conduct the program?

a. The General Counsel suggests that HEW be asked to assume the major burden of responsibility for determining what institutions should be contacted, contacting them, reviewing their records and locating subjects. The basis for suggesting HEW determine which institutions to contact is not clear. Based on discussion in earlier paragraphs, it would seem reasonable to presume that the only institutions to be contacted should be those where it has been established that CIA must bear primary responsibility for the tests that were conducted. There is no apparent reason to contact institutions where the responsibility for the tests clearly is theirs, unless we decide to tell them that we have made such a determination. In either event, according to the Justice opinion, determination of liability "should be made only after a thorough evaluation of the law and the facts pertinent to a particular project." It would seem unfair and outside the proper role of HEW to ask them to make this kind of determination. Such a determination should be made in the first instance by the General Counsel. If consultation is desired, the Department of Justice would be the more likely consultant.

b. Part of the reason the General Counsel suggests that assistance of HEW should be solicited is that if CIA conducts such a program alone, it may be open to charges "that it suppressed evidence, influenced recollections, or failed to pursue or consider adequately any information which might arise." On the other hand, if it is necessary to ask the Department of HEW to review the pharmacological aspects of the drugs used, and later to intercede with private institutions, and if it is necessary to ask the Department of Justice to review the responsibility of CIA for projects undertaken by some of those institutions, one has to wonder how much responsibility for the final product those departments will be willing to accept without accepting it all. That is to say, will they be willing to accept full responsibility for the results of

their analysis if their analysis is based upon research done by employees of the CIA. If we do not ask them to do the whole thing, they will always be in a position to say they did the best they could with what was given to them, leaving the usual implication that we screened out everything we didn't want them to see. The question then is whether results obtained under these circumstances would enjoy any greater credibility than would results if we ran the whole program ourselves.

c. We cannot continue forever to run scared, assuming that the rest of the world will look askance at everything we do simply because we are the ones who have done it. Sooner or later there has to be a change in that pattern. CIA cannot escape responsibility for the programs as originally conceived. Hence, it seems clear that CIA must assume responsibility for determining what notification is necessary and taking prudent action to accomplish that purpose. In short, CIA must assume responsibility for whatever program is instituted. It would not be reasonable to ask another agency, HEW or Justice, to assume that responsibility for us. We should, however, call upon those two departments for whatever assistance we deem necessary to permit us to fulfill our responsibility. Credibility will have to depend upon how prudently we use their services and how well we perform the overall task.

6. How to proceed.

a. The DDA should address a memorandum to the other Deputy Directors, the Executive Secretary for the Office of the Director and Independent Offices, and to Office Directors in the Directorate of Administration asking for a report of progress and status of the general records searches that have been conducted and what, if anything, remains to be done. Their assurances should be solicited that, in the absence of human error, there are no pockets of records relating to drug activity that remain undisclosed. If they are unable or unwilling to give such assurances, they should be asked to describe actions they will take to satisfy themselves that they can give them. It should be possible to get these reports within 15-30 days, and it is expected they will dispense with any further consideration of a need for supplementary overall searches for records of drug activity.

b. People who have reviewed BLUEBIRD/ARTICHOKE are confident that U.S. citizens were not involved in drug experimentation. The purpose of the program was to find information about interrogation supplements, primarily hypnosis, but drugs that were used were used on foreign nationals--POW's and defectors, and are not likely to have produced long-term aftereffects still affecting the health of the

individuals. The Director of Security should be asked for verification of these statements. Exclusion of the BLUEBIRD/ ARTICHOKE subjects from the notification program, should then be feasible.

c. CHICKWIT was a program to acquire information about foreign pharmaceuticals. No testing was involved. The DDS&T should be asked for a verification of these statements, with the consequent exclusion of CHICKWIT from any further consideration.

d. Most of the testing in the OFTEN project was done on animals, according to testimony before the Senate Subcommittee on Health and Scientific Research in September 1977. CIA testimony at these hearings stated that the project was stopped in January 1973, before any human testing was conducted. DoD testimony on the same day stated that final tests were conducted in June 1973. The only results reported to CIA related to the animal tests. The June tests apparently involved the adhesive application to the skin of human volunteers of a substance identified as EA-3167. Both CIA and DoD disclaim responsibility for the June tests. Regardless of which agency may be responsible, if the criteria in the Attorney General's opinion apply, there is an obligation on the part of the Government. There needs to be a pharmacological evaluation of EA-3167 to determine the potential for creation of long-term aftereffects through its application by adhesive to the skin. If such a potential exists, there needs to be a determination of whether the human volunteers were sufficiently aware of the possible effects. The DDS&T should be asked to ascertain the potential long-term effect of an application to the skin of the drug used in OFTEN. The Director of Medical Services should be asked to validate the findings, consulting with HEW if he deems it appropriate. A report of these findings should be submitted within two weeks. If there is such a potential, the DDS&T should ascertain from the Army the degree of awareness of the volunteers and report the findings within 30 days. Subsequent actions will be dependent upon the findings.

e. MKSEARCH was a project to develop, test, and evaluate capabilities in the covert use of biological, chemical and radioactive material systems and techniques for producing predictable human behavioral or physiological changes. No tests were conducted on unwitting humans. The DDS&T should be asked for a verification of these statements with the consequent exclusion of MKSEARCH from any further separate research effort.

f. There are no MKULTRA records which reveal the identities of any of the subjects of tests conducted in the safehouses and there is no practical or prudent initiative the Agency can take to identify or find them. The circumstances of the safehouse program as they are known or

speculated to have been are such that the subjects are likely to have entered them anonymously or under assumed name in any case. The subjects of safehouse testing probably can only become known through inquiries that have been, or may be, directed to the Agency as a result of publicity already given the drug program or that it will receive when the anticipated Marks' book is published. We should accept this premise and the premise that there is no other practical or prudent initiative the Agency can take, and concentrate our efforts on the remainder of the MKULTRA program.

g. Using the analysis of records already completed by the IG, OGC and OTS, the Director of Technical Service should be requested to review MKULTRA documentation to set aside projects which clearly do not involve drug testing on unwitting human subjects. The remainder should be reviewed to identify those where CIA clearly is responsible, clearly is not responsible, responsibility is uncertain; and where subjects clearly were witting, unwitting, or "wittingness" is uncertain.

h. The General Counsel should then be requested to review these files for assignment of responsibility, and the Director of Medical Services should review them to assess the long-term effects of the drugs, seeking guidance or confirmation of their conclusions from Justice and HEW as they deem appropriate.

i. As soon as we have agreed upon our approach to the problem we should present a complete description of it to the Congress as a matter of information.

7. Size of the problem.

a. If the actions proposed above are acceptable there will be a need for intensive review of only a portion of the MKULTRA records in the custody of the Office of Technical Service, a total of about 35 file folders. It appears, from a very preliminary estimate, that at most only about 16 institutions may be involved. The number of researchers that may have to be interviewed, and the number of subjects they may have to be sought cannot be determined until the preliminary steps have been taken. Only then will we be in a position to know exactly what assistance we may require from the Departments of Justice and HEW. Nevertheless, it may be desirable to approach them now with a general explanation of the overall problem, seek their endorsement of our approach to its solution, get an expression of their willingness to lend assistance at such time as we may request it, and request a designation of the people they select to be our points of contact.

b. If the actions proposed are acceptable, they can be completed by the affected components in coordination with the undersigned and there will be no need to create a special task force at this time. I will prepare for your signature, or mine if you prefer, the correspondence necessary to get started and will work with the people already designated in the various components toward completion of the task. If it becomes apparent that more help is needed, be assured you will hear from me.

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TO	NAME AND ADDRESS	DATE	INITIALS
1	Deputy Director of Central Intelligence 7D 5607 Hqs	26 JUL 1978	
2			
3	DCI	27	
4	DDCI	1 AUG 1978	
5	DDA	2 AUG 1978	
6			

	ACTION		DIRECT REPLY		PREPARE REPLY
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Remarks: DDA

Exec Registry Shows that OGC's 24 Jul Paper to DCI Office on 25 Jul 78.

STAT

DDCI HAS ACTION ON THIS CASE.

RRR

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FROM: NAME, ADDRESS AND PHONE NO.	DATE
Deputy Director for Administration 4E47 Hqs	

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FORM NO. 237 Use previous editions (40)

DDA 78-2930

25 July 1978

MEMORANDUM FOR: Director of Central Intelligence

FROM: John F. Blake
Deputy Director for Administration

Stan:

1. I write to comment on Tony Lapham's paper of 24 July 1978 to you on "MKULTRA - Program to Identify Subjects of Agency-Sponsored Drug Testing."

2. I believe this is a very solid paper, which from Tony is not at all an unusual product.

3. In a more specific sense I address myself to paragraph 15 and the idea expressed there that "it would appear to be necessary organizationally to take a staff or task force approach." Tony goes on to suggest that "for this purpose an OMS official may be best suited to heading this effort." While I believe I understand why my learned, legal colleague made that observation, I believe an equally viable alternative is to have a senior general duty staff officer undertake the organization and direction of this undertaking. In making this alternate recommendation, I have a specific individual in mind and would be willing to make him available for such time as is necessary to see this onerous task through.

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John F. Blake

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OGC 78-4825

24 July 1978

MEMORANDUM FOR : Director of Central Intelligence

VIA : Deputy Director of Central Intelligence

FROM : Anthony A. Lapham
General Counsel

SUBJECT : MKULTRA - Program to Identify Subjects of Agency-Sponsored Drug Testing

1. Action Requested: It is requested that you review the portions of this memorandum which summarize the opinion of the Justice Department to the effect that the United States Government has an obligation to attempt to identify, locate, and notify persons who unwittingly may have been subjected to, and continue to suffer harm from, drug-testing activities sponsored by this Agency in the past, and that you consider the approach described below to implement that opinion.

2. Background:

A. Summary of the Opinion. On 17 July 1978 the Department of Justice responded finally and officially to our 22 September 1977 request for guidance concerning the existence, extent and nature of any legal or other responsibility on the part of the U.S. Government to persons who were subjected to CIA-sponsored drug-testing in the 1950s and 1960s. (A copy of our request is attached for your information as Tab A. A copy of the Justice opinion and a covering letter which summarizes that opinion in some detail are attached as Tab B.)

3. Briefly stated, the opinion concludes that the government does have an obligation, supported by general principles of tort law, to attempt to identify, locate, and notify unwitting persons whose health might continue to be affected adversely as a result of those portions of the Agency activities in question which may reasonably be determined to have resulted in such long-term present-day consequences. You should be aware that the prior drafts of this opinion which we have seen concluded in addition that there existed a policy judgment to be made by CIA, although Justice

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favored proceeding this regard, as to whet unwitting persons who were subjected to drug testing sponsored by CIA, which however could not reasonably be expected to have produced long-term effects, also should be found and notified of this fact. The discussion of this policy area was removed from the final opinion, reportedly on the instructions of Judge Bell. Although the opinion now is limited to the legal aspects of this problem and finds a duty to notify only persons who may suffer continuing health consequences, it is of course still open to you to determine that a larger number of persons meeting different criteria should be included in the notification program.

