

IMPROPER SURVEILLANCE OF PRIVATE CITIZENS BY THE MILITARY

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IMPROPER SURVEILLANCE OF PRIVATE CITIZENS BY THE MILITARY

I. INTRODUCTION AND SUMMARY

The Department of Defense maintains agents and investigators abroad and within the United States to gather foreign intelligence and to perform a variety of investigative tasks.¹ This report describes how these agents and investigators have been used in the past to gather information on the political beliefs and activities of "private citizens"² in violation of their rights or in violation of the legal and traditional restraints which separate the military and civilian realms. It does not cover the monitoring of international communications by the National Security Agency.³

A. Traditional and Legal Restraints

The authors of the American Constitution sought to establish and preserve a clear separation of the military from the civilian realms. An express provision of this effect was suggested by one of the delegates to the Constitutional Convention,⁴ but it was not included in the final version since the Founders considered separation assured by other provisions, such as those which made the Armed Forces subordinate to a popularly-elected President,⁵ and left it to a popularly-elected legislature to "raise and support" them.⁶ As James Madison later wrote: "The Union itself, which [the proposed Constitution] cements and secures, destroys every pretext for a military establishment which could be dangerous."⁷

¹ Within the United States, the Select Committee estimates that there are approximately 5000 DOD personnel involved in the conduct of security clearance, criminal, and counterintelligence investigations. For a discussion of the organization and activities of DOD foreign intelligence and investigative elements, see the Select Committee's Foreign and Military Intelligence Report, Department of Defense, pp. 355-359.

² The term "private citizen," as used in this report, refers to persons and groups of persons, who are neither military nor civilian employees of the Department of Defense, nor employees of civilian contractors of the Department of Defense. How the constitutional rights of this special group of citizens are infringed by the intelligence activities of the Department is, however, a matter deserving of congressional attention and the Select Committee, by this omission, does not intend to discourage such an inquiry in the future.

³ The use of military personnel to monitor international communications to obtain information on civilians and civilian organizations is discussed in the Select Committee's Report on National Security Agency Surveillance Affecting Americans.

⁴ Recommendation of Charles Pickney, submitted August 20, 1787, printed in *The Records of the Federal Convention of 1787*, ed. by Max Farrand (New Haven: Yale University Press, 1966), Vol. 2, p. 340.

⁵ Article II, Section 2, Constitution of the United States.

⁶ Article I, Section (12), Constitution of the United States.

⁷ James Madison, No. 41, *Federalist Papers* (New York: Mentor Books, 1961), p. 258.

The Bill of Rights to the Constitution, adopted in 1791, established additional restraints applicable to all government authority, including the military, by forbidding any exercise of governmental power which infringes upon certain rights of the people,⁸ among them, the right to privacy and the rights to freedom of speech, of the press, of religion, of association, and the right to petition the government.⁹

Despite the separation of the military and civilian realms secured by the Constitution and the guarantee of personal liberties found in the Bill of Rights, Congress has enacted no statute which expressly provides how the military may be used in the civilian community, or more specifically, whether it is prohibited from investigating private citizens and private organizations. Congress did enact the *Posse Comitatus Act* in 1878¹⁰ which forbade using the Army to "execute the law," but this was done to prevent federal marshals from commandeering military troops to help enforce the law, and not to prohibit investigations of civilians by the military.¹¹ Apart from the *Posse Comitatus Act*, only the Privacy Act of 1974¹² appears to serve as a restraint upon military investigators, but even the impact of this statute is uncertain.¹³ It prohibits all federal agencies, including the military, from maintaining records which reflect "how any individual exercises rights guaranteed by the First Amendment."¹⁴ While the Act does not prohibit investigations *per se*, its proscription against maintaining records may, as a practical matter, inhibit them.

This report describes certain past investigative activities of the military which may have exceeded these limitations. It also identifies instances in which military investigators may have violated specific statutes because of the tactics employed in investigations of civilians. It does not attempt to evaluate the foreign intelligence and other investigative activities of the Department of Defense in terms of their efficiency or usefulness.

B. Summary of Improper Surveillance Activities

After conducting an investigation of both the foreign and domestic intelligence and investigative activities of the Department of Defense, the Committee identified four types of surveillance, or investigative activity, which have involved the collection of information on the activities of private citizens and private organizations and which may have violated the traditional and legal restraints mentioned above: (1) the collection of information on the political activities of private citizens and private organizations in the late 1960s; (2) monitoring of domestic radio transmissions; (3) investigations of private organizations which the military considered "threats"; and (4) assistance to other agencies engaged in surveillance of civilian political activities. In each case, the Committee attempted to focus upon those activities which are improper in themselves, and those which are improper because it is the military which is engaging in them.

⁸ Amendments I-X, Constitution of the United States.

⁹ Amendment I, Constitution of the United States.

¹⁰ 18 U.S.C. 1385.

¹¹ For a brief history of the *Posse Comitatus Act*, see Edward S. Corwin, *The President: Office and Powers 1787-1957* (New York: New York University Press, 1957), pp. 130-138. See also the discussion at pp. 822-823.

¹² Pub. L. 93-579.

¹³ The application of the Privacy Act of 1974 is discussed in detail at pp. 833-834.

¹⁴ 5 U.S.C. 552a (e) (7).

1. *Collecting Information about the Political Activities of Private Citizens and Private Organizations in the Late 1960s.*—The President is authorized by statute to use the militia (the National Guard), the Armed Forces, or both, to “suppress” domestic violence.¹⁵ Prior to the 1960s, the President’s exercise of this authority had been relatively infrequent.

In the early 1960s, however, the Army and National Guard were called upon with increasing frequency to control civil rights demonstrations, prompting the Army to prepare for possible future disturbances and to begin systematic collection of information concerning civilians and organizations who might be involved.

Initially the Army relied, for the most part, on obtaining information from local police authorities, the FBI, and the news media, rather than assigning its own personnel to investigate. However, as the frequency and severity of urban riots and antiwar demonstrations grew in the late 1960s, the Justice Department and the White House pressed the Army to obtain information on individuals and groups, and the Army’s response was to direct its investigators to report on civilian political activities throughout the country.

Elaborate collection plans were issued, calling for the collection of information on the most trivial of political dissent within the United States.¹⁶ As part of this collection program, massive operations were undertaken by Army intelligence agents to penetrate major protest demonstrations. In addition, political dissent was routinely investigated and reported on in virtually every city within the United States. These reports were circulated, moreover, to law enforcement agencies at all levels of Government, and to other agencies with internal security responsibility. In all, an estimated 100,000 individuals were the subjects of Army surveillance. The number of organizations which were the subjects of an Army file was similarly large, encompassing “virtually every group engaged in dissent in the United States.”¹⁷

Techniques employed to carry out this surveillance included the covert infiltration of private organizations by military agents at demonstrations and meetings; Army agents posing as newsmen; covert photography; and use of civilian informants.

The Department of Defense ended the nationwide collection program as a matter of policy in 1971, after the program had been exposed in the press, and on the eve of a congressional investigation.

2. *Monitoring Private Radio Transmissions in the United States.*—Section 605 of the Communications Act of 1934 prohibits anyone from intercepting and publishing the content of a private radio transmission. Despite this statutory prohibition the Army Security Agency, primarily a foreign intelligence-gathering agency, moni-

¹⁵ 10 U.S.C. 331–334.

¹⁶ One of these plans called for “the identification of all personalities involved, or expected to become involved, in protest activities.” It furthermore tasked military investigators to provide “details concerning the transportation arrangements” of such individuals as well as “details concerning (their) housing facilities.” United States Army Intelligence Command Collection Plan, April 23, 1969.

¹⁷ Testimony of Ralph Stein, former Army intelligence analyst, Senate Judiciary Subcommittee on Constitutional Rights Hearings, “Federal Data Banks, Computers, and the Bill of Rights,” p. 264. See footnote 21, p. 792.

tored and recorded domestic radio transmissions of U.S. citizens on six occasions in the late 1960s.

Some of the radio monitoring was done during demonstrations or urban riots where Army troops had been committed. On occasion, it was undertaken in advance of, or in the absence of, any troop commitment.

After its radio monitoring activity had begun, the Army sought approval from the Federal Communications Commission. The FCC, after receiving an opinion from the Attorney General, advised the Army that such monitoring was illegal. Nevertheless, the Army continued its domestic radio monitoring without informing the FCC until 1970, when the Department of Defense ordered the Army to discontinue such monitoring.

3. *Investigations of Private Organizations Considered "Threats" by the Military.*—Although they are not expressly authorized by law, each of the military services investigates civilian groups, both within and without the United States, which it considers "threats" to its personnel, installations, and operations.

In the late 1960s all of the services were engaged in monitoring civilian antimilitary groups within the United States. This activity was conducted concurrently with the civil disturbance collection effort described above and continued after it stopped. Most of the information gathered about these antimilitary groups was collected from law enforcement agencies and the news media, but the services also quite commonly inserted their own undercover agents and informants into the groups.

Penetrations of groups which are hostile, or might be hostile, to the military continues today in the United States, although it has been greatly reduced. Overseas, military intelligence is more active, largely because it does not have civilian law enforcement agencies to rely upon.

In West Germany and West Berlin, the Army has actively conducted surveillance of activities of American citizens and groups of American citizens whom it considered "threats" since World War II. Until 1968, the authority to target such individuals and groups for surveillance rested solely with the commanders of occupying Army forces, and authorized techniques included opening mail, wiretaps, and covert penetrations. In 1968, the West German Government placed restrictions on the use of mail opening and wiretaps, and forbade the Army from employing such techniques any longer. The use of covert penetrations, however, was not affected by the new restrictions and continued to be employed. Furthermore, the new restrictions did not apply to West Berlin, where an Army commander governs the American sector of the city as part of a special tripartite agreement with the British and French. Here, mail opening and wiretaps continued to be employed after 1968 against Americans and groups of Americans considered to be "threats" to the military without the Army's having to obtain the approval of the West German Government.

In Japan, the Navy has carried out similar operations in three cities against groups of American civilians thought to pose "threats" to the Navy, employing covert penetrations and informants, but not mail opening or wiretapping.

“Threat” investigations are still conducted at present, but under internal controls of the Department of Defense.

4. *Assisting Law Enforcement Agencies in Surveilling Private Citizens and Organizations.*—The *Posse Comitatus Act* (18 U.S.C. 1385) prohibits the military from “executing the law.”¹⁸ Nevertheless, military intelligence has frequently provided assistance to civilian law enforcement agencies. In Chicago during the late 1960s, military intelligence agents turned over their files on civilians and civilian organizations to the Chicago police, were invited to participate in police raids, and routinely exchanged intelligence reports with the police. In Washington, D.C. Army intelligence participated in an FBI raid in a civilian rooming house and provided funds for the police department’s intelligence division.

The military was also called upon by the Justice Department to assist in analyzing intelligence information received during the 1972 national political conventions. Further, it joined other intelligence agencies in drafting the so-called Huston Plan in 1970, and later participated in the Intelligence Evaluation Committee, an interdepartmental committee established by the Justice Department to analyze domestic intelligence information.^{18a}

C. *Effect of 1971 Departmental Directive*

In March 1971, during congressional hearings on the Army’s civil disturbance collection program, the Department of Defense announced the issuance of a new directive to govern the collection and retention of information by the military on “unaffiliated” persons and organizations.¹⁹

In general, the new directive prohibited, as a matter of policy, the collection of any information whatsoever on “unaffiliated” persons and organizations, except for limited “military” purposes. It also established the policy that any information which was collected by the military would be obtained through liaison with law enforcement agencies rather than through military operatives. Finally, it required the destruction of all current holdings of the department which were found to violate the provisions of the directive.

This directive is discussed later in this report as it bears on issues regarding possible legislative restraints upon future investigative activities of the department.²⁰ But an awareness of its existence and a general understanding of its impact is crucial to the case studies which follow.

D. *Issues Presented*

Each of the four types of activity summarized above involve investigations by military intelligence of the political activities of private citizens, and thus, to the extent they survive today, threaten to violate the traditional and legal restraints which govern the use of military forces in the civilian community. This situation gives rise to two major ques-

¹⁸ The *Posse Comitatus Act* originally applied only to the “Army.” It was later amended to include the Air Force, and has been interpreted by the Department of Defense as applying to all the military services.

^{18a} See the Committee Report, “National Security, Civil Liberties, and the Collection of Intelligence: A Report on the Huston Plan.”

¹⁹ DOD Directive 5200.27.

²⁰ See pp. 825–833.

tions: First, should these activities in the civilian community be permitted at all? If so, should they be restrained to prevent their overstepping traditional and legal bounds? Second, are the present DOD directives sufficient for the task? Should Congress enact new legislation?

Beyond these basic questions is the matter of what the restraints which govern these activities should be:

(1) Should the military be prohibited from collecting or maintaining any information regarding "private citizens?" If not, where should the line between permissible and impermissible information be drawn?

(2) Should the military be prohibited from using its own operatives to collect information in the civilian community? Are there collection techniques that might be authorized for some federal agencies (e.g., wiretaps) that should be denied to the military?

Finally, there are issues of oversight and control:

(1) Should there be a special mechanism established to control and oversee activities by the military within the civilian community?

(2) How should congressional oversight of this area be achieved?

E. Conduct and Scope of Investigation

The Committee's inquiry, as summarized above, is divided into four parts. One recognizes at the outset that the first of these—the Army's domestic surveillance program of the late 1960s—has heretofore been the subject of a congressional investigation.²¹ The Select Committee determined, however, that it could not ignore this largest of military intelligence abuses, even though its inquiry must necessarily overlap the previous investigation in some respects. The Army program of the late 1960s, besides being the worst intrusion that military intelligence has ever made into the civilian community, resulted in new departmental restrictions being drawn, and other intelligence activities against American citizens being curtailed or eliminated. Thus, current use of military intelligence agents in the civilian community can not be fully understood without some knowledge of the Army program and how it was curtailed.

The Select Committee inquiry does go well beyond the earlier inquiries. In particular, it represents the first attempt to analyze the origins and termination of the Army program. The Committee had access to former Army intelligence officers, who were not permitted to testify in the earlier investigations, and it had access to documents not previously available to Congress.

²¹ The Senate Judiciary Subcommittee on Constitutional Rights, chaired by Senator Sam J. Ervin, Jr., held two series of hearings and published two committee reports on the subject of military surveillance of civilians: 1) "Federal Data Banks, Computers and the Bill of Rights," Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 92nd Cong., 1st Sess. (1971) (cited hereinafter as *1971 Hearings*); 2) "Military Surveillance," Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, 93rd Cong., 2d Sess., (1974) (cited hereinafter as *1974 Hearings*); 3) "Army Surveillance of Civilians: A Documentary Analysis," A Staff Report of the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 92nd Cong., 1st Sess., (1972) (cited hereinafter as *1972 Report*); and 4) "Military Surveillance of Civilian Politics," A Report of the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess., (1973) (cited hereinafter as *1973 Report*).

After initial briefings from pertinent elements within the Department of Defense, the Committee staff interviewed 35 past and present employees of the Department, and 13 other individuals regarding some aspect of this inquiry.

The investigation generally covered the period from 1967 through 1975, although some events of prior years are described to provide historical background.

F. Organization of Report

Parts II through V of the following Report describe in detail the activities which have been summarized above. In Parts VI and VII, the issues posed above are considered. The effect of recent Departmental restrictions and the effect of the Privacy Act of 1974 are given particular consideration.

II. THE COLLECTION OF INFORMATION ABOUT THE POLITICAL ACTIVITIES OF PRIVATE CITIZENS AND PRIVATE ORGANIZATIONS: 1963-1970

A. Legal Authorities

There is no statute which authorizes military intelligence to collect information on the political activities of private citizens and private organizations, but the Army claimed in 1971 that it needed such information in the late 1960s to enable it to prepare for situations in which it was called upon to put down civil disturbances.²²

Article IV, Section 4 of the United States Constitution provides that "the United States shall . . . protect each [State] . . . against domestic violence."

