

WEDNESDAY, DECEMBER 10, 1975

U.S. SENATE,  
SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS  
WITH RESPECT TO INTELLIGENCE ACTIVITIES,  
*Washington, D.C.*

The committee met, pursuant to notice, at 10:10 a.m. in room 318, Russell Senate Office Building, Senator Frank Church (chairman) presiding.

Present: Senators Church, Hart of Michigan, Mondale, Huddleston, Hart of Colorado, Baker, Goldwater, and Mathias.

Also present: William G. Miller, staff director; Frederick A. O. Schwarz, Jr., chief counsel; and Curtis R. Smothers, counsel to the minority.

The CHAIRMAN. The committee's witness this morning is the Honorable Clarence M. Kelley, the Director of the Federal Bureau of Investigation.

Mr. Kelley was appointed Director in July of 1973 in a troubled time for the FBI. His experience as an innovative law enforcement administrator in charge of the Kansas City Police Department for over 10 years, and his previous work as a special agent of the FBI, have made him uniquely qualified to lead the Bureau.

The select committee is grateful for the cooperation extended by Director Kelley in the course of its inquiry over the past months. The committee is also impressed by the openness of the FBI's witnesses before this committee, and their willingness to consider the need for legislation to clarify the Bureau's intelligence responsibility.

It is important to remember from the outset that this committee is examining only a small portion of the FBI's activities. Our hearings have concentrated on FBI domestic intelligence operations. We have consistently expressed our admiration and support for the Bureau's criminal investigative and law enforcement work, and we recognize the vital importance of counterespionage in the modern world. But domestic intelligence has raised many difficult questions.

The committee has also concentrated on the past rather than on present FBI activities. The abuses brought to light in our hearings occurred years and even decades before Director Kelley took charge.

The staff has advised the committee that under Director Kelley, the FBI has taken significant steps to rethink previous policies and to establish new safeguards against abuse. The FBI is now placing greater emphasis on foreign-related intelligence operations, and less on purely domestic surveillance. The FBI is working more closely with the Justice Department in developing policies and standards for intelligence. These are welcome developments.

Nevertheless, many important issues remain unresolved. Therefore, we have invited Director Kelley to share with the committee his views on some of the considerations the Congress should take into account in thinking about the future of FBI intelligence. Among these issues are whether FBI surveillance should extend beyond the investigation of persons likely to commit specific crimes, whether there should be outside supervision or approval before the FBI conducts certain types of investigations or uses certain surveillance techniques, whether foreign-related intelligence activities should be strictly separated from the FBI's domestic law enforcement functions, and what should be done to the information already in the FBI files and that which may go into those files in the future.

The committee looks forward to a constructive exchange of views with Director Kelley this morning, with Attorney General Levi tomorrow, and with both the FBI and the Justice Department in the next months as the committee considers recommendations that will strengthen the American people's confidence in the Federal Bureau of Investigation. That confidence is vital for the effective enforcement of Federal law and for the security of the Nation against foreign espionage.

Director Kelley, we are pleased to welcome you; and if you would have a prepared statement you would like to lead off with, please proceed.

#### **TESTIMONY OF HON. CLARENCE M. KELLEY, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION**

MR. KELLEY. Thank you very much, Senator Church and gentlemen.

I welcome the interest which this committee has shown in the FBI and most particularly in our operations in the intelligence and internal security fields.

I share your high regard for the rights guaranteed by the Constitution and laws of the United States. Throughout my 35-year career in law enforcement, you will find the same insistence, as has been expressed by this committee, on programs of law enforcement that are themselves fully consistent with law.

I also have strongly supported the concept of legislative oversight. In fact, at the time my appointment as Director of the FBI was being considered by the Senate Judiciary Committee 2½ years ago, I told the members of that committee of my firm belief in congressional oversight.

This committee has completed the most exhaustive study of our intelligence and security operations that has ever been undertaken by anyone outside the FBI other than the present Attorney General. At the outset, we pledged our fullest cooperation and promised to be as candid and forthright as possible in responding to your questions and complying with your requests.

I believe we have lived up to those promises.

The members and staff of this committee have had unprecedented access to FBI information.

You have talked to the personnel who conduct security-type investigations and who are personally involved in every facet of our day-to-day intelligence operations.

You have attended numerous briefings by FBI officials who have sought to familiarize the committee and its staff with all major areas of our activities and operations in the national security and intelligence fields.

In brief, you have had firsthand examination of these matters that is unmatched at any time in the history of the Congress.

As this committee has stated, these hearings have, of necessity, focused largely on certain errors and abuses. I credit this committee for its forthright recognition that the hearings do not give a full or balanced account of the FBI's record of performance.

It is perhaps in the nature of such hearings to focus on abuses to the exclusion of positive accomplishments of the organization.

The counterintelligence programs which have received the lion's share of public attention and critical comment, constituted an infinitesimal portion of our overall work.

A Justice Department committee which was formed last year to conduct a thorough study of the FBI's counterintelligence programs has reported that in the five basic ones it found 3,247 counterintelligence programs were submitted to the FBI headquarters from 1956 to 1971. Of this total, 2,370, less than three-fourths were approved.

I repeat, the vast majority of those 3,247 proposals were being devised, considered, and many were rejected, in an era when the FBI was handling an average of 700,000 investigative matters per year.

Nonetheless, the criticism which has been expressed regarding the counterintelligence programs is most legitimate and understandable.

The question might well be asked what I had in mind when I stated last year that for the FBI to have done less than it did under the circumstances then existing would have been an abdication of its responsibilities to the American people.

What I said then, in 1974, and what I believe today, is that the FBI employees involved in these programs did what they felt was expected of them by the President, the Attorney General, the Congress, and the people of the United States.

Bomb explosions rocked public and private offices and buildings; rioters led by revolutionary extremists laid siege to military, industrial, and educational facilities; and killings, maimings, and other atrocities accompanied such acts of violence from New England to California.

The victims of these acts were human beings, men, women, and children. As is the case in time of peril, whether real or perceived, they looked to their Government, their elected and appointed leadership, and to the FBI and other law enforcement agencies to protect their lives, their property, and their rights.

There were many calls for action from Members of Congress and others, but few guidelines were furnished. The FBI and other law enforcement agencies were besieged by demands, impatient demands, for immediate action.

FBI employees recognized the danger, felt they had a responsibility to respond, and in good faith initiated actions designed to counter conspiratorial efforts of self-proclaimed revolutionary groups, and to neutralize violent activities.

In the development and execution of these programs, mistakes of judgment admittedly were made.

Our concern over whatever abuses occurred in the counterintelligence programs, and there were some substantial ones, should not obscure the underlying purpose of those programs.

We must recognize that situations have occurred in the past and will arise in the future where the Government may well be expected to depart from its traditional role, in the FBI's case, as an investigative and intelligence-gathering agency, and take affirmative steps which are needed to meet an imminent threat to human life or property.

In short, if we learn a murder or bombing is to be carried out now, can we truly meet our responsibilities by investigating only after the crime has occurred, or should we have the ability to prevent? I refer to those instances where there is a strong sense of urgency because of an imminent threat to human life.

Where there exists the potential to penetrate and disrupt, the Congress must consider the question of whether or not such preventive action should be available to the FBI.

These matters are currently being addressed by a task force in the Justice Department, including the FBI, and I am confident that Departmental guidelines and controls can be developed in cooperation with pertinent committees of Congress to insure that such measures are used in an entirely responsible manner.

Probably the most important question here today is what assurances I can give that the errors and abuses which arose under the counterintelligence programs will not occur again. First, let me assure the committee that some very substantial changes have been made in key areas of the FBI's methods of operations since I took the oath of office as Director on July 9, 1973. Today we place a high premium on openness, openness both within and without the service.

I have instituted a program of open, frank discussion in the decision-making process which insures that no future program or major policy decision will ever be adopted without a full and critical review of its propriety.

Participatory management has become a fact in the FBI.

I have made it known throughout our headquarters and field divisions that I welcome all employees, regardless of position or degree of experience, to contribute their thoughts and suggestions, and to voice whatever criticisms or reservations they may have concerning any area of our operations.

The ultimate decisions in the Bureau are mine, and I take full responsibility for them. My goal is to achieve maximum critical analysis among our personnel without in any manner weakening or undermining our basic command structure.

The results of this program have been most beneficial to me personally, to the FBI's disciplined performance, and to the morale of our employees.

In addition, since some of the mistakes of the past were occasioned by direct orders from higher authorities outside the FBI, we have welcomed Attorney General Edward Levi's guidance, counsel, and his continuous availability, in his own words, "as a 'lightning rod' to deflect improper requests."