4. After concluding that such a duty to notify exists, at least where further harm may be thus avoided, the opinion notes that any effort to fulfill this duty must be circumspect because of existing legal constraints and a concern for avoiding damaging intrusions into the privacy of these individuals. Accordingly, such an effort must be limited generally to an examination of federal records and the records of the institutions which were involved where such records have survived and are not protected by law from disclosure, and other documents not subject to limited disclosure such as telephone books and voter registration lists. "To the greatest extent practicable" this effort should be conducted, it is the Justice Department's opinion, without the use of personal interviews with family members, former neighbors, employers or friends since such interviews would cause further embarrassment and loss of privacy to identified subjects.

5. We have determined, and Justice has agreed in this opinion, that this Agency is not in a position, without special legislation, to offer indemnification to any institution or associated individual against liability which may be incurred as a consequence of their involvement in these activities and their agreement to cooperate with the government by making their records available and facilitating the identification of test subjects. In addition, notes Justice, in some cases the institutions themselves may be precluded by law or professional ethic from allowing the government to review their records for these purposes.

6. As to what may be done for confirmed test subjects who are identified and located, the Justice Department conclusion is that a simple notification of involvement may be made along with an offer to provide available information to the subject's physician. Neither this Agency nor any other federal agency appears to have authority, again in the absence of special legislation, to provide medical treatment or to pay the costs of private treatment in this regard. The sole recourse for persons suffering medical expenses as a result of governmental activities is to file claims and institute litigation under the Federal Tort Claims Act.

7. The Justice opinion concludes that CIA has lawful authority to conduct this program, within the constraints described above, but notes that CIA may legitimately approach any other federal agency for assistance it may be authorized and equipped to provide. As is discussed further below, it may be necessary or advisable to call upon HEW or DOD for help in this effort.

8. Finally, the Justice Department opinion points out several circumstances in which the duty to conduct such a notification program may not apply. One such circumstance exists where there are sound policy reasons not to notify such persons. The exception would appear to be unavailable in this instance, particularly since you have already committed the Agency to supporting such a program. The second circumstance would exist were CIA so peripherally involved or ignorant of the nature of the testing as to be not aware of or responsible for any resulting harm to the subjects. By and large, given the nature of the testing programs and the CIA role, this exception also would appear to be inapplicable. Finally, a factor which may apply to exclude certain groups of individuals is that no duty to notify exists where the subject had actual notice of participation in a testing program, although presumably this circumstance would not obviate the duty unless the subject was made aware of all relevant aspects of the experiment, e.g., identity of the drug involved, dosages, etc.

B. Implementation

8. A number of matters require decisions before this opinion may be implemented. In addition to the policy determinations concerning the categories of persons to be included and whether to approach HEW or another federal entity to request assistance, there are numerous questions concerning how the Agency should best organize itself to initiate and maintain such an effort. The paragraphs which follow present for your consideration my thoughts on how to approach this matter.

9. While CIA must of course play an important part in such a program, it may not be the entity best suited for the undertaking. Due to the fragmentary nature of the surviving CIA records, we do not have sufficient information either to allow identification of any test subjects or to develop sufficiently specific details to be very useful to treating physicians in a medical sense. Thus, there will have to be very heavy reliance upon records which may be available at the various institutions, by and large academic in nature, which were involved in these activities. As you are aware, however, CIA enjoys a somewhat less than favorable standing, partially as a result of the MKULTRA disclosures themselves, in the eyes of the very institutions whose records must be

relied upon for this effort to have even a marginal chance of success. For this reason, and to assist in the process of properly evaluating existing Agency records to determine in the first instance which institutions it will be necessary to contact, Secretary Califano should be requested to make available the good offices and assistance of HEW in evaluating the existing information concerning the MKULTRA projects, in approaching appropriate institutions and requesting their cooperation, in examining the records of any institutions which agree to help, and in providing assistance to any subjects who may be located. CIA has, of course, been in contact with most of the institutions identified in the MKULTRA documents during the past several months. Although these communications generally have been courteous, further correspondence from CIA cannot be expected to be received warmly by officials who have been wrestling with the media and inquisitive students as a result of the MKULTRA disclosures. Further, we would be in this case asking these institutions to undertake affirmative efforts to review their records, to make those records available to our investigators, and to expose themselves and their personnel to potential civil liability arising from litigation by identifiable test subjects.

10. In addition, CIA may be open to charges, if it conducts such a program alone, that it suppressed evidence, influenced recollections, or failed to pursue or consider adequately any information which might arise. While the institutional exposure to liability cannot be eliminated, we can alleviate the adverse reaction which might be expected to result from further contact by CIA and also reduce the basis for charges of bad faith against the Agency by cooperating in this effort with HEW. The Agency must participate in the identification of the institutions to be contacted, and, based upon our prior correspondence, the preparation of the initial requests for help. Those requests, however, should come from an "untainted" third party such as HEW to assure the most favorable response. Furthermore, since HEW has been involved in promulgating guidelines to govern human experimentation by the entire federal government, it would seem to be the most appropriate agency to assist not only in contacting the institutions but also in determining which projects most likely would have resulted in long-term ill effects on the health of the subjects and thus which institutions should be contacted. Similarly, the impartial advice and assistance of HEW representatives would be valuable in ensuring and evidencing that such a program has been conducted fairly, impartially, and thoroughly. Furthermore, as is noted in the Justice opinion, there are limited circumstances in which HEW may be enabled to provide medical assistance, such as a "follow-up research program" or a pre-litigation medical examination, and any prospect of such assistance would be heightened by early HEW involvement.

11. [illegible] should direct that the Agency component most familiar with the surviving MKULTRA papers, probably the Office of Technical Services (OTS), begin reviewing all drug research documents to identify, insofar as is possible, the activities which involved drug testing on humans; the specific dates, places, researchers, amounts and sources of money; the specific nature of the testing, dosages, all drugs used, any recorded effects; the status of the subjects (i.e., student volunteers, inmate volunteers, hospital patients, etc.), the population from which these subjects were drawn (Georgetown University Hospital, Atlanta Federal Penitentiary, etc.), the identities of any subjects, and any other information of relevance to the determination of whether adverse effects might result and where the subjects might be located. We have tentatively divided the projects into various categories based upon summary information supplied to us last summer and a copy of this breakdown is attached as Tab C for your information and as a starting point for OTS. This listing should be verified and supplemented by a close review of the documents themselves.

12. All Agency documents relating to drug testing on human subjects which are available should be reviewed. This would include BLUEBIRD/ARTICHOKE, MKSEARCH, OFTEN/CHICKWIT, and other drug-testing conducted without regard to specific project designations, not just those specifically related to MKULTRA which were discovered last summer. To the extent the Office of Security or any other Agency component is more familiar with any of these collections than is OTS, that other component should be assigned the same review responsibilities as to those papers. Further, it is my understanding that the Information and Privacy Staff is the Agency entity charged with accumulating requests and inquiries from persons who claim to have been test subjects. This information should be correlated with the project breakdowns by OTS and other components to determine whether, according to alleged dates and places of involvement, these inquiries include any credible claims which should be investigated. The final compilation will be necessary for a determination as to which institutions should be contacted and requested to help in this effort.

13. Appropriate Agency personnel familiar with these materials should assist HEW representatives in evaluating this information and in drafting correspondence to the appropriate institutions. These letters should describe the goals of this effort, identify the circumstances of the testing as specifically as is possible, alert the institutions to their own potential liabilities and to the indemnification

problem areas in obtaining information, including access to the institutional records whenever possible. It seems to me that it is going to be very difficult, if not impossible, to protect the identities of the researchers involved from any institution which agrees to assist us in this effort and which requests such information as an aid to locating the records in question. As you know, up to this point we have striven to protect the identities of the researchers from disclosure either to the public or to the institutions. However, a continued policy of non-disclosure in the present context could prevent access to the only available sources of information necessary to sustain the notification program, thus frustrating its purposes and further exposing CIA to the charge of deliberately crippling the entire effort. To the extent that the identities of researchers are to be disclosed, I believe the researchers themselves must be notified as the first order of business, and some special problems and unpleasant exchanges can probably be anticipated in this regard.

14. CIA and HEW personnel also will have to cooperate in following up and coping with any unforeseen problems which might arise in this effort. Institutions which agree to help would have to be contacted by representatives of HEW and the Agency's Office of Security for the purpose of amassing as much information as possible about identifiable subjects of the testing. The Office of Security would be responsible for utilizing open sources such as telephone directories, in accordance with the Justice opinion, to attempt to identify and locate persons who may have been subjected to Agency-sponsored drug testing. Contact with any subject located should be made by HEW and CIA representatives jointly. Unless HEW is prepared to furnish further assistance of some sort, it would appear that the most that can or should be done for identified subjects is to supply them or their physicians with all pertinent data concerning the tests so as to facilitate treatment. My Office will, of course, be involved in the development of a policy for dealing with and for disposing of the administrative claims and litigation which may be expected to develop from this effort.

15. It is entirely possible that, depending upon the determinations which are made as to the categories of persons to be notified and the likelihood of long-term effects from the various drugs involved, the actual numbers of persons to be located and notified, and thus the numbers of institutions to be contacted, may be very small. However, in order to accomplish the analysis effort which must precede these determinations and because of the potential size and scope of this project, it would appear to be necessary organizationally to take a staff or task force approach and have

specific Agency personnel designated by the various components involved as primarily responsible for the coordination and accomplishment of the many functions which relate to this program, and for maintaining contact with the HEW representatives. Such a group, in order to be at all successful, must have direction, and for this purpose an OMS official may be best suited to heading this effort.

16. If HEW declines the request, we will have to reconsider that aspect of the program. An alternative course of action would be to call upon the military services which have had some experience in recent years in the initiation and conduct of similar programs to review the claims of servicemen who participated in drug-testing programs. However, I believe the responsibilities proposed for OTS, the Office of Security, OMS, and this Office in this memorandum are appropriate and should proceed unchanged regardless of HEW's reaction.

17. Recommendation: Copies of this paper have been submitted to the components mentioned in order that they may furnish you with their views concerning the wisdom and consequences of these recommendations. The scope and form of this program should be the subject of further discussion at a meeting called by you or the DDCI and you may wish to reserve decision on these matters until after such a discussion.

25X1

Anthony A. Lapham

Attachments

SUBJECT: MKULTRA - Program to Identify Subjects of Agency-Sponsored Drug Testing

OGC/ARC/lv
Distribution:
Orig-Addressee
1-DDCI
1-ER
1-OGC

ROUTING AND RECORD SHEET

SUBJECT: (Optional) MKULTRA - Program to Identify Subjects of Agency-Sponsored Drug Testing

FROM: John F. Blake
Deputy Director for Administration
7D 24 Hqs

EXTENSION [redacted]

NO. DDA 78-2930/3

DATE 23 August 1978

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. Deputy Director of Central Intelligence 7D 6011 Hqs				Frank: 78-843/11
2.				In my recent paper on our program to identify subjects of Agency-sponsored drug testing, you appended the following note: 25X1
3. EO/DDA	8/25			"I told HEW U/S [redacted] a request from us was coming soon. Can we get it out ASAP."
4.				
5. DDA	25 AUG 1978			Both Tony Lapham and myself are of the opinion that it is too early to approach HEW. We do not as yet possess a sufficient description of the size of the undertaking to present a meaningful picture to HEW. I have sprung a senior staff officer loose to undertake this project and he commences his tasking on Monday, 28 August.
6.				
7.				
8.				
9. STAT				I can, however, do the following if you like. I can phone your friend [redacted] establish my relationship with you, and tell [redacted] I would like to be able to contact him when we have our facts better lined up.
10. STAT				
11.				[redacted]
12.				John F. Blake
13.				Att: STAT DDA 78-2930/2 w/DDCI h/w note
14.				Distribution: Orig RS - DDCI 1 - ER 1 - DDA
15.				

