Central Intelligence Agency

Washington, D.C. 20505

3 May 2022

Emma Best
MuckRock News
DEPT MR 57616
411A Highland Avenue
Somerville, MA 02144

Reference: F-2018-02028

Dear Requester:

This letter is a final response to your 8 July 2018 Freedom of Information Act (FOIA) request for **a copy of the historical studies of the Office of the General Counsel, at least one of which was being researched in 1972**. We processed your request in accordance with the FOIA (5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 3141, as amended).

We completed a thorough search for records responsive to your request and located the enclosed document which we determined can be released in its entirety. We also determined that an additional enclosed document can be released in segregable form with deletions made on the basis of FOIA exemptions (b)(3) and (b)(6). Additional material was located and must be denied in its entirety on the basis of FOIA exemptions (b)(1), (b)(3), and (b)(6). Exemption (b)(3) pertains to information exempt from disclosure by statute. The relevant statutes are Section 6 of the Central Intelligence Agency Act of 1949, as amended, and Section 102A(i)(l) of the National Security Act of 1947, as amended.

As the CIA Information and Privacy Coordinator, I am the CIA official responsible for this determination. You have the right to appeal this response to the Agency Release Panel, in my care, within 90 days from the date of this letter. Please explain the basis for your appeal.

Please be advised that you may also seek dispute-resolution services from the CIA FOIA Public Liaison or from the Office of Government Information Services (OGIS) of the National Archives and Records Administration. OGIS offers mediation services to help resolve disputes between FOIA requesters and Federal agencies.

To contact **CIA** directly with questions or to appeal the CIA's response to the Agency Release Panel:	To contact the **Office of Government Information Services (OGIS)** for mediation or with questions:
Information and Privacy Coordinator Central Intelligence Agency Washington, DC 20505 TEL: (703) 613-1287 FAX: (703) 613-3007	Office of Government Information Services National Archives and Records Administration 8601 Adelphi Road – OGIS College Park, MD 20740-6001 TEL: (202) 741-5770 FAX: (202) 741-5769 / ogis@nara.gov

Sincerely,

Anthony J. Capitos
Information and Privacy Coordinator

Enclosures

Unclassified

The Oral History Program

An Interview With Former General Counsel John S. Warner (U)

Editor's Note: The celebration in 1997 of the 50th Anniversary of the CIA served as a reminder of the Agency's fascinating history, with all its successes and its failures. Fortunately, it is still possible to speak with and learn from individuals who were present during the Agency's earliest years. One of those individuals, John Warner, provided to multiple interviewers his recollection of his time with CIA. Although Mr. Warner retired in 1976, he continues to write and speak about the issues concerning intelligence and national security law. He noted that his remarks are snapshots from the past and are illustrative of matters that arose in the history of CIA. One should not draw broad conclusions before exploring the full details of the incidents mentioned.

Photo: John Warner

John Warner served as the Agency's General Counsel from 1973 to 1976. He was present at the creation of CIA, serving as Deputy General Counsel in the Central Intelligence Group in 1946 and remaining in that post with CIA until his appointment as General Counsel in 1973. From 1957 to 1968, Mr. Warner served as Legislative Counsel while maintaining, for most of those years, his post as Deputy General Counsel.

Through the course of his career, John Warner witnessed--and frequently played an important role in--many of the major events and decisions that have shaped the Agency. From designing the legal framework for the Agency, through the evolution of the Agency's relationship with Congress, to Watergate and the damaging revelations of the 1970s, John Warner was on the scene.

Mr. Warner was born in Washington, DC. He began working in a bank when he was 16, and he worked his way through college and law school. He was finishing his master's degree when the Japanese attacked Pearl Harbor. The day after completing his degree, Mr. Warner enlisted as an aviation cadet, was trained to fly B-17s, and eventually completed 35 combat missions in Europe. While home on leave, Mr. Warner met James Donovan, General Counsel of the OSS, at a Washington cocktail party. The two hit it off, and Donovan arranged to have Warner transferred to the General Counsel's office of OSS in December 1944.

The following excerpts, preceded by brief introductions to the excerpted topics, were obtained from two interviews with Mr. Warner that were done under the auspices of the oral history program of the Center for the Study of Intelligence.

On the origins of CIA. *John Warner quickly befriended Larry Houston, another OSS lawyer, who went on to become CIA's first General Counsel. After the war, the two moved with the clandestine collection and support components of OSS, renamed the Strategic Services Unit, to the War Department until the Central Intelligence Group (CIG), was created in January 1946. Houston and Warner together drafted the legislative proposals to establish the CIA. These were to be a part of the National Security Act of 1947, but the Truman administration preferred to keep the CIA component of that Act more general. Their work was eventually encompassed in the CIA Act of 1949.*

John Warner (JW): [Thomas] Troy's *Donovan and the CIA* states [DCI Hoyt] Vandenberg commissioned preparation of a bill to create the CIA and sent it to Clark Clifford [then Special Counsel to President Truman]. Houston's recollection of this event is somewhat different. He recalls that he and I had written a substantial part, if not all, of the legislation prior to Vandenberg's arrival on the scene.

While working on other problems, I discovered a Federal statute, the Independent Offices Appropriations Act of 1945, which provided that a government entity set up by Presidential directive could not exist for more than one year without legislation. Technically, CIG was an entity without legal standing.... That's why we sat down and wrote as quickly as possible. In fact, I wrote the first drafts.

I was a young lawyer, never practiced, never been in government, and so what do you do? I went to the Executive Order, which established the CIG, to pick up what CIA was to be, and then I went to the OSS Appropriation Acts, because that was the only statutory thing about OSS. It was probably the smartest thing I ever did, because that was the guts of what later became the CIA Act of 1949.

On unvouchered funds. *One of the key provisions of the CIA Act of 1949 permitted the Director to expend funds "for objects of a confidential, extraordinary, or emergency nature" on his own authority without having those expenditures subject to audit by the GAO. These funds are known as "unvouchered" or "special" funds. Mr. Warner explains below that the Congress accepted CIA's need for unvouchered funds because the GAO had worked with OSS and understood that the Agency's mission required them.*

JW: The authority for unvouchered funds... that's the guts of the ability of CIA to do its work... to run espionage operations and covert action requiring the highest security. Every other agency in government, whatever vouchers they create are reviewed by the GAO, and they can take exception to it and so forth...

George Washington was the first one to get unvouchered funds. In fact, in the first Congress he said there ought to be a statute authorizing this, and there was. And it's been repeated over the years, except that CIA was the first Agency that got it up to 100 percent of its funds.

Because... the way things started, GAO was on the premises in OSS, and we learned to work with them. And [OSS General Counsel] Jim Donovan even submitted requests to them for an opinion. It was advisory only because it involved unvouchered funds. And there were other questions we would talk to GAO about. So when they were asked [by the Congress] for comments, they said, "Well, we would generally be against this kind of thing, but in view of the mission of CIA, we think it's necessary." Now that's a big step to get the Comptroller General to agree that at least half our money would not be looked at by him. It's also interesting [that] about the same time the Atomic Energy Commission, which was a separate agency, was asking for a big chunk of unvouchered money, and Congress said, "No" and the Comptroller General said, "No."

As you may or may not know, there were a couple of Communists who were members of the Congress, in the House, and they objected all over the place. They objected to the unvouchered funds, and they objected even to the concept [of the CIA].

On the DCI's authority to bring foreign nationals into the country. *One of the more controversial clauses of the CIA Act of 1949 gave the DCI permission to bring up to 100 foreign nationals into the United States each fiscal year, regardless of whether they qualified under the immigration laws.*

JW: Essentially, what happened is, [Senator] McCarran, who was head of Senate Judiciary, which has jurisdiction over immigration matters, said this is an impingement on the immigration authorities. [I explained] to him that this was not an immigration matter, that this was an operational matter to bring a very important alien into the country without regard to all the special provisions of the immigration laws and that probably, very rarely would we get to 100. As it turned out... for many years [there were only] seven or eight a year. But we had to report to McCarran. We said, "We'll give you a yearly report," and he said okay. That was the controversy. It wasn't on the substance of the thing, it was jurisdiction.

On the Office of General Counsel.

JW: I don't know how long it took us to get 10 lawyers [in OGC], but maybe five or six years. And there were no cases that brought us into court as a party, [although] we were increasingly involved with courts in one way or another. [In] private suits where someone was undercover . . . we would try to work arrangements with he judge or with opposing counsel. We'd clear the opposing counsel and brief him: "Look, it has nothing to do with your suite but would you respect this [operational equity]?" And they did. Running through all this, touching base with the judge or opposing counsel was the theme. Never put a false document into court. Never. If you had to take chances on the security involved, you'd do that, but you'd never put a false document, or direct an employee to put a false document. . . . We were lawyers, you just don't lie to a judge . . . .[S]omething that ran through most of our work was the question of preservation of security and compliance with the law. And, of course, the United States with all its laws is the most difficult country in the world. We have so many laws.

On agent contracts. Below, Mr. Warner discusses the case of an agent who sued the Agency for breach of contract. In the Totten case that Mr. Warner refers to, the estate of a Union spy sued the government, claiming that it breached a contract that had existed between the spy and President Lincoln. The Supreme Court ruled against the spy's estate, arguing that, "The secrecy which such contracts impose preclude any action for their enforcement."

JW: There's a long history on that, it's a Civil War case, *Totten*. Where a Union spy sued for back pay. And it went to [the] Supreme Court, and the Supreme Court said there is no basis for any such action. In the one case that came up, we cited the *Totten* case. There had been no citing of it for many, many years. Now there's a lot of them.

On the Marchetti case. *Victor Marchetti served with CIA from 1955 to 1969. Most of that time he was a Soviet military analyst, but, for the last three years of his career, he worked as a staffer in the DCI's office, including a stint as executive assistant to DDCI Rufus Taylor. It was from that vantage point that he learned much about the Agency's covert actions, which he sought to expose in a book after he left the Agency. Upon learning of Marchetti's plans to publish, the Agency on 18 April 1972 successfully sought an order in a US District Court forbidding him to disclose any information about CIA and requiring him to submit his manuscript for review before publishing it. John Warner wrote an article on this episode, and the article, "The Marchetti Case: New Case Law," was published in Studies in Intelligence in the spring of 1977.*

JW: A publisher came to us and said, "Here is a manuscript I think you ought to look at because it looks like it has some sensitive things in it." Prior to this, we'd often thought about what you do when someone threatens to publish or put out classified information. We thought that you would want to get an injunction to prevent him from publishing. Now to get a temporary injunction you've got to have a pretty compelling case....

Well, we had studied this in a theoretical way and looked at commercial contracts to protect proprietary information and thought we could go on a contract theory [arguing that a mutual agreement to protect classified information should be enforced] because everyone signed a secrecy agreement.... Colby called, he was Executive Director then, and [he asked] whether we ever thought about going to court [to prevent disclosure]. I said, "We sure have." . . .

[DCI Richard] Helms was concerned about being in court.... But Larry [Houston] and I went to see him and explained it. He went to talk to Nixon about it...and Nixon said, "Well, if it's that bad, or important, have your lawyers talk to my lawyers." So Larry and I went to see John Ehrlichman, and by then we had a pretty good reading from various directorates on how sensitive some of the material [Marchetti intended for publication] was.... Obviously, when we go to court [the Department of] Justice is our lawyer. And so we talked to Irwin Goldblum [a lawyer from the Department of Justice], and we prepared the necessary papers....

So what we have here is the first time that the CIA as a plaintiff went in to guarantee and protect its

rights and we won. [E]very time you go in court you are losing something. But for me this Marchetti case is precedent shattering. We go in as a plaintiff to protect ourselves....

On the Snepp case. *After the Marchetti case, it was clear that CIA had the right, by virtue of the contractual provisions of the secrecy agreement, to review works that current and former Agency employees planned to submit for publication. The Agency knew that Frank Snepp, who had worked for the Agency from 1968 to 1976, intended to publish a book, and that he and his lawyer assured then DCI Stansfield Turner that he would submit his manuscript for review prior to publishing. He reneged on that promise, however. In the ensuing legal battle, the Agency successfully prevented Snepp from receiving his royalties from the publication of Decent Interval.*

JW: [In the Snepp case that followed Marchetti] for purposes of the trial, CIA's position was, "We are not alleging that there is any classified information in this book. We are just saying he violated his contract." He didn't submit [to the Agency the information he intended to publish], although he had signed a secrecy agreement.... The Supreme Court ruled [in favor of enforcing the secrecy and prepublication review agreements] and approved the forfeiture by Snepp of all profits from his book. So Marchetti and Snepp. I just felt these are tremendous victories the little old lawyers won.

The Freedom of Information Act. *The Freedom of Information Act, which Mr. Warner discusses, entitles anyone to request and receive copies of records in the possession of the executive branch of the Federal Government unless those records fall within certain exempted categories.*

JW: [W]e get to FOIA [Freedom of Information Act] [and] the FOIA amendments. These...impacted every government agency, but particularly the security agencies. The day after it became effective, Morton Halperin put in at least five letters [requesting information from] us, and seven or eight to others... and he was practically a member of Senator Kennedy's staff in getting the amendments passed....

Now [before the FOIA amendments became law,] we sa[id] this should be vetoed, it's unconstitutional.... It provides, if the Agency doesn't answer in 30 days, that they can file suit. You know, ridiculous. Then, of course, courts don't pay any attention to that, but it's wrong to put on the statute books something that no one is going to pay any attention to... so we recommended that the President veto it, and he did. And it was overridden.

On Congressional oversight: *Before the formation of the House and Senate Select Committees on Intelligence, formal Congressional oversight of CIA was performed by small subcommittees of the Appropriations and Armed Services Committees. These committees were among the busiest in the Congress, and their members occasionally did not have time to hold hearings on CIA, even on important matters like its budget. The substantive committees, such as the Senate Foreign Relations Committee, often asked for briefings on world events, but Warner notes that Agency officials would brief on operational matters only to the CIA subcommittees of Appropriations and Armed Services.*

JW: In the first few years I was there, I would...go to each of the committees [and say] "Please, will you hold a hearing so we can brief you." To our own subcommittees, [we briefed on covert action] and other operational matters. But...how well they were briefed is another matter because, if you only met with them once, and there was some event occurring worldwide, that [significant event] got the attention. We did not give them anything in writing. I don't think they had safes.

