Department of Justice

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ADDRESS

OF

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Anyone who reads newspapers or watches the evening news will agree that this year has not been a placid one for me. In fact, I sometimes wonder if it would not have been better for someone else to have been selected to serve as Attorney General. Recently I met in Washington with some 40 business people who were taking advance courses at Stanford University. I answered questions for awhile and finally one man in the rear of the room asked the following question:

> "What condition do you think the Department of Justice would be in today if President Carter had followed the example of President Kennedy and appointed his brother Attorney General?"

I replied that the meeting was at an end.

Controversy would be inherent and intrinsic in the work of any government officer charged simultaneously with enforcing the law and protecting people's civil liberties; the tension is institutional. This tension is emphasized in the Attorney General's role as the President's agent in intelligence and counterintelligence matters. Henry James observed that "it was a complex fate being an American." He must have known the Attorneys General of his time.

I have decided to speak today on the place of intelligence activities in our government and the steps we in the Carter Administration are taking to make secure the rights of individual American citizens from any potential abuse in the name of national security. Although there has been much written and said about intelligence activities during the last few years, I still find that few people know much about our country's intelligence community, or the protective procedures now in place. It is important to inform the American people in a coherent fashion of the steps being taken by this Administration to reform the structure of our intelligence activities -- measures that strengthen the guidelines and oversight of the intelligence agencies without undermining their capacity to fulfill their missions.

One need not be especially astute to realize that government intelligence activities can, if pursued beyond strict bounds, threaten the basic rights which our government is charged with protecting. The past few years have demonstrated that this is no abstract concern.

It is a fair question, then, of any Attorney General to ask how he or she proposes to perform these duties -- law enforcer, spy catcher and protector of liberty -- and be faithful to each. It is no answer to say merely that the Attorney General shall enforce the law and obey the Constitution, for it is the Constitution and the laws under it which create

his dilemma. Oliver Wendell Holmes' "fundamental formula" is especially pertinent here:

> ". . .the chief need of man is to frame general propositions and. . .no general proposition is worth a damn."

I shall try to provide specifics tonight.

To understand the specifics of this Administration's performing its seemingly contradictory duties in furthering intelligence and protecting liberties, one must begin by understanding the legal framework that confines any President and Attorney General. That there should be such limits was opined by Justice Brandeis in his now famous dissent in Olmstead v. U. S., a case that involved electronic surveillance, although not foreign intelligence, but rather domestic law enforcement. Brandeis said that the makers of the Constitution

> ". . .conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."

And it is the government's power to investigate which can so seriously threaten this right to be let alone.

A good deal has happened since Brandeis wrote these words. There seems to have been, in recent years especially, a steady erosion of the right Brandeis spoke of by governments acting in a cause they described as "national security."

One recurring problem in clarifying the public dialogue about intelligence activities is the need to do away with all-purpose incantations about national security. In the recent past, "national security" became a talismanic phrase which was used to ward off any questions about the legitimacy of any governmental conduct to which the phrase was applied. The words "national security" should no longer be used, as they were for so long, to apply to domestic terrorism investigations. Since the Supreme Court's decision in the Keith case in 1972, different legal standards have been applied in these investigations. The myth of "national security" should not be permitted to blur the distinction between foreign intelligence and counterintelligence on the one hand and criminal law enforcement and domestic security investigations on the other hand. "Foreign intelligence" is roughly defined as information relating to the capabilities, intentions and activities of foreign powers or organizations. "Counterintelligence" generally refers to information gathered and activities conducted to protect against espionage and other clandestine intelligence activities and against international terrorist activities. In contrast, domestic security investigations, such as those of domestic terrorist activities, are generally a specialized part of criminal law enforcement, and must be treated differently from foreign intelligence and counterintelligence matters.

Since becoming Attorney General, I have continued to build on the foundation left by Attorney General Levi in establishing guidelines to regulate the FBI's investigations in foreign counterintelligence and domestic security investigations. In general terms, the guidelines require that domestic terrorist groups which claim a political motive must be investigated according to standard criminal law enforcement procedures, including a requirement that a warrant be obtained from a judge before electronic surveillance can be used. Because the groups assert a political motive, the guidelines provide for safeguards to ensure that Americans are not being targeted for investigation on the basis of legitimate activities which are protected by the First Amendment. Too often in the past, government officials used the rationale of "national security" to surveill, disrupt, or discredit political activities they did not like.

A separate set of classified guidelines regulates the FBI's counterespionage operations. When the FBI is investigating the activities in the United States of suspected foreign spies or international terrorists, it must seek the approval of the Attorney General before using investigative techniques such as electronic surveillance.