24 AUG 1978

CONFIDENTIAL

DDA 78-2930/2

16 August 1978

MEMORANDUM FOR: Deputy Director for Science and Technology
Inspector General
Director of Technical Service
Director of Security
Director of Medical Services

FROM: John F. Blake
Deputy Director for Administration

SUBJECT: MKULTRA - Program to Identify Subjects of Agency-Sponsored Drug Testing

REFERENCE: Memo dtd 24 Jul 78 to DCI via DDCI fr GC, same subj

1. Reference memorandum, a copy of which is attached for your information, contained recommendations to the DCI by the General Counsel on how to proceed on subject. The DCI has approved the recommendations. The General Counsel and myself, having mutually reviewed the almost infinite scope of this activity have agreed that the organization and conduct of this undertaking will be under my cognizance and, additionally, I will appoint a senior staff officer to be responsible for the matter.

25X1 2. The purpose of this memorandum is to inform you that I have appointed [redacted] as the MKULTRA locator program coordinator. At this time I would ask each addressee to notify my office by phone identifying their referent on this matter. [redacted] 25X1 will then establish contact with that referent in order to acquaint himself with the file holdings and records that exist.

3. Our initial endeavors will be to try to size the scope of the problem. After that has been accomplished, we will implement the General Counsel's recommendation that a task force be created. It may be necessary to ask you to post a full-time detail for an unspecified period to the task force. [redacted] 25X1

John F. Blake

Att

CONFIDENTIAL

DOWNGRADE TO A-IUO
UPON REMOVAL OF ATT

SUBJECT: MKULTRA - Program to Identify Subjects of Agency-Sponsored Drug Testing

Distribution:
Orig - DDS&T
1 - IG
1 - D/OTS
1 - D/Sec
1 - D/MS
1 - GC
1 - DDCI
1 - ER
25X1 1 - [redacted]
1 - DDA

ER Aug 22 12 54 PM '79

ER Aug 21 4 35 PM '79

ER Aug 17 2 39 PM '79

ER Aug 17 4 44 PM '79

ER Aug 24 9 00 AM '79

ROUTING AND RECORD SHEET

78-843/4

SUBJECT: (Optional)

MKULTRA - Program to Identify Subjects of Agency-Sponsored Drug Testing

FROM:	EXTENSION	NO.
Anthony A. Lapham General Counsel ✓		DATE JWD

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. ER				
2. DDCI		25 JUL 1978	JK	F Seems like best approach to me. JK
3. DCI Recd 25 July		26 JUL 1978	JJ/hwg	
4. → DDCI please note DCI's comment (p. 7, DDA memo of yesterday attached)	7/27/78			
5.				
6.				
7.				
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10.				
11.				
12.				
13.				
14.				
15.				

OGC 78-4825
24 July 1978

MEMORANDUM FOR : Director of Central Intelligence

VIA : Deputy Director of Central Intelligence

FROM : Anthony A. Lapham
General Counsel

SUBJECT : MKULTRA - Program to Identify Subjects of Agency-Sponsored Drug Testing

1. Action Requested: It is requested that you review the portions of this memorandum which summarize the opinion of the Justice Department to the effect that the United States Government has an obligation to attempt to identify, locate, and notify persons who unwittingly may have been subjected to, and continue to suffer harm from, drug-testing activities sponsored by this Agency in the past, and that you consider the approach described below to implement that opinion. See RECOMMENDATION, PARA 17, p.9

2. Background:

A. Summary of the Opinion. On 17 July 1978 the Department of Justice responded finally and officially to our 22 September 1977 request for guidance concerning the existence, extent and nature of any legal or other responsibility on the part of the U.S. Government to persons who were subjected to CIA-sponsored drug-testing in the 1950s and 1960s. (A copy of our request is attached for your information as Tab A. A copy of the Justice opinion and a covering letter which summarizes that opinion in some detail are attached as Tab B.)

3. Briefly stated, the opinion concludes that the government does have an obligation, supported by general principles of tort law, to attempt to identify, locate, and notify unwitting persons whose health might continue to be affected adversely as a result of those portions of the Agency activities in question which may reasonably be determined to have resulted in such long-term present-day consequences. You should be aware that the prior drafts of this opinion which we have seen concluded in addition that there existed a policy judgment to be made by CIA, although Justice

DECLASSIFIED WHEN SEPARATED
FROM ATTACHMENT.

25X1

favored proceeding in this regard, as to whether unwitting persons who were subjected to drug-testing sponsored by CIA, which however could not reasonably be expected to have produced long-term effects, also should be found and notified of this fact. The discussion of this policy area was removed from the final opinion, reportedly on the instructions of Judge Bell. Although the opinion now is limited to the legal aspects of this problem and finds a duty to notify only persons who may suffer continuing health consequences, it is of course still open to you to determine that a larger number of persons meeting different criteria should be included in the notification program.

4. After concluding that such a duty to notify exists, at least where further harm may be thus avoided, the opinion notes that any effort to fulfill this duty must be circumspect because of existing legal constraints and a concern for avoiding damaging intrusions into the privacy of these individuals. Accordingly, such an effort must be limited generally to an examination of federal records and the records of the institutions which were involved where such records have survived and are not protected by law from disclosure, and other documents not subject to limited disclosure such as telephone books and voter registration lists. "To the greatest extent practicable" this effort should be conducted, it is the Justice Department's opinion, without the use of personal interviews with family members, former neighbors, employers or friends since such interviews would cause further embarrassment and loss of privacy to identified subjects.

5. We have determined, and Justice has agreed in this opinion, that this Agency is not in a position, without special legislation, to offer indemnification to any institution or associated individual against liability which may be incurred as a consequence of their involvement in these activities and their agreement to cooperate with the government by making their records available and facilitating the identification of test subjects. In addition, notes Justice, in some cases the institutions themselves may be precluded by law or professional ethic from allowing the government to review their records for these purposes.

6. As to what may be done for confirmed test subjects who are identified and located, the Justice Department conclusion is that a simple notification of involvement may be made along with an offer to provide available information to the subject's physician. Neither this Agency nor any other federal agency appears to have authority, again in the absence of special legislation, to provide medical treatment or to pay the costs of private treatment in this regard. The sole recourse for persons suffering medical expenses as a result of governmental activities is to file claims and institute litigation under the Federal Tort Claims Act.

7. The Justice opinion concludes that CIA has lawful authority to conduct this program, within the constraints described above, but notes that CIA may legitimately approach any other federal agency for assistance it may be authorized and equipped to provide. As is discussed further below, it may be necessary or advisable to call upon HEW or DOD for help in this effort.

8. Finally, the Justice Department opinion points out several circumstances in which the duty to conduct such a notification program may not apply. One such circumstance exists where there are sound policy reasons not to notify such persons. The exception would appear to be unavailable in this instance, particularly since you have already committed the Agency to supporting such a program. The second circumstance would exist were CIA so peripherally involved or ignorant of the nature of the testing as to be not aware of or responsible for any resulting harm to the subjects. By and large, given the nature of the testing programs and the CIA role, this exception also would appear to be inapplicable. Finally, a factor which may apply to exclude certain groups of individuals is that no duty to notify exists where the subject had actual notice of participation in a testing program, although presumably this circumstance would not obviate the duty unless the subject was made aware of all relevant aspects of the experiment, e.g., identity of the drug involved,dosages, etc.

B. Implementation

8. A number of matters require decisions before this opinion may be implemented. In addition to the policy determinations concerning the categories of persons to be included and whether to approach HEW or another federal entity to request assistance, there are numerous questions concerning how the Agency should best organize itself to initiate and maintain such an effort. The paragraphs which follow present for your consideration my thoughts on how to approach this matter.

9. While CIA must of course play an important part in such a program, it may not be the entity best suited for the undertaking. Due to the fragmentary nature of the surviving CIA records, we do not have sufficient information either to allow identification of any test subjects or to develop sufficiently specific details to be very useful to treating physicians in a medical sense. Thus, there will have to be very heavy reliance upon records which may be available at the various institutions, by and large academic in nature, which were involved in these activities. As you are aware, however, CIA enjoys a somewhat less than favorable standing, partially as a result of the MKULTRA disclosures themselves, in the eyes of the very institutions whose records must be

relied upon for this effort to have even a marginal chance of success. For this reason, and to assist in the process of properly evaluating existing Agency records to determine in the first instance which institutions it will be necessary to contact, Secretary Califano should be requested to make available the good offices and assistance of HEW in evaluating the existing information concerning the MKULTRA projects, in approaching appropriate institutions and requesting their cooperation, in examining the records of any institutions which agree to help, and in providing assistance to any subjects who may be located. CIA has, of course, been in contact with most of the institutions identified in the MKULTRA documents during the past several months. Although these communications generally have been courteous, further correspondence from CIA cannot be expected to be received warmly by officials who have been wrestling with the media and inquisitive students as a result of the MKULTRA disclosures. Further, we would be in this case asking these institutions to undertake affirmative efforts to review their records, to make those records available to our investigators, and to expose themselves and their personnel to potential civil liability arising from litigation by identifiable test subjects.

10. In addition, CIA may be open to charges, if it conducts such a program alone, that it suppressed evidence, influenced recollections, or failed to pursue or consider adequately any information which might arise. While the institutional exposure to liability cannot be eliminated, we can alleviate the adverse reaction which might be expected to result from further contact by CIA and also reduce the basis for charges of bad faith against the Agency by cooperating in this effort with HEW. The Agency must participate in the identification of the institutions to be contacted, and, based upon our prior correspondence, the preparation of the initial requests for help. Those requests, however, should come from an "untainted" third party such as HEW to assure the most favorable response. Furthermore, since HEW has been involved in promulgating guidelines to govern human experimentation by the entire federal government, it would seem to be the most appropriate agency to assist not only in contacting the institutions but also in determining which projects most likely would have resulted in long-term ill effects on the health of the subjects and thus which institutions should be contacted. Similarly, the impartial advice and assistance of HEW representatives would be valuable in ensuring and evidencing that such a program has been conducted fairly, impartially, and thoroughly. Furthermore, as is noted in the Justice opinion, there are limited circumstances in which HEW may be enabled to provide medical assistance, such as a "follow-up research program" or a pre-litigation medical examination, and any prospect of such assistance would be heightened by early HEW involvement.

11. At the same time as HEW is being approached, you should direct that the Agency component most familiar with the surviving MKULTRA papers, probably the Office of Technical Services (OTS), begin reviewing all drug research documents to identify, insofar as is possible, the activities which involved drug testing on humans; the specific dates, places, researchers, amounts and sources of money; the specific nature of the testing, dosages, all drugs used, any recorded effects; the status of the subjects (i.e., student volunteers, inmate volunteers, hospital patients, etc.), the population from which these subjects were drawn (Georgetown University Hospital, Atlanta Federal Penitentiary, etc.), the identities of any subjects, and any other information of relevance to the determination of whether adverse effects might result and where the subjects might be located. We have tentatively divided the projects into various categories based upon summary information supplied to us last summer and a copy of this breakdown is attached as Tab C for your information and as a starting point for OTS. This listing should be verified and supplemented by a close review of the documents themselves.