Congress first passed a statute to implement this constitutional provision in 1795,²³ and, although amended, its provisions remain virtually intact today.²⁴ In essence, the President is authorized to use the militia of any state, or the Armed Forces, or both, to "suppress insurrection."²⁵

The President has occasionally exercised this authority and called out the National Guard or the Armed Forces to put down unrest or enforce the law where such enforcement proves to be beyond the capability of civil authorities. According to a 1922 study by the War Department, the President exercised this authority thirty times between 1795 and 1922.²⁶ In recent times, while commitment of federal troops in the civilian community has been more frequent,²⁸ an extraordinary exercise of executive authority.²⁸

There is no explicit authority in sections 331-334 of title 10, United States Code, for the National Guard, or the Armed Forces, to make any "preparations" for future deployments upon order of the President. In 1971, however, the Department of Defense argued before

²² Testimony of Robert F. Froehlke, Assistant Secretary of Defense (Administration), *1971 Hearings*, p. 376.

²³ 1 Stat. 424 (1795).

²⁴ 10 U.S.C. 331-334.

²⁵ 10 U.S.C. 331.

²⁶ Results of this study were quoted in the testimony of Robert F. Froehlke, *1971 Hearings*, pp. 376-377.

²⁷ Froehlke, *1971 Hearings*, pp. 377-378.

²⁸ DOD General Counsel J. Fred Buzhardt told Senator Ervin that only "drastic circumstances" necessitate the deployment of federal troops. See *1971 Hearings*, p. 412.

Congress that such authority could be implied, and would justify the collection of information on persons and organizations in the civilian community :

In order to carry out the President's order (under the statute) and protect the persons and property in an area of civil disturbance with the greatest effectiveness, military commanders must know all that can be learned about the area and its inhabitants. Such a task obviously cannot be performed between the time the President issues his order and the time the military is expected to be on the scene. Information gathering on persons or incidents which may give rise to a civil disturbance and thus commitment of Federal troops must necessarily be on a continuing basis. Such is required by sections 331, 332, and 333 of title 10 of the United States Code, since Congress certainly did not intend that the President utilize an ineffective Federal force.²⁹

The Senate Subcommittee on Constitutional Rights subsequently rejected this assertion, however, stating that it was "unwilling to imply the authority to conduct political surveillance of civilians from the role assigned by statute to the military in the event of civil disturbance."³⁰ It cited the traditional separation of the military and civilian realms as a reason for refusing to imply such authority,³¹ and it questioned the use of military rather than civilian authorities to gather information about pending civil disturbances.³² Finally, it observed that even if the military had implied authority to collect *some* information on areas of potential civil disturbance, this authority did not include the collection of information on how citizens exercise their First Amendment rights.³³

B. Origins and Development of the Army's Domestic Surveillance Program

Army intelligence began collecting information on private citizens and organizations in the early 1960s as part of furnishing information to military commanders whose units were dispatched to control racial situations in the South. In the late 1960s, however, as the volume of civil disturbance and protest demonstrations grew, the Army came under increasing pressure from civilian authorities to provide information on persons and organizations involved in domestic dissent. It responded by sending over 1200 of its investigators into civilian communities to report on all vestiges of political activity.

(1) *Limited Beginnings*.—Despite the lack of clear legal authority to "prepare" for deployments in civil disturbance situations, the Army in the early 1960s initiated formal efforts to plan for its troops being committed in future civil disturbances. Prompted by a rash of troop commitments to control racial situations and enforce court orders in

²⁹ Froehke, *1971 Hearings*, pp. 384-385.

³⁰ *1973 Report*, p. 106.

³¹ *Ibid.*

³² *Ibid.*, p. 108.

³³ *Ibid.*, p. 109.

the South,³⁴ the Joint Chiefs of Staff in 1963 designated the Chief of Staff of the Army as its "Executive Agent" for civil disturbance matters, and the Continental Army Command was made responsible for the selection and deployment of Army troops in such situations.³⁵ Formal contingency plans were drawn.

It was at this time that Army intelligence began collecting information on individuals and organizations, without any express authorization, as part of its overall mission to support military commanders with information regarding possible deployments in civil disturbances.³⁶ The Army's collection, however, was ordinarily confined during this period to those areas where civil disturbances were likely or had already taken place, and information on civilians was ordinarily obtained through liaison with law enforcement and use of public media.³⁷ Any covert use of military intelligence agents within the civilian community still had to have the approval of the Department of the Army.³⁸

In the following three years, the number of riots and disorders within the United States increased dramatically. In 1965, there were four major riots, including Watts, California; in 1966, there were 21 major riots and disorders; and in 1967, there were 83.³⁹ These had necessitated the deployment of National Guard forces 36 times during this period.⁴⁰

The Army, while being deployed only once during the period,⁴¹ was nevertheless affected by events. Frequently, Army troops had been alerted, and occasionally, they had been "pre-positioned" in the event they were called upon.⁴² Army intelligence stepped up its own collection efforts in support of military commanders still relied, for the most part, on their contacts with local police and the public media.⁴³ Army investigators in the United States were still spending most of their time doing security clearance investigations for Army employees.⁴⁴

(2) *The Army's Involvement Intensifies.*—In 1967, the character of the investigative program began to change. In July of that year, the Army was placed on alert for riot duty in Newark, New Jersey, and later in the month was actually deployed for eight days in Detroit, Michigan.⁴⁵ It was the most extensive use of Army troops since 1962.

³⁴ In 1957, federal forces were used in connection with the integration of Central High School in Little Rock, Arkansas. In 1962, 20,000 Army troops were sent to Oxford, Mississippi, in connection with the integration of the University of Mississippi. In 1963, federal troops were dispatched to Tuscaloosa and Huntsville, Alabama, to enforce federal court orders. See *1971 Hearings*, pp. 377, 1291.

³⁵ Froehlke, *1971 Hearings*, p. 377.

³⁶ *Ibid.*, p. 381. This information was also confirmed by former Army Chief of Staff, General Harold K. Johnson. Staff summary of Gen. Harold K. Johnson interview, 11/18/75.

³⁷ Froehlke, *1971 Hearings*, p. 381.

³⁸ *Ibid.*

³⁹ *Ibid.*, p. 377.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, p. 378.

⁴² In early 1965, the Army Intelligence Command was apparently preparing a daily civil disturbance intelligence summary. The Secretary of the Army ordered it discontinued in September 1965, however. Froehlke, *1971 Hearings*, p. 832.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 378.

In the post-mortems which followed the Detroit riots, the lack of adequate intelligence prior to moving into the city was a sore point. But the focus of the criticism was the lack of "physical intelligence" about the area in which troops were being committed. Cyrus Vance, sent by the President to make an after-action assessment, specifically cited the need for this type of information:

In order to overcome the initial unfamiliarity of the Federal troops with the area of operations, it would be desirable if the several continental armies were tasked with reconnoitering the major cities of the United States in which it appears possible that riots may occur. Folders could then be prepared for those cities listing bivouac areas and possible headquarters locations, and providing police data, and other information needed to make an intelligence assessment of the optimum employment of federal troops when committed.⁴⁶

The Army reacted to Vance's recommendation by appointing a special task force in the fall of 1967 to study the civil disturbance situation and make recommendations as to what its role should be.⁴⁷

In the meantime, the Army was preparing for a unique sort of civil disorder, one announced in advance and directed against the military establishment. The so-called March on the Pentagon was scheduled for late October 1967.

For the first time in its history,⁴⁸ the Army authorized a massive covert intelligence operation to be undertaken in connection with a civilian demonstration. In all, 130 Army intelligence agents were used in connection with the demonstration.⁴⁹ Some were used to penetrate protest groups coming to Washington: some were used to penetrate the groups in Washington who were planning the March; and still others were used to penetrate and report on the line of march.⁵⁰ Army agents, moreover, took still and motion pictures of the crowds, and secretly monitored amateur radio bands to learn of the demonstrators' plans.⁵¹

Even after this large covert operation, the Army apparently was still relying primarily on civilian authorities and the media for information on civilian "dissenters."⁵² In a memorandum to the Undersecretary of the Army from the Army Assistant Chief of Staff for Intelligence in late 1967, the Under Secretary was told:

Army intelligence is not engaged in any concerted investigative effort to determine the routes of domestic discontent or

⁴⁶ Final Report of Cyrus R. Vance, Special Assistant to the Secretary of Defense, Concerning the Detroit Riots, July 23 through August 2, 1967; Department of Defense Press Release No. 856-67, 9/12/67, p. 51.

⁴⁷ Froehle, *1971 Hearings*, p. 379.

⁴⁸ See Memorandum, Department of Army, "U.S. Army Intelligence Role in Civil Disturbances," *1971 Hearings*, p. 1292.

⁴⁹ Froehle, *1971 Hearings*, p. 440.

⁵⁰ *Ibid.*, p. 378.

⁵¹ *Ibid.* See pp. 808-809.

⁵² It should be noted that Army Assistant Chief of Staff for Intelligence, Major General William Yarborough, in October 1967 requested that the National Security Agency provide the Army with any information it might have, or obtain, regarding the foreign connections of domestic political groups. See Select Committee report "National Security Agency Surveillance Affecting Americans."

the channels it will follow. The quantity and quality of third agency reports is sufficient to allow proper and timely analysis of the domestic situation so that commanders in the field will be properly informed at all times.⁵³

But if the Army had refrained from widespread use of its own operatives, it was nonetheless increasingly relied on by the White House and the Justice Department to provide information on civil unrest. In a meeting at the White House on January 10, 1968, for example, Attorney General Ramsey Clark told those present⁵⁴ that "every resource" must be used in the domestic intelligence effort and he criticized the Army for not being more selective in the reports that it was sending to the Justice Department.⁵⁵ According to former Army Chief of Staff Harold K. Johnson, this was but one of several meetings at the White House where the Army was urged to take a greater role in the civil disturbance collection effort.⁵⁶

The Army was looked to, first, because it had approximately 1200 agents scattered across the country who were young and could easily mix with dissident young groups of all races.⁵⁷ Second, the Army was virtually the only agency apart from the FBI which had an independent teletype network nationwide which could be used to transmit data on civil unrest.⁵⁸ The FBI had such a network but it was used for other purposes, and could not handle the voluminous amount of data generated by civilian political protests.

The pressure on the Army to produce information was rapidly mounting in the winter of 1967, and it began to have its effect. The Army task force, appointed to study the Army's role in civil disturbances, recommended among other things, that "continuous counterintelligence investigations are required to obtain factual information on the participation of subversive personalities, groups or organizations and their influence on urban populations to cause civil disturbances."⁵⁹ It also recommended that the Army develop new criteria to apply to the collection of domestic intelligence which would "serve to indicate potential areas of civil disturbance."⁶⁰

Chief of Staff Harold K. Johnson approved these recommendations in late November 1967, and directed that a plan be prepared

⁵³ Quoted in Memorandum for Record from Army General Counsel Robert E. Jordan III, for the Under Secretary of the Army, undated, 1974 *Hearings*, p. 288.

⁵⁴ Attending the meeting were White House aides Joseph Califano and Matthew Nimitz, Deputy Secretary of Defense Paul Nitze, Deputy Attorney General Warren Christopher, and Army General Counsel Robert Jordan.

⁵⁵ Memorandum for the Under Secretary of the Army, Subject: Civil Disturbance Planning Meeting in Mr. Califano's Office, 1/10/68.

⁵⁶ Johnson (staff summary), 11/18/75.

⁵⁷ See staff summary of General William Blakefield interview, 7/11/75; staff summary of General William Yarborough (ret.) interview, 7/18/75; staff summary of Col. Arthur Halligan (ret.) interview, 7/15/75; staff summary of Col. Millard Daughtery interview, 11/20/75; staff summary of General Harold K. Johnson interview, 11/18/75.

⁵⁸ *Ibid.*

⁵⁹ Memorandum from Army General Counsel Robert E. Jordan III, for the Secretary of the Army. Subject: Review of Civil Disturbance Intelligence History, undated, 1974 *Hearings*, p. 289. The term "subversive" was not defined.

⁶⁰ *Ibid.*

formally directing the Army to collect civil disturbance information on a nationwide scale.⁶¹

C. The Army's Domestic Surveillance Program

The collection requirements were set out in an annex to the Department of Army Civil Disturbance Plan, promulgated on February 1, 1968.⁶² The plan identified as "dissident elements" the "civil rights movement" and the "anti-Vietnam/anti-draft movements," and stated that they were "supporting the stated objectives of foreign elements which are detrimental to the USA."⁶³ It furthermore directed Army commands to provide information on the "cause of civil disturbance and names of instigators and group participants," as well as information on the "patterns, techniques, and capabilities of subversive elements in cover and deception efforts in civil disturbance situations."⁶⁴ The terms "civil disturbance," "instigators," "group participants," and "subversive elements" were not defined.

While this new collection plan was being implemented across the country, the Army was in the midst of planning its second concerted domestic operation in preparation for a civilian demonstration—the so-called Washington Spring Project. Martin Luther King, Jr. had announced his intention of bringing the nation's poor to Washington in April 1968 in a massive protest demonstration. Antiwar groups had also indicated their intent to use the occasion to protest the war.

The Washington Spring Project did not proceed as scheduled, however, because Dr. King was assassinated in Memphis on April 4th. Extensive rioting broke out in numerous cities across the country causing simultaneous commitments of Army troops in Washington, D.C., Baltimore, and Chicago. Other Army troops were placed on alert in Pittsburgh and Kansas City.⁶⁵

This had never happened before, and it had a profound effect upon the Pentagon. In a meeting with the Secretary of Defense on April 10, 1968, it was agreed that the Army would set up a permanent "task force" to plan for civil disturbances, and that it would operate upon the theory that the Army may have to deploy as many as 10,000 soldiers in 25 cities simultaneously.⁶⁶

Three days later, the Under Secretary of the Army directed the Chief of Staff to establish the Directorate of Civil Disturbance Planning and Operations (DCDPO) which he instructed to "maintain an around-the-clock civil disturbance operations center to monitor incipient and on-going disorders . . . and develop intelligence reporting procedures to provide information on civil disturbances occurring or imminent."⁶⁷

⁶¹ See Memorandum for Record from Milton B. Hyman, Office of the General Counsel, to the Army General Counsel. Subject: Army Civil Disturbance Intelligence Activities, 1/23/71, *1974 Hearings*, p. 302.

⁶² *1971 Hearings*, pp. 1119-1122.

⁶³ *Ibid.*, pp. 1120-1121.

⁶⁴ *Ibid.*, pp. 1121-1122.

⁶⁵ *New York Times*, 4/9/68, p. 36.

⁶⁶ Memorandum for Record from Secretary, General Staff, MG Elias C. Townsend. Subject: Debrief of SECDEF Meeting, 1100 hrs., 4/10/68, *1971 Hearings*, pp. 1281-1282.

⁶⁷ Memorandum from David E. McGiffert, Under Secretary of the Army, for the Chief of Staff, U.S. Army, Subject: Civil Disturbances, 4/13/68, *1971 Hearings*, pp. 1283-1284.

Two other changes were brought on by the King assassination riots. The Secretary of the Army was formally designated Executive Agent for the DOD on civil disturbance matters,⁶⁸ and it was decided that the intelligence requirements of the Army Civil Disturbance Plan of February 1 were inadequate for the Army's purposes.

A new, more detailed, collective plan, classified CONFIDENTIAL, was thus issued on May 2, 1968.⁶⁹ The new plan expanded the criteria to be used for collecting information and directed that information on political activities be gathered in cities where there was a "potential" for civil disorder.⁷⁰ Former Assistant Secretary of Defense Froehlke told the Ervin subcommittee that demands of the collection plan for information were sweeping:

The requirements of the plan were both comprehensive and detailed, and, in the light of experience, substantially beyond the capability of military intelligence to collect. They reflected the all-encompassing and uninhibited demand for information directed at the Department of Army. . . . So comprehensive were the requirements levied in the civil disturbance information collection plan that any category of information related even remotely to people or organizations active in a community in which the potential for a riot or disorder was present, would fall within their scope. Information was sought on organizations by name or by general characterization. Requirements for information were even levied which required collection on activities and potential activities of the public media, including newspapers and television and radio stations.⁷¹

The May 2nd Collection Plan was distributed to the White House, the Department of Justice, the Federal Bureau of Investigation, and the Department of Defense, among others.⁷² While it is not clear whether officials in any of these agencies actually read the plan, it is clear that they had begun to press the Army by this time for information on individuals and organizations involved in domestic dissent.⁷³ While the Army was routinely disseminating its intelligence reports to the FBI, it also frequently received verbal tasking from high-ranking officials on the outside for information on particular incidents or individuals.⁷⁴ Their demands were insistent, and were conveyed down the Army chain of command with a similar degree of intensity.⁷⁵

According to former Army intelligence officials, this led to a situation where restraints on collection in the civilian community were ignored.⁷⁶ Lower-ranking intelligence officers considered the fact that

⁶⁸ DOD Directive 3025.12, 6/8/68, *1971 Hearings*, p. 1272.