In the past few years, the details of how our intelligence agencies have performed their assigned tasks have been opened to our view as never before. These public inquiries led to disclosures of a number of unlawful or questionable actions by these agencies. Principal among these inquiries were the hearings of the Senate Select Committee on Intelligence, which found in its landmark report in 1976 that:

> ". . .the targets of intelligence activity have ranged far beyond persons who could properly be characterized as enemies of freedom and have extended to a wide array of citizens engaging in lawful activity."

The scope of the intelligence gathering was found to be too broad, with intelligence agencies using a "vacuum cleaner approach," indiscriminately sweeping up information about the private lives and political activities of Americans along with the information necessary for proper investigative purposes. Frequently the dissemination of the information collected was excessive, and occasionally it was undertaken for improper reasons. The means of collection included spying on lawful organizations, opening the mail and telegrams of American citizens, monitoring tax returns for political motives, and wiretaps and break-ins without legal authority.

The Committee concluded that, among other things, the guidelines under which the intelligence agencies operated were vague, failing to provide sufficiently clear direction and standards or to establish a failsafe system of accountability and review within the Executive Branch. In addition, the Committee found that the Constitutional system of checks and balances was malfunctioning in the intelligence area because the need for secrecy had been used as a shield from any meaningful Congressional oversight.

These revelations, through their shock to the national conscience, have produced a consensus among the Executive and Legislative Branches, as well as among the American people, that an effective and Constitutionally-sensitive control system must be developed to avoid any recurrence of this history. The Carter Administration took office committed to this goal.

It is now fifteen months since that time. As Attorney General, I am the President's agent in faithfully executing the laws and, by his delegation, I have had responsibility for holding the intelligence community to the rule of law. With President Carter's strongest support and with excellent cooperation from Congress, we have pointed the way toward several significant improvements in the safeguarding of our intelligence activities. I would like to report to you today on some of these measures.

The first major achievement was realized last January when President Carter signed a new intelligence Executive Order. Early in his term of office, President Carter ordered a probing and comprehensive policy review of the existing intelligence Executive Order which President Ford had issued in response to the Senate Select Committee's work.

Several working groups were established to undertake this study. Justice Department attorneys from both the Office of Legal Counsel and my personal staff were key participants in this review. I received regular reports and provided direction on a number of issues. Uppermost in our thinking was finding a means of preserving and protecting the privacy rights of American citizens within a structure which would maximize the effectiveness of our intelligence agencies.

Justice Department lawyers met with teams from other departments in many long and laborious sessions to work out the draft of the new intelligence Executive Order. They finally arrived at a draft which restructured the intelligence community, outlined the responsibilities of the heads of intelligence agencies and set forth restrictions on intelligence activities through a system of Attorney General guidelines.

At that point, the 55-page creation of these lawyer teams was sent to the President for his approval. The President gave it his almost legendary line-by-line review, and sent it back as unacceptable. He said, in essence, that it was incomprehensible.

redundant, wordy, and full of intelligence jargon and legalisms. Only a lawyer could understand it, he objected, and I think he even had doubts that most lawyers could comprehend it. Another draft, with some improvements, was written by the lawyers, and the President again sent it back with the same message -- the Order had to be put into clear English, drastically cut, and reorganized. One more effort finally produced a document, redrafted, reorganized, and cut by one-third. The Order was also given a new numbering system which had a striking resemblance to the Georgia penal code. The President gave this document his approval, and last January we had a great signing ceremony in the Cabinet room.

In its final form, the Executive Order took some significant steps beyond the prior Order. For example, the FBI's counterintelligence activities were brought within the restrictions of the Order for the first time. The Order also called for the writing of new Attorney General procedures to regulate the conduct of virtually all intelligence activities which could affect the rights of Americans either at home or abroad. Depending upon the type of activity, the Attorney General establishes these regulations either unilaterally or in concert with the cabinet officer from the agency that is affected by the procedure. New procedures are called for by the Order covering Defense Department intelligence activities

in the United States, television surveillance and other continuous monitoring techniques, participation in domestic organizations, collection of information about Americans not publicly available, and testing procedures for various kinds of electronic surveillance equipment. The basic principle of all the Attorney General guidelines is to:

> "ensure compliance with law, protect constitutional rights and privacy, and ensure that any intelligence activity within the United States or directed against any United States person is conducted by the least intrusive means possible. The procedures shall also ensure that any use, dissemination and storage of information about United States persons acquired through intelligence activities is limited to that necessary to achieve lawful governmental purposes."

Another critical safeguard in the Executive Order is that warrantless electronic surveillance and other intrusive techniques in foreign intelligence investigations "shall not be undertaken against a United States person without judicial warrant, unless the President has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power." The careful limitation of this use of electronic surveillance by Executive authority is buttressed

by detailed Attorney General guidelines regulating the conduct of electronic surveillance. In many ways, this new Executive Order is the cornerstone of our efforts to construct better and safer systems for intelligence activities.