12. All Agency documents relating to drug testing on human subjects which are available should be reviewed. This would include BLUEBIRD/ARTICHOKE, MKSEARCH, OFTEN/CHICKWIT, and other drug-testing conducted without regard to specific project designations, not just those specifically related to MKULTRA which were discovered last summer. To the extent the Office of Security or any other Agency component is more familiar with any of these collections than is OTS, that other component should be assigned the same review responsibilities as to those papers. Further, it is my understanding that the Information and Privacy Staff is the Agency entity charged with accumulating requests and inquiries from persons who claim to have been test subjects. This information should be correlated with the project breakdowns by OTS and other components to determine whether, according to alleged dates and places of involvement, these inquiries include any credible claims which should be investigated. The final compilation will be necessary for a determination as to which institutions should be contacted and requested to help in this effort.

13. Appropriate Agency personnel familiar with these materials should assist HEW representatives in evaluating this information and in drafting correspondence to the appropriate institutions. These letters should describe the goals of this effort, identify the circumstances of the testing as specifically as is possible, alert the institutions to their own potential liabilities and to the indemnification

problem, and request assistance and all pertinent information, including access to the institutional records whenever possible. It seems to me that it is going to be very difficult, if not impossible, to protect the identities of the researchers involved from any institution which agrees to assist us in this effort and which requests such information as an aid to locating the records in question. As you know, up to this point we have striven to protect the identities of the researchers from disclosure either to the public or to the institutions. However, a continued policy of non-disclosure in the present context could prevent access to the only available sources of information necessary to sustain the notification program, thus frustrating its purposes and further exposing CIA to the charge of deliberately crippling the entire effort. To the extent that the identities of researchers are to be disclosed, I believe the researchers themselves must be notified as the first order of business, and some special problems and unpleasant exchanges can probably be anticipated in this regard.

14. CIA and HEW personnel also will have to cooperate in following up and coping with any unforeseen problems which might arise in this effort. Institutions which agree to help would have to be contacted by representatives of HEW and the Agency's Office of Security for the purpose of amassing as much information as possible about identifiable subjects of the testing. The Office of Security would be responsible for utilizing open sources such as telephone directories, in accordance with the Justice opinion, to attempt to identify and locate persons who may have been subjected to Agency-sponsored drug testing. Contact with any subject located should be made by HEW and CIA representatives jointly. Unless HEW is prepared to furnish further assistance of some sort, it would appear that the most that can or should be done for identified subjects is to supply them or their physicians with all pertinent data concerning the tests so as to facilitate treatment. My Office will, of course, be involved in the development of a policy for dealing with and for disposing of the administrative claims and litigation which may be expected to develop from this effort.

15. It is entirely possible that, depending upon the determinations which are made as to the categories of persons to be notified and the likelihood of long-term effects from the various drugs involved, the actual numbers of persons to be located and notified, and thus the numbers of institutions to be contacted, may be very small. However, in order to accomplish the analysis effort which must precede these determinations and because of the potential size and scope of this project, it would appear to be necessary organizationally to take a staff or task force approach and have

specific Agency personnel designated by the various components involved as primarily responsible for the coordination and accomplishment of the many functions which relate to this program, and for maintaining contact with the HEW representatives. Such a group, in order to be at all successful, must have direction, and for this purpose an OMS official may be best suited to heading this effort.

16. If HEW declines the request, we will have to reconsider that aspect of the program. An alternative course of action would be to call upon the military services which have had some experience in recent years in the initiation and conduct of similar programs to review the claims of servicemen who participated in drug-testing programs. However, I believe the responsibilities proposed for OTS, the Office of Security, OMS, and this Office in this memorandum are appropriate and should proceed unchanged regardless of HEW's reaction.

17. Recommendation: Copies of this paper have been submitted to the components mentioned in order that they may furnish you with their views concerning the wisdom and consequences of ~~these~~ recommendations. The scope and form of this program should be the subject of further discussion at a meeting called by you or the DDCI and you may wish to reserve decision on these matters until after such a discussion.

26 JUL 1978 Approved - DDCI pls take charge - ST

25X1

Anthony A. Lapham

Attachments

CONGRESSIONAL CONTACTS TO LET THEM KNOW OF OUR EFFORTS?

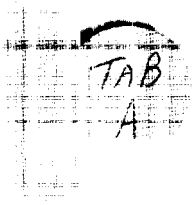
Form 5-57 163

OFFICIAL FILE COPY

[redacted] DCI's Comments to DDCI

SUBJECT: MKULTRA - Program to Identify Subjects of Agency-Sponsored Drug Testing

OGC/ARC/lv
Distribution:
Orig-Addressee
1-DDCI
1-ER
1-OGC



Approved For Release 2003/07/31 : CIA-RDP81-00142R000200070001-5

CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

OGC 77-6048
22 September 1977

Honorable Griffin B. Bell
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Judge Bell:

I have been advised that the Department of Justice is in need of more definitive statement of the issues presented to you by the Director of Central Intelligence in your conversations regarding the Agency's obligations to victims of the Project MKULTRA drug-testing activities which the Agency sponsored in the 1950s and 1960s.

In his testimony to the Senate Select Committee on Intelligence and the Subcommittee on Health and Scientific Research of the Senate Committee on Human Resources on 3 August 1977, concerning the recently discovered materials relating to Project MKULTRA, the Director stated:

> ... I am working closely with the Attorney General on this matter. We are making available to the Attorney General whatever materials he may deem necessary to any investigations he may elect to undertake. Beyond that, we are also working with the Attorney General to determine whether it is practicable from this new evidence to identify any of the persons to whom drugs may have been administered unwittingly. No such names are part of these records. We have not identified the individuals to whom drugs were administered, but we are trying now to determine if there are adequate clues to lead to their identification, and if so, how best to go about fulfilling the government's responsibilities in this matter. (Emphasis added.)

Further, in his testimony, the Director assured the Chairman of the Senate Select Committee on Intelligence that he would report to the Committee in November as to, among other things, "... what steps have been taken to identify victims, and if identified, what [has been] done to assist them, monetarily or otherwise."

The Agency has been unable to locate any records which contain the identities of any individuals who may have been subject to such drug testing. While available Agency records do indicate the institutions at which such testing occurred, and while we have notified these institutions in writing that they were involved in some facet of MKULTRA, even though in many cases on an unwitting basis, we have not yet approached these institutions with a request that they search their records for any relevant information. Barring such a request, we know of no way to bring to light information that might possibly lead to the identification and location of individual drug-testing subjects.

We seek your advice and guidance on the following questions:

-- Is there an obligation, on CIA's part or on the part of the United States Government as a whole, to seek out information, starting with a request to the institutions to search their records, that might lead to the identification and location of individuals upon whom drugs may have been tested? Should such an effort be undertaken in the absence of an obligation?

-- If there is such an obligation, or if in your view an attempt to identify victims would be appropriate notwithstanding an absence of any such obligation, which federal agency should take the lead, taking into account resources and legal authority?

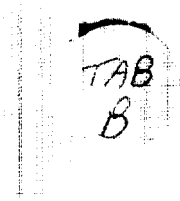
-- If any victims are identified and located, what further steps should be taken at that point, and what agency should take those steps? Would a notification of these individuals be sufficient? Or should they be offered medical examinations and, in any case in which it should reasonably appear that harm has been suffered as a result of the drug testing, medical and financial assistance as well?

-- Institutions that assist in an effort to identify drug-testing subjects may expose themselves in some degree to civil liability at the hands of any individuals who may be identified and subsequently located. Therefore, if the institutions involved are approached with a request to search their records for identifying data, should they be indemnified against any such liability?

The Agency is prepared to supply such additional information regarding the activities conducted under Project MKULTRA as is available in our files and as the Department of Justice may require in its consideration of these issues.

Sincerely,

SIGNED



Approved For Release 2003/07/31 : CIA-RDP81-00142R000200070001-5

Assistant Attorney General
Office of Legal Counsel

7-18-78

Department of Justice
Washington, D.C. 20530

17 JUL 1979

Mr. Anthony A. Lapham
General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Lapham:

Re: MKULTRA Drug-testing Program

This letter will set forth the conclusions and underlying rationale adopted in the attached memorandum on the CIA's obligations to the subjects of the Project MKULTRA drug-testing activities. In brief, our conclusions are that the CIA may be held to have a legal obligation to notify those subjects where it can be reasonably determined that their health may still be adversely affected by their prior involvement in the MKULTRA drug-testing program; that an effort should thus be made to notify these subjects; that legal constraints and a concern for the subjects' privacy mandate that any notification effort be a limited and circumspect one; and, while the CIA might lawfully ask another agency to undertake the notification effort in this instance, the CIA also has lawful authority to carry out this task on its own.

The first question we have addressed is whether there is a legal duty to notify those MKULTRA subjects who can be reasonably determined to have a continuing risk of suffering adverse effects on their health as a consequence of their earlier involvement. While there is no legal authority specifically addressing this question, we believe that, under the best view of general legal principles and analogous case law, a duty to notify such individuals exists in this instance. As a general matter of tort law, the courts and other legal authorities have found a duty to exist where one party puts another in danger; even if the former party's conduct is without fault, he is under a duty to give assistance and to

prevent further harm. See, e.g., Restatement (Second) of Torts §§ 321-22 (1965). As applied here, this principle would appear to require the CIA, having created the harm or risk thereof, to notify the individuals as an effort directed at rendering assistance and preventing further harm.

The court decisions in the area of dissemination of potentially harmful drugs to the public support this result. The decisions make clear that those involved in the distribution of potentially harmful drugs are under a continuing duty to the users of the drugs to keep them apprised of the dangers. See Basko v. Sterling Drug, 416 F.2d 417, 426 (2nd Cir. 1969). This principle would appear to require notification even after the drugs have been administered. The decision in Schwartz v. United States, 230 F.Supp. 536, 540 (E.D. Pa. 1964), perhaps the case closest to this particular situation, bears this point out. In that case a serviceman had been treated by a military doctor with umbrathor, which was later found to be "an extremely dangerous drug"; the court stated:

> The Government should have reviewed the records of all patients to whom umbrathor had been given and warned them of the danger of its retention in their bodies. Accordingly, even if the plaintiff had never returned to a Government physician after his discharge from military service, there was a duty resting on the Government to follow up those cases in which umbrathor had been installed. The Government must be charged with knowledge that umbrathor had been used by its physicians at an earlier date, and its roentgenologists must have known of the danger of umbrathor. The negligence here is not in its installation, but rather in not having affirmatively sought out those who had been endangered after there was knowledge of the danger in order to warn them that in the supposedly innocent treatment there had now been found to lurk the risk of devastating injury.

In light of these general legal principles, we think the government would be held to be under a continuing duty to seek out and warn those whose health may still be impaired.