Within days after taking office, Attorney General Levi instructed that I immediately report to him any requests or practices which, in

my judgment, were improper or which, considering the context of the request, I believed presented the appearances of impropriety.

I am pleased to report to this committee, as I have to the Attorney General, that during my nearly 21½ years as Director under two Presidents and three Attorneys General, no one has approached me or made overtures, directly or otherwise, to use the FBI for partisan, political or other improper purposes.

I can assure you that I would not for a moment consider honoring any such request.

I can assure you, too, in my administration of the FBI, I routinely bring to the attention of the Attorney General and the Deputy Attorney General major policy questions, including those which arise in my continuing review of our operations and practices. These are discussed openly and candidly in order that the Attorney General can exercise his responsibilities over the FBI.

I am convinced that the basic structure of the FBI today is sound. But it would be a mistake to think that integrity can be assured only through institutional means.

Integrity is a human quality. It depends upon the character of the person who occupies the office of the Director and every member of the FBI under him.

I am proud of the 19,000 men and women with whom it is my honor to serve today. Their dedication, their professionalism, their standards, and the self-discipline which they personally demand of themselves and expect of their associates are the Nation's ultimate assurance of proper and responsible conduct at all times by the FBI.

The Congress and the members of this committee in particular have gained a great insight into the problems confronting the FBI in the security and intelligence fields—problems which all too often we have been left to resolve without sufficient guidance from the executive branch or the Congress itself.

As in all human endeavors, errors of judgment have been made. But no one who is looking for the cause of our failures should confine his search solely to the FBI, or even to the executive branch.

The Congress itself has long possessed the mechanism for FBI oversight; yet, seldom has it been exercised.

An initial step was taken in the Senate in 1973 when the Committee on the Judiciary established a Subcommittee on FBI Oversight. Hearings had been commenced, and we were fully committed to maximum participation with the members of that subcommittee.

I laud their efforts. However, those efforts are of very recent origin in terms of the FBI's history.

One of the greatest benefits of the study this committee has made is the expert knowledge you have gained of the complex problems confronting the FBI. But I respectfully submit that those benefits are wasted if they do not lead to the next step, a step that I believe is absolutely essential, a legislative charter, expressing congressional determination of intelligence jurisdiction for the FBI.

Action to resolve the problems confronting us in the security and intelligence fields is urgently needed; and it must be undertaken in a forthright manner. Neither the Congress nor the public can afford to look the other way, leaving it to the FBI to do what must be done, as too often has occurred in the past.

This means too that Congress must assume a continuing role not in the initial decisionmaking process but in the review of our performance.

I would caution against a too-ready reliance upon the courts to do our tough thinking for us. Some proposals that have been advanced during these hearings would extend the role of the courts into the early stages of the investigative process and, thereby, would take over what historically have been executive branch decisions.

I frankly feel that such a trend, if unchecked, would seriously undermine the independence of the judiciary and cast them in a role not contemplated by the authors of our Constitution. Judicial review cannot be a substitute for congressional oversight or executive decision.

The FBI urgently needs a clear and workable determination of our jurisdiction in the intelligence field, a jurisdictional statement that the Congress finds to be responsive to both the will and the needs of the American people.

Senators, first and foremost, I am a police officer, a career police officer. In my police experience, the most frustrating of all problems that I have discovered facing law enforcement in this country—Federal, State, and local—are when demands are made of them to perform their traditional role as protector of life and property without a clear and understandable legal bases to do so.

I recognize that the formulation of such a legislative charter will be a most precise and demanding task.

It must be sufficiently flexible that it does not stifle the FBI's effectiveness in combating the growing incidence of crime and violence across the United States. That charter must clearly address the demonstrated problems of the past; yet, it must amply recognize the fact that times change and so also do the nature and thrust of our criminal and subversive challenges.

The fact that the Department of Justice has commenced the formulation of operational guidelines governing our intelligence activities does not in any manner diminish the need for legislation. The responsibility for conferring jurisdiction resides with the Congress.

In this regard, I am troubled by some proposals which question the need for intelligence gathering and suggest that information needed for the prevention of violence can be acquired in the normal course of criminal investigations.

As a practical matter, the line between intelligence work and regular criminal investigations is often difficult to describe. What begins as an intelligence investigation may well end in arrest and prosecution of the subject. But there are some fundamental differences between these investigations that should be recognized—differences in scope, in objective and in the time of initiation. In the usual criminal case, a crime has occurred and it remains only for the Government to identify the perpetrator and to collect sufficient evidence for prosecution. Since the investigation normally follows the elements of the crime, the scope of the inquiry is limited and fairly well defined.

By contrast, intelligence work involves the gathering of information, not necessarily evidence. The purpose may well be not to prosecute, but to thwart crime or to insure that the Government has enough information to meet any future crisis or emergency. The inquiry is necessarily

broad because it must tell us not only the nature of the threat, but also whether the threat is imminent, the persons involved, and the means by which the threat will be carried out. The ability of the Government to prevent criminal acts is dependent on our anticipation of those criminal acts. Anticipation, in turn, is dependent on advance information, that is, intelligence.

Certainly, reasonable people can differ on these issues. Given the opportunity, I am confident that the continuing need for intelligence work can be documented to the full satisfaction of the Congress. We recognize that what is at stake here is not the interests of the FBI, but rather the interests of every citizen of this country. We recognize also that the resolution of these matters will demand extensive and thoughtful deliberation by the Congress. To this end, I pledge the complete cooperation of the Bureau with this committee or its successors in this important task.

In any event, you have my unqualified assurance as Director that we will carry out both the letter and the spirit of such legislation as the Congress may enact.

That is the substance of my prepared statement.

I would also like to say extemporaneously that I note that on this panel are some gentlemen who were on the Judiciary Committee which heard my testimony at the time I was presented to them for candidacy as Director of the FBI. At that time I took very seriously the charge which may possibly result in the deliberation of this committee and of the full Senate. I have been well aware of the problems of the FBI since that time. I have also been well aware of the capabilities of the FBI to discharge those responsibilities. I don't take them lightly. I am of sufficient experience and age that I have pledged myself to do what is good and proper. I say this not as a self-serving statement but in order that we might place in context my position within the FBI. I could seek sanctuary and perhaps a safe sanctuary by saying during the period these things occurred I was with the local police department in Kansas City, Mo. Prior to that time, however, I was in the FBI.

During the time I was with the FBI and during the time I was with the police department, I continued throughout that period a close acquaintance with, and a strong affection for the FBI.

I only want to point out that based on those years, based on those observations, we have a very fine and very sensitive and a very capable organization. I feel that there is much that can still be done. I know that we are not without fault. I know that from experiences I have had. We will not be completely without fault in the future. But I assure you that we look upon this inquiry, we look upon any mandate which you may feel you have as good and proper. I only want to place in your thinking the fact that you have here a matchless organization, one which, I continue to say, was motivated in most of these instances, I cannot justify some, but the motivation was of the best. I am not pleading, as does a defense attorney. I am only putting in your thinking my objective observations as a citizen who is somewhat concerned about the future of this organization. It is too precious for us to have it in a condition of jeopardy.

Thank you very much.

The CHAIRMAN. Thank you, Director Kelley.

I want to turn first to Senator Hart who won't be able to remain through the whole morning. I think he has one question he would like to ask.

Senator HART of Michigan. Thank you, Mr. Chairman. Senator Mathias and I have Judiciary Committee hearings at 10:30.

I have several questions, and I'm sure they'll be covered by others, but the one that I have as a result of reading your testimony and listening to it this morning relates to your comment at the foot of page 10 and at the top of 11.

There you indicate that you caution us about extending the court's role in the early stages of investigations, suggesting that this might take us beyond the role contemplated for the courts under the Constitution.

Now as you have said, aside from the so-called national security wiretap problem, the main focus of our discussions and concern has been on the possibility of requiring court approval for the use of informants, informants directed to penetrate and report on some group.

One of the witnesses yesterday, Professor Dorsen, pointed out that really those informants are the most pervasive type of an eavesdropping device. It is a human device. An informant is really more intrusive on my privacy than a bug or a tap because he can follow me anywhere. He can ask me questions to get information the Government would like to have.

Now we certainly involve the courts in approval of the wiretaps for physical searches with the intent of the drafters of the Constitution to have a neutral third party magistrate screen use of certain investigative techniques. And the informant is such a technique. He functions sort of like a general warrant, and I don't see why requiring court approval would violate the role envisaged for the courts.

And as I leave, I would like to get your reactions to my feelings.