House Foreign Affairs, Senate Foreign Relations...they would call us... now and then for sensitive intelligence briefings.... We felt we were just as responsible to the Congress as we were to the President. The Congress created us, plus Congress gave us our money. In other words, we were realists. We drew the line when it came to operations.... It was never intrusive. They would ask for an explanation. They might halfheartedly "tsk, tsk," if you missed something...but they never jumped on us. Never.

[We were asked to give] a budget briefing, Sunday afternoon, in the House Office Building in the Capitol at 1 p.m. Okay, I said fine.... Sure enough, there we all are 1 p.m., Longworth Building.... It was sort of a crowded room and Clarence Cannon greets Dulles, "Oh, it's good to see you again Mr.

Secretary." He refers to [Secretary of State John Foster Dulles rather than DCI Allen Dulles] but he knows it is the CIA budget. [Allen] Dulles is a great raconteur. He can tell story after story. He reminds Cannon of this, and Cannon reminds him of that, and they swap stories for two hours. And, in the end: "Well, Mr. Secretary, have you got enough money in your budget for this year, the coming year?" "Well, I think we are all right, Mr. Chairman. Thank you very much." That was the budget hearing. Now [some members, including then representative Gerald Ford] were visibly disturbed by this.... So I pulled [them] aside and I said, "Gentlemen, would you like me to arrange a briefing either here or at the Agency on our budget?" And they... thanked me. And we did [have another briefing] without, obviously, telling the Chairman. And that's why I got to be such good friends with Gerry Ford.

When we began getting into a lot of matters before the Church and Pike Committees... there was a strong core of resistance in the Directorate of Operations. They didn't see why it had to be done. There is still that group that thought Colby did too much [in the way of providing information]. And they were wrong.

On the Church Committee: *On 22 December 1974, The New York Times published an article by Seymour Hersh that alleged CIA had seriously violated its regulations by conducting widespread, illegal operations against domestic dissident groups, such as the anti-Vietnam war movement. Other stories of a similar vein followed, and, in early 1975, the Senate voted to create the Senate Select Committee To Study Governmental Operations With Respect to Intelligence Activities under the chairmanship of Senator Frank Church. The House followed suit by establishing a similar committee under the chairmanship of Representative Otis Pike.*

JW: Church came out with that "CIA is a rogue elephant" statement before he ever had a hearing.... He was running for President.... So they got their charter and I remember vividly Colby and [I] went down to visit Church and his committee counsel.... The purpose of our going down was to establish agreed-on procedures for dealing with classified information, both in terms of personnel and in terms of documents. Church listened politely. Colby said, "We want your people to have standard kinds of safes, we will send security people down to brief your staff people on what kind of safe, or we will provide the safes. We will help you with your procedures for handling documents. We will ask your staff people to undergo investigation and sign secrecy agreements. Now, Senator Church, your clearance consists of the vote of your state that elected you." Patting him on the back.... Colby said, "I see no problem with that," despite the fact that Church had called the CIA a rogue elephant before the hearings ever opened.

The Church Committee issued a report and issued a later legislative proposal.... Very critical, but their report says, which Church signed as Chairman, "CIA has been responsive to the Presidency throughout." No rogue elephant. No one ever saw that in a headline. A lot of their recommendations, and proposed legislation, were ridiculous. This is again the staff. Senators don't read these reports in detail....

On MKULTRA: *MKULTRA was the principal CIA program for the research and development of chemical agents designed to control human behavior. Begun in 1953 out of fear that the Communist countries had made significant progress in mind control, the program lasted for 10 years and eventually focused on using LSD to obtain information from individuals and to control their behavior. On 27 November 1953, Dr. Frank Olson, a civilian employee of the Army, fell to his death from a New York City hotel window eight days after having been administered a dose of LSD by a CIA officer as part of an experiment. The program continued after OlsonÕs death and included the administration of LSD to individuals.*

JW: [In many cases of high-profile flaps,] OGC didn't have the full, unadulterated story.... Because the operators, in part, partook of Helms's view of things. Don't get the lawyers in it. That's part of the operational kind of thinking.... About the Olson case.... The fellow that jumped out the window [allegedly because he was unwittingly administered hallucinogens by the Agency]...we didn't know it was part of a program that did this and did that, but it was quite clear that we had the essence of it that he had agreed that he would be a subject. And no one can say for sure whether this led him to jump out the window, but it was not unreasonable to suppose that it did.... [A]gain, we weren't told the entire story of the program. We were told strictly the elements around this one case. It never occurred to us to raise a question about the propriety of the program.

I've often thought, without making a decision, that we should have been more proactive.... We never went looking for things that would raise questions. When things came to our notice we would act on it[, but we] never went looking for things, which is really an IG function.

On Watergate: *The five burglars who broke into the headquarters of the Democratic National Committee on 17 June 1972 all had CIA connections. Their leader, James McCord, had worked in the Office of Security, and the others, all Cubans, had worked with CIA on the Bay of Pigs operation. A longtime former Agency employee, Howard Hunt, then working for the White House, was also implicated in the burglary. It later emerged that Hunt had used CIA equipment in breaking into the office of Daniel Ellsberg's psychiatrist. Ellsberg had been the source of The Pentagon Papers leak.*

JW: The first time I got involved in Watergate, the US Attorney for the District of Columbia [Earl Silbert] asked if I would come by.... And so I went down there, by myself, and he was there with one other person...and started asking me these various questions.... Up to that time I had, in no way, been involved in anything relating to Watergate, nor did I know the Agency was in any way involved. So the question came as somewhat of a surprise.... Develop some film for Hunt? So I had these two pages of questions, I just can't remember all of them, but they were all, a number of them were things that had more or less appeared in the newspapers, so I knew what in the hell was cooking. I wrote this memorandum and sent it to the Director [Helms].... [Helms] addressed [a] meeting and expressed concern: "What are we going to do about this?" Not one person spoke out until I did. I said, "Dick [Helms], no matter what, we've got to respond to this. A US Attorney for the District of Columbia need answers. I haven't the slightest idea what this is about. None of these questions mean anything to me." [Helms] expressed his concern about involving CIA in the Watergate problem. I said, "Dick, we've got to respond. Now, if you've got some problems that I don't know about you may want to talk to the Attorney General, I don't know, but until I know more about it I can't give you any suggestions."... Eventually, the data was given to me in writing, and I put it together in some sort of package and took it back to the US Attorney.

On the need for secrecy.

JW: We overdid it some ways.... I think in some of our dealings with other [US Government] agencies we overdid the secrecy bit. We should have been more forthcoming.... There are a lot of reasons to be suspicious of CIA, or any government agency. I hear on television programs about this introduction of drugs in Los Angeles. But, on the other hand, what happened with DCI Gates, and others, is that they've opened up a lot of the Agency that they had to do, and should have been done earlier. Before, you go back to the 1950s, and everything is secret...the fact that we exist is almost secret.

Unclassified

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Fifty Years Under Law

1947 - 1997

September 1997

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1947 - 1997

Office of General Counsel
and
Center for the Study of Intelligence

September 1997

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(b)(3)
(b)(6)

Contents

Fifty Years Under Law

Introduction

Non sub homine sed sub deo et lege
("It is not by men but by God and the law [that we are governed]")

—Inscription at Harvard Law School

The Central Intelligence Agency is a creature of law. Fifty years ago, it was created by an act of Congress. Two years later, Congress passed a second act setting out the Agency's special authorities and administrative rules. Today, laws affect every Agency activity. The Agency operates under the Constitution, especially the Fourth Amendment. It spends money according to federal appropriations laws. It derives authorization for expenditures from yearly intelligence authorization acts. It collects intelligence under extensive legal rules of engagement. The identities of its covert employees are specifically protected by federal criminal statutes. It manages information subject to federal information and privacy laws. It handles waste management under environmental regulations. The retirement of its employees, the protection of its secrets, the limits of its operations, even its relationships with other federal agencies, are all governed by laws.

In the beginning, there were fewer laws and thus fewer lawyers. The Office of General Counsel has grown in numbers and presence throughout the Agency since Larry Houston began his tenure as the first General Counsel. Growth came with the greater complexity and number of laws that applied to the Agency and increased Congressional oversight that began in the mid-1970s. The General Counsel has become not only a privy counselor to the Director of Central Intelligence in his intelligence community and CIA roles, but also the manager of a large law firm of more than 100 personnel which delivers legal services to a multibillion-dollar organization. This year, for the first time, the General Counsel will be appointed by the President and confirmed by the Senate.

At present, the Office of General Counsel has [redacted] attorneys in four mainline divisions—Litigation, Administrative Law, Intelligence Support, and Logistics and Procurement Divisions. There is also an Operations Division composed of attorneys assigned on rotation to operating components, such as the area divisions of the Directorate of Operations and the Counterterrorist, Counterintelligence, and Crime and Narcotics Centers. The Office of General Counsel also has attorneys serving in the front offices of the (b)(3)

Directorates of Intelligence and Science and Technology, the National Reconnaissance Office, the Office of Personnel Security, the Community Management Staff, and the Arms Control Intelligence Staff. In addition, the Legislation Group in the Office of Congressional Affairs is staffed by attorneys who perform a legislative counsel function for the Agency. Further, a Law Enforcement Coordination Office was established recently within the Office of General Counsel to handle legal issues related to the Agency's support of law enforcement agencies.

The interaction of the Agency with American jurisprudence has created a body of law that has become coherent enough to be taught as a subject in law schools as diverse as Georgetown, Yale, Virginia, Duke, and Pennsylvania. Intelligence and national security law is now a well-established academic specialty that has resulted in at least two textbooks, several centers, and an ongoing exchange of attorneys from the Office of General Counsel who teach adjunct courses in the subject at local law schools.

That interest in the law and its relation to intelligence led a number of authors to write articles, which were published in *Studies in Intelligence* over the last 40 years and which are now gathered in this collection. *Studies in Intelligence* is the in-house journal of articles on the theoretical, doctrinal, operational, and historical aspects of intelligence that is now published by the Center for the Study of Intelligence at CIA. The articles republished in this collection range from one written by the first General Counsel in 1958 about executive privilege to one published last year on the assassination prohibition in Executive Order 12333—both topics of continued and current legal interest. Former General Counsel John Warner contributed an article on national security and the First Amendment. Other topics include presidential war powers, espionage prosecutions, and a biography of the first General Counsel. Former Attorney General Benjamin Civiletti's article on intelligence gathering and the law is included, as are articles on the evolving role of the General Counsel and the oversight of some intelligence activities by the federal judiciary.

In all of these papers, there is a common theme, sometimes unspoken but always clear: CIA was created by law, authorized to act by law, and bounded by law. Lawyers may disagree on what the law is (and they frequently do), but there is no disagreement that CIA must conduct all of its activities according to law.

Democracies are uncomfortable with secret intelligence activities, especially in the American model with a free press and open debate of all issues. Sir William Stephenson (the man called "Intrepid") said, "We are rightly

repelled by secrecy; it is a potential threat to democratic principle and free government....So there is the conundrum: How can we wield the weapons of secrecy without damage to ourselves: How can we preserve secrecy without endangering constitutional law and individual guarantees of freedom?".

The rule of law reconciles this clash of seeming opposites and reaffirms the basic values and principles of American government, even when it must operate in the shadows and on the night watch. How intelligence law has developed in response to the challenging and dangerous post-World War II conditions is described in these articles by lawyers who actually helped make it. It is a highly interesting story and a fitting commemoration of CIA's 50 years of operation under the rule of law.

Michael J. O'Neil
Acting General Counsel

1. "Executive Privilege in the Field of Intelligence," Lawrence Houston (Fall 1958, Volume 2/4)

A review of legal precedents for protecting sensitive information from disclosure in the courts and Congress, with particular reference to Central Intelligence privileges.

EXECUTIVE PRIVILEGE IN THE FIELD OF INTELLIGENCE

Lawrence R. Houston

Recent agitation in congressional and newspaper circles against "secrecy in government" has focused attention on information security measures in the Executive Branch. The courts, too, have declared in recent months that information used by the government in preparing criminal prosecutions and even some administrative proceedings must be divulged, at least in part, as "one of the fundamentals of fair play." [1] In this atmosphere, the intelligence officer may reflect on the risk he runs of being caught between the upper and nether millstones of congressional or court demands on the one hand and the intelligence organization's requirement for secrecy on the other.

Actually, the problem of demands for the disclosure of information which the government considers confidential is not a new one, as can be seen from the history of the Executive Branch's struggles to withhold information from the courts and Congress. The Executive has based itself in these struggles on the doctrine of the separation of powers among the three branches of government, which holds that no one of the branches shall encroach upon the others.

The Separation of Powers

Demands for the disclosure of information held by the Executive have been made by the courts and by the Congress since the early days of the republic. On the other hand, the very First Congress recognized, more than a year prior to the ratifi-

[1] *Communist Party v Subversive Activities Control Board;* U.S. Court of Appeals, District of Columbia Circuit, decided 9 January 1958.

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1. *(Continued)*

cation of the Bill of Rights, that some of the information held by the Executive ought not to be divulged. An act passed on 1 July 1790 concerning "the means of intercourse between the United States and foreign nations" provided for the settlement of certain expenditures which in the judgment of the President should not be made public.[2] During his first term of office President Washington, anxious to maintain close relations with Congress, on several occasions passed information to the Congress with the warning that it not be publicized. In a special message dated 12 January 1790, for example, he wrote:

> I conceive that an unreserved but a confidential communication of all the papers relative to the recent negotiations with some of the Southern Tribes of Indians is indispensibly requisite for the information of Congress. I am persuaded that they will effectually prevent either transcripts or publications of all such circumstances as might be injurious to the public interests.[3]

Two years later, in March 1792, a House resolution empowered a committee "to call for such persons, papers, and records as may be necessary to assist their inquiries" into Executive Branch actions with respect to a military expedition under Major General St. Clair. The president did not question the authority of the House, but wished to be careful in the matter because of the precedent it might set. He discussed the problem with his cabinet, and they came to the conclusion:

> First, that the House was an inquest and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public: Consequently were to exercise a discretion. Fourth, that neither the committee nor the House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.[4]

By 1794 President Washington, then in his second term, began to show less liberality in divulging information to Congress, for on 26 February of that year he sent a message to the Senate stating that "after an examination of [certain corre-

[2] Richardson, *Messages and Papers of the Presidents*, 2283.