This duty to notify the MKULTRA subjects may be obviated by several circumstances. First, under the principle that it "is not a tort for government to govern," it is possible that no duty to notify may exist where there are sound governmental reasons for not doing so. Second, no obligation may devolve on the CIA in this regard if it in fact is not responsible for the dangers which might still affect the MKULTRA subjects. This could occur if the CIA was unaware of the tests being conducted by the private institutions or if the CIA was only minimally involved in a particular project. Finally, no notification effort need be made if the subjects are already aware of their involvement in a MKULTRA project.

The situation is somewhat different with regard to those subjects whose health may no longer be adversely affected by reason of their participation in the MKULTRA drug-testing program. If there were a duty to notify these individuals, it would have to be based on the fact that the CIA engaged in some form of surreptitious intrusion into their lives; we do not think the law as yet has developed to this point. We know of no statute or principle of common law which would impose any such obligation on the CIA. Any duty in this regard must thus come, if at all, from the Constitution. The only decisions addressing the question of notice of surreptitious intrusion in a constitutional context are in the Fourth Amendment area. The most recent decision to address this issue flatly states that the failure to give notice is not a violation of the Fourth Amendment. United States v. Harrigan, 557 F.2d 879, 883 (1st Cir. 1977). While other decisions suggest in dicta that subsequent notice of an intrusion into an individual's privacy is a constitutional requirement, they do so in a context much different than that presented here and for purposes which would not be served by a notification effort in this instance. Moreover, these decisions also recognize that certain considerations present here--actual notice, impracticability or impossibility, or a concern for the individual's privacy--may preclude a need to give notice. We thus conclude that no notice is required under the Constitution to those whose health is no longer subject to harm arising out of the MKULTRA drug-testing program.

While we thus believe that notification should be given in certain instances, we also recognize that any notification effort will encounter serious difficulties. A concern for the subjects' privacy, the requirements of law, and other factors will require that this process be conducted in a limited and circumspect manner. Problems will arise in the following areas:

(a) Identification: Since the CIA has few records which, by themselves, identify the MKULTRA subjects, identification will have to be accomplished largely through the records of the participating institutions. These institutions may be precluded by law or privilege from cooperating with the CIA, or they may be reluctant to do so in view of their potential liability.

(b) Location: We believe that, insofar as possible, the process of locating identified MKULTRA subjects should be conducted so that no further harm occurs. This will require that, to the greatest extent practicable, the location process be conducted without interviews of those who knew the subject. Any process of location, then, should be largely conducted through records, but legal restrictions on the availability of pertinent documents may hamper even this approach.

(c) Notification and further assistance: We believe that the CIA's obligations will be fulfilled by a simple notification to the subject of his involvement in the MKULTRA program and an offer to supply available data. We doubt whether the CIA has legal authority to offer medical assistance to members of the general public, even if they were initially harmed by the CIA's conduct; but some forms of assistance might be possible through coordination with the Department of Health, Education, and Welfare.

The final issue--which agency should be vested with the responsibility for the notification effort--raises questions of both law and policy. As a matter of policy, we believe this is a question for the CIA to determine along with other agencies that might be authorized and equipped to handle this task. As a matter of law, we

believe that the CIA may legitimately ask such agencies to undertake this effort. See 31 U.S.C. § 686(a). If, however, the CIA does not wish to refer this matter to another agency (or if it is unable to do so), we believe that the CIA has the lawful authority to undertake this task on its own under Executive Order 12036, section 1-8. Further, we do not believe that any of the applicable restrictions on the CIA's activities will preclude this effort by the CIA. The prohibition on the performance by the CIA of law enforcement or internal security functions, 50 U.S.C. § 403(d)(3), cannot legitimately be deemed to preclude a narrow effort to notify those whose rights may have been violated or whose health may have been impaired. The restriction in Executive Order 12036 on the collection of information on United States persons, section 2-208, is intended to preclude intelligence activities directed at United States persons, and should not be deemed to apply to the task at hand either.

We recognize that, due to the legal problems and other considerations discussed above, any effort at notification may be largely unproductive. Nevertheless, we believe that a notification program should at least be initiated and carried out as far as the law and a concern for the subjects' privacy will allow. If impediments are found to preclude an effective notification program, it will then be necessary to re-examine the available alternatives.

We will, of course, be pleased to provide whatever continuing assistance we can on this matter.

Sincerely,

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

MEMORANDUM FOR ANTHONY A. LAPHAM
- General Counsel
Central Intelligence Agency

Re: MKULTRA Drug-testing Program

This is in response to your request for the views of the Department of Justice on several questions concerning the CIA's obligations to the subjects of the Project MKULTRA drug-testing activities sponsored by the CIA in the 1950s and 1960s. In brief, our conclusions are that the CIA may well be held to have a legal duty to notify those MKULTRA drug-testing subjects whose health the CIA has reason to believe may still be adversely affected by their prior involvement in the MKULTRA drug-testing program; that an effort should thus be made to notify these subjects; that legal constraints and a concern for these subjects' privacy mandate that any notification effort be a limited and circumspect one; and, while the CIA might lawfully ask another agency to undertake the notification effort in this instance, the CIA also has lawful authority to carry out this task on its own.

Legal Obligation to Notify MKULTRA Subjects

The question of the government's duty to give notice to the MKULTRA drug-testing subjects raises two different

problems. There exists, first, the question whether the government is obliged to give notice when it engages in some form of surreptitious intrusion into an individual's life; there also exists the question whether there is such an obligation where, as may be the case here, the government's prior conduct might give rise to continuing adverse effects on an individual's health. For the reasons that follow, it is our conclusion that no duty to notify arises in the former instance. While there is no legal authority specifically applicable to the latter situation, we believe that, under the best view of general legal principles and analogous case law, a duty to notify exists in such instances.

A.

The extent to which the federal government is legally obligated to notify individuals whose lives have been subject to some form of surreptitious governmental intrusion is not a matter which has received a great deal of treatment in the law. While Congress has enacted a statutory requirement of notice with respect to certain forms of governmental intrusions, see 18 U.S.C. § 2518(8)(d) (electronic surveillance), Fed. R. Crim. Pro. 41(d) (physical searches), neither these laws nor any others known to us would require notice for the sort of surreptitious intrusions which occurred in the MKULTRA drug-testing program. Nor are we aware of any common law principle which would impose a duty on the federal government in this regard. A legal obligation to notify the subjects of the intrusions involved here must thus be derived, if at all, from the Constitution. Our study of the pertinent cases construing the Constitution's requirements in this area leads us to conclude that there is no constitutional requirement of notice arising out of the surreptitious intrusions occurring in the MKULTRA drug-testing program.

The only decisions we have found addressing the question of notice of surreptitious intrusion are in the

Fourth Amendment area. 1/ In this context, several decisions indicate, at least by way of dictum, that subsequent notice of a surreptitious electronic surveillance must be given in order to meet constitutional requirements. See United States v. Donovan, 429 U.S. 413, 429 n.19 (1977); Zweibon v. Mitchell, 516 F.2d 594, 668 (D. C. Cir. 1975); United States v. Bernstein, 509 F.2d 996, 1000-01 (4th Cir. 1975) vacated for further consideration of other grounds, 430 U.S. 902, reversed on other grounds, 556 F.2d 244 (4th Cir. 1977); United States v. Eastman, 465 F.2d 1057, 1063-64 (3rd Cir. 1972). 2/ The issue of notice has received less attention in the area of physical searches, but here too it has been suggested that notice may be constitutionally required. See United States v. Whitaker, 343 F. Supp. 358, 369 (E.D. Pa. 1972), reversed

1/ The drug-testing activities conducted here, of course, do not fall within the usual parameters of what is thought to be a "search" or a "seizure" within the Fourth Amendment. However, the involuntary or surreptitious administration of a drug for testing purposes could, under a broad reading of the Fourth Amendment, be deemed to be a "seizure" of the subject to "search" for that individual's reactions to that drug. Cf. Schmerber v. California, 384 U.S. 757, 767 (1966) (relating to the Fourth Amendment's applicability to the administration of a blood test). This broad reading would appear particularly justified in view of the events which transpired in the MKULTRA drug-testing program and the Fourth Amendment's underlying purpose of protecting the privacy of individuals from governmental intrusion. The drug-testing program could thereby become subject to whatever notice requirements are imposed by the Fourth Amendment.

2/ In fact, Congress acted at least in part on this belief in providing for notice after an electronic surveillance subject to Title III had been completed. See 114 Cong. Rec. 14485 (1968) (remarks of Senator Hart).

on other grounds 474 F.2d 1246 (3rd Cir. 1973). Cf. United States v. Cafero, 473 F.2d 489, 499 (3rd Cir. 1973).

Substantial reasons of policy could support a legal requirement on the part of the government to give notice in instances where it surreptitiously intrudes into an individual's life. In the Fourth Amendment context, notice serves a need to supply a defendant with information necessary to his defense. See United States v. Chun, 503 F.2d 533, 536-38 & n.6 (9th Cir. 1974). The notice requirement has purposes broader than this, however. It eliminates the possibility of secret government action, see United States v. Bernstein, supra at 1000-01; United States v. LaGorga, 336 F. Supp. 190, 194 (W.D. Pa. 1971); it also affords the person involved an opportunity to seek redress. United States v. Eastman, 326 F. Supp. 1038, 1039 (M.D. Pa. 1971), aff'd, 465 F.2d 1057, 1063 n.13 (3rd Cir. 1972). The notification provision is thus a substantial factor in assuring the public that investigative techniques are reasonably employed. See United States v. Donovan, supra at 439.

In spite of the case law and substantial reasons of policy supporting a requirement of notice, we believe that a substantial case may be made for the proposition that such a requirement does not exist here. It should first be noted that the principal purposes underlying a notification requirement may not be applicable in this context. This is not a situation in which there is any real likelihood that the Government would use the fruits of its surreptitious activity in any criminal proceeding. The program, as it has been described to us, was never designed either to gather or to transmit evidence of wrongdoing for possible criminal action. The statute of limitations has certainly run on any criminal conduct discovered during the course of the experiments. Moreover, notification is no longer needed to prevent government secrecy, since the MKULTRA program has already been revealed. Nor is notification needed to assure the public that the MKULTRA program is being reasonably conducted; the program has long since terminated, and Congress and the

press are presently investigating how the program was conducted in the past. Finally, although it might be contended that notification would provide a means toward allowing individuals to seek redress, we doubt that there is any genuine vitality to this notion. The passage of time, coupled with the availability of defenses against any actions that might be filed, suggest that notice in most cases would be a hollow act.

In any event, we do not believe that the case law, even as it has developed in recent years in the Fourth Amendment context, provides a foundation for finding a legal obligation for the government to notify the subjects of the MKULTRA program. First, most of the decisions that have touched upon the constitutional requirement have generally done so only in dicta. 3/ None of the cases have examined the notice requirement in the kind of detail that would demonstrate that the constitutional issue has received careful scrutiny. In fact, many decisions simply rely on the Supreme Court's decisions in Berger v. New York, 388 U.S. 41, 60 (1967) and Katz v. United States, 389 U.S. 347, 355-56 n.16 (1967), a reliance that we regard as misplaced. Although both Berger and Katz discuss the question of notice, they do so in the context of the justification to avoid giving prior notice and of the requirements which must be met before such notice may be avoided; nothing is specifically said to require a subsequent notice.