⁶⁹ *1971 Hearings*, pp. 1123-1138.

⁷⁰ *1971 Hearings*, pp. 1123-1138.

⁷¹ Froehlke testimony, *1971 Hearings*, p. 384.

⁷² *1971 Hearings*, p. 1137.

⁷³ Froehlke testimony, *1971 Hearings*, p. 388. This statement was also confirmed in the staff interviews with General Harold K. Johnson; Gen. William Blakefield; MG William Yarborough (ret.), Robert E. Jordan III; Col. Arthur Halligan (ret.), and Col. Millard Daugherty (ret.)

⁷⁴ *Ibid.*

⁷⁵ Blakefield (staff summary), 7/11/75; Halligan (staff summary), 7/15/75; Daugherty (staff summary), 11/20/75.

⁷⁶ *Ibid.*

demands were coming from their superiors as sufficient authority to obtain it by whatever means necessary.⁷⁷ Secondly, it led Army intelligence agents in the field to collect as much information as possible so they would not be caught short when demands for timely and comprehensive information came down through channels.⁷⁸

Thus, there developed, as former Assistant Secretary of Defense Robert Froehlke described it, "a practical inconsistency between the level of demand for information imposed and the methods of collection authorized."⁷⁹

Army agents were dispersed into civilian communities across the country and tasked to report on any vestige of political dissent.

D. Questionable Activities on the Part of Army Agents

About 1500 Army intelligence agents were engaged in monitoring civilian protests in 1968.⁸⁰ These agents routinely monitored civilian political activities in the communities to which they were assigned, and occasionally were used as part of concerted intelligence operations undertaken by the Army during the major political protests of the late 1960s. The following discussion thus encompasses activities undertaken both under "routine" circumstances and during major protest demonstrations.

(1) *The Covert Penetration of Civilian Groups.*—Army agents covertly penetrated the organizational structure of civilian political groups, attended their meetings, and participated in their private and public activities. They also were inserted into public demonstrations of all dimensions. A sampling of these activities follows:

—Army agents penetrated the Poor Peoples' March to Washington in April, 1968, as well as the subsequent encampment which became known as "Resurrection City,"⁸¹

—Army agents were also inserted into groups coming from Seattle, Washington to the Poor Peoples' Campaign;⁸²

—Army agents infiltrated the National Mobilization Committee;⁸³

—The Army monitored protests of a welfare mothers organization in Milwaukee, Wisconsin;⁸⁴

—Army agents infiltrated a coalition of church youth groups in Colorado Springs, Colorado;⁸⁵

—Army agents were routinely used to penetrate antiwar groups in Chicago;⁸⁶

⁷⁷ *Ibid.* Retired intelligence Colonel Millard F. Daugherty pointed out that the approval authority for operations in the civilian community was usually the same authority making demands for information. Daugherty (staff summary), 11/20/75.

⁷⁸ *Ibid.*

⁷⁹ Froehlke, 1971 *Hearings*, p. 388.

⁸⁰ See 1973 *Report*, p. 10.

⁸¹ Ralph M. Stein, former Army agent, testimony, 1971 *Hearings*, p. 253; Christopher H. Pyle testimony, 1971 *Hearings*, p. 185.

⁸² Department of Army Memorandum, "U.S. Army Intelligence Role in Civil Disturbances," 1971 *Hearings*, p. 1293.

⁸³ Pyle, 1971 *Hearings*, p. 201.

⁸⁴ Stein, 1971 *Hearings*, p. 273.

⁸⁵ Oliver A. Pierce testimony, 1971 *Hearings*, p. 306.

⁸⁶ John O'Brien, former Army intelligence agent, testimony, 1971, *Hearings*, p. 101.

—Army agents attended a Halloween party for elementary school children in Washington, D.C., where they suspected a local “dissident” might be present;⁸⁷

—Army agents posed as students to monitor classes in “Black Studies” at New York University, where James Farmer, former head of the Congress on Racial Equality, was teaching;⁸⁸

—58 Army agents were inserted into the demonstrations which took place in Chicago during the Democratic National Convention of 1968;⁸⁹

—Army agents attended the October 1969 and November 1969 Moratorium marches in various locations around the country;⁹⁰

—Army agents attended a conference of priests in Washington, D.C., which had convened to discuss birth control measures;⁹¹

—Army agents were routinely assigned to cover speeches made at the major universities in New York City from 1968 to 1970;⁹²

—Army agents attended meetings of a sanitation workers’ union in Atlanta, Georgia, in 1968;⁹³

—An Army agent infiltrated the Southern Christian Leadership Conference in 1968;⁹⁴

—Army agents infiltrated a Yippie commune in Washington, D.C., prior to the 1969 Inauguration;⁹⁵

—Army agents attended an antiwar vigil at the Chapel of Colorado State University;⁹⁶

—Army agents monitored the weekend activities of college fraternities in White, South Dakota, which allegedly had been responsible for previous damage to town property;⁹⁷

—An Army agent attended an antiwar meeting at St. Thomas Episcopal Church in Washington, D.C.;⁹⁸ and

—107 Army agents monitored the protest activities surrounding the Presidential inauguration in Washington, in January 1969.⁹⁹

(2) *Posing as Newsmen/Covert Photography.*—Army intelligence agents frequently posed as newsmen in order to photograph and interview “dissident” personalities. Photographing participants in political activities itself became a widely used intelligence technique.

During the Democratic National Convention of 1968, the Army, for the first time, sent undercover agents, disguised as television news reporters from a nonexistent television news company, to videotape interviews with leaders of the demonstrations.¹⁰⁰ This technique was

⁸⁷ Quentin L. Burgess, former Army intelligence agent, testimony, 1971 Hearings, p. 285.

⁸⁸ Joseph J. Levin, Jr., former Army intelligence agent, testimony, 1971 Hearings, p. 290.

⁸⁹ Froehлке, 1971 Hearings, p. 440.

⁹⁰ Pyle, 1971 Hearings, pp. 204-205; Peirce, 1971 Hearings, p. 305.

⁹¹ Burgess, 1971 Hearings, p. 286.

⁹² Levin, 1971 Hearings, p. 293.

⁹³ Stein, 1971 Hearings, p. 274.

⁹⁴ *Ibid.*

⁹⁵ Pyle, 1971 Hearings, p. 201.

⁹⁶ Laurence F. Lane, former Army intelligence agent, testimony, 1971 Hearings, p. 314.

⁹⁷ Stein, 1971 Hearings, p. 255.

⁹⁸ Burgess, 1971 Hearings, p. 285.

⁹⁹ Froehлке, 1971 Hearings, p. 440.

¹⁰⁰ Froehлке, 1971 Hearings, p. 387. See also, Pyle, 1971 Hearings, p. 154.

repeated during subsequent demonstrations in Atlanta, Washington, D.C., San Francisco, and Baltimore.¹⁰¹

A representative of the Reporter's Committee on Freedom of the Press also stated in congressional testimony that Army agents, posing as newsmen, interviewed H. Rap Brown and Stokely Carmichael in New York in 1967; interviewed staff of the Southern Christian Leadership Conference in 1968; and covered the 1969 Inaugural parade.¹⁰²

The Army began using photographers to take still and motion pictures of the participants in political demonstrations in 1967 during the March on the Pentagon.¹⁰³ This rapidly became an accepted collection technique for Army agents across the country.¹⁰⁴

(3) *Harassment/Disruptive Conduct.*—Army agents generally refrained from aggressive activities against civilian protestors, but occasionally they engaged in conduct designed to harass or confuse such groups. Typically, this sort of activity was carried out at the "grass roots" level by lower-level military intelligence agents, who neither sought nor received authorization for such activity. The Committee found no evidence of any concerted program of harassment, analogous to the COINTELPRO operations of the FBI.¹⁰⁵ Nonetheless, some of the techniques employed by Army agents were similar.

A former intelligence agent stated that he had posed as a bus driver during a demonstration in Chicago, collected the bus tickets of departing demonstrators, and then sent them off to find a nonexistent bus.¹⁰⁶ This same agent also recalled having posed as a parade marshal during the 1969 Inaugural, and, as such, provided misinformation to demonstrators.¹⁰⁷

Another recalled making harassing telephone calls and sending orders of fried chicken to the offices of the Chicago 7 defense team.¹⁰⁸ Another admitted having torn notices of rallies and demonstrations from school bulletin boards,¹⁰⁹ and still another recalled agents having heckled speakers in order to cause a disruption.¹¹⁰

Another former agent stated in a newspaper account that he was given blank postcards which had been confiscated by the FBI from the headquarters of a protest group in Washington, D.C. The cards were to be sent in by Washington residents who were willing to house demonstrators during the inaugural demonstrations. The agent stated

¹⁰¹ Lane, *1971 Hearings*, p. 314.

¹⁰² Fred P. Graham, testimony, "Freedom of the Press," *Hearings before the Subcommittee on Constitutional Rights*, Committee on the Judiciary, United States Senate, 92nd Cong., 1st Sess. (1971), p. 260.

¹⁰³ Memorandum, Department of Army, "U.S. Army Intelligence Role in Civil Disturbances," *1971 Hearings*, p. 1292.

¹⁰⁴ Pyle, *1971 Hearings*, p. 155 (photographing demonstrations at the University of Minnesota); O'Brien, *1971 Hearings*, p. 113 (photographing dissidents in Chicago); Stein, *1971 Hearings*, p. 273 (photographing demonstrators in Seattle); Peirce, *1971 Hearings*, p. 307 (photographing demonstrators in Colorado Springs).

¹⁰⁵ For a full description of the FBI's COINTELPRO operations, see the Select Committee report on this subject.

¹⁰⁶ Richard Norusis, former Army intelligence agent, testimony, 6/23/75.

¹⁰⁷ *Ibid.*

¹⁰⁸ O'Brien testimony, *1971 Hearings*, p. 114. Also, "Government Spied On Chicago 7; U.S. Attempts in '69, '70 Told," *Chicago Tribune*, 11/13/73.

¹⁰⁹ Statement of Conner Henry, former Army intelligence agent.

¹¹⁰ Statement of former Army intelligence agent, Casper, Wyoming, Field Office of the 113th Military Intelligence Group (anonymous), in files of Select Committee.

that he filled out the cards with the names of fictitious persons and sent them in.¹¹¹

The Select Committee also investigated the relationship of military intelligence with a right-wing terrorist group in Chicago known as the Legion of Justice. Former members of the terrorist group told the Committee that from 1968 until 1970 "military intelligence" had directed and helped finance their activities against left-wing groups in Chicago.¹¹² They also alleged that the Army had supplied tear gas, grenades, and bugging devices to be used against left-wing groups.¹¹³ Finally, they suggested that Army intelligence had received a film and various documents stolen by the Legion from left-wing organizations.¹¹⁴

The Committee's investigation did not substantiate any of these allegations.¹¹⁵ It did, however, show that Army intelligence agents had been in contact with the leader of the Legion on several occasions in regard to obtaining information on left-wing groups.¹¹⁶ Army agents insisted, however, that they did not realize that their source was a leader of the terrorist group, nor that the information he was offering the Army had been stolen.¹¹⁷

(4) *Maintenance of Files on Private Citizens and Private Organizations.*—All of the information collected by Army agents on civilian political activity was stored in "scores"¹¹⁸ of data banks throughout the United States, some of which the Army had computerized.¹¹⁹ The reports were routinely fed to the FBI, the Navy, and the Air Force, and were occasionally circulated to the Central Intelligence Agency and the Defense Intelligence Agency.¹²⁰

In all, the Army probably maintained files on at least 100,000 Americans from 1967 until 1970.¹²¹ Among them were: Dr. Martin Luther King, Jr., Whitney Young, Julius Hobson, Julian Bond, Arlo Guthrie, Joan Baez, Major General Edwin Walker, Jesse Jackson, Walter Fauntroy, Dr. Benjamin Spock, Rev. William Sloane Coffin, Congressman Abner Mikva, Senator Adlai Stevenson III,¹²² as well as

¹¹¹ See "Break-In by FBI Alleged Before 1969 Inauguration," *New York Times*, 5/31/73, pp. 1, 6; "FBI Was Given Key for Search in 1969," *New York Times*, 6/1/73, p. 14.

The Select Committee was unable to locate the source of this news report; however, FBI records made available to the Committee indicate that such searches were made in the Washington D.C. area in advance of the presidential inauguration.

¹¹² Staff summaries of Stephen Sedlacko and Tom Stewart interviews, 5/28/75.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ The allegations that Army intelligence furnished the Legion with bugging devices and tear gas grenades appears improbable since these items were not in the inventory of Army intelligence units. Approval of fund expenditures also had to come from intelligence group headquarters, and there were no records of such expenditures being approved. The remainder of the allegations were not supported by testimony received from Army witnesses.

¹¹⁶ Richard Norusis, 6/23/75; Thomas Filkins testimony, 10/21/75; and Robert Liesik, 6/27/75, former members of the 113th Military Intelligence Group.

¹¹⁷ Norusis, 6/23/75, and Filkins, 10/21/75.

¹¹⁸ 1973 Report, p. 4.

¹¹⁹ The Army maintained computerized files at Fort Holabird, Fort Monroe, Fort Hood, and the Pentagon. See 1973 Report, pp. 59-83.

¹²⁰ Froehlke, 1971 Hearings, p. 423.

¹²¹ 1972 Report, p. 57.

¹²² Stein, 1971 Hearings, p. 266.

"clergymen, teachers, journalists, editors, attorneys, industrialists, a laborer, a construction worker, railroad engineers, a postal clerk, a taxi driver, a chiropractor, a doctor, a chemist, an economist, a historian, a playwright, an accountant an entertainer, professors, a radio announcer, business executives, and authors"¹²³ who became subjects of Army files simply because of their participation in political protests of one sort or another.

In addition, one witness told the Ervin subcommittee that "it was no exaggeration to state that (the Army's files) covered virtually every group engaged in dissent in the United States."¹²⁴ Cited as examples were the American Civil Liberties Union, the National Association for the Advancement of Colored People, the Ku Klux Klan, the Congress on Racial Equality, the Urban League, the Women's Strike for Peace, the American Friends Service Committee, the Citizen's Coordinating Committee for Civil Liberties, the Southern Christian Leadership Conference *Ramparts*, *The National Review*, Anti-Defamation League of B'nai B'rith, National Committee for a Sane Nuclear Policy, the John Birch Society, Young Americans for Freedom, Clergy and Laymen Concerned About the War, Business Executives Move to End the War in Vietnam, and the National Organization for Women, among others.¹²⁵

E. Termination of the Army's Civil Disturbance Collection Program

The Army did not decide to terminate its domestic collection program until the summer of 1970, after it had been exposed in the press and Congress had announced its intentions to investigate. There had, nevertheless, been reservations within the Army regarding the scope of its domestic effort as early as the fall of 1968.

The first indication that anyone at the Department of Defense had qualms about the Army's domestic program came in September 1968, when Deputy Secretary of Defense Paul Nitze disapproved an Army request for 167 additional spaces for Army intelligence agents citing "reservations regarding the extent of Army involvement in domestic intelligence activities."¹²⁶

Three months later Army Under Secretary David McGiffert also expressed concern that the Army's domestic collection program might not be "worth the effort," and expressed his desire that the "civil disturbance collection effort be more sharply focused on essential requirements and the mission be more precisely delineated."¹²⁷

This concern apparently led McGiffert in February 1969 to attempt to curtail the Army's program. In a memorandum to the Vice Chief of Staff, he expressed concern that the Army was, in furtherance of the civil disturbance mission, collecting detailed information on persons, organizations, and movements. Citing expediency rather than principle, he stated that "our limited assets should not be expended in developing such detailed information on these matters as part of the

¹²³ 1973 Report, p. 57.