Mr. KELLEY. I do not feel that there is any use of the informant in intrusion, which is to this extent objectionable. The concept of the informant has been approved by numerous court decisions. Let us now go to the moral connotation of the use of the informant.

I think, as in many cases, it is a matter of balance. You have only very few ways of solving crimes, one of which is the use of the informant, I think, the protection of the right of the victim to be victimized. You have within the Constitution certain grants that are under ordinary circumstances abrogation of rights. The right to search and seize, which, of course, can't be unreasonable, but nonetheless, you have the right.

I think that were we to lose the right of the informant, we would lose to a great measure our capability of doing our job.

Now, I'm not arguing with you, Senator. That it is not an unusual procedure. I'm not even going to say that it is not an intrusion, because it is. But it has to be one, I think, in which virtue of the benefits must be counted.

We don't like to use it. We don't like the problems that are attendant. We take great care.

Now you mention the court possibly having jurisdiction over them. I think that possibly we could present the matter to the court, but



what are they going to do insofar as monitoring their effort? Are they going to have to follow it all the way through?

Also, there is, of course, urgency in the other contacts. Must the court be contacted for each and approval of the court given for each contact?

There are a great many problems insofar as administration of it.

I frankly feel, and again, all I can do is give you my idea—that there is a satisfactory control over the informants as we now exercise it today. Yes, there are going to be some who will get beyond our control, but this is going to happen no matter what you do.

Senator HART of Michigan. I appreciate your reaction. I was not suggesting that there is consideration here to prohibit informants. I was reflecting a view that I felt and hold that the use of an informant does require some balance, as you yourself said, and I would be more comfortable with a third party making a judgment as to whether the intrusion is warranted by the particular circumstance. But I do understand your position.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Hart.

[Senator Hart of Michigan leaves the hearing room.]

The CHAIRMAN. Senator Baker, do you have questions?

Senator BAKER. Mr. Chairman, thank you very much.

Mr. Kelley, I have a great respect for you and your organization and I personally regret that the organization is in political distress, but we've both got to recognize that it is, along with other agencies and departments of the Government.

I think you probably would agree with me that even though that is extraordinarily unpleasant and in many respects unfortunate, it also has a plus side. That is, it gives us an indication of our future direction and the opportunity, at least, to improve the level of competency and service of the Government itself.

With that hopeful note, would you be agreeable then to volunteering for me any suggestions you have on how to improve the responsiveness of the FBI, or indeed, for any other law enforcement agencies of the Government, to the Congress, to the Attorney General, to the President? Beyond that, would you give me any suggestions you have on how you would provide the methods, the access, the documents, the records, the authority, for the Congress to perform its essential, I believe, essential oversight responsibility to see that these functions, these delicate functions are being undertaken properly?

And before you answer, let me tell you two or three things I am concerned about.

It hasn't been long ago that the FBI Director was not even confirmed by the Senate of the United States. I believe you are the first one to be confirmed by the Senate of the United States. I think that is a movement in the right direction. I think the FBI has taken on a stature and additional importance that requires it to have closer supervision and scrutiny by us. At the same time I rather doubt that we can become involved in the daily relationship between you and the Attorney General. Therefore, I tend to believe that the Attorney General needs to be more directly involved in the operations of the FBI. I would appreciate any comments on that.

Second, I rather believe that major decisions of the intelligence community and the FBI ought to be in writing, so that the Congress can, if it needs to in the future, take a look at these decisions and the process by which they were made to decide that you are or you are not performing your services diligently.

I don't think you can have oversight unless you have access to records, and in many cases records don't exist and in some cases the people who made those decisions are now departed and in other cases you have conflicts.

How would you suggest then that you improve the quality of service of your agency? How would you propose that you increase the opportunity for oversight by the Congress of the United States? What other suggestions do you have for improving the level of law enforcement in the essential activity that is required?

Mr. KELLEY. I would possibly be repetitious in answering this Senator, but I get a great deal of pleasure from telling what I think is necessary and what I hope that I have followed. One, which is beyond my control, but which I think is very important, is that the position of Director, is one to which great attention should be paid in choosing the man who will properly acquit himself.

I feel that the Judiciary Committee, at least in going over me, did a pretty good job. I feel that it is most necessary that care be taken that his philosophy, his means of management, his facility to adapt to change, his tendency toward consulting with other members of the official family, that he be willing to, for example, go through oversight with no reticence, and that I think that he should be chosen very carefully.

I think further that he should be responsible for those matters which indicate impropriety or illegality.

Senator BAKER. Could you stop for just a second? Who does he work for? Does the Director, in your view, work for the President of the United States, for the Attorney General, for the Justice Department, for the executive branch?

Who is the executive of the FBI, the Director of the FBI, responsible to? Who should he be responsible to?

Mr. KELLEY. Jurisdictionally, to the Attorney General, but I think this is such an important field of influence that it is not at all unlikely that we can expand it to the judiciary, the legislature, and of course, we are under the Attorney General.

Senator BAKER. Do you have any problems with the idea of the President of the United States calling the Director of the FBI and asking for performance of a particular task? Does that give you any difficulty? Or do you think that the relationship between the FBI Director and the President is such that that is desirable, or should it be conduited through the Attorney General?

Mr. KELLEY. I think it should be in the great majority of the cases conduited through the Attorney General. There has been traditionally some acceptance of the fact that if the President wants to see and talk with the Director, he may call him directly.

It has been my practice in such an event to thereafter report to the Attorney General, whoever it might be, that I have been called over and what I discussed and was told. And this was revealed in full to them.

Senator BAKER. I suppose we could pass a statute that says the President has to go through the Attorney General, although I rather suspect it would be a little presumptuous.

But to go the next step, do you think it is necessary for the pursuit of effective oversight on the part of the Congress, to have some sort of document written, or at least some sort of account of a Presidential order or an order of the Attorney General given to a Director of the FBI?

Do you think that these things need to be handled in a more formal way?

Mr. KELLEY. Personally, it would be my practice in the event I receive such an order, to request that it be documented. This is a protection as well as a clarification as to whether or not it should be placed as part of legislation. I, frankly, would like to reserve that for some more consideration. I don't know whether it would be, but I think that it can be worked very easily.

Senator BAKER. Mr. Kelley, Attorney General Levi, I believe, has already established some sort of agency or function within the Department that is serving as the equivalent, I suppose, of an Inspector General of the Justice Department, including the FBI. Are you familiar with the steps that Mr. Levi has taken in that respect? I think he calls it the Office of Professional Responsibility.

Mr. KELLEY. Yes, sir, I'm familiar with it.

Senator BAKER. Do you have any comment on that? Will you give us any observations as to whether you think that will be useful, helpful, or whether it will not be useful or helpful, how it affects the FBI, how you visualize your relationship to it in the future?

Mr. KELLEY. I don't object to this, which is to some extent an oversight within the Department of Justice under the Attorney General.

Frankly, it just came out. I have not considered it completely, but to the general concept, yes, I very definitely subscribe.

Senator BAKER. How would you feel about extending that concept of government-wide operation, a national Inspector General who is involved with an oversight of all of the agencies of Government as they interface with the constitutionally protected rights of the individual citizen? Would you care to comment on that, or would you rather save that for a while?

Mr. KELLEY. I would like to reserve that one.

Senator BAKER. I'm not surprised. Would you think about it and let us know what you think about it?

Mr. KELLEY. I will. [See Appendix B, p. 992.]

Senator BAKER. All right. Mr. Chairman, thank you very much. The CHAIRMAN. Senator Huddleston.

Senator HUDDLESTON. Thank you, Mr. Chairman.

Mr. Kelley, in your statement you describe the conditions that existed when much of the abuse that we have talked about during this inquiry occurred, indicating that the people within the Bureau felt like they were doing what was expected of them by the President, by the Attorney General, the Congress and the people of the United States.

Does not this suggest that there has been a reaction there to prevailing attitudes that might have existed in the country because of certain circumstances rather than any clear and specific direct in-

structions that might have been received from proper authorities? And if that is the case, is it possible in developing this charter, this guideline, to provide for that kind of specific instruction?

Mr. KELLEY. I think so, yes. I think that they can logically be incorporated and that—

Senator HUDDLESTON. You can see there would be a continuing danger if any agency is left to simply react to whatever the attitudes may be at a specific time in this country because—

Mr. KELLEY. Senator, I don't contemplate it being a continuing danger, but there certainly could be a very acceptable guidepost whereby we can, in the event such a need seems to arise, know what we can do.