3/ The one decision whose holding may go so far as to hold notice constitutionally required is United States v. Eastman, supra, and any constitutional aspects of that holding were later limited to deliberate attempts initiated prior to search to avoid mandatory statutory procedures after the search. United States v. Cafero, supra at 499-500.

Finally, we would note that the latest decision on this subject, United States v. Harrigan, 557 F.2d 879, 883 (1st Cir. 1977), refutes the proposition that notice of surreptitious government intrusions is constitutionally required. The court, in an opinion by Judge Coffin, there stated:

> we think that Donovan [429 U.S. 413] and other Supreme Court opinions refute any suggestion that the failure to serve the statutory post interception notice upon defendant was a violation of the Fourth Amendment.

In view of this pronouncement, 4/ and for the other reasons discussed above, we do not believe that there is a legal obligation on the part of the government to notify those individuals subjected to surreptitious governmental intrusions into their lives. 5/

4/ It should be noted that in Harrigan the defendants did receive notice within a short time after they were indicted. This was, of course, also the case in Donovan. It is possible, then, that these cases may be read to say that the timing of notice is not constitutionally critical so long as some notice preceeds any formal governmental action based on the information surreptitiously obtained. We could find much to support such a requirement. So long, however, as no use is to be made--or has been made--to the detriment of the individuals involved, we doubt whether the case law would support a requirement of notice.

5/ This same conclusion, in our view, would also apply to the question whether notification of electronic surveillance for foreign intelligence or counterintelligence purposes is required in S. 1566. Indeed, the very recent opinion by Judge Bryan in United States v. Humphrey, Crim. No. 78-25-A (E.D. Va. 1978), the Vietnam spy case, assumes that notice would not be required where a bona fide counterintelligence surveillance has been undertaken. Slip op. at 4-5.

Assuming, however, that either the case law or the purposes underlying notification would require that notification normally be given to the target of surreptitious governmental action, we do not believe that notification would be required in this instance. The pertinent case law indicates that notice is not an absolute constitutional requirement, and that on occasion other considerations might justify a result in which no notice is given. For instance, formal notification may not be required if the subject already has actual notice. See United States v. Alfonso, 552 F.2d 605, 614 (5th Cir. 1977); United States v. Wolk, 466 F.2d 1143 (8th Cir. 1972). In addition, the impracticability or impossibility of giving notice may relieve the government of such an obligation. Cf. United States v. Whitaker, supra at 1247. However, the major countervailing factor here appears to be that considerations of privacy may warrant nondisclosure in certain instances. For example, Congress, in drafting Title III, allowed the court discretion in determining whether disclosure should be made to untargeted individuals whose communications have been intercepted. 18 U.S.C. § 2518(8)(d). The prime consideration advanced for nondisclosure was protection of the individual. See 114 Cong. Rec. 14476, 14485-86 (1968)(remarks of Senators Long & Hart). Several courts have paid heed to this underlying concern of privacy in upholding the constitutionality of this approach. See United States v. Whitaker, supra at 1247; United States v. Cafero, supra at 501-02.

We believe that the factors just mentioned would legally justify a decision not to give notice here. First, many of the subjects may already have actual notice of the fact that drugs were administered to them; this notice may have been given to them in conjunction with the administration of the drugs, or it may arise out of the recent publicity given to the MKULTRA program. Second, notification of the subjects will be extremely difficult, if not impossible. The CIA intentionally did not keep extensive records of the MKULTRA program, and many of the records

which it did keep have now been destroyed. As we understand it, the records which remain do not generally reveal the names of subjects, but simply disclose the identities of the institutions participating in the program. While it may be possible to learn the subjects' identities from these institutions, it is also possible that their records will not be helpful. Moreover, the institutions' participation in a notification program could subject them to liability for their part in MKULTRA, and it can be reasonably expected that some of them will be reluctant to cooperate; cooperation might also be precluded by requirements of law mandating confidentiality of the subjects' identities. Even if the institutions cooperate and reveal the subjects' identities, it will be difficult to locate the subjects in view of the lengthy period since the program ended.

More important, however, is a factor which we suspect is unique to this particular situation. Any effort to identify and locate the subjects could well result in a further and greater invasion of their privacy. This process will necessarily involve the compilation of lists of the names of the individuals; inquiries among friends, relatives, employers, etc; and the formulation of a case file which may well recount much of the person's life over the past years. It is reasonable to assume that many of the individuals involved would not want this sort of inquiry conducted. Indeed, it was for this reason that only a limited investigation was allowed in connection with the FBI's COINTELPRO notification program. Any fair analysis under the Fourth Amendment, founded as it is on notions of reasonableness, would surely take these considerations into account. We thus conclude that, due both to practical considerations and to a concern for the privacy of the subjects of the MKULTRA program, it is unlikely that a court would hold that notice of surreptitious governmental activity is legally required under the facts here.

B.

Even though notice need not be given to every individual subjected to the MKULTRA drug-testing program, we believe a different situation exists where an individual's involvement in the program can reasonably be determined to have resulted in continuing adverse effects on his health. While there are no decisions specifically applicable to this situation, we believe that, under the best view of general legal principles and analogous case law, an obligation to notify the subjects arises on the part of the United States and its officials.

The concept of duty under the common law of torts is, in many ways, an elusive one. A determination that a duty exists is often conclusory, and is merely a decision that considerations of policy warrant granting a particular plaintiff the protection of the law. Prosser, Law of Torts § 53 at 325-26 (4th ed. 1971). The considerations underlying such a decision may vary. As a guiding principle in this area, it has been stated that a duty exists where reasonable men would recognize it and agree that it exists. Id. at 327. Another way of stating the same principle is that a duty arises where, in the general level of moral judgment of the community, some action ordinarily ought to be done. 2 Harper & James, The Law of Torts § 16.2 at 903 (1956).

Under this standard, we believe that a duty would be found to exist on the part of the government to notify those subjects of the MKULTRA program whose health can be reasonably determined to be still adversely affected by their prior involvement in MKULTRA drug-testing. The government most probably impaired the health of some subjects in the course of the program. It is quite possible that the deleterious effects on the health of these individuals are continuing; it also seems possible that notification of the individual's participation in the MKULTRA program may provide guidance as to a course of treatment and thus alleviate the results of the original conduct of the

MKULTRA program. We believe that notice to the individuals, as an action which might alleviate the initial harm caused by the government, is an action which reasonable men would say the government ought to undertake. As such, a duty would arise on the part of the government to undertake a notification program.

This conclusion is supported by principles of tort law which impose on a party a duty to aid one in peril. While one is generally not under an obligation to aid another person in danger, the law has created such a duty in situations in which some special relation between the parties justifies it. One such situation exists where the danger to one person is created by another; in such instances, the party creating the danger, even if his conduct is without fault, is under a duty to give assistance and to avoid any further harm to the injured party. Several sources of authority support this duty; the courts, first, have recognized and applied it in a variety of situations. See, e.g., Ward v. Morehead City Sea Food Co., 87 S.E. 958 (S.C. N.C. 1916) (requiring notice of contaminated fish sold by defendant); Simonsen v. Thorin, 234 N.W. 628 (S.C. Neb. 1931) (duty to warn of obstruction in street caused by defendant). The duty is also accepted as one of general applicability by the commentators on tort law. The Restatement (Second) of Torts §§ 321-22 (1965) provides:

> § 321. Duty to Act When Prior Conduct is Found to be Dangerous
>
> (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.
>
> (2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

§ 322. Duty to Aid Another Harmed by Actor's Conduct

> If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

Dean Prosser also has acknowledged that this duty generally prevails:

> It also is recognized that if the defendant's own negligence has been responsible for the plaintiff's situation, a relation has arisen which imposes a duty to make a reasonable effort to give assistance, and avoid any further harm. Where the original danger is created by innocent conduct, involving no fault on the part of the defendant, it was formerly the rule that no such duty arose; but this appears to have given way, in recent decisions, to a recognition of the duty to take action, both where the prior innocent conduct has created an unreasonable risk of harm to the plaintiff, and where it already injured him.

Prosser, Law of Torts § 56 at 342-43 (4th ed. 1971). See also 2 Harper & James, The Law of Torts § 18.6 at 1047-48 (1956). We think that these authorities indicate that in this instance notification be given to the individuals who may be reasonably determined to suffer adverse effects from their participation in the MKULTRA program. The government, having created the harm or risk thereof, is under a duty to render aid and prevent further harm, and this necessarily requires notification so that medical treatment may be adjusted to take account of whatever occurred in the MKULTRA program.

This same conclusion also seems to follow from various court decisions involving the duties imposed on those who disseminate potentially harmful drugs to the public. The

law holds drug manufacturers and druggists to a high degree of care commensurate with the potential harm of a particular drug, see, e.g., Henderson v. National Drug Co., 23 A.2d 743, 748 (S.C. Pa. 1942), and we think this same duty devolved upon the CIA when it undertook to dispense drugs to the public. One responsibility imposed by the courts in this regard is a duty to warn of the dangers inherent in a drug made available to the public. See e.g., Salmon v. Parke, Davis and Company, 520 F.2d 1359, 1362 (4th Cir. 1975); Sterling Drug, Inc. v. Yarrow, 408 F.2d 978, 992-93 (8th Cir. 1969); Davis v. Wyeth Laboratories, Inc., 339 F.2d 121, 130 (9th Cir. 1968). It is our understanding that in many cases the CIA did not do this; in fact, in many instances the CIA did not even inform the individuals involved that they were being given drugs. See S. Rep. No. 755, 94th Cong., 2d Sess., Book I at 389-403 (1976). The fact that the CIA at one time felt impelled to withhold notice and disclosure cannot, in our view, justify a continued failure to give notice and a warning as to the dangers involved. The courts have made clear that those involved in the distribution of potentially harmful drugs are under a continuing duty to the foreseeable users of the drug to keep them apprised of the dangers. See Schenebeck v. Sterling Drug, Inc., 423 F.2d 919, 922 (8th Cir. 1970). For this reason, drug manufacturers are obliged to give notice after discovering risks of drugs already placed on the market. See Basko v. Sterling Drug, 416 F.2d 417, 426 (2nd Cir. 1969); Tinnerholm v. Parke, Davis & Co., 285 F. Supp. 432, 451 (S.D.N.Y. 1968), modified on other grounds and aff'd, 411 F.2d 48 (2nd Cir. 1969). Similarly, the continuing nature of this duty would appear to require that, once the CIA's need for non-disclosure in the first instance subsided, notice and a warning of the dangers be given. Even though this situation differs somewhat in that the drugs have already been administered, the underlying concern of the law in this area--that of the potential harm that the drugs may cause--would appear to require notice in order to prevent or mitigate further adverse consequences.

The decision in Schwartz v. United States, 230 F. Supp. 536, 540 (E.D. Pa. 1964), bears this point out. In that case, during military service the plaintiff had been treated by a military doctor, for medical purposes, with umbrathor, "an extremely dangerous drug." The district court found that the government should have been aware of its dangerous propensities long before the drug made radical surgery necessary. The court further stated:

> The Government should have reviewed the records of all patients to whom umbrathor had been given and warned them of the danger of its retention in their bodies. Accordingly, even if the plaintiff had never returned to a Government physician after his discharge from military service, there was a duty resting on the Government to follow up those cases in which umbrathor had been installed. The Government must be charged with knowledge that umbrathor had been used by its physicians at an earlier date, and its roentgenologists must have known of the danger of umbrathor. The negligence here is not in its installation, but rather in not having affirmatively sought out those who had been endangered after there was knowledge of the danger in order to warn them that in the supposedly innocent treatment there had now been found to lurk the risk of devastating injury.