¹²⁴ Stein, 1971 Hearings, p. 264.

¹²⁵ *Ibid.*

¹²⁶ Quoted in Memorandum from Army General Counsel Robert E. Jordan, for the Secretary of the Army. Subject: Review of Civil Disturbance Intelligence History, 1974 Hearings, p. 293. (Cited hereinafter as Jordan memo).

¹²⁷ Froehke, 1971 Hearings, p. 393.

process of assigning priorities to particular metropolitan areas.”¹²⁸ He expressed the opinion that such information, to the extent it was necessary, could be gathered from civilian law enforcement agencies. The memorandum also required that he be apprised on a quarterly basis of all covert and overt collection activities.

The Under Secretary's memorandum met with stiff resistance from the Army staff and was not fully implemented.¹²⁹ The Under Secretary did not press his demands, in part because he was about to leave, and in part because the Army General Counsel had initiated negotiations with the Department of Justice to reach an agreement which would relieve the Army of its domestic intelligence-gathering role.¹³⁰ However, the agreement which eventually resulted from these discussions—the Interdepartmental Action Plan on Civil Disturbances—left the domestic role of Army intelligence as ambiguous as before.¹³¹ Nevertheless, the initiative of the General Counsel had served to forestall the implementation of McGiffert's memorandum until his successor had taken office, and could be prevailed upon to continue the Army's collection activities.

McGiffert's successor, Thaddeus R. Beal, did nonetheless retain the requirement that the Army's collection activities be reported to him on a quarterly basis. In the first of these reports, filed on April 15, 1969, the Army indicated that 35 percent of its 3219 intelligence reports were based on operations conducted by Army agents.¹³² This figure caused some alarm at the Department of Army level,¹³³ but did not engender any formal attempts to limit such operations.

It was only in January 1970, when a former Army intelligence officer, Christopher H. Pyle, wrote an article for the *Washington Monthly* exposing the extent of the Army's domestic program, that serious efforts to curb the Army's domestic activities were undertaken.¹³⁴ Pyle's article drew substantial attention in the press, and two congressional committees in the spring of 1970 announced their intentions to hold hearings on the matter.¹³⁵

In response to the growing public pressure, the Army on June 9, 1970, rescinded its May 2, 1968 collection plan and issued an order stating that:

Under no circumstances will the Army acquire, report, process, or store civil disturbance information on civilian individuals or organizations whose activities cannot, in a rea-

¹²⁸ Memorandum from David E. McGiffert, Under Secretary of the Army, for the Vice Chief of Staff, Subject: Army Intelligence Mission and Requirements Related to Civil Disturbances, 2/5/69, *1971 Hearings*, p. 1139.

¹²⁹ See Memorandum from the DCDPO to the Army General Counsel, Subject: Army Intelligence Mission and Requirements Related to Civil Disturbances, 3/4/69, *1971 Hearings*, pp. 1289-1292.

¹³⁰ Jordan memo, *1974 Hearings*, p. 296.

¹³¹ The final version of the plan stated that "raw intelligence data pertaining to civil disturbances will be acquired from such sources of the Government as may be available." See *1974 Hearings*, pp. 346-353.

¹³² Jordan memo, *1974 Hearings*, p. 298.

¹³³ *Ibid.*

¹³⁴ Christopher H. Pyle, "CONUS Intelligence: The Army Watches Civilian Politics," *Washington Monthly* (January 1970), pp. 4-16.

¹³⁵ Senate Subcommittee on Constitutional Rights and the House Armed Services Committee.

sonably direct manner, be related to a distinct threat of civil disturbance exceeding the law enforcement capabilities of local and State authorities.¹³⁶

The matter did not end there, however. Congressional hearings were still in the offing,¹³⁷ and in December, NBC News reported that the Army had had files on Illinois Senator Adlai Stevenson, III and Congressman Abner Mikva.¹³⁸

These disclosures brought on renewed criticism which led Secretary of Defense Melvin R. Laird on December 23, 1970, to direct that new regulations be proposed which would ensure that "these [intelligence activities] be conducted in a manner which recognizes and preserves individual human rights."¹³⁹

On March 1, 1971, the day the Senate was to begin hearings on the Army surveillance program, DOD formally issued the new regulation called for by Secretary Laird.¹⁴⁰ The new directive in general prohibited military personnel from collecting information on "unaffiliated" persons and organizations, except where "essential" to the military mission. It also required that all information which violated the new directive, and was currently being held by the military, must be destroyed. While as a practical matter implementation of the directive did not occur immediately,¹⁴¹ the Army's nationwide collection effort against civilians had officially come to an end.

III. MONITORING PRIVATE RADIO TRANSMISSIONS IN THE UNITED STATES: 1967-1970

During the late 1960s, when the Army was being called upon to control civil disturbances, an element of the Army, the Army Security Agency (ASA), normally used to intercept international communications for foreign intelligence purposes, was used to monitor radio transmissions in the United States. At times it was authorized not only to monitor radio transmission, but to "jam" radio broadcasts or transmit false information over the air, if such techniques were thought necessary.

At first, ASA conducted its monitoring activity in support of Army troops committed in civil disturbances. Later, however, ASA moni-

¹³⁶ Letter from Robert E. Lynch, Acting Adjutant General of the Army, to subordinate commands, Subject: Collection, Reporting, Processing, and Storage of Civil Disturbance Information, 6/9/70, *1971 Hearings*, pp. 1099-1102.

¹³⁷ Although the House committee had conducted its own investigation, it had decided against holding public hearings. The Senate subcommittee, while cancelling hearings scheduled for October 1970, announced its intention of scheduling them in early 1971.

¹³⁸ NBC News, First Tuesday, 12/1/70.

¹³⁹ *1971 Hearings*, p. 1299.

¹⁴⁰ DOD Directive 5200.27, dated March 1, 1971, Subject: The Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense. The provisions of this directive are discussed in detail at pp. 825-833.

¹⁴¹ Several penetrations of civilian groups, begun before the directive, continued after it was issued, on the grounds that exceptions would later be sought under the terms of the directive. Also, it required months for the Army and other services to dispose of old files being held in violation of the directive.

tored radio communications in situations where Army troops had not been deployed, and were not expected to be. Indeed, on two occasions, ASA ordered its units, in violation of standing instructions, to conduct general searches of the radio spectrum without regard to the source or subject matter of the transmissions. ASA did not report these incidents to the Army, even when specifically asked to do so as part of the Army's preparations for the Ervin subcommittee hearings in 1971.

In this report, the domestic use of the Army Security Agency is treated separately from the Army's civil disturbance collection program for several reasons. First, ASA is an agency whose primary mission is to gather foreign intelligence. In this respect, it differs from the other Army collectors in the field in the late 1960s, who were there primarily to conduct security clearance investigations. Second, ASA has unique capabilities for surveillance that other Army investigators do not possess. The fact that these capabilities were turned inward upon private citizens is uniquely ominous. Finally, this type of surveillance activity is bound by particular legal restraints which do not apply to other types of investigative activity.

A. Legal Authorities and Restrictions

(1) *Mission of the Army Security Agency.*—ASA carries out communications intercepts for both national and tactical intelligence purposes.¹⁴² It also develops techniques of electronic warfare—"jamming" and "deceptive transmitting"—to support tactical Army operations.¹⁴³

While it does maintain operational units within the United States—in both mobile and fixed-station configurations—the domestic mission of these units is limited primarily to support of Army training exercises and to determine the vulnerability of Army tactical communications to interception by hostile intelligence agents.¹⁴⁴

(2) *Section 605 of the 1934 Communications Act Prohibits Monitoring.*—Section 605 of the 1934 Communications Act provides, in pertinent part:

No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.¹⁴⁵

The statute thus makes the interception *and* publication of radio transmissions a crime. While anyone with the appropriate radio receiver may intercept the radio communication of another, Congress has decided that the interceptor must not publish it. The law thus assures persons using radios to communicate that their transmissions will not be intercepted and divulged.

B. Origins of Domestic Radio Monitoring by ASA

Prior to 1963, there had been no explicit Army policy which had either authorized or prohibited domestic use of the ASA. In 1963, however, the Army was forced to decide the issue when it received

¹⁴² Army Regulation 10-22(C).

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ 47 U.S.C. 605.

requests for ASA support from two Army task forces assigned to deal with civil disturbances brewing in Alabama and Mississippi. The commander of one of these task forces requested on June 7, 1963, that ASA units be used to monitor police, taxi, amateur, and citizens band radio, and that ASA be authorized to "jam" transmissions emanating from a Ku Klux Klan net in Tuscaloosa, Alabama, if such action were found desirable.¹⁴⁶

But the Department of Army said "no." In a message to the task force commander, it prohibited the domestic use of ASA resources:

United States Army Security Agency organizations or elements thereof are prohibited from engaging in USASA-type operational roles (e.g., monitoring or jamming of civil and amateur telecommunications) in support of U.S. Army forces committed to maintain or enforce law and order during civil disturbances and disorders within the states and territories of the United States of America.¹⁴⁷

This policy remained in effect for the next four years, until the pressure of events caused the Army to reverse its position.

C. Domestic Radio Monitoring by ASA: 1967-1970

(1) *The March on the Pentagon.*—In October 1967, preparations were underway for the so-called March on the Pentagon, scheduled for late in the month. As part of this planning, a "high level" decision was made in the Army to allow ASA units to support Army units which would be used to control the demonstration.¹⁴⁸ Accordingly, on October 14, 1967, a message went from the Army to ASA expressly rescinding the 1963 ban, and directing that ASA participate in "Task Force Washington," the Army force created to handle the demonstration.¹⁴⁹ The Army directed not only that ASA monitor civilian communications during the March, but that it have the capability to "jam" radio transmissions and to undertake "deceptive transmitting," in the event that either became necessary.¹⁵⁰

¹⁴⁶ Message from Commanding General, Third Army, to the Commanding General, Continental Army Command, 6/7/63.

¹⁴⁷ Message from the Department of Army to subordinate commands, 6/11/67, Subject: Monitoring Civil and Amateur Telecommunications during Civil Disturbances in U.S.

¹⁴⁸ None of the documents examined by the staff identified the particular individual who approved the ASA deployment in connection with the March on the Pentagon. In a report made by the Army Inspector General to the Secretary of the Army, 1/3/72, Subject: Report of Investigation into the Failure to Provide Mr. Froehke with Full and Accurate Information Prior to his Appearance Before the Ervin Subcommittee, the Inspector General simply refers to this decision as having been made "at a high level." (p. 25.)

This investigation of the Army Inspector General was undertaken because ASA had failed to provide Assistant Secretary of Defense Robert F. Froehke, the DOD witness at the Ervin subcommittee hearings, with information regarding its orders, issued without Army approval, to conduct general searches of the radio spectrum in connection with the Republican National Convention of 1968 and the Huey Newton trial in September 1968. See pp. 812-813.

¹⁴⁹ Message from the Department of Army to the Army Security Agency, 10/14/67, Subject: Use of ASA's Resources in Civil Disturbances.

¹⁵⁰ *Ibid.*

According to an after-action report later filed by ASA after the March, this was the first time that ASA resources had ever been used in support of the Army domestically.¹⁵¹

During the weekend of the March, ASA units monitored citizens band, police band, taxi band, and amateur radio bands from a total of 36 listening posts.¹⁵² Twenty-three of these were located at the Pentagon; nine at ASA headquarters in Arlington, Virginia; and four at an ASA fixed station facility near Warrenton, Virginia.¹⁵³ The after-action report of ASA also recites the fact that while it did have the capability to "jam" and undertake "deceptive transmitting" during the March, none was actually carried out.¹⁵⁴

Despite its participation in the "March," ASA's potential usefulness in civil disorders was not widely recognized, even in the Army. The Army's Civil Disturbance Collection Plan of February 1, 1968, contained no mention of ASA's role in such activities. Moreover, the message of October 14, 1967, which had rescinded the 1963 ban, had been sent only to ASA.¹⁵⁵ Presumably, the rest of the Army was not on official notice of ASA's potential support capability.

On March 31, 1968, official notice was provided in a classified message sent to all domestic commands of the Army.¹⁵⁶ The message stated that ASA would participate in the Army's Civil Disturbance Collection Plan and could be used to monitor domestic communications and conduct jamming and deception in support of Army forces committed in civil disorders and disturbances. All such operations were required to have the approval of the Army Chief of Staff. It also provided that ASA personnel were to be "disguised" either in civilian clothes or as members of other military units. None were permitted to be used as liaison with civilian authorities. The 1963 ban was expressly rescinded.

(2) *The King Assassination Riots.*—Four days after the message was sent authorizing use of ASA units in civil disturbances, Dr. Martin Luther King, Jr. was assassinated in Memphis, and rioting erupted in Washington, D.C. On April 5, even though Army forces had not officially been brought on the scene, ASA units were directed by the Army to begin monitoring civilian radio transmissions as part of the riot control operation.¹⁵⁷ They were instructed to report directly to the Army Operations Center until an Army Task Force had been officially committed. On April 9, in anticipation of further demonstrations in Atlanta, the site of the King funeral, ASA elements were again requested to conduct radio monitoring operations, in advance of any troop commitment.¹⁵⁸

¹⁵¹ Annex A (Intelligence Summary) to USASA Task Force Washington After Action Report, Army Security Agency, 1/5/68, p. 4.

¹⁵² Letter from Col. Robert R. Brust, Chief of Staff, Army Security Agency, to Robert E. Jordan, III, Army General Counsel, Subject: Radio Monitoring Activity, 12/15/70 (cited hereinafter as Brust Letter).

¹⁵³ Memorandum from John D. Kelley, Office of the Deputy Chief of Staff, Security, to the Army Chief of Staff, Subject: ASA Radio Monitoring, 2/3/71, in Select Committee files. (Cited hereinafter as Kelley memorandum).

¹⁵⁴ 47 U.S.C. 605.

¹⁵⁵ See footnote 149.

¹⁵⁶ Department of Army message to subordinate commands, 3/31/68, Subject: Use of USASA Resources in Civil Disturbances.

¹⁵⁷ Department of Army message to ASA, 4/5/68, Subject: Use of Resources.

¹⁵⁸ Department of Army message to ASA, 4/9/68.

In all, the monitoring lasted from April 5 until April 17, 1968. ASA units at the Arlington, Virginia, headquarters, at the Treasury Building in Washington, and at a fixed station facility near Warrenton, Virginia, participated in the Washington area monitoring.¹⁵⁹ ASA units at Fort McPherson, Georgia, performed similar tasks for the Atlanta area. Citizens band, police band, taxi band, military band, and amateur bands were monitored.¹⁶⁰ On April 23, after the monitoring had ceased, ASA sent a message to the National Security Agency, informing it that ASA had participated in the domestic operations surrounding the King death. The message further advised: "Similar tasking by DA expected in future whenever Federal troops committed in civil disturbance operations."¹⁶¹ This is the only indication found by the Committee staff that NSA had ever been officially apprised of the domestic activities of ASA.

After the King funeral, on April 29, 1968, persons from the Office of the Army Assistant Chief of Staff for Intelligence met with representatives of the FCC for the purpose of obtaining the FCC's approval of future Army monitoring broadcasts during civil disturbances.¹⁶²

The FCC asked that the Army put its request in writing.¹⁶³

(3) *The Poor People's Campaign in Washington, D.C.*—Despite its failure to achieve any immediate approval from the FCC, the Army proceeded with plans to monitor civilian radio communications as part of its surveillance of the Poor People's March and Campaign in Washington, D.C. ASA began radio monitoring on May 8, 1968, although no formal authorization of these activities appears to have come from the Army until May 21, 1968.¹⁶⁴ In any case, some form of radio monitoring took place from May 8 until June 26, 1968.¹⁶⁵ Two mobile vans were located for this purpose at the 13th Police Precinct in Washington.¹⁶⁶ Other locations included ASA headquarters, the Treasury Building, and (from June 6 until June 26) the ASA fixed station facility near Warrenton, Virginia.¹⁶⁷

It was not until after the Poor People's Campaign that the Army renewed its initiative to the FCC in a June 25, 1968, letter from Acting Assistant Chief of Staff MG Wesley Franklin to Rosel Hyde, the FCC Chairman.¹⁶⁸ The letter suggested, first of all, that the FCC itself monitor civilian radio broadcasts in these situations to obtain information useful to the Army. Alternatively, it was suggested that the Army be allowed to monitor on its own.