Senator HUDDLESTON. Well, in pursuing the area which Senator Hart was discussing—whether or not we can provide sufficient guidelines which would replace a decision by the court in determining what action might be proper and specific in protecting individual's rights, can't we also provide the restrictions and guidelines and the various techniques that might be used?

For instance, supposing we do establish the fact, as has already been done, that informants are necessary and desirable. How do we keep that informant operating within the proper limits so that he in fact is not violating individual rights?

Mr. KELLEY. Well, of course, much of the reliance must be placed on the agent and the supervision of the FBI to assure that there is no infringement of rights.

Senator HUDDLESTON. But this is an area with which we've had some difficulty in the past. We have assumed that a particular action was necessary, that there was a present threat that some intelligence programs should be initiated, but in many cases it has gone beyond what would appear to have been necessary to have addressed the original threat. How do we keep within the proper balance there?

Mr. KELLEY. Well, actually, it's just about like any other offense. It is an invasion of the other individual's right and it is by an officer and an FBI agent is an officer. There's the possibility of criminal prosecution against him. This is one which I think might flow if he counsels the informant.

Now insofar as his inability to control the informant, I don't suppose that would warrant prosecution, but there is still supervisory control over that agent and over that informant by insisting that control is exercised on a continuing basis.

Senator HUDDLESTON. It brings up an interesting point as to whether or not a law enforcement agency ought to be very alert to any law violations of its own members or anyone else.

If a White House official asks the FBI or someone to do something unlawful, the question seems to me to be whether or not that is a violation that should be reported by the FBI.

Mr. KELLEY. I think that any violation which comes to our attention should either be handled by us or the proper authority.

Senator HUDDLESTON. But that hasn't been the case in the past.

Mr. KELLEY. Well, I don't know what you're referring to but I would think your statement is proper.

Senator HUDDLESTON. Well, we certainly have evidence of unlawful activity taking place in various projects that have been undertaken,

which certainly were not brought to light willingly by the FBI or by other law enforcement agencies.

The question that I'm really concerned about, as we attempt to draw guidelines and charters that would give the agency the best flexibility that they may need against a wide range of threats, is how we control what happens within each of those actions to keep them from going beyond what was intended to begin with?

Mr. KELLEY. You're still speaking of informants?

Senator HUDDLESTON. Not only informants but the agents themselves as they go into surveillance, wiretaps, or other intelligence-gathering techniques.

The original thrust of my question was, even though we may be able to provide guidelines of a broad nature, how do we control the techniques that might be used, that in themselves might be a serious violation of the rights?

Mr. KELLEY. Well, first, I don't know whether it's germane to your question but I do feel that it should be pointed out that the association to, the relationship between the informant and his agent handler is a very confidential one, and I doubt very seriously whether we could have any guidelines, where there might be an extension of any monitors here because thereby you do have a destruction of that relationship. Insofar as the activities of agents, informants or others which may be illegal, we have on many occasions learned of violations of the law on the part of informants, and either prosecuted ourselves, through the reporting of it to the U.S. attorney, or turned it over to the local authority. We have done this on many occasions. Insofar as our own personnel, we have an internal organization, the Inspection Division, which reviews this type of activity, and if there be any violation—yes, no question about it, we would pursue it to the point of prosecution.

Senator HUDDLESTON. But it could be helped by periodic review.

Mr. KELLEY. We do, on an annual basis, review the activities of our 59 offices through that same Inspection Division, and they have a clear charge to go over this as well as other matters.

Senator HUDDLESTON. Mr. Kelley, you pointed out the difference in the approaches in gathering evidence after a crime has been committed.

Would there be any advantage, or would it be feasible to attempt to separate these functions within the Agency, in the departments, for instance, without mixing gathering intelligence and gathering evidence? Are the techniques definable and different?

Mr. KELLEY. Senator, I think they are compatible. I see no objection to the way that they are now being handled on a management basis. I think, as a matter of fact, it is a very fine association whereby the intelligence, stemming as it does from a substantive violation, is a natural complement.

Senator HUDDLESTON. Now, another area, the FBI furnishes information to numerous government agencies. Is this properly restricted and controlled at the present time, in your judgment, as to just who can ask the FBI for information, what kind of information they can ask for, and probably even more important, what restrictions can be put on the use of that information once it has been supplied by the FBI?

Mr. KELLEY. I think so, Senator.

Senator HUDDLESTON. You think there are proper restrictions now?

Mr. KELLEY. I don't know that we can ourselves judge in all cases whether or not there is good and sufficient reason for an agency to inquire. I think that there should be a very close delineation by the agencies as to what they're going to ask for, but I think that we do have sufficient rules that are satisfactory to us.

Senator HUDDLESTON. You're confident that the information your agency supplies is not being misused, to the detriment of the rights of any individuals.

Mr. KELLEY. Senator, I'm only confident in what I do myself. I would say that I am satisfied.

Senator HUDDLESTON. I was wondering whether some inclusion ought to be made in whatever charter is made as to who specifically can request, what limits ought to be placed on the request, and what they can do with it after they get it.

Mr. KELLEY. Yes.

Senator HUDDLESTON. I have some concern about the fact that in intelligence gathering, one is bound to gather a great deal of information about some individual that is useless as far as the intent of the intelligence gathering is concerned, but might be in some way embarrassing or harmful to the individual, whether or not there's any effort to separate this kind of information out of a person's file that is really initiated for a purpose, for a specific purpose unrelated to this information.

Is there any effort, or could any direction be given to doing that?

Mr. KELLEY. We would be very happy to work under the guidelines or rules or anything else to purge material which is extraneous, irrelevant, or for any other reason objectionable.

Senator HUDDLESTON. And how about the length of time that these files are kept in the agency?

Mr. KELLEY. We are willing to work within that framework, too.

Senator HUDDLESTON. I think that might be done.

I think in developing the chain of command, so to speak, it certainly would be very difficult to prevent the President of the United States from calling up the head of the FBI or anyone else and discussing any law enforcement problem he might so desire, and perhaps even give direction to the agency.

But how about that? What about White House personnel who might also be inclined to call the Director and ask him to do specific things? Could there be some clear-cut understanding as to whether or not the Director would be obligated to undertake any such project, that just anybody at the White House might suggest?

Mr. KELLEY. It's very clear to me that any request must come from Mr. Buchen's office, and that it be, in any case, wherein it is a request for action, followed with a letter so requesting.

This has come up before during the Watergate hearings, and I think it has been placed very vividly in our minds; that is, take care that you just don't follow the request of some underling who does not truly reflect the desire of the President.

Senator HUDDLESTON. Just one more question about techniques, aside from the guidelines of authority on broad projects undertaken.

Would it be feasible from time to time in a congressional oversight committee to discuss with the Department and with the Bureau various techniques so that they could have some input as to whether or not these actions are consistent with the overall guidelines, to start with, and consistent with the very protections?

Mr. KELLEY. Senator, I have already said to the Oversight Committee of the Senate that so far as I can now see, the only thing that would be withheld is the identity of informants. We'll discuss techniques, we'll discuss our present activities. I think this is the only way that we can exchange our opinions and get accomplished what you want to accomplish and what I want to accomplish.

Senator HUDDLESTON. I feel that is an important aspect of it because even though you have a charter which gives broad direction for all the guidelines and to the types of projects that you enter into it, if we don't get down to specifics, such things as how intelligence is to be collected, how evidence is to be collected, what is done after it is collected, that type of thing, it seems to me we are leaving a wide gap again for the Bureau to assume that it has total instruction and total permission to move in a certain direction and go beyond what is intended or what was authorized.

Thank you, Mr. Chairman, and Mr. Director.

The CHAIRMAN. Senator Goldwater?

Senator GOLDWATER. Mr. Kelley, as part of the FBI electronic surveillance of Dr. King, several tapes of specific conversations, and later a composite King tape were produced. Are these tapes still in the possession of the FBI?

Mr. KELLEY. Yes, sir.

Senator GOLDWATER. Have they been reviewed by you?

Mr. KELLEY. No, sir.

Senator GOLDWATER. Have they been reviewed by any of your staff, to your knowledge?

Mr. KELLEY. Senator, I think that they have been reviewed. I know that at least some have reviewed it within the area of this particular section. There has been no review of them since I came to the FBI, I can tell you that.

Senator GOLDWATER. Would these tapes be available to the committee if the committee felt they would like to hear them?

Mr. KELLEY. This, Senator Goldwater, is a matter which is of, as I said before, some delicacy, and there would have to be a discussion of this in an executive session.