The court thus made clear that the government cannot avoid a duty to notify merely due to the fact that the drugs were administered long ago. Rather, the government, having administered the drugs in the first instance, was held to be under a continuing duty to seek out and warn those whose health may still be impaired.

It may, of course, be argued that the responsibilities imposed by tort law are inapplicable to the United States, on the ground that the sovereign has no underlying obligations in this regard. This theory finds some support in

the case law, primarily in the opinions of Mr. Justice Holmes. In Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), he stated:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

See also The Western Maid, 257 U.S. 419, 432-34 (1922); Commissioners of the State Insurance Fund v. United States, 72 F. Supp. 549, 554 (S.D.N.Y. 1947). If this is true, then the duties normally imposed by the common law of torts would have no application here.

We do not, however, believe this to be the case. It should first be noted that Mr. Justice Holmes' views do not represent the consistent position of the Supreme Court on this matter. Other decisions of the Court have recognized that the sovereign may have underlying obligations vis-a-vis its citizens, but is simply shielded from liability by the bar of sovereign immunity. See, e.g., The Siren, 74 U.S. 152, 155-56 (1868). Cf. Hart & Wechsler, The Federal Courts and the Federal System 1342-43 (2nd ed. 1973). In Langford v. United States, 101 U.S. 341, 342-43 (1879), the Court explicitly rejected the notion that the government could do no wrong and recognized that the government could commit a tort; implicit in this recognition there is an admission that the government had responsibilities towards its own citizens. The existence of these Supreme Court decisions raises questions as to the legal validity of Mr. Justice Holmes' views, and at least serve to deprive his views of controlling force here.

The passage of time may also have served to undermine Mr. Justice Holmes' conclusion. Numerous legal scholars have challenged Holmes' theory, largely on the ground that it has no validity in a country where the people, and not the government, are sovereign. See , e.g.,

Street, Governmental Liability 9 (1953); Borchard, Governmental Responsibility in Tort, 36 Yale L. J. 757, 1039 (1927). The recent court decisions abrogating the doctrine of sovereign immunity of the states also would impliedly reject Holmes' concept. Those decisions recognize that a state, acting through its agents, may commit a tort, see, e.g., Muskopf v. Corning Hospital District, 359 P.2d 457, 462 (S.C. Cal. 1961), and necessarily inherent in any such determination is a recognition that the sovereign has obligations to its citizens under tort law. We thus believe that, no matter how Holmes' legal proposition would be viewed in his day, it is not an acceptable tenet today to say that the federal government, which after all exists to act on behalf of the people, may conduct activities without regard to principles of law designed to protect the interests of the people, even if those principles are not founded on the Constitution or federal statutes.

In any event, the passage of the Federal Tort Claims Act (FTCA), and the court decisions applying that Act, render Mr. Justice Holmes' views inapplicable here. His view is that no legal obligation attaches to the United States in the absence of consent, and the enactment of the FTCA constitutes this sort of consent. The Act in its explicit terms refers to negligent or wrongful acts or omissions of employees of the government, and not to torts of the government itself. 28 U.S.C. § 1346(b). The Act could thus be viewed as not imposing any substantive duties on the government, other than to pay for the torts of its employees. See H.R. Rep. No. 2800, 71st Cong., 3rd Sess. 7-10 (1931). H. R. Rep. No. 286, 70th Cong., 1st Sess. 1-3 (1928). We do not believe, however, that this distinction is of much significance here. The courts, in applying the FTCA, commonly speak of the government's obligations under state law, see, e.g., Smith v. United States, 546 F.2d 872, 877 (10th Cir. 1976), and would most likely do so in this case. More importantly, the FTCA recognizes that federal employees, acting within the scope of their employment, may commit torts upon individual citizens. Implicit in this recognition is an admission that federal employees are bound to adhere to each state's tort law in the performance of their duties;

the same obligation would also appear to devolve upon each employee in view of the rather obvious need not to create liabilities on the part of the United States. We thus believe that the FTCA imposes on the appropriate government officials the duty to adhere to the tenets of tort law as set forth above. 6/

6/ The FTCA does not, of course, impose liability on the United States for certain sorts of torts. 28 U.S.C. § 2680 (h). By reason of this limitation, the United States might avoid liability under the FTCA if its employees' failure to give notice was deemed to constitute deceit or misrepresentation. See National Mfg. Co. v. United States, 210 F.2d 263, 276 (8th Cir. 1954); Kilduff v. United States, 248 F. Supp. 310, 313-14 (E.D. Va. 1960). We would note, initially, that it is unclear whether the courts would extend these exceptions of the FTCA to this particular case. The decisions indicate that the torts of deceit and misrepresentation are very largely confined to invasions of a financial or commercial character in the course of business dealings. See United States v. Neustadt, 366 U.S. 696, 711 n.26 (1961). But see Lloyd v. Cessna Aircraft Company, 429 F. Supp. 181, 187 (E.D. Tenn. 1977). In addition, the courts also have a tendency, in assessing failures to warn of health hazards, to deem them as a negligent performance of an operational duty rather than misrepresentation. See Ingham v. Eastern Airlines, Inc., 373 F.2d 227, 238-39 (2nd Cir. 1967); Betesh v. United States, 400 F. Supp. 238, 241 n.2 (D.D.C. 1974). But see Bartie v. United States, 216 F. Supp. 10, 20-21 (W.D. La. 1963), aff'd, 326 F.2d 754 (5th Cir. 1964). This approach might be particularly appealing to the judiciary where, as here, the underlying duty is a duty to warn and any breach of that duty could be termed a misrepresentation. Cf. Hicks v. United States, 511 F.2d 407, 414 (D.C. Cir. 1975); Wenninger v. United States, 234 F. Supp. 499, 505 (D. Del. 1964), aff'd, 352 F.2d 523 (3rd Cir. 1965).

In any event, even if the government's failure to notify would fall within one of the exceptions to (cont'd)

C.

While we thus generally conclude that the government and its agents would be held to be under a duty to notify those MKULTRA subjects who may still suffer adverse effects from their participation in the MKULTRA drug-testing program, this duty may not attach in certain circumstances. We shall briefly discuss each of these separate circumstances; however, a final determination as to these exceptions must depend on the pertinent facts and circumstances.

(a) Policy decisions. It is possible that no duty to notify may exist where there are sound government reasons for not doing so. It has been recognized that it "is not a tort for government to govern," Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting), and that therefore the basic policy decisions of government, within constitutional limitations, are necessarily nontortious. Muskopf v. Corning Hospital District, supra at 462. See also 3 Davis, Administrative Law Treatise § 25.13 at 490 (1958). While Congress' intent in enacting the "discretionary function" exception to the FTCA is somewhat unclear, the courts have followed this same general approach in exempting from the scope of the FTCA governmental decisions made at the planning, as opposed to the operational, levels of government. Dalehite v. United States, supra at 42; Driscoll v. United States, 525 F.2d 136, 138 (9th Cir. 1975). It may thus be that, if there are valid reasons of government policy not to notify the MKULTRA subjects, there may be no duty to do so.

6/ (cont'd) the FTCA, we do not believe that this means there is no duty to notify. The fact that sovereign immunity has not been waived as to a particular course of conduct does not, in our view, mean that the government is free to adopt that conduct without regard to the interests of its citizens or the general principles of law protecting those interests.

Of course, there are limits to the extent to which a "policy" decision may vitiate all of the government's responsibilities, and the courts are likely to impose some checks on governmental decision in this regard. For example, even though the "discretionary function" exception extends even to an abuse of discretion, a "discretionary" decision not to abide by state tort law could vitiate the entire FTCA and the courts would be unlikely to uphold this result. Cf. Smith v. United States, supra at 877 (10th Cir. 1976). An example of this, with particular applicability to the question of notification, is the decision in Bulloch v. United States, 133 F. Supp. 885, 888-89 (D. Utah 1955). There the court had no trouble concluding that a decision to conduct nuclear tests, and decisions as to the time and manner of those tests, were within the discretionary function exception. The court was more troubled, however, by the fact that no notice of the impending detonation had been given, and indicated that the decision not to give notice may not be within the discretionary function exception unless it was founded on a good reason. See also Smith v. United States, supra at 877; United States v. White, 211 F.2d 79, 82-83 (9th Cir. 1954). But see Bartie v. United States, supra.

At present we know of no such reason that would justify a failure to initiate a notification program here. If, however, the CIA believes that valid reasons for non-notification exist and wishes to avail itself of this possible exception to a duty under tort law, we shall be happy to consider its justification in light of the applicable law.

(b) Lack of governmental responsibility. There may also be no responsibility on the government to notify MKULTRA subjects if, under current law, it would not be held responsible for the dangers which might still affect the MKULTRA subjects. This circumstance could come about in light of the fact that most of the MKULTRA programs were not conducted directly by the CIA, but by private institutions. As such, the CIA itself could conceivably have been

so peripherally involved in a particular project, or so unaware of the tests actually being conducted, that it would not be held liable for putting the MKULTRA subjects into danger; no duty of notification would therefore devolve on the CIA. However, since these issues will most probably present close questions, and since we do not believe that an administrative decision should easily preclude notice, a determination on this matter should be made only after a thorough evaluation of the law and the facts pertinent to a particular project and a decision that the CIA could not arguably be held responsible for that project.

(c) Actual notice. Finally, we do not believe that there exists a duty to notify MKULTRA subjects if they already have actual notice of the activity in which they were involved. The duty to give notice here is predicated on the possibility that notice would be helpful, and little benefit would be achieved by giving a subject notice of something about which he is already aware. However, if there is any doubt as to an individual's actual notice of his participation in the MKULTRA program, or of the particular testing that he underwent, such information should be conveyed to that individual.

The Notification Process

While the disadvantages inherent in notification are not sufficient, in our view, to preclude a notification effort, we believe that these disadvantages, together with other factors, will influence how the notification process is conducted. Where notification is to be given, a concern for the subjects' privacy, the requirements of law, and other factors will require that the identification, location, and notification process be conducted in a limited and circumspect manner.

a. Identification. It is our understanding that the CIA at present has few records which, by themselves, could identify the MKULTRA subjects. Any identification of these subjects, therefore, will have to be accomplished largely through an examination of the records of the participating institutions. The need to approach these institutions in order to identify the MKULTRA subjects may cause substantial problems in implementing any sort of notification program.

Two different sorts of considerations will pose problems here. First, the institutions may be precluded by law or privilege from divulging the identity of the MKULTRA subjects to the CIA. For example, such disclosure could be prohibited by federal statute, see, e.g., 20 U.S.C. § 1232g(b), 21 U.S.C. § 1175, 7/ federal agency regulations, state statutes or regulations, or the doctor-patient privilege. A determination whether such legal impediments to disclosure exist will depend on the facts surrounding a particular project, the institution involved, and the applicable laws. The decision as to legality thus cannot be generically made here, but must be made as each specific problem arises.