A second major initiative toward protecting civil liberties in the intelligence field is the Foreign Intelligence Surveillance Act, frequently referred to as the "wiretap bill." This bill is the product of much hard work and was designed in close consultation between the Administration and the Congress. We had the benefit of some fine initial work on this approach by President Ford and Attorney General Levi. We are hopeful of its passage. This bill would ensure for the first time that the safeguards of a judicial warrant procedure are extended to all electronic surveillance in the United States conducted for intelligence purposes.

Under the proposed bill, a request for electronic surveillance would have to include a formal certification from a senior intelligence official that the purpose of the surveillance was to seek important foreign intelligence information. The Attorney General must find that a surveillance request meets all the standards of the Act. He then sends the special warrant applications to a federal judge for approval.

Some concern has been expressed about the increased risk of improper disclosure from the participation of more people in the approval process, as called for by the bill. I have great faith in the federal judiciary, however, and I am confident that the necessary security precautions can be established to protect highly sensitive information.

This bill represents the resolution of several important and difficult issues worked out between the Justice Department and the Congress. First, we have accepted the principle that, as a matter of sound public policy, judicial warrants should be required in foreign counterintelligence cases, even though as a Constitutional matter the President has inherent power in this area to authorize such surveillance without judicial warrant. Second, we have reached a general agreement on the fact that to obtain such warrants the government would have to meet a standard which connects the suspect activity to the criminal law. The nature of the criminal standard would vary depending on the conduct in question. Third, we have agreed that the Attorney General should inform the Congress on a regular basis about the manner in which the Act is being implemented. The passage of the Foreign Intelligence Surveillance Act is not only a critical step forward in the intelligence field, but it will also supply momentum vital to the next phase of our program -- the development of charter legislation.

The "new frontier" in the intelligence field is the drafting of this charter legislation to outline the authority and mission of each intelligence agency and set standards and procedures to guide their activities. It may take more than a year to settle the myriad questions on this vast new frontier. President Carter and I are firmly committed to sticking with the task until it is done and to working closely with Congress at every step.

The Senate Select Committee on Intelligence has already introduced a massive package of charter bills for discussion purposes and they are now embarked upon several months of hearings on these issues. One key question we will work together to resolve is finding the level of regulatory detail that can be written into these charter statutes without restricting the kind of flexibility necessary in conducting intelligence activities.

Another difficult area which is receiving our attention is the protection of legitimate government secrets while permitting those who seek to exercise their First Amendment rights to criticize the government, no matter how embarrassing such criticism might be. One step in this direction is to be certain that the classification stamp is used to protect legitimate government secrets, and not, as may have sometimes been the case in the past, as a shield to prevent legitimate

access to information the government possesses and to thwart fair criticism based on such information.

In this light, it is important that we enforce the contractual obligations of government employees not to divulge classified information without prior governmental review. There is a commitment in this Administration to review in a reasonable and prompt manner material intended for disclosure, so as not to inhibit "whistleblowing" about improper government conduct. I believe we should consider new proposals to ensure the timeliness of such review, with a person independent from the classifying office doing the reviewing. Such steps would make certain that information would be protected because it contained legitimate national secrets and not because it is embarrassing.

As I mentioned earlier, I suspect in the past we may have used classification designations excessively. It would be useful to create a mechanism, perhaps something like an inspector general, to sample classifications and make certain that the government does not place "secret" or "top secret" labels on material that should be made public.

Thus, as we seek to enforce contracts prohibiting divulgence of classified information, we must also work to tailor those contracts so that they do not reach beyond the protection of legitimate government secrets into an area where they inhibit the expression of political views or other First Amendment rights.

These major efforts -- the Foreign Intelligence Surveillance Act, the new intelligence Executive Order, and the development of charter legislation -- all represent our policy in setting a proper balance between effective intelligence and protection of Constitutional rights. Two overriding principles have governed the development of these measures. First, our Constitutional rule of law cannot be sacrificed or compromised. Second,our tripartite system of checks-and-balances must be applied to the intelligence activities of the government.

This has been a demanding, time-consuming task of translating the consensus for reform into workable documents of control. The effort calls to mind the story of the American farmer who was visiting Buckingham Palace. After carefully inspecting with his trained eye the beautiful lawns that surround that historic building, he approached a gardener and asked how they were able to produce such magnificent lawns. The gardener replied that they had obtained the best soil from all over England and carefully combined it, had gotten the best mix of seed and planted it by hand, had used the best fertilizer available, and then had watered and mowed it every day for 500 years. We cannot let it take 500 years to complete these new reforms in the intelligence community but the task is important enough to be undertaken in that same kind of careful, conscientious, painstaking manner.

It is our duty as Americans to demonstrate that we can conduct intelligence activity successfully and vigorously while maintaining absolute respect for our Constitutional commitment to individual rights. That is the spirit in which we are moving forward.

Thank you very much.