The CHAIRMAN. I might say in that connection that the committee staff gave some consideration to this matter and decided that it would compound the original error for the staff to review the tapes, because that would be a still further invasion of privacy, and so the staff refrained from insisting on obtaining the tapes, believing that it was unnecessary, and quite possibly improper, in order to get at what we needed to know about the King case.

So the staff did refrain, and for that reason the issue never came to a head. I just wanted to lay that information before the Senator.

Senator GOLDWATER. I realize that's a prerogative of the staff, but it's also the prerogative of the committee if, and I'm not advocating it, if we wanted to hear them ourselves to determine whether Mr. Hoover

was off on a wild goose chase or whether there was, in effect, some reason. Again, I am not advocating it I am merely asking a question. They would be available if the committee took a vote to hear them and decided on it.

Mr. KELLEY. I don't think it would be within my jurisdiction to respond to this, Senator. It would have to be the Attorney General.

Senator GOLDWATER. I see. Now, are these tapes and other products of surveillance routinely retained even after an individual ceased to be a target of inquiry?

Mr. KELLEY. They are retained usually for 10 years.

Senator GOLDWATER. Ten years.

Mr. KELLEY. Yes, sir.

Senator GOLDWATER. What is the future value, if any, to the Bureau of retaining such information?

Mr. KELLEY. If there be guidelines that set out a destruction or erasure, we will abide by it. We will, on those occasions where we think that matters might come up within that period of time which may need the retention of them, we will express our opinion at that time, but other than that we would be guided by guidelines.

Senator GOLDWATER. Is it your view that legitimate law enforcement needs should outweigh privacy considerations with respect to retention of such information, or do we need the clear guidelines on the destruction of these materials when the investigative purposes for which they were collected have been served?

Mr. KELLEY. We feel that there should be a good close look at the retention of material, and we would, of course, like to have an input. But we welcome consideration of this.

Senator GOLDWATER. That is all I have, Mr. Chairman. Thank you very much.

The CHAIRMAN. Thank you, Senator.

Senator Mondale?

Senator MONDALE. Mr. Director, it seems to me that the most crucial question before the Congress is to accept the invitation of the FBI to draw congressionally imposed lines, limits of authority so the FBI will know clearly what you can and cannot do, so you will not be subject to later judgments. The question is, where should that line be drawn?

As you know, in 1924 when the FBI was created, and Mr. Stone later became the Chief Justice, he drew the line at criminal law enforcement. He said that never again would we go beyond the authority imposed upon us to get into political ideas. We would stay in the area of law enforcement.

Would you not think it makes a good deal of sense to draw the guidelines in a way that your activities are restricted to the enforcement of the law, investigations of crime, investigations of conspiracies to commit crime, rather than to leave this very difficult to define and control area of political ideas?

Mr. KELLEY. I don't know whether I understand your last statement of involving the area of political ideas. I say that I feel that certainly we should be vested and should continue in the field of criminal investigations as an investigatory objective. These are conclusions, of course, which are based on statutes in the so-called security field, national or foreign.



These are criminal violations. I feel that they should be in tandem. I feel, having worked many years in this atmosphere, that you have more ears and eyes and you have more personnel working together, covering the same fields. I do not think there should be a separation of the intelligence matters, because it is a concomitant. It naturally flows from the investigation of the security matters and the criminal.

Senator MONDALE. Mr. Kelley, what Mr. Stone said was that the Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with such conduct as is forbidden by the laws of the United States. When the police system goes beyond these limits, it is dangerous to proper administration of justice and human liberty.

Do you object to that definition?

Mr. KELLEY. I think that life has become much more sophisticated and we have added to the so-called policeman's area of concern some matters which were probably not as important at that time. I think that the fact that the FBI has been in touch with the security investigations and the gathering of intelligence is something which has proved to be at times troublesome and given us great concern, but it is a viable, productive procedure.

I don't know what Mr. Stone was thinking of entirely of this course, but I can tell you about the procedure today.

Senator MONDALE. I think you recognize, if that further step is taken, as you're recommending here, at that point it becomes so difficult to guarantee. In fact, in my opinion, it becomes impossible to guarantee that we won't see a recurrence of some of the abuses that we've seen in the past, and I don't know how you establish any kind of meaningful oversight on a function as nebulous as the one you've just defined.

If the FBI possesses the authority to investigate ideas that they consider to be threats to this Nation's security, how on earth can standards be developed that would provide any basis for oversight? We have seen how that definition can be stretched to include practically everybody, including moderate civil rights leaders, war dissenters and so on.

How can you, from among other things, be protected from criticism later on that you exceeded your authority or didn't do something that some politician tried to pressure you into doing?

Mr. KELLEY. It might well be, Senator, that 10 years from now a Director of the FBI will be seated here and will be criticized for doing that which today is construed as very acceptable.

Senator MONDALE. Correct. And I have great sympathy for the predicament in which the FBI finds itself.

Mr. KELLEY. And the Director.

Senator MONDALE. And the Director especially. That is why I think it's in the interest of the FBI to get these lines as sharply defined as possible, so that when you are pressured to do things, or when, after the fact, people with good 20/20 hindsight can criticize you or the Bureau, you can say, here are the standards that you gave us, and they specifically say this, and that is your answer. We have to live by the law. If we don't define it specifically, it seems to me that these excesses could reoccur, because I don't think it's possible to define them, and the

FBI is inevitably going to be kicked back and forth, depending on personal notions of what you should have done. Don't you fear that?

Mr. KELLEY. Not too much, Senator. I think we learned a great lesson by virtue of Watergate, the revelations that have come up as a result of this committee's inquiries, the fact that I think that we have a different type of spirit today in the Bureau, the fact that, as I said before, you came in, that I think the Bureau is a matchless organization, and they are eager to do that which is vital and proper, and the fact that we are getting a number of very fine young people in the organization, people of the other ethnic backgrounds than we had years ago. I think there is a greater understanding in the Bureau today of what is the proper type of conduct.

We may not be able to project this on all occasions, because we must equate this with the need and with our experience, but if precise guidelines are the goal, you're going to have trouble. If, on the other hand, there is flexibility, I think that we can work very well within those guidelines.

Senator MONDALE. As you know, I don't think there is a better trained or professionally higher qualified law enforcement organization in the world than the FBI. I think we all agree it is superb. But the problem has been, from time to time, that when you go beyond the area of enforcing the law into the area of political ideas, in fact, you leave the criminal field, you get into politics. That is where, it seems to me, the great controversy exists, and where you are almost inevitably going to be subjected to fierce criticism in the future, no matter how you do it. Once you get into politics, you get into trouble.

Mr. KELLEY. I agree to that, and I point out that in almost every branch of the Government and in every part, as a matter of fact, every segment of our society, there are some who deviate from the normal course. I feel that within the Bureau there is less likelihood of this happening, and I think that working with you, we can at least make some achievements that will be significant.

Now, whether it will be lasting, I don't know, but I think we've made a good start.

Senator MONDALE. In your speech in Montreal on August 9, you said we must be willing to surrender a small measure of our liberties to preserve the great bulk of them. Which liberties did you have in mind?

Mr. KELLEY. Well, of course, this speech has been misunderstood many, many times.

Senator MONDALE. Well, I want you to have a chance to clear it up.

Mr. KELLEY. All that was intended here was a restatement of the approach which the courts historically have used in resolving most issues of constitutional importance, and its recognition that rights are not susceptible to absolute protection. It's a matter of balance. Even in the fourth amendment, for example, which protects the right of privacy, it does not prohibit searches and seizures. As I mentioned, it only refers to those that are unreasonable.

I came from the police field. What is more restrictive to more people than traffic regulation? But what would be more chaotic is if you did not have traffic regulation. We do, in order to live in the complexities and intricacies of today's life, have to give up some of our rights. Some may construe this as an extravagant statement. If it is so, I wish to say that I was only pointing out that there has to be a balance.

Senator MONDALE. So when you say we have to give up some liberties, or as you just said, some rights, which rights would you have us give up?

Mr. KELLEY. Under the fourth amendment, you would have the right for search and seizure.

Senator MONDALE. You wouldn't give up the fourth amendment, right?

Mr. KELLEY. Oh, no, not the right.

Senator MONDALE. What right do you have in mind?

Mr. KELLEY. The right to be free from search and seizure.

Senator MONDALE. There's no such right in the Constitution. You can have such seizures, but they must be reasonable, under court warrant. Did you mean to go beyond that?

Mr. KELLEY. That's right.

Senator MONDALE. You should be able to go beyond that?

Mr. KELLEY. No, no. I do not mean that we should ever go beyond a constitutional right guarantee.

Senator MONDALE. Well, would you say, Mr. Kelley, that that sentence might have been inartful in your speech?