[3] 1 *id.* 63.

[4] Writings of Thomas Jefferson, 303–305.

1. *(Continued)*

spondence] I directed copies and translations to be made *except* in those particulars which, in my judgment, for public consideration, ought not be communicated." [5] Two years later, on 30 March 1796, he transmitted to the House his famous refusal to divulge certain information requested by the House in connection with the Jay Treaty. In this treaty, many people believed, the young republic did not get enough concessions from the British, and the Federalists who supported it had become the target of popular resentment. Washington replied as follows to a House resolution:

> I trust that no part of my conduct has ever indicated a disposition to withhold any information which the Constitution has enjoined upon the President as a duty to give, or which could be required of him by either House of Congress as a right . . . The matter of foreign negotiations, requires caution, and their success must often depend on secrecy; and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic.

Pointing out that he had been a member of the general convention and therefore "knew the principles on which the Constitution was formed," Washington concluded that since "it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different Departments should be preserved, a just regard to the Constitution and to the duty of my office under all circumstances of this case forbids the compliance with your request." [6]

Thus during Washington's administration the doctrine of the separation of powers came to provide the basis for executive privilege in withholding information. This doctrine, not specifically enunciated in the Constitution, emerged from decisions taken on specific political situations which arose during the first years of the republic, as the same men who wrote the Constitution interpreted it in such ways as they thought promoted its intended ends. In this way it was established that the Executive Branch of the Government has within its control certain types of executive documents which the Legislature cannot dislodge no matter how great the demand. The Executive Branch can be asked for documents, but should exercise

[5] 1 Richardson, *op. cit. supra*, note 2, 144. Italics supplied.
[6] 1 *id.* 186.

1. *(Continued)*

discretion as to whether their release would serve a public good or be contrary to the public interest.

The Judiciary also recognized, as early as 1803, the independence of the Executive Branch and its ability to control its own affairs. Chief Justice Marshall wrote: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the Executive, or executive officers, perform duties in which they have a discretion. Questions in this nature political, or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court." [7]

It is notable that this executive privilege was applied in the congressional cases cited above to the President's responsibility for foreign affairs. Under the Continental Congress, the Department of Foreign Affairs had been almost completely subject to congressional direction. Every member of the Congress was entitled to see all records of the Department, including secret matters. But after the Constitution was written, and pursuant to its grand design based on the separation of powers, Congress in 1789 subordinated the Department of Foreign Affairs to the Executive Branch and provided that its Secretary should have custody and charge of all records and papers in the Department. In 1816 the Senate Foreign Relations Committee declared that the "President is the Constitutional representative of the United States with regard to foreign matters" and that the nature of transactions with foreign nations "requires caution and success frequently depends on secrecy and dispatch."

Precedent in Intelligence Cases

Intelligence activities, intimately linked with foreign policy, played their part in the evolution of the Executive Branch's position on disclosure of information. In 1801 Congress interested itself in the expenditures of various Executive Departments and instituted an inquiry "as to the unauthorized disbursement of public funds." In reply to charges that the War Department expended funds for secret service not authorized by law, Oliver Wolcott (Comptroller of the United States 1791–1795; Secretary of the Treasury 1795–1800) gave a clear exposition of the accounting requirements of intelligence which is applicable today:

[7] *Marbury v Madison*, 1 Cranch 137 (1803).

1. *(Continued)*

> I never doubted for one instant that such expenditures were lawful, and that the principle should now be questioned has excited a degree of astonishment in my mind at least equal to the "surprise" of the Committee.
>
> Is it then seriously asserted that in the War and Navy Departments — establishments which from their nature presuppose an actual or probable state of *war*, which are designed to protect our country against *enemies* — that the precise *object* of every expenditure must be *published*? Upon what principle are our Generals and Commanders to be deprived of powers which are sanctioned by universal usage and expressly recognized as lawful by all writers of the Law of Nations? If one of our Naval Commanders now in the Mediterranean should expend a few hundred dollars for intelligence respecting the force of his enemy or the measures meditated by him, ought the present Administration to disallow the charge, or publish the source from which the intelligence was derived? Is it not equivalent to a publication to leave in a public office of accounts a document explaining all circumstances relating to a payment? Ought the truth be concealed by allowing fictitious accounts? Could a more effectual mode of preventing abuses be devised than to establish it as a rule that all confidential expenditures should be ascertained to the satisfaction of the Chief Magistrate of our country, that his express sanction should be obtained, and that the amount of all such expenditures should be referred to a *distinct account* in the Public Records? [8]

The statute referred to in the debates was an Act of Congress passed on 9 February 1793 which gave the President authority, if the public interest required, to account for money drawn from the Treasury for the purpose of "intercourse with foreign nations" simply by his own certification or that of the Secretary of State. Actually, this statute reaffirmed the similar legislation of 1790 providing for the settlement of certain expenditures which, in the judgment of the President, ought not be made public.[9] The substance of these Acts was revived and continued in later legislation, and President Polk utilized it in 1846 in refusing to accede to a House resolution requesting an accounting of Daniel Webster's expenses as Secretary of State in the previous administration.

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[8] *Control of Federal Expenditures*, A Documentary History 1775–1894, Institute for Government Record of the Brookings Institution, pp. 329–330. Punctuation modernized.

[9] Richardson, *supra*, note 2.

1. *(Continued)*

In 1842 Webster had negotiated an agreement with the British representative, Lord Ashburton, on the long-disputed boundary of Maine. To make the treaty more palatable to the public and enhance its chances of ratification in the Senate, Webster had spent money out of "secret service funds" to carry on favorable propaganda in the religious press of Maine. Senator Benton termed this practice a "shame and an injury . . . a solemn bamboozlement." A Congressional investigation followed, during the course of which the request was levied upon President Polk.

President Polk based his refusal to comply on the statutes which gave the President discretionary authority to withhold details on how money was spent. He supported his predecessor's determination that the expenditure should not be made public, asserting that if not "a matter of strict duty, it would certainly be a safe general rule that this should not be done." In his message to Congress he acknowledged the "strong and correct public feeling throughout the country against secrecy of any kind in the administration of the Government" but argued that "emergencies may arise in which it becomes absolutely necessary for the public safety or public good to make expenditures the very object of which would be defeated by publicity." He pointed out as an example that in time of war or impending danger it may be necessary to "employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they had the least apprehension that their names or their agency would in any contingency be divulged." [10]

The non-disclosure of information relating to intelligence was tested rather vigorously in several instances during the Civil War, and these tests established a strong precedent in favor of the inviolability of intelligence activities. Brigadier General G. M. Dodge, who conducted a number of intelligence activities in the West with considerable results, became the object of relentless criticism for his financing methods. He refused obdurately to break the confidence of his agents by revealing names and amounts paid, and when he was denied the funds necessary for these activities, he had to raise the money for his agents by confiscating cotton crops in the South

[10] 5 Richardson, *op. cit. supra*, note 2, 2281.

1. *(Continued)*

and selling them at public auction. Three years after the end of the War, when War Department auditors discovered that General Dodge had paid spies for Grant's and Sherman's armies, they peremptorily ordered him to make an accounting of the exact sums. Receipts and vouchers signed by spies who lived in the South were obviously difficult to obtain, and furthermore the names of the agents, for their own security, could not be disclosed. As a result, when the War Department closed Dodge's secret service accounts 21 years after the war, they were apparently still without a receipt for every dollar spent.[11]

A leading legal decision governing the privilege of the Executive Branch to withhold intelligence also had its genesis in the Civil War. In July 1861 William A. Loyd entered into a contract with President Lincoln under which he proceeded "within the rebel lines and remained during the entire war." He collected intelligence information all during the war and transmitted it directly to the President. At the end of the war he was reimbursed his expenses, but did not get any of the $200-per-month salary for which the contract called. After Loyd's death a suit was brought by his administrator against the Government to collect the salary Lincoln had contracted to pay him.

The case was finally decided by the Supreme Court in 1876, and the claim was denied. Mr Justice Field set forth in his opinion a position on secrecy in intelligence matters which is still being followed today. He wrote that Loyd was engaged in secret service, "the information sought was to be obtained clandestinely," and "the employment and the service were to be equally concealed." The Government and the employee "must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter." Were the conditions of such secret contracts to be divulged, embarrassment and compromise of the Government in its public duties and consequent injury to the public would result, or furthermore the person or the character of the agent might be injured or endangered. The secrecy which such contracts impose "is implied in all secret employments of the Government in time of war, or upon matters affecting foreign relations," and precludes any action for their enforcement. "The pub-

[11] Perkins, J. R., *Trails, Rails and War*, Bobbs-Merrill (1929).

1. *(Continued)*

licity produced by an action would itself be a breach of a contract of that kind and thus defeat a recovery." [12]

The pattern of executive privilege as applied to withholding information on intelligence activities was determined by the resolution of these situations which occurred from the first years of the Republic through the Civil War. Decisions in later cases utilized the precedents which had here been established. In 1948 the Supreme Court, deciding a case concerning an application for an overseas air route, reaffirmed that "the President, both as Commander-in-Chief and as the nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world," and defined its own position on cases involving secret information:

> It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences . . . The very nature of executive decisions as to foreign policy is political, not judicial.[13]

Intelligence information is recognized by the three branches of Government as of special importance because of its connection with foreign affairs and military security.

Authorities for CIA Information Controls

As an Executive agency CIA partakes of the privileges accorded generally to the Executive Branch with respect to withholding information, privileges ultimately dependent on the separation of powers doctrine. In addition, Congress has specifically recognized the secrecy essential in the operation of Central Intelligence by providing in the National Security Act of 1947 that the Director "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." In the Central Intelligence Act of 1949, noting again this responsibility of the Director, Congress exempted the Agency from any law which requires the disclosure of the organization, functions, names, official titles, salaries, or num-

[12] *Totten Adm'r v United States;* 92 US 105 (1876).

[13] *Chicago and Southern Airlines, Inc. v Waterman Steamship Corporation;* 33 US 103 (1948).

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1. *(Continued)*

bers of personnel employed. Other statutes exempt the Agency from requirements to file certain information reports.

Pursuant to the Director's task of safeguarding intelligence information, Agency regulations governing the release of information serve notice upon employees that unauthorized disclosure is a criminal and an administrative offense. A criminal prosecution for unauthorized disclosure can be instituted against an employee under several statutes, including the Espionage Laws, or administrative sanctions including discharge can be applied against him.

Central Intelligence is also subject to the provision of Executive Order 10501 that "classified defense information shall not be disseminated outside the Executive Branch except under conditions and through channels authorized by the head of the disseminating department or agency." This provision, although it has never been tested in the courts, gives the Director added support in controlling the release of information to the courts and Congress as well as to the public. He can and will upon request release information of no security significance to the courts or Congress; he can exercise discretion in the release of information produced by and concerning the CIA; but there are limitations on his authority over information originating in other departments, joint interagency documents, and personnel security information. If the decision whether to comply with a demand for information cannot be made at the Director's level, it is referred to the National Security Council.

CIA's position vis-a-vis the courts and Congress is unique beside that of other agencies, because of the recognized secrecy and sensitivity and the connection with foreign affairs possessed by the information with which the Agency deals. This position has been tested on several occasions.

Intelligence and the Courts

The secrecy of intelligence employment which the Supreme Court recognized in the Totten case on the Loyd-Lincoln contract over eighty years ago is basically unchanged today. The difficulties encountered in the courts by a person claiming pay for secret work allegedly performed for the Government were illustrated in the Gratton Booth Tucker case in 1954. Tucker alleged that he had performed services "under conditions of utmost secrecy, in line of duty, under the supervision of agents

1. *(Continued)*

of the United States Secret Service and of the C.I.D. of the Armed Services and Department of Justice, FBI and of the Central Intelligence Agency." He claimed that from 1942 to 1947 he contributed his services voluntarily and "without thought of compensation in anticriminal and counterespionage activities in Mexico and behind the lines in Germany," and that in 1950 he was assigned to Korea. For all this he brought suit against the United States in the Court of Claims, seeking payment of $50,000 annually for the years he worked and of $10,000 as expenses. On the very basis of these allegations, and without going into the matter any further, the court refused recovery, citing the Totten case as authority.[14]

Another aspect of the Government's privilege not to disclose state secrets in open court was decided several years ago by the Supreme Court in the Reynolds case. This was a suit for damages brought against the Government by the widows of three civilian observers who were killed in the crash of a military plane on which they were testing secret electronic equipment. The Air Force refused to divulge certain information which the widows thought necessary to their case, stating that the matter was privileged against disclosure pursuant to Air Force regulations prohibiting that reports be made available to persons "outside the authorized chain of command." The Air Force then made a formal claim of privilege, affirming that "the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." An affidavit by the Air Force Judge Advocate General asserted further that the material could not be furnished "without seriously hampering national security." The Supreme Court accepted the Air Force argument, saying that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." And these Air Force statements had been sufficient to satisfy the court of the military secret involved.[15]

The privilege of withholding national security information from the courts has been subject to some limitation. One case, *U.S. v Jarvinen*,[16] illustrates that this executive privilege is not

[14] *Gratton Booth Tucker v United States;* 127 Ct. Cl. 477 (1954).

[15] *United States v Reynolds;* 345 US 1 (1952).

[16] *United States v Jarvinen;* Dist. Ct. Western District of Washington, Northern Div. (1952).

1. *(Continued)*

judicially inviolable. Jarvinen was a casual informant in the United States who gave information in 1952 to CIA and later to the FBI that Owen Lattimore had booked passage to the USSR. He later informed CIA that he had fabricated the whole story. Soon thereafter Jarvinen was indicted for making false statements to government agencies. At the trial a CIA employee called to testify by the Department of Justice prosecutor was directed by CIA not to answer. The witness' claim of privilege was not accepted, however, and when he refused the court's order to answer he was held in contempt and sentenced to fifteen days in jail. He was pardoned by the President.