¹⁵⁹ Kelley memorandum, 2/3/71.

¹⁶⁰ Brust letter, 12/15/70.

¹⁶¹ Army Security Agency message to the National Security Agency, 4/23/68, Subject: Civil Disturbance Tasking.

¹⁶² See Memorandum for Record, Army Assistant Chief of Staff for Intelligence, 6/10/68, Subject: Possible Violations of Federal Communications Act in Connection with Civil Disturbances.

¹⁶³ *Ibid.*

¹⁶⁴ Department of Army message to ASA, 5/21/68, Subject: USASA Support to DA OPLAN Washington Spring Project.

¹⁶⁵ Brust letter, 12/15/70.

¹⁶⁶ Kelley memorandum, 2/3/71.

¹⁶⁷ *Ibid.*

¹⁶⁸ Letter from MG Wesley C. Franklin, Acting Assistant Chief of Staff for Intelligence, Department of Army, to Rosel H. Hyde, Chairman, Federal Communications Commission, 6/25/68.

The FCC referred the Army's letter to the Department of Justice for a legal opinion.¹⁶⁹ However, by August 6, when the Republican National Convention opened in Miami Beach, the FCC had taken no formal action.

(4) *The National Political Conventions of 1968.*—Senior officers at ASA were unaware of the initiative to the FCC being taken by the Army Assistant Chief of Staff for Intelligence.¹⁷⁰ Thus, the fact that the FCC was preparing a response to the Army's query with respect to its domestic radio monitoring had no bearing on ASA deciding, on its own, to resume radio monitoring in connection with the Republican National Convention in Miami Beach.

On August 6, 1968, without the required approval of the Army Chief of Staff, ASA ordered its fixed stations in Virginia and Florida to begin general searches of the amateur radio bands to determine if there were dissident elements which were planning to disrupt the GOP Convention.¹⁷¹ It ordered the monitoring to continue through August 10.¹⁷²

ASA had no reports from its fixed stations regarding the convention, and thus cannot state with certainty that such monitoring was, in fact, carried out.¹⁷³ The incident is significant, however, because (1) it illustrates that such monitoring could be ordered, and was ordered, without the required clearance of the Department of Army;¹⁷⁴ and (2) it involved "general searches"—scanning of incoming radio signals without regard for their source or subject matter.

In any case, while the Miami Beach convention had occasioned relatively little disruption, Army intelligence predicted that the forthcoming Democratic National Convention, scheduled to begin on August 22 in Chicago, would occasion violent confrontations between protestors and civilian authorities.

Prompted by fears that Army troops might have to be committed, and that the Army Security Agency might once again be deployed, representatives of the Army Assistant Chief of Staff for Intelligence again pressed the FCC for a response to the earlier inquiry regarding domestic radio monitoring. At a meeting held on August 15, 1968, the FCC gave its reply: such monitoring would be illegal under section 605 of the Communications Act of 1934.¹⁷⁵ FCC representatives told the Army that the matter had been brought up with the Attorney General and that he had disapproved the Army request.¹⁷⁶ The FCC agreed, however, to submit a written reply to the Army stating that

¹⁶⁹ Staff summary of Hilbert Slosberg, former Deputy General Counsel, Federal Communications Commission, interview, 6/17/75.

¹⁷⁰ Staff summary of MG Charles Denholm (ret.) interview, 6/16/75; and staff summary of Col. John J. McFadden, ASA, interview 8/23/75.

¹⁷¹ Message from ASA to selected field stations, 8/6/68. Subject: Tasking in Support of DA Civil Disturbance Operations.

¹⁷² *Ibid.*

¹⁷³ See footnote 148.

¹⁷⁴ The Department of the Army did not learn of the incident until February 1971. (Kelley memorandum, 2/3/71.)

¹⁷⁵ Memorandum for Record, Army Assistant Chief of Staff for Intelligence, 8/16/68, Subject: Possible Violations of Federal Communications Act in Connection with Civil Disturbances. For provisions of section 605 see page 807.

¹⁷⁶ This was confirmed by Sol Lindenbaum, Executive Assistant to the Attorney General. Staff summary of Sol Lindenbaum interview, p. 11.

it could not "provide a positive answer" to the Army's proposal, rather than a letter which branded the proposal as "illegal."¹⁷⁷

The FCC's formal reply to the Army was sent on August 19, 1968.¹⁷⁸ By this time however, the pressures on the Department of Army to authorize deployments of ASA in Chicago had grown. On August 12, 1968, the ASA had itself requested Army approval to send radio monitoring teams to Chicago.¹⁷⁹ This was followed by a request from the Army Commander at Fort Sheridan, on the outskirts of Chicago, asking for ASA support.¹⁸⁰ He anticipated his own troops being called upon.

Thus, on August 21, in obvious disregard of the FCC's opinion that civil disturbance radio monitoring by the Army would be illegal, the Army ordered ASA to send monitoring teams to Chicago from Fort Hood, Texas, and Fort Bragg, North Carolina.¹⁸¹ These teams were positioned at three locations in the downtown area and, while no Army troops were actually called out during the demonstrations, these teams did monitor citizens, police, and commercial bands from August 22 to August 31.¹⁸²

(5) *The Huey Newton Trial*.—Less than two weeks after the close of the Democratic Convention in Chicago, Black Panther leader Huey Newton was brought to trial in Alameda, California. Again ASA, without the approval of the Army Chief of Staff, ordered as required by the message of March 31, 1968 its fixed stations near Warrenton, Virginia, and Monterrey, California, to monitor domestic radio communications to determine if there were any groups around the country which might be planning demonstrations in support of Newton.¹⁸³ The order, in this case, called for a "general search" of all amateur radio bands from September 6 through September 10, 1968.¹⁸⁴ This meant that ASA elements were given free reign to listen in on radio transmissions across the country, without regard to point of origin or subject matter.

¹⁷⁷ Army ACSI Memorandum for the Record, 8/16/68.

¹⁷⁸ Letter from Max D. Paglin, Executive Director, FCC, to Major General Wesley C. Franklin, Deputy Chief of Staff for Intelligence, 8/19/68.

¹⁷⁹ Message from ASA to Department of Army, 8/12/68, Subject: Force Generation and Closure Times.

¹⁸⁰ Message from Fifth Army to the Continental Army Command, 8/16/68, Subject: USASA Support.

¹⁸¹ Message from Department of Army to Army Security Agency, 8/21/68, Subject: USASA Support.

¹⁸² Brust letter, 12/15/70.

Press allegations were made two years afterward that during this period ASA agents had bugged the campaign headquarters of Democratic Presidential candidate Eugene McCarthy. (See "Military Agents Had Secret Role at 1968 Conventions," *Washington Evening Star*, 12/2/70.) An ASA after-action report of the Chicago operation made no mention of the bugging, but it did mention that the most productive of the radio nets being monitored was a radio net set up between medical aid stations serving demonstrators in the Loop area. The net control station, ASA learned, had been located in a room of the Conrad Hilton Hotel, which was assigned to a member of the McCarthy campaign staff. (See Army Security Agency Report, 7/29/69, Subject: USASA Support to DA Civil Disturbance in Chicago, Illinois.) This may have been the source of the press story.

¹⁸³ Message from ASA to subordinate field stations, 9/6/68, Subject: Operation Rancher III.

¹⁸⁴ *Ibid.*

ASA could produce no record which showed what monitoring, if any, actually took place.¹⁸⁵ The order to monitor is, nevertheless, significant since it was given without authorization, and in a situation where the use of Army troops was not contemplated.

(6) *Cafe Zipper*.—There is no record of any further domestic radio monitoring by ASA until March 1969. On March 17, 1969, during a civil disturbance exercise at Fort Hood, Texas, ASA units, who were monitoring radio transmissions of the participating forces to determine their vulnerability, intercepted transmissions of unidentified persons using citizens band radios who appeared to be monitoring the conduct of the exercise. ASA requested Army permission to continue monitoring the net—designated Cafe Zipper Net 2—and permission was given.¹⁸⁶

It was subsequently decided by ASA that the net was a nationwide net probably comprised of members of the Citizens Band Radio Operators of America. In a message from the Department of Army to the Fort Hood commander, the net was cryptically described as being “devoted to the illegal use of citizens band for hobby purposes. It is not believed to represent a threat to the United States Army.”¹⁸⁷ This conclusion was reached on April 21, 1969, over a month after the monitoring had begun.

The significance of this incident is that the monitoring was not undertaken for any authorized purpose. Although there was never any indication that a civil disturbance would develop, requiring the use of Army troops, the monitoring continued for more than a month.

D. The Termination of Domestic Radio Intercepts

While there were no further domestic intercepts actually undertaken after “CAFE ZIPPER,” the Army continued to debate ASA’s support role in civil disturbance operations. The Army’s civil disturbance office proposed in the fall of 1969 that the ASA role be formalized in regulation.¹⁸⁸ This prompted the Office of the Army Assistant Chief of Staff for Intelligence (ACSI) (which had been told a year earlier that such activity was illegal) to ask for another legal opinion from the Army Judge Advocate General.¹⁸⁹ On October 2, 1969, Army JAG responded that such activity was probably illegal.¹⁹⁰ Relying on this opinion, the ACSI “nonconcurred” in the proposal of the civil disturbance office.¹⁹¹

¹⁸⁵ The investigation of the Army Inspector General included searches of ASA files and interviews with ASA operational personnel. The investigation did not uncover any documentary evidence, however, showing the results of the “general search” which had been ordered in connection with the Newton trial.

¹⁸⁶ Message from Department of Army to ASA, 4/10/69, Subject: Cafe Zipper.

¹⁸⁷ Message from Department of Army to Continental Army Command, 4/22/69, Subject: Cafe Zipper.

¹⁸⁸ Memorandum for the Record, Army Assistant Chief of Staff for Intelligence, 10/13/69, Subject: USASA Employment of Civil Disturbance Operations.

¹⁸⁹ Disposition Form, Assistant Chief of Staff for Intelligence, to the Army Judge Advocate General, 9/15/69, Subject: USASA Employment of Civil Disturbance Operations.

¹⁹⁰ Letter from William M. Nichols, Colonel, Judge Advocate General Corps, to the Army Chief of Staff for Intelligence, 10/2/67, Subject: USASA Employment in Civil Disturbance Operations.

¹⁹¹ Disposition Form, Army Assistant Chief of Staff for Intelligence to the Directorate of Civil Disturbance Plans and Operations, 10/15/69, Subject: USASA Employment of Civil Disturbance Operations.

Shortly thereafter, Army ACSI sent a memorandum to the Army General Counsel recommending that the Army seek legislative authority to engage in future radio monitoring.¹⁹² In the same memorandum, however, it was stated that previous ASA operations had been of little value:

No compromise of any covert operation has occurred to date. However, it should be pointed out that the intelligence obtained was of marginal value. Existing laws prohibit monitoring civilian radio transmissions and for the USASA to continue covert monitoring could prove harmful to the United States Army if compromised. Continued use of the USASA in this effort does not appear justified considering the risks involved.¹⁹³

In spite of the Army ACSI's apparent decision in October 1969 that further domestic use of ASA was not justified, he took no formal action to put an end to such use. ASA itself sought guidance from ACSI regarding its domestic support role on two occasions in 1970,¹⁹⁴ but ACSI responses were ambiguous. On December 1, 1970, for example, the Army told ASA that while it would no longer have a formal support role in civil disturbances, "in the event intelligence estimates of civil disturbance threats change to indicate a requirement for ASA support in civil disturbances operations, ASA will again be asked to provide support."¹⁹⁵

In fact, as was the case with the Army's civil disturbance collection program, ASA domestic intercepts were not formally terminated until they were exposed in the press. On December 1, 1970, NBC News reported that ASA units had been used to monitor civilian radio broadcasts during the 1968 Democratic National Convention.¹⁹⁶ This led the Army, on December 10, 1970, to rescind the March 31, 1968 message which had authorized the use of ASA resources in support of civil disturbance operations.¹⁹⁷

No subsequent authorization has been issued.

IV. INVESTIGATING CIVILIAN GROUPS CONSIDERED "THREATS" TO THE MILITARY: A CONTINUING PROGRAM

There is no express statutory authority for the military to investigate persons or groups whom the military considers as "threats." The services cite only the general authority of the National Security Act of 1947 which authorizes each service secretary to undertake those functions "necessary or appropriate for the training, operations, ad-

¹⁹² Memorandum from Army Assistant Chief of Staff for Intelligence to the Army General Counsel, Subject: United States Army Security Agency (USASA) Covert Activities in Civil Disturbance Control Operations (undated).

¹⁹³ *Ibid.*

¹⁹⁴ Message from ASA to Department of Army, 11/28/69, Subject: Status of USASA Support to DA Civil Disturbance Control Operations. Message from ASA to Department of Army, 11/30/70, Subject: USASA Support to DA Civil Disturbance Control Operations.

¹⁹⁵ Message from Department of Army to ASA, 12/1/70, Subject: USASA Support to DA Civil Disturbance Control Operations.

¹⁹⁶ NBC News, First Tuesday, 12/1/70.

¹⁹⁷ Memorandum for Record, Army Assistant Chief of Staff for Intelligence, 12/11/70, Subject: Meeting with General Counsel.

ministration, logistical support and maintenance, welfare, preparedness, and effectiveness of (their particular service)."¹⁹⁸

Each of the military departments has traditionally maintained that the services required such authority in order to defend themselves.¹⁹⁹ Their argument has been that within the United States the FBI does not provide sufficient information for this purpose, and, outside the United States, there is no law enforcement agency upon which they can rely at all for such information.²⁰⁰

The restrictions, imposed by the DOD in 1971 upon the collection of information on "unaffiliated" persons and groups, expressly excepted the collection of information on "threats" from its general prohibition.²⁰¹ But the 1971 restrictions do not define what a "threat" is, apart from listing examples such as "subversion of the loyalty, discipline, or morale of Department of Defense military or civilian personnel," which lend themselves to broad interpretations.²⁰²

A. Investigations of Civilian Groups Within the United States

(1) *Investigations Undertaken Prior to the 1971 Directive.*—In the late 1960s and early 1970s military investigators from each of the three services conducted investigations and maintained files on civilian groups whose activities were directed against the military. The Army reported to Congress that it "maintained files" on eleven such civilian groups during 1969 and 1970.²⁰³ Furthermore fourteen military groups (designated as "Resistance in the Army"—RITA) were subjects of Army investigations.²⁰⁴

Of particular interest to all the services were offpost coffeehouses, operated by these civilian groups, and "underground" newspapers, published by the same groups. Typically, both were designed to attract military personnel. The primary means of obtaining information on both the coffeehouses and the underground newspapers was to penetrate them with either a military intelligence agent or a military informant, who would report back on the group's activities. These reports were typically shared with the FBI and local law enforcement agencies.

Again, Army representatives told Congress that the Army had conducted "investigations" of 17 such coffeehouses,²⁰⁵ and "maintained

¹⁹⁸ 10 U.S.C. 3012 (authority for the Secretary of the Army).

See 10 U.S.C. 5031 and 10 U.S.C. 8012 for comparable provisions for the Secretary of the Navy and Secretary of the Air Force, respectively.

¹⁹⁹ Testimony of David O. Cooke, Deputy Assistant Secretary of Defense (Comptroller), 1974 *Hearings*, p. 108.

²⁰⁰ *Ibid.*, pp. 106, 122.

²⁰¹ DOD Directive 5200.27, paragraph IV (A).

²⁰² That part of the DOD Directive which permits the investigation of civilian groups considered by the military as "threats" is discussed in detail at pp. 827-828.

²⁰³ "Department of Defense Appropriations for FY 71," Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 91st Cong., 2nd Sess. (1970), Pt. III, p. 163.