Mr. KELLEY. I said that if it was misunderstood, I made a mistake, because I should never make a statement which—yes, it was inartful.

Senator MONDALE. I think I know about your record in law enforcement well enough to tell you that I think you were saying something different, that it was taken to mean something different than I think you intended.

What you are saying is that, in the exercise of your law enforcement powers, the rights of individuals are determined by the laws and the courts, but the courts, in the handling of those issues, have to balance rights and other values.

That's what you're essentially saying, is that correct?

Mr. KELLEY. Senator, I ought to have you write my speeches so that I don't have any misunderstandings. I didn't intend that to be at the time anything that was unusual. I have to admit that maybe I made a mistake.

Senator MONDALE. What you are saying in effect is that the rights of the American people can be determined not by the Director of the FBI but by the courts and by the law. You meant that?

Mr. KELLEY. Indeed, yes, sir.

Senator MONDALE. All right. Thank you.

The CHAIRMAN. Senator Hart?

Senator HART of Colorado. Mr. Kelley, in response to a question by Senator Mondale, one of his first questions about laying down guidelines, it seems to me what you were saying was we could work together. That is to say the Bureau and the Congress lay down guidelines that would not unreasonably hamper you from investigations of crime control in the country.

But I think implicit in his question was also an area that you didn't respond to, and that is, what kind of guidelines do you lay down to protect you and the Bureau from political pressure, the misuse of the Bureau by political figures, particularly in the White House?

And we've had indications that at least two of your predecessors, if not more, obviously were corrupted and Mr. Gray was under great pressure from the White House to use the facilities of the Bureau and their capabilities to accomplish some political end.

It seems to me you were arguing in favor of fewer restrictions so you could get on with your job, but that is not what Senator Mondale and the rest of us are interested in.

What kind of restrictions can we lay down to protect you from political pressures? I'd be interested in that side of the coin, if you would.

Mr. KELLEY. I would welcome any guidelines which would protect me or any successor from this type of thing. I think that would be splendid. I have not reviewed the guidelines as prepared to the present date by the Department. It might be that they are well defined in there. But I welcome any consideration of such directives.

Senator HART of Colorado. Do you think this is a problem?

Mr. KELLEY. No, sir, not with me.

Senator HART of Colorado. Do you think that it has been a problem for the people that preceded you?

Mr. KELLEY. I think so.

Senator HART of Colorado. And that's a problem the Congress ought to address?

Mr. KELLEY. I think so.

Senator HART of Colorado. The committee received a letter from the Department of Justice a couple of days ago, in which the Assistant Attorney General asked our cooperation in carrying out the investigation, or their efforts to review the investigation, conducted by the FBI into the death of Martin Luther King, Jr., in order to determine whether that investigation should be reopened. They asked our cooperation, they asked for our transcripts, the testimony before the committee, all material provided to the committee by the FBI which relates to Dr. King and the Southern Christian Leadership Conference.

I guess my question is this: Why is the Justice Department asking this committee for FBI files?

Mr. KELLEY. I don't think they're asking for files. I think they're asking for what testimony was given by witnesses whose testimony has not been given up. I don't know.

Senator HART of Colorado. I'll quote it. "And all material provided to the committee by the FBI which relates to Dr. King and the Southern Christian Leadership Conference."

I repeat the question. Why is the Justice Department asking this committee for material provided to us by the FBI?

Mr. KELLEY. Frankly, I don't know. Do you mind if I just ask—  
[Pause.]

Mr. KELLEY [continued]. I am informed, and I knew this one. Everything that was sent to you was sent through them. Did they have a copy also? Yes, they had a retained copy. I don't know why.

Senator HART of Colorado. So there's nothing you provided us that's not available to the Justice Department?

Mr. KELLEY. That's right.

Senator HART of Colorado. And you can't account for why an official of the Justice Department would ask this committee for your records?

Mr. KELLEY. No, sir.

Senator HART of Colorado. You released a statement on November 18, 1974, regarding the FBI's counterintelligence program and you said you made a detailed study of COINTELPRO activities and reached the following conclusions, and I quote:

"The purpose of these counterintelligence programs was to prevent dangerously and potentially deadly acts against individuals, organizations and, institutions, both public and private, across the United States."

We had an FBI informant before this committee and he stated he told the FBI on a number of occasions that he planned violent acts against black people in groups. And yet, he said there were few, if any, instances in which the FBI actually prevented violence from taking place. How does his testimony square with your statement that I have quoted?

Mr. KELLEY. It doesn't, and I don't know if any of his statements contrary to what we have said are the truth. We don't subscribe to what he said. We have checked into it and we know of no instances where, for example, the 15 minutes story and that type of thing has been substantiated.

Senator HART of Colorado. You're saying the testimony he gave us under oath was not accurate?

Mr. KELLEY. Right.

Senator HART of Colorado. You also said in that statement, and I quote:

I want to assure you that Director Hoover did not conceal from superior authorities the fact that the FBI was engaged in neutralizing and disruptive tactics against revolutionary and violence-prone groups.

Now the committee has received testimony that higher authorities, the Attorney General and Congress, were not informed of New Left COINTELPRO activities. Do you have any information in this regard?

I know in that statement you cite one or two instances, but in terms of the bulk of COINTELPRO activities, the record seems to indicate that there was not systematic information flowing upward through the chain of command to Director Hoover's superiors.

Mr. KELLEY. May I ask that I be given the opportunity to substantiate that with documentation?

Senator HART of Colorado. Sure.

Mr. KELLEY. Or respond to it. [See Appendix B, p. 992.]

Senator HART of Colorado. Director Kelley, just in passing, do you agree with the statement made by President Ford that those responsible for harassing and trying to destroy Dr. King should be brought to justice?

Mr. KELLEY. Those who were directly responsible and upon whose orders the activities were taken are responsible. I don't know if he intended to say that, but if he did not, I would say that it would be more proper. Insofar as my own opinion is concerned, that it should be centered on those who said to do it, those who are responsible.

I took the responsibility for any such program and I don't expect that those under me would be not acting in accordance with what they think is proper and may even have some reservation, but they do it on my orders. I accept that responsibility. I think that it should rest on those who instructed that that be done.

Senator HART of Colorado. But you agree that the people who give the orders should be brought to justice.

Mr. KELLEY. I do.

The CHAIRMAN. Aren't they all dead?

Mr. KELLEY. No.

The CHAIRMAN. Not quite?

Mr. KELLEY. Not quite.

Senator HART of Colorado. That's all, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Director Kelly, in the committee's review of COINTELPRO and other political involvements of the FBI, it seems to me that we have encountered two or three basic questions.

Since the investigation is over insofar as the committee is concerned, we're now turning our attention to remedies for the future, what I would think would be our constructive legislative work. It is very important that we focus on what we learned in that investigation.

One thing that we have learned is that Presidents of the United States have from time to time ordered the FBI to obtain for them certain kinds of information by exercising the necessary surveillance to obtain and to have a purely political character, that they simply wanted to have for their own personal purposes. I think that you would agree that that is not a proper function of the FBI.

Yet it's awfully difficult for anyone in the FBI, including the Director, to turn down a President of the United States if he receives a direct order from the President. It is always possible, of course, to say no, and if you insist, I will resign. But that puts a very hard burden on any man serving in your position, particularly if the President puts a good face on the request and makes it sound plausible or even invents some excuse. It is always easy for him to say, you know, I am considering Senator White for an important position in my administration, and I need to know more about his activities, particularly of late. I've had some cause for concern and I want to be certain that there is nothing in his record that would later embarrass me, and I just want you to keep careful track of him and report to me on what he's been doing lately.

It's difficult for you to reply to the President: "Mr. President, that's a very questionable activity for the FBI, and I frankly don't believe that you've given me the real reason why you want this man followed. I think his opposition to your current policy is politically embarrassing to you and you want to get something on him."

I mean, you know, the Director can hardly talk back that way, and I'm wondering what we could do in the way of protecting your office and the FBI from political exploitation in this basic charter that we write.

I want your suggestions, but let's begin with one or two of mine. I would like your response.

If we were to write into the law that any order given you either by the President or by the Attorney General should be transmitted in writing and should clearly state the objective and purpose of the request and that the FBI would maintain those written orders and that furthermore they would be available to any oversight committee of the Congress. If the Joint Committee on Intelligence is established, that committee would have access to such a file.

So that the committee itself would be satisfied that orders were not being given to the FBI that were improper or unlawful. What would you think of writing a provision of that kind into a charter for the FBI?