The CIA argument had been based on the provision of the CIA Act of 1949 that the Director "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure" and on Executive Order 10290, then in effect, which limited dissemination of classified security information. The court had reservations about the substantive merits of the privilege, and the widespread publicity emanating from the case apparently vitiated the claim of need to protect sources and methods. It was the further opinion of the court that in a criminal prosecution the Government must choose either to present all the pertinent information, regardless of its sensitivity, or to risk dismissal of the case by not presenting any sensitive information at all.

There have been several instances of indirect Agency participation in court cases, usually when employees have been requested to furnish documents or testify on behalf of the Government or private parties. In recent cases in which other Government agencies have participated there has been a cooperation between them and Central Intelligence representatives which was lacking in the Jarvinen case, and little difficulty has been encountered with respect to the privilege of withholding classified information. A good example is the Justice Department's prosecution of the case against Petersen,[17] an employee of the National Security Agency who had passed NSA documents to the Dutch. The Justice Department needed to present classified information to the court in order to substantiate its case, but the Director of Central Intelligence advised, in

[17] *United States v Petersen* (E. D. Va. Criminal No. 3049, January 4, 1955).

1. *(Continued)*

the interest of security, that a particular document not be used. The Justice Department accepted this recommendation and succeeded in convicting Petersen on other evidence.

CIA and Congress

CIA's record of cooperation with congressional committees has on the whole been satisfactory. The Agency certainly recognizes that Congress has a legitimate interest in some intelligence information and obviously a better claim on it than say the private citizen who needs it for purposes of litigation. Although, under the separation of powers doctrine, intelligence gathering and production is an executive function and the responsibility of the Executive Branch, the Congress does have responsibilities in the foreign affairs field. It is, moreover, the appropriating authority for Agency funds, and indiscriminate withholding of information could not only result in a poorly informed Congress but also jeopardize the good will the Agency enjoys with it. Within the bounds of security, therefore, CIA has attempted conscientiously to fulfill requests from Congress proper to the legislative function. And Congress, for its part, has so far respected CIA's decision to withhold information or produce it only in closed session with the understanding that it is not to be released.

If summoned by a subpoena to testify before a Congressional Committee, all CIA employees, including the Director, are required to appear or be held in contempt of Congress. There are few instances, however, in which an employee has been subpoenaed to testify involuntarily, and no documents have ever been released to Congress without the Director's approval. In most cases it has been as a matter of form or at Agency request that an employee's testimony has been called for and a subpoena served. In only two instances situations have arisen which led to strained relations between the Agency and congressional committees. When Agency testimony was desired by the Senate Internal Security Committee concerning the security status of John Paton Davies, CIA successfully requested several delays in the hearings on security grounds. And in 1954, while the Senate Committee on Government Operations was considering inquiring as to certain facts relating to the security status of an Agency employee, counsel for the Committee and the General Counsel of CIA agreed on the

1. *(Continued)*

legitimate interests of the Agency and the Committee. The employee was never questioned by the Committee.

No court cases have defined an employee's rights to withhold from Congress information which has been classified and the divulgence of which could work harm to this country's intelligence program. Such a case could theoretically arise through testing a Congressional contempt citation in a habeas corpus proceeding, but it is unlikely that such a test will be made. The employee could use an order from the Director as a basis for not testifying, and the Director's judgment has always been respected by the Congress when he has decided he cannot reveal certain information. Because the information which CIA has is so clearly within the purview of the Executive Branch, this Agency has a much stronger legal basis for refusal than other departments have.

If Congress should persist, there would of course have to be eventual Presidential support for continued refusal to give information. Such support was tendered, outside the intelligence and foreign fields, in 1909 when Theodore Roosevelt withstood a Senate resolution calling for certain papers in the Bureau of Corporations concerned with the absorption by U.S. Steel of another corporation. Roosevelt informed the Senate that he had obtained personal possession of the papers it desired but that the Senate could get them only by impeachment. "Some of these facts which they [the Senate] want," he declared, "for what purpose I hardly know, were given to the Government under the Seal of Secrecy and cannot be divulged, and I will see to it that the word of this Government to the individual is kept sacred." [18]

Generally, there has been a spirit of cooperation between the Legislative and Executive Branches. In those cases where a conflict has occurred, and the Executive has refused to divulge information requested even in the strongest terms by the Legislature, the decision of the Executive has prevailed. The Constitution has been in existence for over 170 years and under it 34 Presidents and 85 Congresses have forged a strong interpretation of the separation of powers. In the field of foreign affairs intelligence, the Director of Central Intelligence, acting

[18] *The Letters of Archie Butt, Personal Aide to President Roosevelt;* by Abbott, pp. 305–06.

1. *(Continued)*

under the constitutional powers of the Executive Branch of Government together with powers granted by statute, can withhold such information as he believes is in the best interests of the United States. If a showdown were to occur, however, the issue is between the President and Congress as to whether classified information should be divulged against the wishes of the Director, who is responsible for the protection of sources and methods. Historical precedent in similar situations appears to favor the President.

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2. "Impunity of Agents in International Law," M.C. Miskovsky (Spring 1961, Volume 5/2)

Legal grounds for holding another nation's agents not personally liable for their directed violation of a nation's laws.

IMPUNITY OF AGENTS IN INTERNATIONAL LAW

International rules and institutions have existed since the earliest days, but it was not until the 16th and 17th centuries that there were developed the laws governing relations between European states which became the basis of our present-day international law. The disintegration of the Holy Roman Empire and the emergence of sovereign states representing great concentrations of military, economic, and political power led to the development or formulation of new rules by which nations sought to govern their dealings with one another. At the same time the concept of sovereignty as a power constituting the sole source of laws was enunciated, and with it an explanation of the concept of the nation.

The rules of international law and the concept of sovereignty in a sense limit each other; and particularly in the treatment of crimes like espionage and subversion, international law is confronted with what Philip C. Jessup once called the "taboo of absolute sovereignty." The state is especially jealous of its power to punish those who it believes have tried to undermine its authority, and the principles of international law can apply in matters affecting the security of a state only at the discretion of that state. The Swiss diplomat Emerich de Vattel, whose book *Le Droit des Gens*[1] had an influence on American political philosophy, was one of the early writers in international law who observed that men "put up with certain things although in themselves unjust and worthy of condemnation, because they cannot oppose them by force without transgressing the liberty of individual Nations and thus destroying the foundations of their natural society." Vattel was particularly concerned with the relationships, duties, and responsibilities of nations during times of stress.

[1] *Law of Nations.* Fenwick, Trans. (Washington: Carnegie Institution of Washington, 1916.)

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2. *(Continued)*

Impunity of Agents

Principles of National Jurisdiction

The concept of sovereignty carries along with it the rule that the laws of a country are supreme within its own territorial limits. Consequently, generally speaking, whether a particular act constitutes a crime is determined by the laws of the country within whose borders it was committed. In extension of this *territorial* principle for determining national jurisdiction, however, there have been developed, in accordance with the varying experience of individual nations, at least four other pragmatic principles which a state may choose to follow in determining whether it can try a person criminally for acts committed in violation of its laws. A *nationality* principle would determine jurisdiction by reference to the nationality or national character of the person committing the offense, so that his own state would try him under its law. Under a *protection* principle, jurisdiction would go to the state whose national interest was injured by the offense, wherever it was committed. A *passive personality* principle would similarly determine jurisdiction by reference to the nationality or national character of the *person* injured. And a *universality* principle, finally, would give it to the state having custody of the offender.[2] In any case, however, a state may claim jurisdiction only with respect to an act or omission which is made an offense by its own laws.

The principle of *territorial* competence is basic in Anglo-American jurisprudence, and it has been incorporated in many other modern state codes. Its basis is the sovereign, which has the strongest interest, the best facilities, and the most powerful instruments for repressing crimes in its territory, by whomever committed. It is obvious that under the territorial principle the sovereign must exercise exclusive control over the acts of persons within its territory; there is no question of its right of jursidiction to punish acts that constitute a threat to its authority.

The concept of sovereignty is so strong, however, that it may also, in the *protective* principle of jurisdiction, push beyond state borders with power to try persons outside engaging in acts against the security, territorial integrity, or po-

[2] Research in International Law Supplement to the *American Journal of International Law*, Vol. 29 (1935).

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2. *(Continued)*

litical independence of the state. This principle was formulated in statutes of the Italian city-states in the 15th and 16th centuries, and many modern states apply it to both aliens and citizens. Conflicts arise, of course, where the prohibited acts are carried on in another state in which such acts are not illegal. Without agreement, it is difficult to see how the protective theory can be effective in such cases without an infringement of the sovereignty of the second state.

In the United States, the rule seems to be that the protective principle is not applied unless the legislation designating the crimes so specifies. In the Soviet Union, espionage cases apparently do fall under the protective theory of jurisdiction. In the October 1960 *International Affairs*, G. Zhukov wrote:

> It should be noted that American plans of space espionage directed against the security of the USSR and other Socialist countries are incompatible with the generally recognized principles and rules of international law, designed to protect the security of states against encroachments from outside, including outer space.

This position would give the USSR (and other Bloc countries) jurisdiction over espionage offenses against them, no matter where perpetrated.

Scope of Immunities

On the other hand, the USSR has, in effect, recognized the immunity of American military attachés within its territory by not prosecuting the charges of espionage leveled against them. It thus honors the provisions of international law and agreement whereby officers, diplomatic representatives, consuls, armed forces, ships, aircraft, and other persons and instrumentalities of a state may be immune from the exercise of another state's jurisdiction even under the territorial principle and consequently not subject to legal penalties.[3]

While diplomatic immunity as applied to embassy officials is universally accepted, the question of what persons outside

[3] "Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice," by William Barnes. Department of State Bulletin, 1 August 1960.

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2. *(Continued)*

Impunity of Agents

this category can claim a similar immunity becomes more difficult. There is nevertheless some authority in international law for the proposition that if a man is a duly commissioned agent of his government, albeit without diplomatic immunity, any illegal acts he performs within the scope of his duties may still be considered not his personal violations but his government's national acts, raising questions public and political between independent nations. Under this theory the offended nation ought not try the individual before ordinary tribunals under its own laws but should seek redress according to the law of nations.[4]

This theory and variations of it have found acceptance in a number of situations. For example, in the Claims Convention between France and Mexico of 25 September 1924, Mexico assumed liability for certain acts of its revolutionary forces, accepting the even broader principle that the "responsibility of the State exists whether its organs acted in conformance with or contrary to law or to the order of a superior authority."[5] The applicability of the theory in any particular case depends, of course, not only on its being accepted by the offended nation but also on an acknowledgment by the offending nation that the offender is in fact its commissioned agent, that it authorized or now adopts his acts as its public acts. For this reason texts on international law have denied its application to the acts of secret political agents and spies:

> . . . An agent . . . secretly sent abroad for political purposes without a letter of recommendation, and therefore without being formally admitted by the Government of the State in which he is fulfilling his task . . . has no recognized position whatever according to International Law. He is not an agent of a State for its relations with other States, and he is therefore in the same position as any other foreign individual living within the boundaries of a State. He may be expelled at any moment if he becomes troublesome, and he may be criminally punished if he commits a political or ordinary crime. . . .
>
> Spies are secret agents of a State sent abroad for the purpose of obtaining clandestinely information in regard to military or political secrets. Although all States constantly or occasionally send spies

[4] Secretary of State Webster to Attorney General Crittenden, 15 March 1841. See 2 Moore International Law Digest 26 (1906).

[5] Hackworth 557 (1943).

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2. *(Continued)*

> abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognized position whatever according to International Law, since they are not agents of States for their international relations. Every State punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished. A spy cannot legally excuse himself by pleading that he only executed the orders of his Government, and the latter will never interfere, since it cannot officially confess to having commissioned a spy.[6]

Nevertheless governments do sometimes officially confess to having commissioned their clandestine agents and do interfere in their prosecution under the law of the offended land. Although the several historical cases on record have not afforded a fully adequate test of this ground for claiming personal impunity they do include some in which the offended nation has accepted it. In three cases the United States has been involved.

Paramilitary Raid

During the 1837 insurrection in Canada the rebels obtained recruits and supplies from the United States. A small steamer, the *Caroline,* was used for this purpose by a group encamped on the American side of the Niagara River. On 29 December 1837, while moored at Schlosser, on the American side, with 33 American citizens on board, this steamer was boarded by an armed body of men from the Canadian side under the orders of a British officer. They attacked the occupants, wounding several and killing at least one American, and then fired the steamer and set her adrift over Niagara Falls. The United States protested. The British Government replied that the piratical character of the *Caroline* was established, that American laws were not being enforced along the border, and that destruction of the steamer was an act of necessary self-defense.

In November 1840 British citizen Alexander McLeod was arrested by New York State authorities on a charge of mur-

[6] H. Lauterpacht, *Oppenheim's International Law* (Longman's, 7th ed., 1948), Vol. I, pp. 770, 772.

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2. *(Continued)*

der in connection with the Caroline affair. On 13 December 1840 Mr. Fox, the British Minister at Washington, asked on his own responsibility for McLeod's immediate release, on the ground that the destruction of the *Caroline* was a "public act of persons in Her Majesty's service, obeying the order of their superior authorities," which could, therefore, "only be made the subject of discussion between the two national Governments" and could "not justly be made the ground of legal proceedings in the United States against the persons concerned." On 28 December 1840 the U.S. Secretary of State, Mr. Forsythe, replied that no warrant for interposition in the New York State case could be found in the powers with which the Federal Executive was invested, and he also denied that the British demand was well founded.

When on 12 March 1841, however, Mr. Fox presented the British Government's official and formal demand for McLeod's release on the same grounds, Daniel Webster, who had meanwhile become Secretary of State, wrote to the Attorney General communicating the President's instructions and laying down the following principle:

> That an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the Government of the United States has no inclination to dispute.

