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OGC 75-1937
16 May 1975

MEMORANDUM FOR: Acting General Counsel

SUBJECT: Draft Memorandum Entitled CIA Surveillance
Activities Within the United States

REFERENCE: Memo for Gen. Counsel, fm IG, dtd 15 May 75, same
subj.

1. In the referent memorandum the Inspector General expresses reservations on the proposed paper to the DCI entitled CIA Surveillance Activities Within the United States (hereinafter referred to as the DRAFT). This memorandum addresses the IG's comments.

2. The IG objects to use of the word "consensual" in the definition of consensual monitoring at para. 2b of the DRAFT. In his opinion the word "consensual" implies agreement of all the parties to a conversation.

a. As defined in the DRAFT, "consensual monitoring," requires the consent of only one of the parties. If all parties had to agree to the monitoring, there would not be a surveillance.

b. The word "consensual" (or consensus for that matter) does not mean total agreement or agreement by all. In the case of consensual monitoring the agreement is between one of the parties to the conversation and the person doing the monitoring.

c. The overhearing or recording of an oral or wire communication by, or with the consent of, one of the parties thereto is specifically recognized and not prohibited by 18 U.S.C. § 2511(2)(c) and (d).

d. The IG's proposal to substitute "electronic monitoring" for consensual monitoring would eliminate "eavesdropping" or overhearing by other than electronic devices.

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3. The IG believes that subparagraphs 2c(1) and (2) of the DRAFT are redundant of the covering paragraph 2c. This is not so.

a. Paragraph 2c defines electronic surveillance and cites the legal authorities which permit it.

b. Subparagraph 2c(1) states that electronic surveillance not conducted pursuant to the authorities of paragraph 2c is a crime.

c. Subparagraph 2c(2) outlines how warrantless electronic surveillance may be approved and states that any requests by CIA to the FBI for such surveillance require the approval of the DCI.

d. The discussion in 2c(1) and (2) was included in their present detail at the request of the IG's representative on the working group that drafted the paper.

4. The IG's comment in paragraph 1c of the referent memo is not clear. It objects to para. 3 of the DRAFT "because of its attempt to be all inclusive [sic] and detail things in a manner that is lacking in clarity...." Paragraph 3 sets forth justification under the Agency's charter for use of physical surveillance and consensual monitoring. The working group, with the full participation of the IG representative, deliberately attempted to list all possible justifications. However, this must be done in general terms of what is recognized (or argued) to be permissible under the charter. It was not intended to list every specific factual situation in which surveillance would be justified.

5. The IG suggests that a limitation of 24 hours on surveillance necessary to establish the identity of individuals discovered during an authorized surveillance is arbitrary. It is that, but without it, what guidance is there on the point? Can surveillance to establish identity continue for an indefinite period? The limitation provides an answer. It does not require surveillance for 24 hours but rather establishes a maximum period for surveillance when an individual's identity is not sooner determined. Without some limitation there is room for misinterpretation or abuse. If there is disagreement over the length of time which should be allowed, that is a different question.

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6. The IG feels that para. 4d, which provides for oral approval of the DCI in cases where operational requirements or exigent circumstances preclude written request, is inappropriate and restrictive. Perhaps another official should be designated to grant this type of request when the DCI cannot be reached. However, total elimination of prior approval by some official detached from the requesting officer's potential bias in favor of surveillance would seem to completely disregard the concept of centralized control of this activity and lead to abuse through colored, after-the-fact judgments. In addition, elimination of the requirement for oral approval by someone in these cases is uncoshmetic.

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Assistant General Counsel

cc: IG
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