Mr. KELLEY. I would say writing into the law any order issued by the President that is a request for action by the Attorney General should be in writing, is certainly, in my opinion, a very plausible solution. I'm sure that in contemplation of this there would be some that will say yes or some that will say no, but I think we could define an area where you are trying to cure the abuses and we could do that.

Now as to the availability to any oversight committee of Congress, I would say generally that I certainly would have no objection to this but again, there may be some request for something of high confidentiality that the President might put in writing such as some national or foreign security matter.

I would like to have such a consideration be given a great deal of thought and that the oversight committee review be conditioned with that possibility. I don't think it would present a problem.

I have said previously that I feel I can discuss everything except the identity of the informants to the oversight committee. I welcome that.

The CHAIRMAN. Well, that has been of course the way we proceeded with this committee. It has worked pretty well, I think.

Now, Senator Goldwater brought up a question on the Martin Luther King tapes. I would like to pursue that question. If these tapes do not contain any evidence that needs to be preserved for ongoing criminal investigations, and since Dr. King has long since been violently removed from the scene, why are they preserved? Why aren't they simply destroyed? Is there a problem that we can help through new law to enable the FBI to remove from its files so much of this information that it has collected that is no longer needed or may never have connected the person with any criminal activity? And yet, all of that information just stays there in the files year after year.

What can we do? How can a law be changed? If that's not the problem, then what is? Why are these tapes still down there at the FBI?

Mr. KELLEY. Well, of course, we do have the rule that they are maintained 10 years. Now, why the rule is your question and why, right now, are they maintained? Since we do maintain everything since the inquiry has started and until that's lifted, we can't destroy anything.

I would say that this is a proper area for guidelines or legislation and again, as I have said, there should be some flexibility and I know that's a broad statement but there might be some areas wherein that the subject of the investigation himself may want them retained because it shows his innocence. I think you have to deliberate this very carefully, but it can be done and we are willing to be guided by those rules.

The CHAIRMAN. Let me ask you this. The FBI is conducting thousands of investigations every year on possible appointees to Federal position. As a matter of fact, the only time I ever see an FBI agent is when he comes around and flashes his badge and asks me a question or two about what I know of Mr. so and so, who's being considered for an executive office. And we have a very brief conversation in which I tell him that as far as I know, he's a loyal and patriotic citizen, and that is about the extent of it.

Then when this file is completed and the person involved is either appointed or not appointed, what happens to that file? I know it's full of all kinds of gossip because it is in the nature of the investigation to go out to his old neighborhoods and talk to everybody who might have known him? What happens to the file? Is that just retained forever?

Mr. KELLEY. We have some capability of destroying some files and they are rather lengthy insofar as retention. We have some archival rules which govern the retention of material which is developed in cases involving certain members of the executive branch of the Government. I see no reason why this would not be a proper area for consideration of legislation.

The CHAIRMAN. Can you give me any idea of how much—do you have records that would tell us how much time and money is being spent by the FBI just in conducting these thousands of routine investigations on possible Presidential appointments to Federal offices?

Mr. KELLEY. I feel confident we can get it. I do not have it now, but if you would like to have the annual cost for the investigation of Federal appointees—

The CHAIRMAN. Yes. Plus any other information that would indicate to us what proportion of the time and effort of the FBI was absorbed in this kind of activity.

Mr. KELLEY. I can tell you it is relatively small, but I can get you, I think, the exact amount of time and the approximate expense.

The CHAIRMAN. I wish you would do that because this is a matter we need more information about. And when you supply those data to the committee, would you also supply the number of such investigations each year? You know, I don't expect you to go back 20 or 25 years, but give us a good idea of the last few years. For example, enough to give us an idea of how much time and how broad the reach of these investigations may be.

Mr. KELLEY. Through 1970?

The CHAIRMAN. That would be sufficient, I would think.

The other matter that is connected to this same subject that I would like your best judgment on is whether these investigations could not be limited to offices of sensitivity. That is to say, where legitimate national security interest might be involved so that there is a reason to make a close check on past associations, attitudes and expressions of belief.

I have often wondered whether we couldn't eliminate routine Federal offices that are not particularly sensitive in the national security sense from the reach of these FBI checks. And so when you respond to the series of questions, I wish you would include the offices that are now covered by such checks and give us an idea of how far down into the Federal bureaucracy this extends. Could you do that?

Mr. KELLEY. Yes, sir. [See Appendix B, p. 992.]

The CHAIRMAN. Fine. Now there is a vote. The vote always comes just at the wrong time, but Mr. Schwarz wants to ask you some additional questions for the record, and there may be other questions that would be posed by the staff, after which I will ask Mr. Schwarz to adjourn the hearings. It looks like we're going to be tied up on the floor with votes.

But, before I leave, I want to thank you for your testimony, Mr. Kelley, and to express my appreciation to you for the way you have cooperated with the committee in the course of its investigation during the past months.

Mr. KELLEY. Thank you.



The CHAIRMAN. And I hope, as you do, that as a result of the work of the committee we can write a generic law for the FBI that will help to remedy many of the problems we'll encounter in the future.

Thank you.

Mr. SCHWARZ. Mr. Kelley, I'll try to be very brief.

In your statement, you said the following, and I would like then to question about what you said:

We must recognize that situations have occurred in the past and will arise in the future where the Government may well be expected to depart from its traditional role, in the FBI's case, as an investigative and intelligence-gathering agency, and take affirmative steps which are needed to meet an imminent threat to human life or property.

Now, by that you mean to take what kind of steps in what kind of situation? And can you give some concrete examples under your general principles statement?

Mr. KELLEY. I think that Mr. Adams addressed himself to that the other day, where you have an extremist who is an employee at the waterworks, and he makes a statement that he's going to do something which is devastating to the city, and you have no way to attack this under the ordinary procedures, and so therefore you must take some steps to meet that imminent threat to human life or property.

Mr. SCHWARZ. So let us take that case as a test of the principle. You are saying the extremist has said he is going to do something to the waterworks, poison it or something, and he is on the way down there with the poison in his car. Is that the presumption?

Mr. KELLEY. We hadn't gone that far, but all right, you can extend it.

Mr. SCHWARZ. All right, now, in that case you have the traditional law enforcement tool, which is the power of arrest.

Mr. KELLEY. Not under probable cause where he has not gone down there. The hypothetical we gave was one where he had not taken any overt acts in perpetration of this.

Mr. SCHWARZ. If he hasn't taken any overt acts, are you then in what you would call an imminent threat of human life or property?

Mr. KELLEY. I think so.

Mr. SCHWARZ. How so? Unless he has taken an overt act to buy the poison or to get in the car with the poison, there is not by definition any threat to life or property.

Mr. KELLEY. Mr. Schwarz, I've been around in this business a long time. I've heard a number of threats which were issued, and they thereafter materialized into actions. I don't take these threats as being empty ones, because so many times they have been acted upon.

I was criticized one time when there was a threat made to kill me, and it was said later on, it's not rhetoric, it's not rhetoric to me, because when they say they're going to kill me, that just means one thing.

Mr. SCHWARZ. But I'm not disagreeing with you.

Mr. KELLEY. But you are disagreeing with me. You're saying on the basis of experience that you cannot detect a possible threat. That's the whole area of concern that we have here—losing the capability of doing something. We don't say we should initiate it ourselves. We say that we should go to the Attorney General. We do not

subscribe to the idea that we should act independently because maybe we don't have the judicial review—the capability of determining, but we do think that we should report it and thereafter see what can be done.

Mr. SCHWARZ. Have you changed in the course of our discussion the standard you refer to in your opening statement,<sup>1</sup> where you're talking about an imminent threat.

Mr. KELLEY. Yes.

Mr. SCHWARZ. And I hear you now as saying a possible threat.

Mr. KELLEY. An imminent possible threat.

Mr. SCHWARZ. An imminent possible threat.

Would that be a fair standard for either action, other than arrest? I don't know what you have in mind, but something to prevent the person from carrying out his activities, other than arrest, for instance, what is an example of what you have in mind?

Mr. KELLEY. Removing him from his position or whatever is necessary in order to make it impossible, or at least as impossible as possible, to perpetuate this thing.

Mr. SCHWARZ. You mean have him lose his job or—

Mr. KELLEY. I don't know what it would be.

Mr. SCHWARZ. Isolate him in some fashion?

Mr. KELLEY. In some fashion perhaps.

Mr. SCHWARZ. Now, for such activity and for opening an investigation into a domestic group, could you live with a standard which said you would have to have an immediate threat that someone was likely to commit a serious Federal crime involving violence?

Mr. KELLEY. I think that this thing could be worked out so that there could be an adequate basis for an evaluation.