Webster answered the British on 24 April, admitting the grounds of the demand, but stating that the Federal Government was unable to comply with it. He apparently believed, however, that the British action would give New York State cause to exempt McLeod from prosecution. McLeod brought a habeas corpus proceeding, but his discharge was refused by the New York court. He was brought to trial on the murder charge and acquitted. In a final note to Lord Ashburton disposing of the Caroline matter, Mr. Webster wrote:

> This Government has admitted, that for an act committed by the command of his Sovereign, *jure belli*, an individual cannot be responsible in the ordinary Courts of another State. It would regard it as a high indignity if a citizen of its own, acting under its

2. *(Continued)*

authority and by its special command in such cases, were held to answer in a municipal tribunal, and to undergo punishment, as if the behest of his government were no defense or protection to him.[7]

Confidential Factfinder, No Spy

On 18 June 1849 Secretary of State Clayton issued to Mr. A. Dudley Mann, who was then in Europe, instructions for a mission it was desired he undertake as a special and confidential agent "to obtain minute and reliable information in regard to Hungary," then in revolt against the Austrian Imperial Government. Mr. Mann proceeded to Vienna, where he found the revolution practically quelled, and therefore did not visit Hungary. The text of his instructions, however, was made public in 1850 when President Taylor released it to the U.S. Senate in response to a Senate resolution. The Austrian chargé d'affaires in Washington, Mr. Hulsemann, then entered an official protest, declaring:

> Those who did not hesitate to assume the responsibility of sending Mr. Dudley Mann on such an errand, should, independent of considerations of propriety, have borne in mind that they were exposing their emissary to be treated as a spy. It is to be regretted that the American Government was not better informed as to the actual resources of Austria and her historical perseverance in defending her just rights . . . the Imperial Government totally disapproves, and will always continue to disapprove, of those proceedings, so offensive to the laws of propriety; and that it protests against all interference in the internal affairs of its Government.

Mr. Webster, by now again Secretary, replied:

> . . . the American Government sought for nothing but the truth; it desired to learn the facts through a reliable channel. It so happened, in the chances and vicissitudes of human affairs, that the result was adverse to the Hungarian revolution. The American agent, as was stated in his instructions to be not unlikely, found the

[7] The texts of the early diplomatic communications regarding the Caroline affair and the McLeod case can be found in the report on *People v. McLeod*, 25 Wend 482 (N.Y. 1841). Others can be found in British and Foreign State Papers 1841–1842, volume 30. 2 Moore 24 (1906) contains a complete summary of the affair. So does "The Caroline and McLeod Cases" by P. Y. Jennings, appearing in 32 Am. Jr. Int. Law 82 (1938). The latter also contains information on the aftermath of the case in which McLeod sought reimbursement from a Claims Commission. A learned critique by Judge Talmadge of the decision in *People v. McLeod* is found in 26 Wend Appendix 663 (N.Y. 1842). Textbooks such as BISHOP p. 584 (1953) and 1 HYDE 239 (2d Edition 1931) give summaries of the affair.

2. *(Continued)*

Impunity of Agents

condition of Hungarian affairs less prosperous than it had been, or had been believed to be. He did not enter Hungary nor hold any direct communication with her revolutionary leaders. He reported against the recognition of her independence because he found she had been unable to set up a firm and stable government. He carefully forebore, as his instructions require, to give publicity to his mission, and the undersigned supposes that the Austrian Government first learned its existence from the communications of the President to the Senate.

Mr. Hulsemann will observe from this statement that Mr. Mann's mission was wholly unobjectionable, and strictly within the rule of the law of nations, and the duty of the United States as a neutral power. He will accordingly feel how little foundation there is for his remark that "those who did not hesitate to assume the responsibility of sending Mr. Dudley Mann on such an errand, should, independent of considerations of propriety, have borne in mind that they were exposing their emissary to be treated as a spy." A spy is a person sent by one belligerent to gain secret information of the forces and defenses of the other, to be used for hostile purposes. According to practice, he may use deception, under the penalty of being lawfully hanged if detected. To give this odious name and character to a confidential agent of a neutral power, bearing the commission of his country, and sent for a purpose fully warranted by the law of nations, is not only to abuse language, but also to confound all just ideas, and to announce the wildest and most extravagant notions, such as certainly were not to have been expected in a grave diplomatic paper; and the President directs the undersigned to say to Mr. Hulsemann that the American Government would regard such an imputation upon it by the cabinet of Austria, as that it employs spies, and that in a quarrel none of its own, as distinctly offensive, if it did not presume, as it is willing to presume, that the word used in the original German was not of equivalent meaning with "spy" in the English language, or that in some other way the employment of such an opprobrious term may be explained. Had the Imperial Government of Austria subjected Mr. Mann to the treatment of a spy, it would have placed itself without the pale of civilization, and the cabinet of Vienna may be assured that if it had carried, or attempted to carry, any such lawless purpose into effect in the case of an authorized agent of this Government the spirit of the people of this country would have demanded immediate hostilities to be waged by the utmost exertion of the power of the Republic—military and naval.[1]

German Saboteur

Werner Horn, a German, was indicted in the Federal District of Massachusetts for unlawfully transporting explosives early in World War I from New York to Vanceboro, Maine.

[1] 1 Moore 218 (1906)

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2. *(Continued)*

Horn claimed immunity from trial upon the indictment in a petition for habeas corpus. His contention, which the Circuit Court of Appeals for the First Circuit called "without precedent," was as follows:

> That your petitioner is an officer in the army of the empire of Germany, to wit, a first lieutenant in the division of the aforesaid army known as the Landwehr; that a state of war exists between the empires of Great Britain and Germany, which state of war has been recognized by the President of the United States in an official proclamation; that your petitioner is accused of destroying part of the international bridge in the township of McAdam, province of New Brunswick and Dominion of Canada; that he is now held in custody by the respondent on the charge of carrying explosives illegally, which allegation, if true, is inseparably connected with the destruction of said bridge; that he is a subject and citizen of the empire of Germany and domiciled therein, and is being held in custody for the aforesaid act, which was done under his right, title, authority, privilege, protection, and exemption claimed under his commission as said officer as described aforesaid.

Claiming thus that the felony for which he was indicted was incidental to an act of war cognizable only by the law of nations, Horn quoted Webster's statement in the Caroline affair: "That an individual forming part of a public force, and acting under the authority of his government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the Government of the United States has no inclination to dispute." The Circuit Court did not dispute the principle, but, noting that "this exemption of the individual is on the ground that his act was a national act of his sovereign," held that the petition failed "entirely to show either express or implied national authority for doing the acts charged in the indictment; therefore no question of international law is involved, and the District Court has full jurisdiction to proceed to trial of the indictment found by its grand jury." [9]

European Cases

In 1887 the German Government arrested and put on trial one Schnaebele, a French customs inspector who had operated

[9] Horn v. Mitchell, 232 F. 819 (1st Cir., 1916). Affirmed on other grounds 243 US 247 (1917).

2. *(Continued)*

Impunity of Agents

a network of secret agents in Germany. The arrest was made during an official visit he paid to Germany to hold a customs conference. In the course of his interrogation he admitted that he had been inciting German nationals to treason. The French Government intervened on the grounds that Schnaebele enjoyed extraterritorial protection during his visit to Germany. These grounds, which obviated any need for French acknowledgment of his commission as a subversive agent, were apparently considered sufficient: Bismarck ordered Schnaebele released.[10]

In the 1920's the Italian secret service, using Italian agents in Switzerland, lured one Cesare Rossi from his Swiss hotel room to the Italian enclave at Campione, where he was arrested and taken to Italy. The Swiss Government protested these "acts attributable to the authorities of another state" which "not only violate national dignity but which also cause a state of unrest and suspicion . . ." It is not known whether the Italian authorities acknowledged such an attribution of their agents' acts in the diplomatic talks which followed, but the affair was settled in de facto accordance with the principle of agent impunity: on 21 November 1928 the Swiss Government announced that it considered the matter closed, since the Italian official involved in illegal intelligence activities had left Switzerland and two Italian nationals who had illegally relayed information had been deported.[11]

In Sweden there is apparently a trend toward the rule that if an apprehended agent is acknowledged by his government to have been acting under orders he cannot be brought to trial in the apprehending country; his illegal acts become a matter for diplomatic discussion between the two governments. A case since World War II on which details are not available was disposed of in this way by a Swedish court.[12]

War and "Imperfect" War

None of these cases offers a precise precedent for one in which a peacetime espionage agent is apprehended by the target country and then released to his government upon its

[10] Johannes Erasmus, *The Intelligence Service* (Institute of International Law, Goettingen University, 1952), p. 55.

[11] *Ibid.*, p. 54.

[12] Believed to be documented in Rytt Juidiskt Arkiv No. 15, 1946.

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2. *(Continued)*

acknowledgment of his commission. In those that are otherwise quite close, war is an element in the circumstances, with the offended nation often a third party. Webster's final note on the Caroline affair specifically cited *ius belli*. The blamelessness of the mere instruments of a government waging however unjust a war is well recognized. Vattel wrote:

> But as to the reparation of any damage—are the military, the general officers and soldiers, obliged, in consequence, to repair the injuries they have done, not of their own will, but as instruments in the hands of their sovereign? It is the duty of subjects to suppose the orders of their sovereign just and wise . . . When, therefore, they have lent their assistance in a war which is afterwards found to be unjust, the sovereign alone is guilty. He alone is bound to repair the injuries. The subjects, and in particular the military, are innocent; they have acted only from a necessary obedience.[13]

Yet there appears to be a similarity between the wartime situation in which a uniformed member of a force gathering information behind enemy lines, when captured, is treated as a prisoner of war rather than executed for spying and the peacetime situation of an intelligence agent whose acts are acknowledged and adopted by the sending state. In both the agent is a mere instrument of the state. The basis for the traditional practice of holding the agent personally responsible seems to be the clandestine nature of his acts. When these are adopted by the sending state they are no longer clandestine, and the ultimate responsibility is fixed.

As for *ius belli*, texts on international law recognize that no clean-cut distinction can be made between war and peace in this respect. A contemporary authority cites some of the older texts for the proposition that:

> If a country feels that it is being threatened by the unlawful conduct of another country—such as perhaps by preparations for aggression—that country should be free to protect itself against such a threat with the help of defensive measures. This includes the employment of agents for the purpose of determining enemy intentions.[14]

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[13] 3 Vattel, Section 187.

[14] Erasmus, *op. cit.*, p. 115, footnote 120, citing Heffter-Geffeken (p. 495), Venselow (p. 227), Vattel (pp. 598 and 607), and Rogge, *Nationale Friedens-Politik* (p. 596).

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2. *(Continued)*

Impunity of Agents

The older texts point out various types of hostile acts short of formal war that a sovereign might commission his subjects to perform.[15] Judge Rutherford says:

> If one nation seizes the goods of another nation by force, upon account of some damage, etc., such contentions by force are reprisals. There may be likewise other acts of hostility between two nations which do not properly come under the name of reprisals, such as the beseiging of each other's towns, or the sinking of each other's fleets, whilst the nations in other respects are at peace with each other. These are public wars, because nations are the contending parties. But as they are confined to some particular object, they are of the imperfect sort . . .[16]

Vattel commented that:

> A war lawful and in form, is carefully to be distinguished from an unlawful war entered on without any form, or rather from those incursions which are committed either without lawful authority or apparent cause, as likewise without formalities, and only for havoc and pillage.[17]

He indicated that all hostile acts were lawful wars, if made with lawful authority and apparent cause, and "not for pillage and havoc." This rule had its application in admiralty cases. Justice Story stated:

> Every hostile attack of a piratical nature in times of peace, is not necessarily piratical. It may be by mistake, or in necessary self-defense, or to repel a supposed meditated attack by pirates—it may be justifiable, and then no blame attaches to the act; or, it may be without just excuse, and then it carries responsibility in damages. If it proceed further; if it be an attack from revenge and malignity, from gross abuse of power and settled purpose of mischief, it then assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer.[18]

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[15] Judge Talmadge discusses this point in his learned critique of the decision in *People v. McLeod,* cited in footnote 7 above.

[16] 2 Rutherford, Section 10, as cited in 26 Wend Appendix 663 (NY 1842).

[17] 3 Vattel, Section 67.

[18] The Marianna Flora. The Vice-Consul of Portugal, Claimant. 24 US (11 Wheat. 1, 41) 1 (1826); 6 L. Ed. 405, 414.

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2. *(Continued)*

These texts, therefore, in enunciating the principle of personal impunity, are not speaking of war only in terms of formal declared war, but including also hostile acts when otherwise peaceful conditions exist. As Rutherford points out:

> In the less solemn kinds of war, what the members do who act under the particular direction and authority of their nation, is by the law of nations no personal crime in them; they cannot, therefore, be punished consistently with the law, for any act in which it considers them only as the instruments, and the nation as the agent.[19]

A principle of international law which emerges from a study of the older texts might then be stated as follows. *Where an individual, under orders from his sovereign, commits a hostile act upon a foreign nation, this cannot be said to be a controversy between individuals, to be decided by a court under domestic law where there is a common judge and arbiter. This is a controversy between nations, who admit no judge except themselves.* While this rule arose during periods of historical development when concepts of hostilities and relations between nations were much more rudimentary than at present, the basic problems of the rights and responsibilities of nations were similar to what they are now. This principle has been recognized by the United States since the early days of the Republic. The third Attorney General of the United States, writing to the Secretary of State on 29 December 1797, declared:

> It is well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission to any judiciary tribunal of the United States.[20]

Broader Considerations

We have not attempted in this discussion to take into account the broader implications of general international acceptance of a rule of law that the state is responsible for all the acts of a subject carried out pursuant to orders of the sovereign. It can easily be seen that a nation might demand

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[19] 2 Rutherford, Section 18, as cited in 26 Wend Appendix 663 (NY 1842).

[20] Quoted in 26 Wend Appendix 663 (NY 1842).

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2. *(Continued)*

limitations placed on the rule, and in many cases a nation might totally reject the rule for its purposes. Questions such as the following would have to be pondered by all nations. Could a murder committed pursuant to orders by an agent of a foreign nation be permitted to go unpunished if the foreign nation demanded his return? What would be the implications for a small nation if a strong nation flooded the country with illegal espionage agents acting under orders, and upon capture made a request for their return? Would war or the threat of war as an alternative to punishment act as a deterrent on the use of authorized confidential agents collecting information from foreign countries?

Some of these questions have been raised in the past and have moved many writers not to recognize the right of a sovereign to expect the return of an agent who pursuant to orders has committed an offense against another sovereign. We have not attempted to present here the opposing viewpoint of these writers or to discuss the limitations on the rule of personal impunity as it appears in international law. The purpose of this paper has been simply to explore the precedents and authorities in international law to determine if there is any basis for the proposition that a government has the right to the return of one of its officers who has been apprehended abroad for criminal acts committed pursuant to its orders. There is such a basis.

