Exhibit A

Assistant Attorney General
Office of Legal Counsel

7-18-78

Department of Justice
Washington, D.C. 20530

17 JUL 1979

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

Dear Mr. Lapham:

Re: MKULTRA Drug-testing Program

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

Department of Justice
Washington, D.C. 20530

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

Re: MKULTRA Drug-testing Program

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

Legal Obligation to Notify MKULTRA Subjects

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

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

A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

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

Dean Prosser also has acknowledged that this duty generally prevails:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C.

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

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

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

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

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

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

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

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

The Notification Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Cont. on p. 23)

Responsible Federal Agency

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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Office of Legal Counsel