The extent to which the Army was still maintaining files and conducting surveillance activities against civilians came in the course of testimony regarding Army expenditures for intelligence.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*, p. 161. These included the Fun, Travel and Adventure Coffee House near Ft. Knox, Ky.; Sergeant Brown's Memorial Necktie near Ft. Devens, Mass.; Open Your Eyes near Ft. Eustis, Va.; Shelter Half near Ft. Lewis, Wash.; and the Oleo Strut, near Ft. Hood, Texas.

files" on 53 "underground" newspapers²⁰⁶ during 1969 and 1970; but that as of March 1970, the number of coffeehouses, as well as the number of "underground" newspapers, was "drastically declining."²⁰⁷

(2) *Investigations of Civilian Groups After the 1971 Directive.*—As mentioned above, in March 1971, an internal directive was issued which generally limited the military's collection of information about private groups and individuals. It allowed for the collection of information on "threats," however, and it permitted the military to penetrate covertly civilian groups so long as such penetrations were approved by a special DOD-level board—the Defense Investigative Review Council (DIRC).²⁰⁸ The directive set no standards, however, upon which the DIRC would base its decision.²⁰⁹

Since the date of the directive, nine requests have been made by the military services (none of which were made by the Army) for DIRC approval of covert penetrations directed against civilian groups. Summaries of these requests follow.²¹⁰

(a) *Antiwar Group in San Diego, California.*—On March 25, 1971, Navy Secretary John Warner requested DIRC approval for three ongoing penetrations of civilian groups being carried out by agents of the Naval Investigative Service (NIS). On May 24, 1971, he amended the request by asking for permission to continue only one of the three.

This entailed the penetration of an antiwar organization in San Diego whose membership was predominantly comprised of military personnel. NIS reported that it had several sources within the group, including one in the "inner circle" of the group's headquarters. DIRC was also informed that the FBI had declined to conduct its own penetration, but had been informed of the NIS operation and its plans to continue.

DIRC approved the request on May 24, 1971. In November 1971, it revalidated the penetration at the request of the Navy.

On June 30, 1972, the Navy terminated the operation on its own initiative. It reported to DIRC that it had succeeded in identifying 189 military personnel who were members or had some contact with the group (NIS had obtained a copy of the membership list), and had obtained extensive information on its financial and political connections. NIS also indicated that it had filed a total of twenty-one reports on the group, all of which had been distributed to the FBI, DIA, the Air Force, and the Army. The operation terminated because the group had disbanded.

(b) *Peace Group to Hanoi.*—The Air Force had recruited an antiwar activist who was scheduled to go to Hanoi as part of a peace group to report on the conditions of prisoners-of-war in North Vietnam. DIRC approval was sought since the operation involved the penetration of a civilian group.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, p. 163.

²⁰⁸ DOD Directive 5200.27, para. V (E).

²⁰⁹ The deficiency in the DOD Directive is discussed in detail at pp. 828–833. It should be noted, however, that the DIRC has issued instructions to guide the individual services in submitting their requests for approval of covert penetrations. Presumably, these same standards would govern the DIRC's decision.

²¹⁰ All of the following summaries are the product of staff review of DIRC files.

DIRC gave its approval on September 24, 1971, but the Air Force source did not make the contemplated trip to North Vietnam, and no information was obtained.

(c) *Underground Newspaper Near Travis Air Force Base.*—On October 1, 1971, Air Force Secretary John McLucas requested DIRC permission to penetrate the staff of an underground newspaper which was published near Travis Air Force Base in California. He stated that the newspaper had encouraged insubordination by Air Force personnel, and that a penetration was necessary to determine whether there was any conscious effort to disrupt Air Force activities or damage Air Force property. DIRC approved the request on October 6, 1971.

The operation lasted until October 1972. DIRC was informed that the Air Force Office of Special Investigations had not succeeded in planting a source on the newspaper staff, but that it had identified fifty Air Force personnel and fifteen civilians who were active in the newspaper's operations. No evidence of any conscious effort to damage Air Force property or disrupt Air Force activities was found.

(d) *Peace Group in San Diego, California.*—On May 30, 1972, Navy Under Secretary Frank Sanders requested DIRC approval for the penetration of a second antiwar group in San Diego, California. Members of the group were thought to have been instrumental in protesting the deployment of certain ships to South Vietnam. DIRC was informed that both the FBI and local police had declined to place a source in the group.

DIRC approved the operation on June 5, 1972. A year later, NIS filed a progress report and requested revalidation of the operation. It cited the fact that the operation had succeeded in identifying military personnel who were members of the group, and had learned of "discussions" regarding plans to sabotage U.S. ships,²¹ to encourage insubordination within the Navy, and to reveal military secrets. NIS also stated that it had received warnings of public demonstrations against the war as a result of the penetration. The DIRC revalidated the penetration. It continued until May 1974, when the group no longer focused upon military problems.

(e) *Antiwar Group in Charleston, South Carolina.*—On October 20, 1972, the Navy requested DIRC approval to penetrate an antiwar group in Charleston, South Carolina. It cited FBI reports which showed the group planned to protest the departure of certain ships to South Vietnam, and was contemplating acts of sabotage against a Navy vessel. NIS reported that the FBI already had a source within the group, but that the source did not provide sufficient information regarding military personnel and military targets. DIRC approved the penetration.

The operation lasted until May 1973, when it was determined that the group no longer represented a significant threat to the Navy. NIS reported that as a result of the penetration it had learned of one incident in which Navy personnel had attempted to damage the boilers on a U.S. vessel.

(f) *White Racist Group in Charleston, South Carolina.*—On April 23, 1973, the Air Force Office of Special Investigations requested

²¹ The "plans" referred to in the files apparently were never carried out.

DIRC approval of a penetration of a white racist group in Charleston, South Carolina. Members of this group had apparently been responsible for encouraging racial unrest at Charleston Air Force Base. Furthermore, the Air Force had information that the group had contacted an Air Force sergeant for the purpose of obtaining ammunition from the airbase. DIRC approved the penetration.

This penetration never took place because the military source was transferred before his application for membership in the group was approved.

(g) *Dissident Group in Long Beach, California.*—On March 15, 1973, the Navy requested DIRC approval for the penetration of a dissident group with antimilitary objectives in Long Beach, California. DIRC was informed that the FBI did not have a source within this group.

DIRC disapproved the request on the grounds that the group did not represent “a direct and palpable threat” to the Navy. It suggested, however, that the Navy might provide a source which could be placed under FBI control.

In fact, a Navy agent was “loaned” to the FBI in September 1973, with DIRC approval. It lasted until July 1974, when the FBI decided to terminate.

(h) *Servicemen’s Counseling Center in San Diego.*—On June 7, 1974, the Navy requested DIRC approval for a penetration of a servicemen’s counseling center in San Diego, California. It stated that it had reason to believe that the center was under communist influence and encouraged insubordination among Navy personnel.

DIRC took no action on the request, and it was formally withdrawn in August 1974.

(i) *Antimilitary Group in Charleston, South Carolina.*—On March 14, 1975, the Navy requested DIRC approval to penetrate a group that was offering advice to dissident sailors in Charleston, S.C. It cited evidence it had obtained from the FBI that the group intended to encourage a sit-down strike aboard a Navy vessel. NIS indicated that it already had someone within the group that would cooperate.

DIRC approved this penetration to last for a period of 90 days only. On May 1, 1975, the Navy reported that the penetration had been terminated. NIS had learned of plans for a sit-down strike but it never materialized because the ringleader had been administratively discharged for drug-related reasons. Apparently, the Navy informant had provided information which formed the basis for the discharge.

B. Investigations of Civilian Groups Overseas

Overseas, in the absence of the FBI, the military services have in the past been more active in investigating civilian groups which they consider “threats.” In many cases, these groups have been composed entirely or in part of American citizens living abroad.

Until August 1975, there were no departmental restrictions on investigations of U.S. citizens living abroad.²¹² DOD Directive 5200.27,

²¹² On August 20, 1975, the Defense Investigative Review Council voted to extend DOD Directive 5200.27 overseas. This change has subsequently been incorporated in the directive.

In a case currently pending before the United States District Court for the District of Columbia (*Berlin Democratic Club et al. v. Schlesinger et al.*, Civil

which restricted such investigations in the United States, did not apply overseas. Hence, the only restrictions which did apply were the laws of the host country and the Status of Forces treaties which normally govern the relationship between American occupying forces and the host country. As a practical matter authority to conduct operations against civilian groups has rested largely with local military commanders.²¹³

(1) *Army Operations in West Germany and West Berlin.*—The Army has had troops stationed in West Germany and West Berlin since the conclusion of World War II. As part of the occupation agreements negotiated between the United States and West Germany, the German Government agreed to provide security for American forces stationed in West Germany.²¹⁴ In satisfaction of this obligation, the West German government has allowed the U.S. Army to conduct counterintelligence operations within its boundaries. While such operations were undertaken, for the most part, to detect the activities of hostile intelligence agents or to recruit sources for foreign intelligence purposes, they were occasionally undertaken to identify persons or groups which sought to undermine the discipline or morale of U.S. troops.

Until 1968, the decision to conduct such operations rested largely with the commanders of intelligence units scattered throughout the country.²¹⁵ They were guided for the most part by operational necessity. While no figures are available for this period, it is clear that American citizens were occasionally targeted by these operations, and that relationships between foreign groups and individuals, and American citizens were routinely scrutinized.²¹⁶

A variety of intelligence-gathering techniques were employed: wiretaps, mail opening, covert penetrations, photography, and personal surveillances. All were performed apparently with the knowledge of the West German authorities, and, in the case of mail and telephone intercepts, with their cooperation.²¹⁷

In 1968, the Federal Republic of Germany (FRG) brought the most sensitive surveillance activities—mail opening and wiretaps—under its exclusive control. It created a parliamentary commission to

Action No. 310-74, filed 2/29/74), the government does not argue that U.S. citizens who live or travel in foreign countries lose their constitutional rights vis-a-vis the United States Government agencies, i.e., the Army, which might be present in such countries. It does argue, however, that the Government has additional security needs abroad against which the exercise of constitutional rights must be balanced. The Government further argues that certain constitutional safeguards, e.g., the warrant requirement of the Fourth Amendment, are not applicable in foreign contexts. See Memorandum of Law in Support of Motion to Dismiss, or, in the Alternative, for Summary Judgment, filed 6/7/74, pp. 46-48, 66-76, 105-107.

²¹³ This authority has, of course, been subject to the direction of higher military authority.

²¹⁴ Convention on Relations Between the Three Powers and the Federal Republic of Germany, 5/26/52, As Amended by Schedule I of the Protocol on Termination of the Occupation Regime in Germany, Signed at Paris, 10/23/54, Article 5. Printed in "Documents on Germany: 1944-1970," Committee on Foreign Relations, United States Senate (1971), p. 250.

²¹⁵ Staff summary of DOD Briefing, Army Counterintelligence Operations in West Germany and West Berlin, 10/24/75.

²¹⁶ *Ibid.* Also see staff summary of Col. John J. Coakley (ret.) interview, 8/14/75.

²¹⁷ *Ibid.*

pass upon all requests for both mail and telephone intercepts, and required that all such intercepts be performed by FRG authorities.²¹⁸ The requirements of this law were incorporated in a supplemental agreement to the Status of Forces Agreement, referred to above.

Thus, the Army has been required to request mail opening and wire surveillance from the West German commission in conformity with the requirements of the new law since 1968. On one occasion, in fact, a wiretap was requested on a foreign national who was working closely with an American political group in Heidelberg.²¹⁹ It resulted in the Army's obtaining considerable information regarding the personal and political activities of American citizens who were living and traveling in the Heidelberg area.²²⁰

Insofar as other types of surveillance are concerned—penetrations, photographic or covert observation—U.S. Army intelligence officers continued to have approval authority.

In fact, Army intelligence has conducted surveillance operations against civilian groups, comprised in part of American citizens, in West Germany since 1968. In Heidelberg, for instance, the Army in 1973 attempted to penetrate the staff of an "underground" newspaper, *Fight Back*, which was directed at military personnel in the area.²²¹ It also penetrated a civilian legal counseling troupe in Heidelberg which was offering free counsel to servicemen.²²²

In Mainz, another West German city, the principal target of Army operations in 1973 was a meeting house jointly sponsored by the U.S. National Council of Churches, the World Council of Churches, and the German Evangelische Kirche, which attracted servicemen allegedly engaged in "dissident" activities within the military.^{22 3} The Army photographed persons going into the meeting house, wrote down license plate numbers, and sent their own agents inside to report back on the group's activities.²²⁴

Similar operations were carried out by the Army in West Berlin where the laws of the Federal Republic of Germany did not apply. Hence, the 1968 law, which placed strict restrictions on the Army's ability to employ unilaterally mail openings and wiretaps, had no effect there.

In West Berlin, under a special tripartite agreement with the British and the French called the Allied *Kommandatura*, the Army commander is made the governing authority for the American sector

²¹⁸ Federal Republic of Germany, Law Restricting the Privacy of Mails, Telephone and Telegraphic Communications, 8/13/68, commonly referred to as the "G-10" law.

²¹⁹ 1974 Hearings, pp. 382-389.

²²⁰ *Ibid.* The summaries of wiretapped conversations indicate, in fact, that the Army was more interested in the activities of American dissidents who were working with the subject of the wiretap than it was with the subject himself.

²²¹ See "Germany Expelling U.S. Student for Work on Anti-Army Newspaper," *New York Times*, 9/13/73.

²²² Affidavit of Carl E. Maze, Army intelligence agent, Defendants Submission to the Court *in camera*, Ex Parte Berlin Democratic Club, *et al. v. Schlesinger* Civil Action No. 310-74. United States District Court for the District of Columbia, 10/29/74.

²²³ 1974 Hearings, p. 394, and "U.S. Army Is Said To Spy on Its Critics in Germany," *New York Times*, 7/28/73, p. 1.

²²⁴ 1974 Hearings, p. 394.

of West Berlin.²²⁵ The *Kommandatura* contains no restrictions on intelligence gathering of any kind: On the contrary, it requires each of the three governments to provide information to the others regarding security in their respective sectors of the city.²²⁶ An active intelligence operation thus appears to have been contemplated.

In fact, such an operation has been carried out by the Army since World War II, not simply for its own purposes, but for the other Allied commands as well. The Army has engaged in wiretapping and mail openings as part of this program, as well as a variety of other surveillance techniques.²²⁷ Further, in West Berlin, as in other cities in West Germany, the Army has occasionally turned this intelligence apparatus against civilian groups (composed largely of American citizens) who were considered by the Army to be "threats."²²⁸

In August 1972, the Army focused its attention on a group called "Americans in Berlin for McGovern," an organization which reportedly had petitioned the National Democratic Party in the United States for official affiliation.²²⁹ After the election, the group changed its name to Concerned Americans in Berlin, and attempted to interest military men in joining. Members of the group were connected to an "underground" newspaper called *Forward*, which made direct appeals for support to military personnel in West Berlin.

As part of its surveillance of the group's activities, the Army opened mail addressed to the newspaper, and penetrated its staff.²³⁰ It also sent informants or agents into Concerned Americans in Berlin to report on its activities.²³¹ Surveillance of the group continued until 1974.

(2) *Navy Operations in Japan*.²³²—Beginning in 1973, the Naval Investigative Service (NIS) conducted special counterintelligence operations (covert penetrations) in three Japanese cities—Okinawa, Iwakuni, and Yokosuka—against targets similar to those investigated by the Army in West Germany. In each case, the targets were private meeting places operated by a coalition of political groups, comprised predominantly of Americans living in Japan. The groups attempted to attract military personnel—often they provided legal counseling and representation; and in some cases they published newspapers designed to appeal to the military.

Mail opening and wiretaps were not used by the Navy against these groups, as the Army had done in West Germany. The Navy's method of operation in Japan was confined to using its own personnel as informants. NIS records show that these informants made frequent—in some cases, almost daily—reports to their case officers. Usually, the reports described the activities of the members of each group, and

²²⁵ Statement of Principles Governing the Relationship Between the Allied Kommandatura and Greater Berlin, Signed by the Three Western Commandants, Berlin, 5/14/49. Also, Allied Kommandatura Letter, Subject: Declaration on Berlin, to the Governing Mayor, Berlin, 5/5/55.

²²⁶ *Ibid.*, para 2(e).

²²⁷ DOD Briefing (staff summary), 10/24/75.

²²⁸ *Ibid.*

²²⁹ 1974 Hearings, pp. 370–379.

²³⁰ 1974 Hearings, pp. 364–365.