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3. "The Protection of Intelligence Data," John D. Morrison, Jr. (Spring 1967, Volume 11/2)

Historical review of the problem and some remedial proposals.

THE PROTECTION OF INTELLIGENCE DATA

John D. Morrison, Jr.

The unauthorized exposure of classified information is a chronic problem for governments and intelligence agencies. Defense against the conscious agent of a foreign power is different from, and in some ways less difficult than, deterring revelations due to carelessness, malice, or greed on the part of government employees. The problem is particularly acute in a democratic society whose laws and courts must provide broad protection to criminal defendants. The deterrence provided by the espionage laws and related statutes is weakened by the difficulty of prosecution under them. This is especially true in cases involving disaffected or careless employees of intelligence agencies; the defenses usually include strong equitable pleas which may excite a sympathetic public response.

No legislation or administrative procedure can offer perfect protection. It is submitted, however, that both our laws and our administrative procedures could be improved so as to provide more effective deterrence. Some particular avenues that might be taken will emerge from the following discussion.

The Espionage Laws: An Incomplete Structure

A review of American legislation in the field of criminal espionage shows that historically there has been limited legislative effort directed to the protection of intelligence data. As a result there is a startling lack of protection for a governmental function of growing importance and sensitivity. Perhaps the need for laws protecting intelligence data has reached significant proportions only in the relatively recent past.

The changes, technological and other, in the manner in which nations deal with each other have caused some improvements in legislation dealing with the protection of state secrets. Diplomatic communications have traditionally been protected. As early as 1807, the Supreme Court suggested that the legislature recognize and provide against crimes affecting the national security which "have

3. *(Continued)*

not ripened into treason."[1] It was not until 1911, however, that Congress passed the first important statute dealing with the broad problem of espionage. In 1917 the language of the 1911 act was amended to read much as it does today. More recently congressional attention has been focused—and appropriate legislation enacted—on the problems involved in protecting atomic energy data[2] and communications intelligence.[3] The Internal Security Act of 1950[4] made it unlawful for a government employee merely to communicate classified information to a known representative of a foreign government.[5]

However, the espionage laws[6] are still the basic statutory protection against unauthorized disclosure of intelligence materials and information. No legislation has yet been enacted to cover the new problems arising out of the chronic "cold war" status of international relations and the consequent need for a sophisticated, professional intelligence apparatus as an arm of the executive. The wartime concept of the military secret is inadequate to cover information about the personnel, activities, and products of such an apparatus, information whose extreme sensitivity is often not readily apparent even though its exposure may have a most damaging effect on the national security.

These shortcomings point to the need for new legislation establishing a category "Intelligence Data" and providing that anything so designated by an authorized official shall be judicially recognized as such solely on the basis of that designation. This would solve a vexatious and recurring problem for which there is no known cure in existing laws. That problem is the immunity enjoyed by an exposer of sensitive information when the information itself cannot for practical reasons be brought into the open for the purpose of prosecution.

The Official Secrets Acts

It has often been suggested that, if legislation is needed in this area, the British Official Secrets Acts with their broader protection offer a good example to be followed. It is not commonly understood

[1] Ex parte Bollman and Ex parte Swartwout, 4 Cranch 75, 127, 2 L. Ed. 554, 571 (1807).

[2] 42 U.S.C. §2271 et seq.

[3] 18 U.S.C. §798.

[4] 50 U.S.C. §783(b).

[5] See *Scarbeck v. U.S.*, 317 F. 2d 546, cert. denied, 83 S. Ct. 1897 (1963).

[6] 18 U.S.C. §§791-798.

3. *(Continued)*

that the British acts are based on a different legal theory from that underlying our espionage acts. Under our system the information divulged must be shown to be related to national defense and security either by its very nature or as coming within statutory definitions such as those for communications intelligence and atomic energy data. The British acts are based on the theory of privilege, according to which all official information, whether or not related to the national defense and security, is the property of the crown. It is therefore privileged, and those who receive it officially may not divulge it without the crown's authority.

In a British prosecution for unauthorized disclosure several consequences flow from the privilege theory. Portions of the trial can be held *in camera* if the court agrees. Under our constitution, while certain procedural aspects can be considered *in camera*, no part of the actual trial could be heard privately. In Britain certain presumptions may apply. For instance, if the defendant is known to have possession of privileged information and to have been in the company of a known foreign espionage agent, there is a presumption that he passed the information. The presumption is rebuttable; but our Supreme Court opinions indicate that such a presumption would not be permissible here. Most important, in the English system it is not necessary to prove that any item of information relates to the national defense and security.

A good example is the so-called Isis case in which two Oxford students published in their college magazine, *Isis*, the story of their experiences in the Navy, including technical intelligence operations in the Baltic. The prosecution merely testified that the article contained information which they had acquired in their official service and was, therefore, privileged. After the verdict of guilty, the prosecution approached the court alone, without presence of defendants or defense counsel, and briefed the court, solely for purposes of sentencing, on the significance of each item of information to the government. Such a briefing, we believe, would be held error under our system.[7]

In another case, that of an RAF officer named Wraight who defected to Russia and then returned, a government witness who had inter-

[7] *Jencks v. U.S.*, 353 U.S. 657, 668 (1957). But see post Jencks Statute 18 U.S.C. §3500(c) permitting *in camera* examination for relevancy and editing of pre-trial reports of government witnesses.

3. *(Continued)*

viewed the defendant for the security services was allowed to testify without publicly identifying himself. His name was handed in writing to the court. Possibly this could be done here if the defense agreed to it, but it seems clear it could not be done over the defense's objection.

In short, the Official Secrets Acts would seem to be in important respects unconstitutional in this country and therefore cannot be relied on as examples of means by which we could protect intelligence data. In addition, despite the technical advantages which the British laws provide for the prosecution, experience has shown that these do not by any means give complete protection; they are only to some degree more effective than our system.

Intelligence Sources and Methods

The statutory authorities and responsibilities of the Director of Central Intelligence include the responsibility for "protecting intelligence sources and methods from unauthorized disclosure."[8] The Congress's use of the term "intelligence sources and methods" indicates its recognition of the existence of a special kind of data encompassing a great deal more than what is usually termed "classified intelligence information." The espionage laws and the statutes designed to protect communications and atomic secrets, though they specify in detail the kinds of information they seek to protect, nevertheless do not cover everything that might be defined as intelligence data whose exposure could be detrimental to the national interests. For example, knowing the identities of U.S. covert intelligence officers or the fact that U.S. intelligence is making a study of certain published unclassified materials might be of great value to a foreign intelligence agency, but there is some question whether such information would be considered by a court to be included among the things protected by existing statutes.

The Congress has also recognized the need for protecting intelligence sources and methods by enacting for CIA a number of special authorities and exemptions from legal requirements otherwise in general force throughout the government. The Agency is exempted from the "provisions of any . . . law which require the publication

[8] National Security Act of 1947, §102(d), 61 Stat. 495 50 U.S.C. §403.

3. *(Continued)*

or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."[9] Similarly, the Agency is authorized to expend the funds made available to it for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director. It is exempted from statutory requirements regarding exchanges of funds and the performance rating of employees and from laws and executive orders governing appeals from adverse personnel actions.

Thus Congress has charged the Director of Central Intelligence with protecting intelligence sources and methods from unauthorized disclosure, has recognized that the term "intelligence sources and methods" encompasses an area not entirely covered in other statutes, and has affirmed the need for such protection by providing statutory authority for that purpose. The void in the statutory structure protecting intelligence sources and methods is the absence of sanctions against unauthorized disclosure which can be invoked without disclosing the very sources and methods whose protection is sought.

The Judicial View of Intelligence

The courts have long recognized that the secret intelligence activities of the executive branch, though indispensable to the government, are by their nature matters whose disclosure would be injurious to the public. In the Totten case[10] compensation was sought under a secret contract with President Lincoln for espionage activities behind Confederate lines. The opinion of the Supreme Court stated:

> If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of the dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way would be impossible; and, as such services are sometimes indispensable to the Government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforce-

[9] Central Intelligence Agency Act of 1949, as amended, §6, 63 Stat. 208, 50 U.S.C. §403g.

[10] *Totten v. U.S.*, 92 U.S. 105 (1876).

3. *(Continued)*

ment. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not let the confidence be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband or wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. *Much greater reason exists for the application of the principle to cases of contract for secret services with the Government, as the existence of a contract of that kind is itself a fact not to be disclosed.* [Emphasis supplied.]

The Totten case marks the beginning of the juridical idea—and judicial cognizance of it—that there is a kind of relationship to the state which is confidential, beyond judicial inquiry, and involving a trust of such nature that the courts cannot aid a breach of it, even in their solemn duty of administering justice.[11] A secret agent is almost impotent in his own cause; he literally cannot maintain an action in the courts where his secret activities are germane to the case.[12]

Judicial Access to Sensitive Data

Present espionage laws dealing with unlawful transmission or obtaining of information related to the national defense[13] have been interpreted as requiring proof of certain questions of fact; evidence on these questions must be submitted to the jury for consideration of its weight and sufficiency. For instance, the information betrayed must in fact be related to the national defense and must not have been generally available.[14] The courts have held that a jury cannot find on these facts unless it has access to the information allegedly related to the national defense and hears testimony regarding its use, importance, exclusiveness, and value to a foreign government or

[11] *See Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 Fed. 353 (1912), in which the court struck documents from the record on the ground that it was against public policy to disclose military secrets. See cases cited in note 18.

[12] *De Arnaud v. U.S.*, 29 Ct. 555, 151 U.S. 483 (1894); *Allen v. U.S.*, 27 Ct. Cl. 89 (1892); *Tucker* v. *U.S.*, 118 F. Supp. 371 (1954).

[13] 18 U.S.C. §§793, 794, and 798.

[14] *U.S. v. Heine*, 151 F.2d 813, 816 (1945), citing *Gorin v. U.S.*, 312 U.S. 19, 28, 61 S.Ct. 429, 85 L.Ed. 488 (1941).

3. *(Continued)*

Legal Protection

potential injury to the United States.[15] The defendant in a criminal proceeding must likewise have access to it, since the information itself may tend to exculpate him with respect to dealings in it.[16] As Judge Learned Hand said in *U.S. v. Andolschek*, "The Government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."[17]

These rulings have left the government in the position of having to reveal in court the very information it is trying to keep secret or else not prosecute those who steal information and use it to the injury of the nation. To invoke the law's protection of the secret, the secret must be told.

Judicial experience with the privilege which protects military and state secrets has been limited in this country.[18] British experience, though more extensive, is still slight compared to that with other evidentiary privileges.[19] Nevertheless, it is clear at least from the civil precedents that the court itself must determine whether the circumstances are appropriate for the claim of privilege[20] and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[21] The latter requirement is the real difficulty. In dealing with it, courts have found it helpful to draw upon judicial experience

[15] *Gorin v. U.S.*, 312 U.S. 19, 30-31, supra note 14.

[16] *U.S. v. Reynolds*, 345 U.S. 1, 73 S.Ct. 538 (1953); *Jencks v. U.S.*, supra note 7.

[17] 142 F.2d 503, 506 (1944).

[18] See *Totten v. U.S.*, 93 U.S. 105, 23 L.Ed. 605 (1876); *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 Fed. 353 (1912); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (1939); *Cresmer v. U.S.*, 9 F.R.D. 203 (1949). See also *Bank Line v. U.S.*, 68 F. Supp. 587, 163 F.2d 133 (1947). 8 Wigmore on Evidence (3d Ed.) sec. 2212(a), p. 161, and sec. 2378(g)(5), pp. 785 et seq.; 1 Greenleaf on Evidence (16th Ed.) secs. 250-251; Sanford, Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments, 3 Vanderbilt Law Review 73-75 (1949). See also *Ticon v. Emerson*, 134 N.Y.S. 2d 716, 206 Misc. 727 (1954).

[19] Most of the English precedents are reviewed in *Duncan v. Cammel, Laird & Co., Ltd.*, A.C. 624 (1942). For a thorough study of the history and application of the Official Secrets Acts see David Williams' *Not in the Public Interest* (London, 1965), reviewed in *Studies* X 3, p. 97.

[20] Id. at 642.

[21] *U.S. v. Reynolds*, supra note 16, at 8, citing *Duncan v. Cammel, Laird & Co., Ltd.*, supra note 19, and *Hoffman v. U.S.*, 341 U.S. 479 (1951).

3. *(Continued)*

in dealing with an analogous privilege, that against self-incrimination. The Supreme Court said in *U.S. v. Reynolds:* [22]

> The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. Indeed, in the earlier stages of judicial experience with the problem, both extremes were advocated, some saying that the bare assertion by the witness must be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification. Neither extreme prevailed, and a sound formula of compromise was developed. . . .
>
> Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.[23]

Of course Reynolds was a civil case, but the evidentiary difficulty in criminal cases is quite comparable. Thus, citing Reynolds, the Supreme Court stated in *Jencks v. U.S.:* [24]

> It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession. This has been recognized in decisions of this Court in civil causes where the Court has considered the statutory authority conferred upon the departments of government to adopt regulations not inconsistent with law for . . . use . . . of the records, papers, appertaining to his department. The Attorney General has adopted regulations pursuant to this authority declaring all Justice De-

[23] Supra note 16, at 8-10.

[23] In *Kaiser Aluminum & Chemical Corp. v. U.S.*, 157 F. Supp. 939 (1958), the Court of Claims held that judicial examination of a document for which executive privilege has been asserted should not be ordered without a definite showing by plaintiff of facts indicating reasonable cause for requiring such a submission. Otherwise, said the Court, at 949, the executive determination would be merely preliminary and "the officer and agency most aware of the needs of government and most cognizant with [sic] the circumstances surrounding the legal claim will have to yield determination to another officer (the Court) less well equipped."

[24] Supra note 7, at 670.

3. *(Continued)*

Legal Protection

partment records confidential and that no disclosure, including disclosure in response to subpoena, may be made without his permission.

But this Court has noticed, in *U.S. v. Reynolds*, the holdings of the Court of Appeals for Second Circuit that, in criminal causes ". . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . ."[25]

The loophole afforded by this evidentiary difficulty has not been overlooked by the thief who limits his trade to information too sensitive to be revealed. Nor is it ignored by the more imaginative among those accused of other crimes when they claim that their offenses were committed at the behest of an intelligence agency which uses its statutory shield to protect itself at the expense of its agent.