Mr. SCHWARZ. So those words, without trying to commit you entirely to them, do not seem to you to depart far from what you think would be an acceptable standard.

Mr. KELLEY. Well, an imminent, immediate threat might be, by virtue of the word "immediate", that he's going to do it the next minute. In that case it may be necessary for you to, not with the presence or the possibility, not be able to do anything except put him under arrest.

Mr. SCHWARZ. Of course, of course. And nobody would at all disagree with that kind of action.

Mr. KELLEY. I don't think they would either.

Mr. SCHWARZ. But on the question, let's take the opening of an investigation into a domestic group. Is it basically consistent with practicality to make the test immediate threat of a serious Federal crime involving violence?

Mr. KELLEY. To open a domestic security case?

Mr. SCHWARZ. Yes.

Mr. KELLEY. It appears to me that this is a terrorist activity, in effect. We certainly have terrorist activities under our jurisdiction as a threat against the United States.

Mr. SCHWARZ. Now, are there other circumstances where it is justifiable to open an investigation of the domestic group where you do not have an immediate threat of serious Federal crime involving violence?

Mr. KELLEY. Oh, I think there are other criteria, and they have been well defined as to what is the possible opening, the basis for a possible

<sup>1</sup> See p. 284.

opening. We haven't been discussing that, we have been discussing particular instances, but there are other criteria that are used, yes.

Mr. SCHWARZ. What would the other criteria be?

Mr. KELLEY. Well, the possible statutory violations over which we have jurisdiction are, generally speaking, the most used of the bases. And then you have, of course, some intelligence investigations which should, of course, be of short duration if there is no showing of this leading to action or a viable intent.

Mr. SCHWARZ. So that's what you're looking for in the intelligence investigation?

Mr. KELLEY. By intelligence investigation, yes, you are looking to prevent.

Mr. SCHWARZ. What you are looking to prevent, and what you're looking to find, is a likelihood of action combined with an intent to take an issue?

Mr. KELLEY. And the capability.

Mr. SCHWARZ. And the capability. I just have two other lines, Mr. Kelley, and I appreciate very much your time.

Mr. KELLEY. That's all right.

Mr. SCHWARZ. Assuming a legitimate investigation has been started into a domestic intelligence matter, is it legitimate for the FBI, in addition to obtaining information that relates to what we've just been talking about, the likelihood of violent action, is it also legitimate for the FBI to collect, retain, and disseminate information concerning on the one hand the sex life of a person and the political views of a person on the other?

Mr. KELLEY. I think, Mr. Schwarz, that this is just what many of our problems are—perhaps the guidelines can define this type of thing. I think probably you will agree that within the determination of the deviations possibly of sex lives, there might be something that is relevant. I would say ordinarily it's not. And so far as political views, yes, I think that this could be, if he is espousing some cause or some view that advocates violence or the overthrow of the government.

Mr. SCHWARZ. Would those be the only limits on political views that you think are OK to collect, advocates of violence or of overthrow?

Mr. KELLEY. Well, I don't think because he's a Democrat or a Republican it would be anything that would be damaging, but it might on the other hand counter the report that he's a member of some other organization.

Mr. SCHWARZ. Is the standard you used on collection of sex life information relevant? I suppose anything might be relevant, but don't you think that as a function of balance, it has to have a high degree of relevance before it's justifiable to collect that kind of information on American citizens who are not suspected of having committed crimes?

Mr. KELLEY. Insofar as doing it presently, it has been included in some reports as a result of the requirement that that is what is required by our rules, that when a person reports something to us, we do a report of the complaint. Insofar as a determination by guidelines that might be prepared later, I think that we can certainly deliberate on this to see whether or not this is something we should retain, and we would not object to anything reasonable in that regard.

Mr. SCHWARZ. I just have one final question.

Taking the current manual and trying to understand its applicability laid against the facts in the Martin Luther King case, under section 87, permission is granted to open investigations of the infiltration of nonsubversive groups, and the first sentence reads: "When information is received indicating that a subversive group is seeking to systematically infiltrate and control a nonsubversive group or organization, an investigation can be opened."

Now, I take it that is the same standard that was used in opening the investigation of the Southern Christian Leadership Conference in the 1960's, so that investigation could still be open today under the current FBI manual.

Mr. KELLEY. We are interested in the infiltration of clearly subversive groups into nonsubversive groups inasmuch as this is a ploy that is used many times, and having infiltrated, they then get control, and they have a self-launched organization which they can use, and not, certainly, to the benefit of the country.

Mr. SCHWARZ. But is the answer to my question yes, that under that standard, the SCLC investigation could still be opened today?

Mr. KELLEY. I think so.

Mr. SCHWARZ. All right, then, just one final question.

Do you agree that special care needs to be taken not only of the standards for initially opening an investigation of a group, but perhaps extra care needs to be taken when the investigation goes beyond the initial target group to individuals or people who come into contact with it?

Mr. KELLEY. I don't know if I agree with that entirely. If you mean that we go into the nonsubversive group—that we then investigate people in that nonsubversive group, not the infiltrators, but the non-infiltrators, that we conduct a lengthy investigation of them without any basis for doing so other than that they are in an infiltrated group, I would say probably that's not necessary.

Mr. SCHWARZ. Thank you very much.

Mr. SMOTHERS. Just a couple of very brief lines of inquiry, Mr. Kelley. I think that one of the questions that the chief counsel was raising is one that goes further into your statement, when you talk about the difficulty of setting out the line between intelligence gathering and law enforcement kinds of functions. Nevertheless, though, I think that you have made an effort, indeed, the Bureau's organizational scheme reflects an effort to distinguish some of this.

Putting aside for one moment the counterespionage effort, and looking strictly at what we have been calling domestic intelligence, is it your view that the retention of this function in the Bureau is critical to the Bureau's law enforcement position?

Mr. KELLEY. My personal opinion is that the Bureau does a splendid job in this area. I feel further that the background of criminal investigatory activities and experiences which all counterintelligence people have is very helpful. It is helpful not only in gathering knowledge and the experience; it also enters in the field so that you have a person with a broad understanding of rights and privileges, and you don't have so much that spy or cloak-and-dagger type, that very, very secret type of operation.

I subscribe to the present system heartily.

Mr. SMOTHERS. Would it be of assistance to your mission if, within the Bureau, guidelines were established that effectively limited access or controlled dissemination of the intelligence product? In other words, if we had a situation where the intelligence product is critical to assist the law enforcement effort, I don't think there's any question that there should be access to it.

Isn't our problem one of controlling the use of that intelligence product and preventing the kind of murky crossing of lines there with the information legitimately needed for law enforcement?

Mr. KELLEY. There is always a problem when there is wide dissemination, because that just numerically increases the possibility of misuse, abuse or slander, libel, or anything of that matter, and I think that it would be well worthwhile to review the dissemination rules to make them subject to close guidance in the guidelines that we're speaking of.

Mr. SMOTHERS. Let me just raise one final area with you. A question was raised about the investigation now being conducted by the Justice Department regarding the improper actions of COINTELPRO, and the King case in particular. As we look at allegations of impropriety by your personnel, I think it would be helpful for our record here to have some insight into the procedure the Bureau would normally follow. What does the Bureau do when it gets an allegation that an agent or administrative official in the Bureau has behaved improperly? Is an investigation conducted internally, or is it routinely referred to the Justice Department?

Mr. KELLY. There may be a revision in this type of procedure as a result of the establishment of the Council for Professional Responsibility. At present it would be in the great majority of the cases turned over to our Inspection Division for investigation. There might be, on some unusual occasion, a designation of a special task force made up, perhaps, of division heads. That is most unlikely, but it is handled internally at present.

Mr. SMOTHERS. Would these internal determinations be reviewed by the Justice Department, or do you think that is a necessary step?

I guess what we are searching for here is, first, to what extent does the Bureau police itself; and second, is the Department of Justice involved in the policy determinations? For instance, what if the Attorney General disagreed with the assertion that only the higher-up officials who ordered the action against King should be the subject of investigation and maybe prosecution? How does the interplay work there between you and Justice?

Mr. KELLEY. We do report to the Attorney General those activities which we construe as improper or possibly illegal. There is a possibility that the Department, having been advised of the situation, might take it on their own to do their own investigating, and this is something that we feel is a decision to be made only rather rarely, because we feel we have within our own organization sufficient capability to handle that. But we do not protest it. It is handled independently of us.

Mr. SMOTHERS. Thank you.

Mr. SCHWARZ. Thank you.

[Whereupon, at 12:12 p.m., the committee recessed subject to the call of the Chair.]