²³¹ Maze Affidavit, *Berlin Democratic Club et al. v. Schlesinger*, 10/29/74; and 1974 Hearings, pp. 373–379.

²³² The description of these operations is based upon an examination of NIS files by the Select Committee staff.

what had taken place in discussions and programs at the meeting places. Any military personnel who frequented the meeting places were reported, as were any "outsiders" who came as guests. NIS frequently ran FBI and DOD checks on such "outsiders," and occasionally requested copies of passport and visa applications from U.S. and foreign authorities.

Navy informants also obtained copies of letters and envelopes found at the meeting houses, and took copies of subscription lists, financial records, and "contact" lists maintained by the groups under surveillance. In most cases, they also provided copies of photographs taken of group members to NIS.

Information regarding the participation of Navy personnel was reported by NIS to local Navy commanders, and on at least two occasions, Navy personnel who became active participants in the groups were transferred to other locations.

None of the three penetrations were coordinated with the FBI, CIA, or DOD counterintelligence agencies as they would have been if the agents of a hostile intelligence service had been involved. Nonetheless, NIS did disseminate reports on the three groups to all of the agencies mentioned.

In none of the three cases did NIS have information prior to conducting the penetration that the groups were, in fact, engaged in, or planning to engage in, illegal activities. The penetrations were undertaken to determine if the groups posed any threat to the Navy, and, if so, to enable the Navy to prepare for it.

All of these operations were instituted by the Director of the Naval Investigative Service. Since they involved overseas operations, they did not, at that time, require the approval of the Defense Investigative Review Council.

V. ASSISTING LAW ENFORCEMENT AGENCIES IN SURVEILLANCE OF PRIVATE CITIZENS AND ORGANIZATIONS

Military intelligence is rather frequently called upon, or undertakes on its own initiative, to provide information or support to law enforcement agencies at all levels of government, as well as the Secret Service.

A. *Legal Authority*

The extent to which the military can legally be used to "assist" law enforcement agencies in the performance of their duties is not clear. On the one hand, the *Posse Comitatus Act* of 1878 prohibits the military from "executing the law . . . except in cases and under circumstances expressly authorized by the Constitution or act of Congress."²³³

One such statutory exception, which Congress recognized in its debates on the 1878 Act,²³⁴ was the power of the President to use the armed forces to enforce the laws, in times of insurrection.²³⁵ Such use, however, was conditioned upon the President's issuing a formal proclamation calling for the insurgents to disperse.²³⁶

²³³ 18 U.S.C. 1385.

²³⁴ 7 Cong. Rec. 3349 (1878).

²³⁵ 10 U.S.C. 331-333.

²³⁶ 10 U.S.C. 334.

In the years following the Civil War, federal marshals had relied on Army troops to help them enforce federal election laws in the South.²³⁷ By enacting the *Posse Comitatus Act* in 1878, Congress sought to end the practice, or at least ensure that federal troops could not be used without a formal proclamation from the President.²³⁸ This suggests, therefore, that the *Posse Comitatus Act* was intended to limit the ability of law enforcement agencies, in the absence of a presidential proclamation, to task federal troops for support.

Insofar as military intelligence is concerned, it seems clear that the Act would prevent its being tasked by civilian law enforcement to perform criminal investigations of civilians. The extent to which the military intelligence can otherwise be required to support such activity is not so clear, but the *Posse Comitatus Act* undoubtedly serves to restrain such cooperation.

B. Nature of Assistance

(1) *Collection and Exchange of Information.*—In Chicago, Army intelligence in the late 1960s received a copy of virtually all police intelligence reports.²³⁹ The military, in turn, provided the Chicago police with their own reports, and in some cases, with military personnel records.²⁴⁰ In addition, Army intelligence frequently responded to police and Secret Service requests for information.²⁴¹

When the DOD restrictions came into effect in 1971 calling for the destruction of all files on “unaffiliated” persons and organizations, several Army intelligence units turned over their intelligence files on dissident individuals and organizations to local police authorities rather than having them destroyed: the Chicago Police Department received the files of the 113th Military Intelligence Group;²⁴² the Pennsylvania State Police obtained the files on “personalities” of the 109th Military Group;²⁴³ the Cuyahoga County Sheriff’s office received the 109th’s files on dissident organizations in the Cleveland, Ohio, area;²⁴⁴ and the Washington, D.C. Police Department reviewed and retained certain files of the 116th Military Intelligence Group.²⁴⁵

In 1972, an Air Force counterintelligence unit in San Diego began maintaining files on dissident individuals and groups in the San Diego area. This activity was *in anticipation* of receiving tasking from the Secret Service to collect such information in preparation for the 1972 Republican National Convention, which was scheduled for San Diego at that time.²⁴⁶

²³⁷ See Edward S. Corwin, *The President: Office and Powers, 1787–1957*, (New York: New York University Press, 1957), pp. 137–138.

²³⁸ *Ibid.* See also, Rankin and Kallmayr, *Freedom and Emergency Powers in the Cold War* (New York: Appleton-Century-Crofts, 1964) p. 220.

²³⁹ Norusis (staff summary), 6/23/75.

²⁴⁰ *Ibid.* Also, see “Lawyer Data Winds Up in Police Files,” *Chicago Daily News*, 4/9/75, p. 1.

²⁴¹ O’Brien, *1971 Hearings*, pp. 116–117.

²⁴² “Ex-FBI Aide Accused in Police Spy Hearings,” *Chicago Tribune*, 6/21/75, p. 3.

²⁴³ *1971 Hearings*, p. 1297.

²⁴⁴ *Ibid.*

²⁴⁵ Memorandum for ACSI Task Force, U.S. Army Intelligence Command, Subject: Possible Transfer of MI Files, 2/8/71.

²⁴⁶ See DIRC Inspection Report No. 4, 4/21/72, *1974 Hearings*, p. 250.

(2) *Transfer of Money and Equipment.*—In 1968 after the riots following the assassination of Martin Luther King Jr., a meeting was held at the White House. At this meeting Mayor Walter Washington, of Washington, D.C., expressed concern that the Intelligence Division of the Metropolitan Police Department did not have sufficient resources to predict future riots and disorders.

Shortly thereafter, at the order of the White House, the Army arranged for a transfer of \$150,000 from its intelligence funds to the D.C. Police Department to be used for intelligence purposes.²⁴⁸ In the summer of 1968, the Army also agreed to furnish the Justice Department with tear gas grenades for distribution to local police departments, but the plan was never implemented.²⁴⁹

(3) *Participation in Law Enforcement Operations.*—On January 14, 1969, shortly before the inauguration of President Nixon, two Army intelligence agents participated in an FBI search of the evacuated premises of an underground newspaper in Washington, D.C.²⁵⁰ The FBI obtained a key from the landlord to gain entry, and subsequently removed documents which they found on the premises. These were turned over to the Army agents.²⁵¹

In Chicago, two Army intelligence agents were invited to "observe" a 1970 police raid on a meeting place of the Chicago 7 defense team.²⁵² Another Army agent in Chicago stated that he had been invited to participate in several raids by the Chicago police, including the raid on the apartment of Black Panther leader Fred Hampton in November 1969.²⁵³ He denied having participated in any of the raids, however.

During the Democratic Convention of 1968, Army intelligence agents in Chicago were also detailed to support the U.S. Secret Service. One of the agents who was involved was assigned at various times to monitor personally the activities and whereabouts of Ralph Abernathy, Lester Maddox, and Jesse Jackson.²⁵⁴

In 1974, at the request of the FBI, Army investigators were used to take down the license numbers of cars in a parking lot at West Point, New York.²⁵⁵ The lot was being used to park the cars of demonstrators in town for a protest demonstration.

Also in 1974, a special agent of the Defense Investigative Service was asked to assist with an investigation of the U.S. Customs Bureau by interviewing a friend suspected of having knowledge of the case.²⁵⁶

(4) *Participation in Interagency Intelligence Projects.*—Representatives of the military were among those involved in drafting the so-

²⁴⁸ See Testimony of Albert C. Hall, Assistant Secretary of Defense (Intelligence), Hearings before the Select Committee on Intelligence, U.S. House of Representatives, 94th Cong., 1st Sess. (1975), p. 219.

²⁴⁹ Hyman Memorandum, 1974 Hearings, p. 307.

²⁵⁰ "Break-In by FBI Alleged Before 1969 Inauguration," *New York Times*, 3/31/73, p. 1; also "FBI Was Given Key for Search in 1969," *New York Times*, 6/1/73, p. 14.

²⁵¹ *Ibid.*

²⁵² Norusis (staff summary), 6/23/75.

²⁵³ Staff summary of Jerry L. Borman interview, 6/13/75.

²⁵⁴ Statement of Richard G. Stahl, former intelligence agent, 6/18/75.

²⁵⁵ See Army Response to 2nd Select Committee inquiry, in Select Committee files.

²⁵⁶ *Ibid.*

called Huston plan in the summer of 1970.²⁵⁷ This plan was developed for the President and proposed numerous alternatives for the expansion of domestic intelligence capabilities. The military representatives, however, succeeded in keeping the military out of further domestic responsibilities. As White House aide Huston put it in his recommendations to the President: "The intelligence community is agreed that the risks of lifting these restraints (on military intelligence) are greater than the value of any possible intelligence which could be acquired by doing so."²⁵⁸

In December 1970, however, six months after the Huston Plan had been rescinded, the Department of Defense agreed to participate in an interagency committee on domestic intelligence. Designated the Intelligence Evaluation Committee, the group operated under the aegis of the Justice Department.²⁵⁹ Its objectives were to prepare analyses and reports on domestic unrest. The DOD furnished one representative to the Committee which lasted from January 1971 until June 1973.²⁶⁰ It also furnished a Navy ensign who was assigned to the IEC working staff.²⁶¹

In 1972, the Under Secretary of the Army approved a Justice Department request to furnish three Army intelligence analysts to the Justice Department's Information Evaluation Center in Miami Beach.²⁶² The purpose of these agents was to analyze intelligence coming into a Justice Department communications center regarding possible demonstrations during the Democratic and Republican National Conventions of 1972. These agents were on duty from July 15 to July 25, 1972; and from August 15 to August 25, 1972.²⁶³

VI. CURRENT DEPARTMENTAL RESTRAINTS UPON SURVEILLANCE OF CIVILIANS

As discussed above, after the Army's civil disturbance collection program had been exposed in the press, the Department of Defense in March 1971 issued a new directive²⁶⁴ which, in general:

- forbade the military from collecting and maintaining information on "unaffiliated" persons and organizations, except for that "essential" to the military mission;

- required that all information being held in violation of the directive be destroyed;

- permitted the military to continue investigating civilian groups which it considered as "threats";

²⁵⁷ Representatives of the Army, Navy, Air Force, DIA and NSA took part. For a detailed description of the Huston Plan and its evolution, see the Select Committee staff report, "National Security, Civil Liberties, and the Collection of Intelligence: A Report on the Huston Plan."

²⁵⁸ Memorandum from Tom Charles Huston to H.R. Haldeman, 7/17/70, Subject: Domestic Intelligence Review, p. 4.

²⁵⁹ See Letter from D. O. Cooke, Deputy Assistant Secretary of Defense, to Senator Sam J. Ervin, Jr., 1974 *Hearings*, p. 205.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*, p. 206.

²⁶² *Ibid.*, p. 205.

²⁶³ *Ibid.*, p. 206.

²⁶⁴ DOD Directive 5200.27.

—permitted the military to conduct both covert and overt surveillance of civilian political activities if permitted by high-level DOD officials;

—did not prevent military intelligence from continuing to supply assistance to civilian law enforcement agencies.

The discussion now turns to a more detailed account of what the directive requires and how it has worked. We begin by noting the impact the directive has had on intelligence activities undertaken for the purposes identified in Parts II–V above. The report then discusses the remaining provisions of the directive as restraints upon military surveillance in the future.

One must keep in mind throughout, however, that it is an administrative directive being considered. No matter how effective it may have been in the past, the directive can be rescinded or changed at the direction of the Secretary of Defense.

A. Curbing Past Abuses

Although the new directive places relatively strict restraints on the collection and retention of information regarding “unaffiliated” persons and organizations, it leaves military intelligence free to engage in collection activities for each of the purposes described in parts II–V.

(1) *Preparing for Civil Disturbances.*—The directive states that the Attorney General of the United States is the chief civilian officer for purposes of coordinating activities relating to civil disturbances. Furthermore, it gives the Secretary of Defense or his designee—in this case, the Secretary of the Army—the authority to order that information be acquired to meet the Department’s “operational requirements,” if “there is a distinct threat of a civil disturbance exceeding the law enforcement capabilities of state and local authorities.”²⁶⁵

The directive does not state from whom the Department is authorized to obtain the information relating to its “operational requirements,” or whether it may use its own personnel to collect such information. Moreover, by reciting that the Attorney General is the chief official responsible for coordinating civil disturbance operations, it implies that if the Attorney General were to task the DOD for information regarding civil disturbances, the Department would have no choice but to comply. This is, of course, precisely what took place in 1967.

Thus, while the directive requires that any civil disturbance collection effort using military operatives or otherwise be “turned on” at a high level of the Department, it does not forbid the military from collecting information for this purpose.

As a matter of fact, the Secretary of the Army has exercised his authority under the directive by designating a small element at the Department of Army level—the Division of Military Support—to maintain contact with the Justice Department and acquire information from it regarding “distinct threats of civil disturbances.” None of this information is currently disseminated within DOD but, presumably, it would be in the event Army troops were deployed.

It would seem that while the directive appears to authorize the collection of information on potential civil disturbances on a case-by-case

²⁶⁵ DOD Directive 5200.27, Para. IV (c).

basis, in fact the Army has decided to authorize continuous, albeit limited, collection.

The Committee's investigation also revealed that this portion of the directive has been violated. As late as 1975, the National Security Agency, a foreign intelligence collection agency of the Department of Defense, was maintaining information on potential civil disturbances on the grounds that it was helpful to NSA recruiters who may be entering such "troublespots."²⁶⁷ DOD put an end to the practice.

(2) *Monitoring Domestic Radio Transmissions.*—The directive contains no direct reference to radio monitoring. Rather, it has a general prohibition against the use of electronic surveillance "except as authorized by law."

It is noted, in this regard, that the monitoring and publication of radio transmissions are outlawed by section 605 of the Communications Act of 1934, but that did not prevent the Army Security Agency from engaging in such intercepts from 1967 to 1970.²⁶⁸ The Army, in fact, continued such monitoring even after being told by the FCC that it was illegal.

(3) *Investigating "Threats" to the Military.*—The directive expressly provides that "information may be acquired about activities threatening defense military and civilian personnel and defense activities and installations . . ." One example of a "threatening" activity cited in the directive is the subversion of loyalty, discipline, or morale of Department of Defense military or civilian personnel by actively encouraging violation of law, disobedience of lawful orders or regulations, or disruption of military activities."

This exception for "threats" is, on its face, ambiguous. The phrase "subversion of the loyalty, discipline, or morale of DOD personnel," is not defined, nor is the phrase "encouraging . . . disobedience . . . or disruption of military activities." Conceivably, these exceptions could encompass any form of protest activity against the established order in the civilian community.

The Committee has noted in the course of its investigation that there are differing interpretations of what constitutes a "threat" among the military services. For example, the Navy considered the fact that its personnel were members of a "dissident" civilian group sufficient grounds to treat the group as a "threat," and thereby justify retaining information about the group. The Army and Air Force, however, did not consider the membership of their personnel in such a group sufficient grounds to collect information on the group. They would retain information regarding such a group only if it could otherwise be shown to be a "demonstrable threat" to their respective services.

These differences in interpretation are also reflected in the services' requests to the DIRC for approval of covert penetrations. In the one case where the DIRC turned down such a request, it did so on the basis

²⁶⁷ DIRC Inspection Report, No. 19, 4/29/75. See Select Committee Report "National Security Agency Surveillance Affecting Americans".

²⁶⁸ Neither the National Security Agency nor the service cryptologic agencies which are under its operational control (the Army Security Agency is one of these) regard section 605 of the 1934 Act or title III of the Omnibus Crime Control and Safe Streets Act as applying to them, since they collect foreign intelligence. See the Select Committee report "National Security Agency Surveillance Affecting Americans". A different question is posed, however, when the National Security Agency or one of its service components intercepts domestic communications for purposes other than foreign intelligence.

that the civilian group against which a penetration was proposed, although presumably antimilitary, did not represent a "direct and palpable" threat. The directive, of course, makes no such distinction.