Judicial Evaluation of Sensitive Data

It must be emphasized that undesired disclosure is only one difficulty in the submission of intelligence data to a jury. There is another great problem, the capability of the jury to evaluate such data, often complex and technical and often meaningful only in the context of other sensitive information not otherwise bearing on the case.[26] It can of course be argued that juries often have to grapple with technical facts and that the law provides for assistance in such instances in the form of expert witnesses. But in a case dealing with secret information, resort to these legal devices merely increases the amount of sensitive data which must be shorn of its usefulness by disclosure, increasing the government's reluctance to prosecute and thwarting the protective congressional intent expressed in legislation.

Some Avenues for Action

The courts have recognized that intelligence activities are confidential *per se* and not subject to judicial inquiry. Congress, in the National Security Act, has charged the Director of Central Intelligence with the protection of intelligence sources and methods and has given

[25] The quoted material from the Reynolds case appears at 345 U.S. 12.

[26] Compare the holding in the Kaiser case, supra note 23, on the competence of the court to evaluate the contents of a document for which there has been a claim of executive privilege.

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3. *(Continued)*

him certain statutory authority and exemptions to assist him in meeting this obligation. Yet the espionage laws and related statutes enacted for the same or a similar purpose can often not be put to work just when the offense represents the greatest potential threat to the public welfare.

There are three steps which would go far toward solving the problems which still exist in this area. Two of them would seem to require new legislation; the third might be accomplished, at least with respect to CIA, by regulation under the DCI's existing authority. First would be a criminal statute defining what is to be protected and providing punishment for exposure. Second, this statute should also confer injunctive authority, because prevention of exposure is more to the point than punishment for violation and in many cases an injunction might offer greater deterrence than the penal provisions for violation. In addition, the act might provide that persons convicted under it would forfeit retirement benefits; precedent for this exists in 5 U.S.C. §8312, the so-called "Hiss Act."

The third step would be a requirement by the Director that all employees, agents, consultants, and others who enter into a relationship with CIA giving them privity to intelligence data agree in writing to assign as of that time to the Agency all rights in anything intended by them for publication based on information received in the course of their official duties. Perhaps a similar step could be taken by other intelligence agencies. Such agreements, along with appropriate regulations governing the dissemination of intelligence data, could in themselves serve as a basis for injunctive relief, apart from or as an alternative to the statutory provision for injunctions against the criminal act of exposure.

Some such steps are necessary if we are to overcome the shortcomings in laws protecting intelligence information which limit prosecution to cases where intent is clear and where divulging information in open court is not detrimental.

4. "CIA, The Courts and Executive Privilege," Lawrence Houston (Winter 1973, Volume 17/4)

Another privilege claim upheld

CIA, THE COURTS AND EXECUTIVE PRIVILEGE

Lawrence R. Houston

Over the years, CIA has had many occasions to negotiate in the various courts on the problem of security of its records and particularly of its intelligence sources and methods. Normally, some sort of accommodation has been reached to cover the needs of the court and the requirements of security. Only twice has the Agency been forced to the final step of claiming executive privilege. Both of these occasions were in civil actions wherein the claim of privilege is given weight by the court but does not bring about dismissal of the action as would be the case in a criminal trial.

The most recent case resulted in an interesting opinion by Judge Marvin E. Frankel, the Federal District Judge in question. The case arose out of an insurance dispute in which action was brought by Pan American Airways On September 6, 1970, Pan American was operating a Boeing 747 airplane on its scheduled route from Brussels, Belgium, to New York City, with a stop in Amsterdam, Holland. On the flight from Amsterdam to London, two of the passengers produced hand guns and grenades, forcibly took command of the crew and the passengers, and ordered the pilot to proceed to Beirut, Lebanon. The hijackers, though not themselves Arabs, were working with and for the Palestinian operation called the Popular Front for the Liberation of Palestine (PFLP). In collaboration with other PFLP people who met them in Beirut, they laced the aircraft with explosives during and after a stop in the Lebanese capital. Then they caused the airplane to be flown to Cairo, Egypt, lighting fuses just before landing to ignite the explosives. The large complement of passengers and crew thus had scant minutes to disembark and flee as the plane landed at Cairo, before the craft exploded, burned, and was totally destroyed.

Pan American, of course, carried insurance coverage. This was in two packages. The so-called "all risk" insurance was carried by a group of American insurance companies to the full value of the plane, $24 million, and the policy contained a "war risk" exclusion. In other words, the American companies would not pay for loss caused by an act of war as defined in the policy. Pan American then obtained war risk coverage in two lots, $14 million from a Lloyd's group in London and $10 million from the United States Federal Aviation Authority. The "all risk" defendants were adamant that the loss was due to an act of war, and the other two defendants were just as firm that this hijacking did not come under the war risk exclusion. Pan American, therefore, brought suit against all the groups, and left it to the Federal District Court in New York to interpret the various policies.

Several large and expensive teams of lawyers started research into all aspects of the episode and the background of those involved. Early in the course of this preparation, Mr. Lawrence E. Walsh, representing the American defendants, came to see me and Mr. John S. Warner, then Deputy General Counsel. He claimed that the British defendants had had the help of documenta-

4. *(Continued)*

tion from official British intelligence components to assist in building their case and, therefore, he claimed that the American defendants had the right to inspect any and all American intelligence records in any way pertinent to the subject. We explained the security problems involved, particularly in the source and method area, and that these would present real obstacles to making available intelligence documentation. As a former Attorney General, Mr. Walsh actually had some familiarity with this subject.

We did not commit the Agency to any production of records Mr. Walsh subsequently obtained an order for discovery directed, among others, to the Department of Defense, Department of State, and CIA, directing the production of all records having to do with the episode in which the plane was destroyed, with the complete background and history of the PFLP and a large number of named individuals connected therewith, and with a number of other specifically identified subjects. The only body of unclassified material that was responsive in any way was a compilation of FBIS reports on the subject, which was offered but not accepted by the "all risk" insurers. We asked the United States Attorney to try to negotiate some middle position, as did State, but State finally gave defense counsel access to its records including classified material.

A rough appraisal of what a full response to the discovery order would mean for CIA indicated that there would be a minimum of over 5,000 items, the majority of them raw reports, many from highly sensitive sources, all involving security problems to one degree or another. We also came to the conclusion that while there was much valuable intelligence material in this, the salient facts pertaining to the destruction of the plane and to the PFLP were readily available from open sources. We, therefore, felt the American defendants would not be prejudiced in their case by failing to have CIA records. Accordingly, we entered a formal claim of sovereign immunity in answer to the discovery order, an action that must be taken personally by the Director. The claim was supported by an affidavit which set forth the security problems, including the danger, particularly in this case, to lives and well-being of sources who might be exposed through the court process. The case was argued at great length by eminent counsel for some of the outstanding firms in the country, as well as by the United States Attorney.

On 17 September 1973, Judge Frankel handed down his opinion, which was long and dealt with the issues in great detail. In short, he came to the conclusion that the PFLP was not an organized military operation, and the hijacking was an isolated act not related to any military operations so that it did not come within the exclusion of the war risk policy and the American companies defending were ordered to pay the judgment in full. He then dealt specifically with the CIA claim of privilege, and his treatment is best set forth in the Judge's own words as follows:

> The all risk defendants have unleashed manpower, suited to the sums at stake, in massive, works of factual and legal research. Lavish discovery has been had of State Department, FAA, and FBI documents to learn about the PFLP, the Middle East struggles generally, and the disputed hijacking. Several inches of secret and otherwise classified State Department papers have been made a peculiar sort of secret annex to the record, with counsel and the court (*dubitante*) submitting to "clearance" procedures for access. All risk counsel also demanded,

4. *(Continued)*

however, secret Central Intelligence Agency (CIA) documents, and this agency, after some procedural rituals, interposed the "secrets of state" privilege. Ultimate determination of the issue thus posed was postponed until after trial. The all risk defendants at this point make the heady claim that if all else fails, they should have judgment for this reason against the "United States."

There is a threshold question of some magnitude whether the problem should be considered as one of discovery against the Government as a party The all risk defendants have, strictly speaking, no claim against the United States, which has sold insurance to the plaintiff. The Government's "proprietary" role as insurer does not comfortably or conveniently lead to the conclusion that all its agencies, however separate, must be treated as fractions of this single "party" for discovery purposes. It might well be held that the applicable standards for disclosure are those of the Freedom of Information Act and that the all risk argument is ended by the duly imposed "secret" classification under the ruling in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973).

But even viewing The Government as a monolith, and applying *inter partes* rules of discovery, the risk argument fails because:

(1) the claim of privilege appears to have been justified in the circumstances, at least when measured against
(2) the trivial showing of alleged need for disclosure.

The CIA Director explained the refusal to disclose, even for *in camera* inspection, on the ground that:

> "The revelation of the identity of these sources to the Court or to the parties to this litigation could result not only in their loss to the Central Intelligence Agency for the future but also in serious physical danger to a number of them who are risking their lives and careers to assist us."

The circumstances apparent to the court from the entirety of this case render this a realistic and convincing concern. The setting reeks of violence and danger. The loss of American and other lives through terror is a vivid part of our evidence. But there should be no need to linger over this. With characteristic responsibility, all risk counsel reported during the trial that one of their witnesses had probably lied in cross-examination, and that the explanation appeared to be potential physical dangers to him had he done otherwise. The matter was left at that. It seems appropriate to pay similar heed to the representation of the CIA without yielding an iota of the court's responsibility and power to judge for itself the grounds of a claim of privilege.

This conclusion is reached easily in this case because the asserted needs for disclosure are shadowy and speculative at best. It is said that CIA documents might indicate (by hearsay, of course) payments by Arab governments to the PFLP. But the all risk defendants had the PLA Commanding General on the stand for days and did not even ask about this. Moreover, other evidence adduced by the all risk defendants showed there were no such payments, or none of consequence. It is argued that CIA hearsay might disclose PFLP intent and "aims and

4. *(Continued)*

> operations during 1970." But surely our record, including reams of State Department hearsay, to say nothing of PFLP's non-reticent functioning, is ample on that. It is argued that the all risk defendants tried unsuccessfully to procure a witness from the PFLP, and that the CIA files would be or show "other sources of alternative evidence." But this persists in overlooking the hearsay rule and is otherwise a matter of unlikely conjecture.
>
> In short, we have here, with the perspective of a huge record, a "formal claim of privilege set against a dubious showing of necessity." *United States* v. *Reynolds*, 345 U.S. 1, 11 (1953) The "formal claim" was made in a setting of substantial assurance that legitimate concerns for security and human life were at stake. Against that were extensive alternative sources, including broad disclosures by government agencies. The court is led upon the record as a whole to the firm judgment that the "intelligence" sought would not have enhanced significantly the factual knowledge needed for this lawsuit.
>
> It is concluded, under the principles of *United States* v. *Reynolds*, that there was no occasion for insisting upon *in camera* inspection of the documents and that there is no basis either for the extraordinary judgment the all risk insurers seek or for any other "sanctions."

It was, of course, gratifying to have the Agency claim of privilege upheld. However, there was still one point of concern left open by this opinion. There have been several degrees of privilege running back through legal history. Recent discussion has tended to differ between a claim of *government privilege*, which has to do with confidential communications within the government, and a claim of *sovereign immunity* which is based on security considerations pertaining to the national interest. The difference is that in the government privilege the courts take it upon themselves to review the information to see if it is relevant and necessary to the case, but there is a body of law which indicates that the claim of sovereign immunity is not reviewable by the courts. It is this latter interpretation which we had placed on our claim. However, it will be noted Judge Frankel took a differing view as he says:

> It seems appropriate to pay similar heed to the representation of the CIA without yielding an iota of the court's responsibility and power to judge for itself the grounds of a claim of privilege.

Whether he meant actually court review of the material involved or whether he had in mind some further demonstration of the need to protect the information is not quite clear. In this case, of course, the outcome was completely satisfactory.

5. "The Marchetti Case: New Case Law," John S. Warner (Spring 1977, Volume 21/1)

Security by injunction

THE MARCHETTI CASE: NEW CASE LAW

John S. Warner*

The Marchetti case is truly a landmark case in the annals of the law—and it has far-reaching implications for the Central Intelligence Agency, the intelligence community, and the federal government as a whole, as will be demonstrated.

Actually, the legal story consists of two separate but related legal actions.

(1) The first case was initiated at the request of CIA by the United States of America, represented by the Department of Justice. CIA sought an injunction which would prevent a former employee, Victor Marchetti, from publishing a proposed magazine article by enforcing the secrecy agreement he signed upon entering into employment with CIA. After hearings, appeals, trials, and further appeals, a permanent injunction was issued. The decision of the United States District Court for the Eastern District of Virginia in Alexandria, Va , was appealed to the U.S. Court of Appeals for the Fourth Circuit. There the original decision was affirmed, and a petition for a writ of *certiorari*** was filed with the U S Supreme Court. That court declined to review the decision of the Circuit Court, which is cited as *U.S.* v. *Marchetti*, 466F 2d 1309(1972).

(2) The second case was initiated by Alfred A. Knopf, a publisher, and Marchetti and John D. Marks, co-authors of a proposed book, *The CIA and The Cult of Intelligence*, submitted to CIA on 27 August 1973 pursuant to the terms of the injunction issued in the first case. This latter case, against the United States, was filed in the U.S. District Court for the Southern District of New York. On motion of Department of Justice lawyers, and after hearing arguments, that court ordered the case removed to the Alexandria District Court which had heard the first case and had issued the injunction. The basic issue in this second case concerned the appropriateness of the deletions CIA had made from the Marchetti-Marks manuscript. After trial, the Alexandria District Court made a decision which was extremely adverse to the government's position. Upon appeal, the Fourth Circuit Court of Appeals reversed the District Court, fully approving the government's position—i.e., agreeing with all the deletions requested by CIA This case too was appealed to the Supreme Court, but *certiorari* was denied. This case is cited as *Knopf* v. *Colby*, 509F 2d 1362(1975).

