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Taking Liberties With An Executive Order

A Post editorial of Jan. 25 ["Controls on Intelligence"] welcomed the executive order on intelligence issued by President Carter on the previous day as a substantial improvement over the Ford order in part, it was said, because the restrictions to protect civil liberties are more explicit and extensive.

The editorial writer may have been misled by the story, appearing in *The*

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Post a few days before the order was issued, that reported that a number of specific restrictions would be in the order. These restrictions were, however, absent when the order was actually issued. In fact, the sections of the Carter order that deal with restrictions to protect civil liberties were taken virtually verbatim from the Ford order and include at least as many increases in authority to conduct surveillance as there are new restrictions.

Most important, the Carter order perpetuates, and indeed makes even more explicit, the two fundamental defects

of the Ford order relating to the conditions under which Americans can be put under surveillance and the claimed authority to conduct warrantless searches. On both of these issues the legislation introduced with broad support by the Senate Intelligence Committee is fundamentally different.

Both the Ford and Carter orders permit the intelligence agencies to target Americans as the subjects of investigations when they are not suspected of any criminal activity. Both orders use very general and undefined terms to specify when Americans can come under surveillance. The orders permit surveillance of a person believed to be an agent of a foreign power, for example. That phrase is not defined and is not linked to doing anything illegal. The Carter order introduced a new set of categories of situations in which surveillance of Americans is permitted. These are described cryptically as a "lawful counterintelligence, personnel, or physical or communications security investigation." These phrases are not defined in any way that establishes any meaningful criteria for determining when it is proper to conduct an investigation.

If the Carter order does not establish control by explicit or extensive limitations on who can be the object of surveillance, neither does it restrict the techniques that can be used. Although the CIA and other intelligence agencies are prohibited from certain kinds of surveillance and from manipulation of domestic political organizations, there are no absolute prohibitions on the FBI.

The bureau is left free to do whatever the attorney general finds to be lawful and the least intrusive means necessary to accomplish the purpose of the investigation. Attorneys general

have, to say the very least, varied in their view of what the Constitution permits, and history should not give one any high confidence in a system that depends primarily on the attorney general's restraining the intelligence agencies without explicit presidential or legislative prohibitions or criteria.

In establishing procedures for conducting different kinds of surveillance, the order distinguished between techniques, such as interviews, that do not require a warrant in criminal investigations, and those, such as mail openings, that do. The section dealing with the latter category is in many ways the most disturbing in the order.

The order permits the president to secretly authorize searches that, although they would require a court order in criminal investigations, would be carried on without a warrant if done for "intelligence purposes." The only limitation is that the attorney general approves the activity and determines there is probable cause to believe the American is an "agent of a foreign power." All this in secret and with no definition of that talismanic phrase. The Constitution would appear to require the approval of a neutral magistrate before such surveillance could be permitted—and then only if the Fourth Amendment requirement that such searches be reasonable is obeyed.

(Much of the Carter order is designed to restructure the intelligence community to make it more efficient and more useful to policymakers. In those parts of the order, there is much to applaud and much to remain skeptical about, but that is a different subject. I am concerned here only with civil liberties.)

In issuing his order, Carter did depart in one critical way from his predecessor's position; he welcomed comprehensive legislation. The new order makes such legislation imperative if Congress is prepared to live up to its obligations where Carter has failed, and to bring the intelligence agencies under the Constitution. The charter proposed on Feb. 9 by the Senate Intelligence Committee is a welcome starting point for such efforts.

Taking Exception