We have also seen in practice that what the military views as "threats" are not always perceived as such by the FBI which, when approached by the military, declines to initiate an investigation of the civilian group in question.

(4) *Assisting Law Enforcement Agencies.*—The directive states that DOD will place "maximum reliance" upon domestic law enforcement agencies to satisfy its informational needs regarding civilians. It also provides that the directive shall not be construed to prevent the Department from reporting threats to life and property, or violations of the law, to local law enforcement.

It makes no reference, however, to DOD's being tasked by law enforcement or other Federal agencies to perform intelligence duties in the civilian community. In practice, DOD has taken the position that all operations within the civilian community must be carried out in accordance with the directive, whether they are done at the request of other agencies or not.

Nevertheless there is a discernible tendency for DOD to agree when asked by other agencies to undertake intelligence activities which it would otherwise forbid to itself. For example, DOD participation in the Intelligence Evaluation Committee and its support to the Justice Department at the 1972 political conventions are cases where DOD undertook domestic intelligence activities at the request of other agencies, which it presumably would not have undertaken on its own initiative.

In short, the activities of the Department of Defense which have led to abuses in the past are still within its jurisdiction, although the use of military personnel to collect such information has been restricted. The nature of these restrictions is the subject of the next section.

B. Preventing Surveillance in the Future

Although DOD Directive 5200.27 does seek to prohibit the "collecting, reporting, processing, or storing information on individuals or organizations not affiliated with the Department of Defense," it allows for exceptions and its terms are so ambiguous that future surveillance activities in the civilian community might be undertaken consistent with the directive.

(1) *Scope.*—Until August 20, 1975, DOD Directive 5200.27 applied only to military personnel located in the 50 states, and the territories and possessions of the United States.²⁷¹ Furthermore, it did not apply to the acquisition of "foreign intelligence information," even if such information involved unaffiliated persons and organizations.

As noted previously, the Army undertook operations against civilian groups in West Germany and West Berlin, and the Navy undertook operations against similar groups in Japan, without seeking exceptions to the DOD directive.

There has also been confusion over the meaning of the exclusion of foreign intelligence information. Until August 1973, two years after

²⁷¹ On August 20, 1975, DIRC expanded the scope of the directive to include military personnel in overseas locations.

the directive had been in effect, the National Security Agency, a foreign intelligence collection agency within the Department of Defense, considered itself to be exempted by this clause from the provisions of the directive.²⁷²

Moreover, NSA was found to have been violating the restrictions of the directive. Its Office of Security was told in 1973 to destroy 40 cubic feet of files on "unaffiliated" individuals and organizations being held in violation of the directive.²⁷³

(2) *Permitted Exceptions*.—In addition to designating what information on unaffiliated individuals and groups may be collected and retained, the directive also provides *how* such information shall be collected. It begins by stating as a matter of "policy," that "maximum reliance" will be placed upon local law enforcement authorities. It, nevertheless, allows military personnel to be used to collect "essential" information if authorized by various high-level persons within the military.

(a) *Covert surveillance*.—The directive provides that "there shall be no covert or otherwise deceptive surveillance or penetration of civilian organizations unless specifically authorized by the Secretary of Defense or his designee." In this case, the "designee" is the Chairman of the Defense Investigative Review Council, the special board, referred to earlier, established to monitor the implementation of the directive.²⁷⁴

It should be noted, however, that the directive provides no criteria to guide the judgment of those officials who must decide whether covert surveillance should be employed. Assistant Secretary of Defense Robert F. Froehlke, in an exchange with Senator Edward M. Kennedy during the 1971 hearings, conceded that the directive may be deficient in this respect:

KENNEDY. And you are not maintaining any information then on any individual at the present time who is involved in in protests?

FROEHLKE. Only under the policy that we have now. It does allow it under certain circumstances, but in all cases a civilian official would first have to give his approval. . . .

KENNEDY. And what criteria does he use?

FROEHLKE. Judgment, his judgment.

KENNEDY. Completely a subjective determination?

FROEHLKE. As of this moment, yes. . . .

KENNEDY. Don't you think criteria ought to be set?

FROEHLKE. Yes. Short of having criteria, you are going to be arbitrary.²⁷⁵

As noted above, this authority has been exercised nine times since 1971 by the Chairman of the DIRC, all for the purpose of conducting penetrations of civilian groups considered "threats." The Com-

²⁷² The DIRC informed NSA that the directive covered all elements of the Department of Defense, including foreign intelligence collection agencies. It only excludes from its general prohibition "foreign intelligence information." See DIRC Inspection Report, No. 19, 3/29/75; and Staff Summary of Roland Morrow, Defense Investigative Program Office, interview, 5/22/75.

²⁷³ *Ibid.*

²⁷⁴ The DIRC was established by DOD Directive 5200.26.

²⁷⁵ 1971 *Hearings*, p. 435.

mittee's investigation revealed only one minor "deceptive surveillance" which appears not to have been authorized by the DIRC in accordance with the directive. This occurred at Pawnee, Oklahoma, near Fort Sill, where on two occasions in the spring of 1973 the Provost Marshal of Fort Sill ordered Army personnel to conduct reconnaissance flights to determine if members of the American Indian Movement were marching on the Army post, or were building fortifications near Fort Sill.²⁷⁷

(b) *Overt Surveillance*.—The directive also provides that "no DOD personnel will be assigned to attend public or private meetings, demonstrations, or other similar activities for the purpose of acquiring information the collection of which is authorized by this Directive without specific prior approval by the Secretary of Defense or his designee." The designees in this case are the Secretaries and Under Secretaries of each military department. Local commanders may also authorize such surveillance on their own initiative to collect information on "direct and immediate threats," but this must subsequently be reported to the Secretary of Defense or his designees.

Again, the Committee investigation revealed only one probable violation of this provision. Army investigators attended a protest rally in West Point, New York, in May, 1974, without the required authorization of the Secretary or Under Secretary of the Army.

(c) *Electronic Surveillance*.—As mentioned previously, the directive provides only that the department will not conduct electronic surveillance of any unaffiliated persons or organization "except as authorized by law." This would seem to mean that insofar as non-consensual wiretaps and eavesdrops are concerned, DOD must obtain the approval of the Attorney General in accordance with section 2516 of title 18, United States Code. Consensual eavesdrops (one party consents) must also have the approval of the Attorney General;²⁷⁹ consensual wiretaps, however, may be approved within the Department of Defense, but only for the investigation of crimes.²⁸⁰

It should also be noted that since electronic surveillance would also be covert or deceptive, presumably its use would also require the approval of the Secretary of Defense or the Chairman of the Defense Investigative Review Council.

The Committee found no evidence that DOD had employed electronic surveillance against any unaffiliated person or organization in the United States since 1971.

(d) *Retention of Files*.—The directive prohibits the "storage" of information which violates its provisions. It further provides that any information gathered under its provisions shall be destroyed within 90 days, "unless its retention is specifically required by law, or unless its retention is specifically authorized under criteria established by the Secretary of Defense or his designee." The designee in this case is the Chairman of the Defense Investigative Review Council.

²⁷⁷ See DOD Response to Senate Select Committee's 2nd document request.

²⁷⁹ See Memorandum from the Attorney General to the heads of Executive Departments and Agencies; 6/16/67.

²⁸⁰ DOD Directive 5200.24.

The Chairman of the DIRC did exercise this authority soon after the directive was issued to permit the military departments to maintain "dead storage" files, so long as procedures were employed to screen any such files prior to disseminating information from them.²⁸¹ This decision was made in order that the military departments would not have to screen literally millions of files in "dead storage." It did, nonetheless, result in a technical violation of the directive since much of this information was not retainable.

A second violation of these provisions was the Army's retention of microfilm files in a counterintelligence analysis unit in Washington, D.C. Secretary of the Army Howard H. Callaway announced in January, 1975, that the microfilm files contained substantial information on the political activities of persons and organizations unaffiliated with the Department of Defense and should have been destroyed.

Subsequent investigation by DOD disclosed that the microfilm contained 160,000 documents, 24,000 of which were added since March 1, 1971, the date of the departmental directive. Of the 136,000 documents dated prior to the directive, approximately 6,900 were found to be held in violation of the directive's retention criteria. Of those 24,000 added after the date of the departmental directive, 175 were identified in a preliminarily screening as being in possible violation of the directive. Twenty-three were then determined by DOD to be in definite violation of its directive.

The Army explained that the microfilm files had, in fact, been screened in December 1970, in accordance with an Army order preceding the promulgation of the DOD directive. At that time, those who screened the files apparently considered the exception made for "threats" to the Army to be broader than the current interpretation. Due to the negligence of subsequent commanders of the Army unit which maintained the files, the annual screening required by the departmental directive did not occur.

A similar explanation was given for the accumulation of twenty-three documents, obviously in violation of the directive. After the date such directive was issued, the Army suggested that those who had placed such documents in the files had a different interpretation of the term "threat" than was currently acceptable.

The Select Committee also investigated news reports that the Army's civil disturbance files, the retention of which was not authorized by the directive, were transferred in 1972 from Fort Holabird, Maryland, to the Massachusetts Institute of Technology via a Defense Department computer network.²⁸³ The Committee investigation, however, did not substantiate the news report.

(3) *Implementation and Enforcement.*—The task of implementing and enforcing the departmental restrictions is delegated primarily to the Defense Investigative Review Council (DIRC), the Chairman of which reports directly to the Secretary of Defense on such matters.²⁸⁴

The DIRC carries out its work by issuing guidance to subordinate elements of the department on how the basic directive should be imple-

²⁸¹ DIRC Study Report No. 1, 5/5/71. Subject: Retention Criteria for Investigative Information, Para VI.

²⁸³ The Report was aired on the NBC Nightly News, 6/3/75.

²⁸⁴ See DOD Directive 5200.26.

mented. It also conducts unannounced inspections of DOD installations to determine whether they are in compliance with the departmental restrictions. As of May 29, 1975, the DIRC had conducted 19 such inspections, covering a total of 82 DOD installations.²⁸⁵

In general, the Committee investigation found that implementation of the departmental restrictions has been vigorous and effective. The Committee reached this judgment only after its staff inspected the files and key operational personnel of every major domestic intelligence headquarters of the Department. It found that the Department of Defense now maintains little information on private citizens and organizations in its current files. Of that which is maintained, all has been carefully segregated and is systematically screened prior to disclosure outside the particular agency which holds them.

Moreover, as indicated above, violations of the directive have been rare and relatively minor. They do not demonstrate widespread or systematic misconduct. Furthermore, exceptions permitted by the Department to the general prohibition of the directive do not appear, in the Committee's view, to represent egregious abuses of discretion on the part of authorizing officials.

(4) *Prospects for the Future.*— While the current departmental directives have succeeded in limiting military surveillance activities against private citizens and organizations, these limitations remain only in the form of an internal regulation, which can be rescinded or amended by the Secretary of Defense. Although the Department assures the Committee that it has no intention of doing either, it cannot dispute the fact that such a possibility remains. Several former Army officials told the Committee staff that if America returned to a period of perceived crisis, such as the late 1960s, the new controls may be scrapped.²⁸⁶ Assistant Secretary of Defense Robert F. Froehke conceded as much in his testimony before the Ervin committee in 1971:

The Army, in such situations (civil disturbances), is really the only unit of Government that has the resources today. Whether or not it should be that way I think is very debatable, but that is now the fact, and when you get crisis situations, you need information. Responsible officials fear cities are going to burn. Where do they look? They look to that unit of Government that has the resources available, and it is always the Army.²⁸⁷

Indeed, the current directives have such great flexibility that renewed surveillance activity could easily be undertaken if permitted by high level officials of the Department. Again, one might consider the following exchange between Senator Edward M. Kennedy and Assistant Secretary Froehke at the 1971 Ervin hearings:

KENNEDY. Are we going to assume now at the end of these hearings that the Department of Army is going to continue to involve itself (in collecting information on civilians)?

²⁸⁵ At each installation visited by the DIRC inspection team, all units which are likely to collect or maintain information on unaffiliated individuals and organizations are normally inspected.

²⁸⁶ Staff summary of Col. Arthur Halligan interview, 7/15/75; and staff summary of Gen. Millard Daugherty interview, 11/20/75.

²⁸⁷ 1971 Hearings, p. 436.

FROEHLKE. The Army is out of it. . . .

KENNEDY. Of course, they are out of it unless your council [the DIRC] decides they are back in it.

FROEHLKE. Yes, sir. . . .²⁸⁸

VII. CURRENT STATUTORY RESTRICTIONS UPON MILITARY SURVEILLANCE

There is no statute which expressly prohibits the investigation of private citizens by the military.

As noted above, the *Posse Comitatus Act* (18 U.S.C. 1385) which prohibits the military from being used to "execute the law," would probably prevent the military from conducting criminal investigations of civilians, but that this would not bear upon other types of investigations.²⁸⁹

Other than this, only the Privacy Act of 1974²⁹⁰ appears to bear indirectly upon the matter. The Privacy Act imposes general restrictions on all agencies of the Federal Government that "maintain systems of records" insofar as the maintenance and dissemination of records on individuals are concerned.

One of these general restrictions, which applies to the Department of Defense, as an agency which "maintains a system of records," is:

Each agency that maintains a system of records shall . . . maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.²⁹¹

Thus, the Act prohibits the maintenance of certain files, and not investigations *per se*. Obviously, if an agency is prohibited from maintaining records of investigations, it will ordinarily not be disposed to conduct them.

Nevertheless, the impact of the Privacy Act, insofar as preventing military investigations in the civilian community, is far from certain. The Act itself has received no authoritative judicial interpretation,²⁹² and section 552a(e)(7), cited above, is, on its face, ambiguous. It is unclear, for example, what a record "describing how any individual exercises rights guaranteed by the First Amendment" might consist of. Would attendance at a protest demonstration, for example, be an activity which could not be recorded under the Act? If the military expected to be deployed during the demonstration, would taking note of an individual's attendance be permissible under the Act? Whether an individual act represents the exercise of First Amendment rights or is conduct which justifies government investigation often depends upon the facts of the case.

Further, section 552(e)(7) allows a government agency to maintain information on an individual's exercise of First Amendment rights if (1) the agency is expressly authorized by statute to main-

²⁸⁸ *Ibid.*

²⁸⁹ See pp. 822-823.

²⁹⁰ P.L. 93-579.

²⁹¹ 5 U.S.C. 552a(e)(7).

²⁹² The Privacy Act of 1974 became effective on 9/27/75.

tain such information; (2) if the maintenance of such record is authorized by the individual concerned; or (3) if such information is pertinent to and within the scope of an authorized law enforcement activity.”²⁹³

These exceptions would appear to allow the military to maintain records on private citizens and organizations for certain purposes of its own, and to permit the use of these records by other federal agencies which themselves fall within one of the excepted categories.

For example, the military is charged with enforcement of the Uniform Code of Military Justice, a law enforcement function. Thus, criminal investigators would probably be able to maintain information on the political activities of private citizens which was pertinent to their investigations. Similarly, the military conducts security clearance investigations to which subjects give their consent. Presumably, this would enable military investigators to maintain information on the political activities of such individuals.

Insofar as assisting other agencies is concerned, the reader has also seen that the military intelligence has frequently been employed by agencies with law enforcement purposes (the Justice Department and FBI), and by an agency “expressly authorized by law” to maintain such information (the Secret Service).²⁹⁴ It would appear, therefore, that the military is not foreclosed by the Privacy Act from providing intelligence assistance to other agencies.

In summary, the Privacy Act falls short of providing adequate assurance that the military will not engage in surveillance of private citizens in the future. The statute is written as applying generally to all government agencies; its particular application to the military is unclear. It is also sufficiently ambiguous and contains enough exceptions to raise doubts as to its effectiveness as a future restraint on military investigative activity against private individuals and organizations.

²⁹³ This exception, insofar as the military is concerned, would have to be considered in light of the *Posse Comitatus Act*.

²⁹⁴ Section 2 of Pub. C. 90-331 (Note to section 305c, title 18, *United States Code*).