Second, even if the institutions could legally cooperate with the CIA, they may refuse to do so since their cooperation in notification could lead to litigation and potential liability on their part for the role they played in the underlying activities. To preclude this possibility, your letter suggests that the institutions be promised indemnification by the federal government. However, we do not believe that, under current law, the CIA is authorized to enter contracts of indemnification. The pertinent statutes allow federal agencies to enter indemnification contracts only if they are authorized to do so by law or appropriation. 31 U.S.C. § 665(a); 41 U.S.C. § 11(a). See California-Pacific Utilities Company v. United States, 194 Ct. Cl. 703, 714-16 (1971); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928). We know of no provision of law or any appropriation which authorizes the CIA to indemnify any institution for what would be the misdeeds of the institution itself.

These obstacles, however, may be overcome, at least in some instances. The laws mandating confidentiality of

7/ In addition, the Privacy Act, 5 U.S.C. § 552a, or other statutes might prohibit government agencies which participated in MKULTRA from disclosing information to the CIA.

information may be found not to apply to this particular sort of situation. Moreover, even if the pertinent institutions cannot disclose the subjects' names to the CIA, they might be legally authorized to notify the subjects directly.8/ And while some institutions may be unwilling to cooperate in view of their potential liability, others may well believe that there is no possibility of potential liability or may be willing to risk this possibility in order to notify the subjects.

b. Location. If the CIA succeeds in obtaining the identities of the MKULTRA subjects, the question then remains how it can go about locating them. The limitations of the law will impose certain restrictions here, and a concern for the privacy of the individuals involved will mandate further restrictions on the location process.

We believe that, insofar as possible, the location process should be conducted so that no further harm occurs to the MKULTRA subjects. This would require that, to the greatest extent practicable, the location process should be conducted without interviews so as to prevent the subjects from becoming publicly associated with the CIA or with the MKULTRA program. Such interviews would necessarily be with those who knew the subject, and this in turn may cause harm or embarrassment to the subject.

This means that the process of location will have to be largely conducted through records, and problems also arise here. Again, private institutions may not be able to cooperate due to legal prohibitions, see, e.g., 20 U.S.C. § 1232g(b), and there are also restraints imposed by the law on the use of government records. See 5 U.S.C. § 552a (Privacy Act); 26 U.S.C. § 6103 (pertaining to tax records). The CIA, however, may be able to take advantage of exceptions to the Privacy Act, particularly the one pertaining to the health of the individual, see 5 U.S.C. § 552a(b)(8), or it might even request various federal agencies to undertake location and notification--particularly if those

8/ It is questionable, however, how effective such a notification process would be if the institutions made no great effort to ascertain the subject's present location.

agencies took part in the underlying MKULTRA activities. In addition, the CIA would also remain free to examine documents which are not subject to restrictions on disclosure--such as, for example, voter registration lists, telephone books, etc.

c. Notification. Your letter also asks what steps should be taken after the MKULTRA subjects have been identified and located. We believe that, as an initial matter, a simple notification that the subject may have been involved in the MKULTRA program will suffice. The subject could also be advised that medical attention may be advisable or necessary, and that the CIA was willing to cooperate in any way to provide the necessary information to the subject's doctors.

The CIA's authority to do more than this--i.e., provide actual medical treatment--is more open to question. The CIA's statutory authority to provide medical treatment or to pay the direct costs of medical treatment is limited to its own officers and employees, 50 U.S.C. § 403e(5), and that provision's legislative history is to this same effect. See H.R. Rep. No. 160, 81st Cong., 1st Sess. 4 (1949); S. Rep. No. 106, 81st Cong., 1st Sess. 3 (1949). We thus think it doubtful that the CIA has authority to perform such functions for the members of the general public, even where harm has resulted to such individuals through the CIA's actions.9/ Rather, the procedure apparently contemplated by Congress in such situations is that the injured individuals will obtain their own medical treatment, and then file claims to recover their damages under the Federal Tort Claims Act. In the event that the particular conduct falls within one of the exceptions to the FTCA, see, e.g., 28 U.S.C. § 2680(a) or (h), the individual's only recourse may be by way of legislation.

9/ Since the duties under tort law here devolve not only upon the CIA, but also upon the federal government, we have also looked into the question whether any other federal agency has authority to provide medical treatment to members of the general public injured by federal governmental action. We have found no agency which generally has such authority. However, in our conversations with staff of the Public Health

(Cont. on p. 23)

Responsible Federal Agency

Your letter asks what federal agency should be vested with the responsibility to identify, locate, and notify the victims, and to take whatever other steps may be necessary. In our view, this is a question involving conflicting policy considerations which should be determined by the CIA itself and the other agencies which might be available to perform this task. If the CIA wishes another federal agency to carry out the notification project, we believe that it may legitimately approach any such agency that is authorized and equipped to undertake such a task. See 31 U.S.C. § 686(a). If, however, the CIA does not wish to refer this matter to another agency (or if it is unable to do so), we believe that the CIA has lawful authority to carry out this task on its own.

Executive Order 12036 authorizes the CIA to "produce . . . foreign intelligence relating to the national security," including "scientific" or "technical" intelligence. Section 1-802. In essence, the MKULTRA program was an effort in this direction, since it was designed to produce resources which could support foreign intelligence operations and to ascertain the "enemy's theoretical potential" in this area. See S. Rep. 755, 94th Cong., 2d Sess., Book I at 390 (1976). As such, since the CIA is empowered to take action "related to" this activity, section 1-8, we believe it has authority to undertake a notification program intended to redress the wrongs which may have occurred in connection with this activity.

The fact that the drug-testing itself may be beyond the terms of the present Executive order, or otherwise in

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9/ (Cont.)
Service General Counsel Office, we have been informed that it might be possible for federal agencies to provide medical assistance in a follow-up research program or to provide a free medical examination for purposes of preparing for litigation. Further inquiries along this line should be addressed either to the Secretary of the Department of Health, Education, and Welfare or to the Surgeon General. Informal inquiries might be made to Mr. Sidney Edelman, Assistant General Counsel for Public Health.

violation of law, cannot be regarded as divesting the CIA of authority to act in this area. Even if the drug-testing were illegal, the institution of remedial action "related to" such activity cannot itself be illegal or unauthorized. A primary purpose of the Executive order is to ensure adherence to the law, and to say that the CIA is precluded from taking corrective action on testing that may be unlawful would stand that purpose on its head.

Nor do we believe that any of the applicable restrictions on the CIA's authority lead to a contrary result. A notification process, first, would not appear to come within the statutory prohibition "the Agency shall have no police, subpoena, law-enforcement powers, or internal security functions." 50 U.S.C. § 403(d)(3). While such a process may involve an inquiry into the affairs of the MKULTRA subjects, that inquiry, as described above, will of necessity be a limited and circumscribed one. It is difficult to see how such a narrow approach, for the sole purpose of notifying those whose rights may have been violated or whose health may have been impaired, could be construed as an attempt to assume "police or law-enforcement powers" or to engage in "internal security functions."

The decision in Weissman v. Central Intelligence Agency, 565 F.2d 692 (D.C. Cir. 1977) does not undermine this conclusion. As we indicated in our previous opinions to you on this matter, that decision does not prohibit every sort of investigation of Americans by the CIA. Rather, the decision focuses on intrusive investigations of those who have no connection with the CIA. These underlying concerns are simply not present in the investigation contemplated here. The inquiry is to be a limited one and will be concerned only with aiding those who have had some connection with the CIA's MKULTRA program, albeit perhaps unwittingly. More importantly, the inquiry will not be conducted covertly.

Nor would the limitations imposed by Executive Order 12036 preclude the CIA from partaking in a notification program. The limitation most applicable here is section 2-208, which forbids any intelligence agency to "collect, disseminate, or store information concerning the activities of United States persons that is not available publicly," except in cases of consent or in cases allowed by established procedures. While the literal language of this provision

might apply to some of the activities inherent in a notification process, we do not believe that this provision was designed to preclude the activities here. As is evident from the overall caption to section 2 ("Restrictions on Intelligence Activities"), the purposes set forth in section 2-101 (relating to the gathering of foreign intelligence information), the foreign intelligence agencies to whom section 2-208 applies, and the exceptions to section 2-208, the provision is directed at precluding intelligence activities directed at United States persons. As such, it should not be deemed to apply to an activity directed exclusively at redressing possible violations of law or rectifying the continuing adverse effects of past actions.

Conclusion

We recognize that, because of the legal problems and other considerations discussed above, any effort at notification may be largely unproductive. However, we cannot know whether this is in fact the case until the CIA at least initiates the process. We therefore recommend that the CIA begin this process, and carry it out as far as the law and a concern for the subjects' privacy will allow. If the legal restrictions turn out in fact to preclude an effective notification program, it will then be necessary to re-examine our alternatives, which might possibly include legislation to correct whatever legal impediments are found to exist.

We believe that this letter responds to the questions of law set forth in your request. If any such questions remain unanswered, or if this letter raises additional questions, we will be happy to advise you on these matters as they arise.

John M. Harmon

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

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CONFIDENTIAL
28 July 1977

MEMORANDUM FOR: Anthony A. Lapham

25X1 [redacted]

25X1 FROM : [redacted]
Office of General Counsel

SUBJECT : MKULTRA - Extent and Nature of Institutional Involvement

Attached for your consideration is a roughly prioritized listing of MKULTRA subprojects. The identities of institutions, or individuals where appropriate, which the recently discovered Agency records indicate were entangled in various broad categories of MKULTRA activities are grouped by project number in six categories ranging downward from "Human Drug Testing Definite - Unwitting" to "Human Drug Testing Implied - Volunteers," with additional categories for "Human Involvement Likely - Non-Drug Related," "Apparent Non-Human Research," and "Other" activities. The appropriate institution or individual is identified after each project number, along with the name of the principal researcher(s) in parentheses, the time span, and the approximate amount of money expended. Certain projects appear in more than one category due to indications that more than one type of activity was involved. Where any doubt existed, projects have been placed in the highest category possible given the nature of the research described, the nature of other activities in which the researcher was involved, and the amount of money expended during the project.

25X1 [redacted]

Attachment

[redacted] 25X1

Next 12 Page(s) In Document Exempt

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Extract from the Staff Meeting Minutes of 19 July 1978:

Lapham noted receipt last night of an opinion from the Department of Justice on the question of whether the Agency can and must identify, locate and notify victims of MKULTRA. The Director made a commitment to do so during public testimony last summer. The opinion, which has wide-ranging implications for all government agencies, states that it is the Agency's duty to so notify the victims. The Agency could ask another agency to do this for us, but it is unlikely that one would do so. Mr. Carlucci said that a precedent exists at HEW and Lapham might look into whether or not HEW would be willing to locate these people for us. Lapham explained that the Agency has no records of who was involved, and if any do exist they would be at the institutions where these experiments were carried out. The Agency will therefore need to enlist the help of these institutions, which would expose them to possible liabilities. The Agency would also have to reveal for the first time the names of researchers who conducted these experiments. Lapham said that he would forward a memorandum to the Deputy Director and Director summarizing the decision and the problems it presents. He noted that years of litigation are likely.

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