Perhaps this is the place for some background on the central figure, Victor Leo Marchetti Marchetti served for two years, 1951-1953, in France and Germany as a corporal in Army Intelligence, including six months of Russian Area study at the EUCOM Intelligence School in Oberammergau. Returning to the United States to complete his college studies, he graduated from Penn State in June 1955 with a bachelor's degree in History (Russian Area Studies), worked three months as an analyst at the National Security Agency, and entered on duty with CIA as a GS-7 on 3

*The author wishes to acknowledge the assistance of Lawrence R Houston and John K Greaney in the preparation of this article

**A writ of *certiorari* certifies that the Supreme Court agrees to hear the case in question, when such a writ is denied, it means the Supreme Court sees no reason for taking the case to the Supreme Court

5. *(Continued)*

October 1955 at the age of 25 He rose relatively rapidly, primarily through the Office of Research and Reports, but also with tours in the Directorate of Operations and the Office of National Estimates From ONE, as a GS-14, he went to the Office of Plans, Programs, and Budget in January, 1966, and served there for two and a half years In July, 1968, having reached the GS-15 level, he became Executive Assistant to the Deputy Director of Central Intelligence for a period of nine months He was then assigned to the Planning, Programming, and Budget Staff at the National Photographic Interpretation Center, and five months later resigned for "personal reasons" in September, 1969

In his assignments with the CIA PPB office, where he handled the papers for the "303 Committee" (later the "40 Committee") which passed on Covert Action proposals, and particularly with the DDCI, Marchetti got an overall view of the Agency and access to sensitive information afforded to extremely few Agency employees There was no evidence of serious disillusion or disenchantment with the Agency before he left

After his departure from the Agency, Marchetti began writing, first a novel, *The Rope-Dancer,* and then non-fiction articles concerning Agency activities In March 1972, the Agency received a draft of an article Marchetti had written for *Esquire* magazine, together with the outline of a proposed book on CIA The source expressed the opinion that the Agency might be concerned with the content, because many aspects seemed classified and sensitive Indeed, the Agency was concerned Very serious classified matters were discussed Included were names of agents, relations with named governments, and identifying details of ongoing operations There were items which might have led to the rupture of diplomatic relations between the United States and other countries. Disclosure would cause grave harm to intelligence activities of the U.S Government and to CIA

William E Colby, then Executive Director, telephoned me in my capacity of Deputy General Counsel at the time, asking what legal action could be taken The answer was that no criminal action would be successful once the material were published, but this might be the proper situation for seeking an injunction Colby asked whether we were certain of our legal position as to an injunction We noted that extensive legal research within the Agency and consultation with the Department of Justice had taken place five or six years before Colby asked for some documents on this as quickly as possible, and had them within 30 minutes.

It is useful to digress to look at this novel legal approach. For years the Agency had recognized the practical impossibility, under existing law, of applying criminal sanctions to employees and former employees who disclosed classified information to unauthorized persons In the mid-Sixties, however, under threat of a revealing book by a disgruntled former employee, the lawyers looked into the possibility of civil sanctions—namely, an injunction to enforce his contract based on the secrecy agreement each employee signs at the beginning of his employment It was known, of course, that various industry agreements had been enforced in the courts—agreements that protected industrial processes and other proprietary rights from disclosure by employees, both during and after employment Why shouldn't the U.S Government also be protected on the simple basis of a valid contract? The conclusion was reached that a court action had a good chance of success The Department of Justice was consulted, and after thorough review agreed The pending threat went away, but the papers were preserved against later need

What did Colby do with the documents when we produced them? He discussed them with the then-Director, Richard Helms, who took the matter up personally with

5. *(Continued)*

Marchetti Case

the President The President said he would turn this over to John Ehrlichman, then his Counsel Helms asked CIA General Counsel Lawrence R Houston and me to go to the White House to see Ehrlichman and discuss possible action on the proposed article and book by Marchetti. In late March 1972 we were shown into Ehrlichman's office in the White House In a few minutes Ehrlichman appeared, accompanied by an assistant, David R. Young They had done their homework, knew the factual situation, had studied the pertinent criminal law, and had the proper law books in their hands After thorough discussion, it was agreed that the criminal statutes would provide no remedy for the problem facing us Talk then turned to the injunction possibility. We presented our view in favor of a try in the courts for an injunction, conceding that there was no precedent involving the U.S Government in the case law

Finally it was mutually agreed to have a try at an injunction Talk then turned to the means of preparing the case. Houston and I urged care with respect to which Deparment of Justice attorney would handle the case, on the grounds that dealing with classified intelligence information would require considerable understanding to prepare a complaint, briefs, and oral argument while at the same time protecting the sensitive aspects; this, after all, was what the case was all about He then suggested Daniel J. McAuliffe, an attorney in the Internal Security Division of the Department of Justice, who was on detail to the White House. Ehrlichman described McAuliffe as very able and discreet Within a day or so, McAuliffe came to the Headquarters Building to begin his study of the case and to start his education into the intricacies of classification and intelligence There were to be many hours of joint study and consultation McAuliffe was indeed a thoroughly competent professional who performed the research and prepared the documentation which was the basis for the subsequent court action. When it came time to go to court, the matter was turned over to Irwin Goldbloom, another thoroughly expert and capable lawyer in the Civil Division of the Department of Justice

One of the first problems came with the realization that if Marchetti published the information about which we were concerned, then the injunction proceeding would be useless Normally, in seeking an injunction, the person against whom it is sought is served with appropriate papers and given an opportunity to be represented before the judge. We were afraid, however, that Marchetti, if served, might immediately get in touch with the media and broadcast the very items about which we were concerned Accordingly, we took the backup documentation, together with the proposed temporary restraining order, to Judge Albert V Bryan Jr., of the U S District Court for Eastern Virginia, sitting in Alexandria We met Judge Bryan in his chambers, showed him quotations from Marchetti's manuscript which, to us, appeared most damaging if made public, and explained our theory of an injunction based on the secrecy agreement We also stated that Marchetti had not been served and explained why we came in with an *ex parte* proceeding under these circumstances

Judge Bryan agreed with the argument put forward by Goldbloom and signed the temporary restraining order without hesitation on 18 April 1972 He then called in one of the marshals and ordered him to serve Marchetti immediately with the executed order

This set in motion the proceedings leading to the first court hearing before Judge Bryan, at which Marchetti was represented by counsel for the American Civil Liberties Union The defense counsel appealed on technical grounds on an urgent basis, and the appeal was heard within a few days by the U S Fourth Circuit Court of Appeals sitting in Alexandria While the appellate court refused to stop the

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5. *(Continued)*

proceedings, they did raise some troublesome questions, particularly about clearance of witnesses for the defense who would have access to the classified material They warned that nothing could be done which could be construed as intimidating or warning off witnesses

Some details of the actual trial are appropriate here because of their relevance to the second case Judge Bryan permitted the government to file classified briefs and classified exhibits Much testimony of witnesses was *in camera*—court closed to the public. The judge issued appropriate protective orders, binding on all parties and their attorneys, and at the close of the trial ordered all classified records sealed This sealed record, of course, was made available to the Fourth Circuit Court of Appeals There were affidavits and oral testimony by Agency personnel as to which matters in the proposed *Esquire* article and the book outline were considered classified Judge Bryan had some difficulty in accepting simple testimony that a matter was classified The issue was not whether a matter had been properly classified, but rather whether it was in fact classified at all, in instances where the defendant argued that it was not For example, in a situation involving the true name of an agent, the judge was satisfied when shown an acknowledgment of an assigned pseudonym on a card showing the agent's true name and stamped "Secret" Similar types of documents for other situations were exhibited to support the testimony of Agency employees, and the judge appeared satisfied as did the defendant's lawyers Judge Bryan issued a permanent injunction on 19 May and an appeal was taken

Now, what were the basic legal issues reviewed by the Circuit Court? From the beginning, Marchetti's lawyers (from the American Civil Liberties Union) urged that an injunction was a prior restraint in violation of the First Amendment providing that "Congress shall make no law. . . abridging the freedom of the press" By case law the amendment has been applied to the Executive Branch and to the courts The Circuit Court reviewed the constitutional basis for secrecy within the Executive Branch and its right and duty to maintain secrecy The Court went on to say that First Amendment rights and freedom of speech are not absolute rights, and that the secrecy agreement was a reasonable and constitutional means for the Director of Central Intelligence to implement his statutory charge to protect intelligence sources and methods from unauthorized disclosure In other areas, the Court said that the Agency must review any submission within 30 days, and that Marchetti, if dissatisfied with the Agency action, could seek judicial review This burden, the Court added, should not be on CIA The Court went on to say.

> Indeed, in most instances, there ought to be no practical reason for judicial review since, because of its limited nature, there would be only narrow areas for possible disagreement

The Court also held that

> The issues upon judicial review would seem to be simply whether or not the information was classified and, if so, whether or not, by prior disclosure [by the Government], it had come into the public domain

Inasmuch as the Court held that "the process of classification is part of the Executive function beyond the scope of judicial review," CIA would have no obligation to establish the *propriety* of classification, but would be required to establish only the *fact* of classification

The three judges, Clement F. Haynesworth, Harrison L. Winter, and the late J Braxton Craven, Jr , agreed on the basic opinion except that Craven would not

5. *(Continued)*

Marchetti Case

subscribe to a flat rule that there should not be any judicial review of classification As he put it,

> I would not object to a presumption of reasonableness [on the part of the Government], and a requirement that the assailant demonstrate by clear and convincing evidence that a classification is arbitrary and capricious before it may be invalidated

The opinion of the Circuit Court remanded the case to the District Court to limit the injunction to classified information so that on 15 March 1973 it finally read as follows

> ORDERED
>
> That the operative provisions of the permanent injunction entered by this Court on May 24, 1972 be and they hereby are revised and that the "Ordered" provisions of said permanent injunction shall now provide:
>
> That the defendent, Victor L Marchetti, his agents, servants, employees and attorneys, and all other persons in active concert or participation with him, and each of them, be, and they hereby are permanently enjoined from further breaching the terms and conditions of the defendant's secrecy agreement, dated 3 March 1955, with the Central Intelligence Agency by disclosing in any manner (1) any classified information relating to intelligence activities, (2) any classified information concerning intelligence sources and methods; *Provided*, however, that this Injunction shall not apply to any such information, the release of which has been authorized in accordance with the terms and conditions of the aforesaid contract, and *Provided*, further, that this Injunction shall apply only with respect to classified information obtained by said defendent during the course of his employment under the aforesaid secrecy agreement and which has not been placed in the public domain by prior disclosure by the United States; and it is
>
> FURTHER ORDERED.
>
> that the defendant shall submit to the Central Intelligence Agency, for examination 30 days in advance of release to any person or corporation, any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources and methods, for the purpose of avoiding inadvertent disclosure of classified information contrary to the provisions and conditions of the aforesaid secrecy agreement, and such manuscript, article, essay or other writing shall not be released without prior authorization from the Director of Central Intelligence or his designated representative

CIA had fashioned a workable tool in a court of law, based on a simple contract theory. This tool could prevent serious damage to the interests of the United States or threats to the personal safety of individuals, by acting *in advance* of the threatened disclosure Even if the government were able to take criminal action on a disclosure, the damage would already have been done Other agencies in the Intelligence Community were urged to establish secrecy agreement procedures In the face of increasing concern over publication of classified information, CIA had taken the initiative in the courts and won a significant victory in a landmark legal case

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5. *(Continued)*

Marchetti Case

II

The second case starts with a letter from Marchetti's lawyer dated 27 August 1973 which transmitted a proposed manuscript of 517 pages pursuant to the terms of the permanent injunction issued in the first case CIA had 30 days to respond A task force was organized with representatives from the four directorates, and at the same time each of the four Deputy Directors was charged with reading the entire manuscript within a matter of days. At a meeting of the four deputies and the task force, it was agreed that the manuscript was in fact "Top Secret—Sensitive," and should be so marked There were other difficulties the manuscript included compartmented information and sensitive need-to-know projects, and not all of the task force members or Agency lawyers had the requisite clearances (which were quickly granted) Also, some items were of prime interest to other agencies, including State, NSA, and Navy. Excerpts were sent to other agencies as appropriate The task force was informed that for each item adjudged as classified, the judgment would have to be backed up with documentation The process also began of sorting out which items would be assigned to which Deputy Director for final judgment

Colby—by now DCI—was of course kept fully informed of precisely how this mammoth judgmental and mechanical task was being planned and pushed forward There was careful consideration of which items, although classified, were so widely known that no serious harm would result from publication. Colby made the decision that we should proceed to list all classified items consistent with the language of the injunction, with the view that at a later date, possibly at trial, CIA could withdraw on the softer items I debated this with Colby—probably insufficiently and not vociferously enough—on the grounds that the authors and their lawyers would publicize the items withdrawn with the simple theme that CIA had listed them as classified and then changed its mind The inference drawn would be that CIA thereby confirmed the validity of each item previously deleted but subsequently cleared When the book was published, this was precisely what happened—all of the items which CIA first deleted and then cleared were printed in boldface type so that any reader knew what CIA regarded as classified as of the submission of the manuscript

It is impossible to overemphasize the massive job of reviewing these 517 pages of manuscript. Some reviewers had a tendency to delete three or four pages at a time so as to drop an entire subject, when in fact deletion of a few sentences, names, or places would have done the job. This happened particularly with the other agencies involved, but inasmuch as the Agency was responding on behalf of all (no volunteers here to go on the record or to provide witnesses in court), there had to be consistency Finally the job was done, and a letter dated 26 September 1973 was sent forward attaching a listing of 339 deletions, referring, for example, to words three through eight on line 17 of page 276 This was done to avoid putting the classified words in the letter, so that the letter itself could remain unclassified for use in the open court record. In the letter, an offer was made for a conference to ascertain if by modest word changes some of the listed deletions could be made acceptable to CIA

Such a conference was held on 4 October 1973 with Marchetti, his ACLU lawyer Melvin Wulf, myself as CIA General Counsel, and John K. Greaney as Assistant General Counsel It was an all-day session which got nowhere They presented a quantity of newspaper clippings which contained information similar to items in the manuscript and urged that such information in the clippings in effect made the items in the manuscript unclassified We countered that this was not so, and that if Marchetti would simply attribute the information in the manuscript to the media sources, CIA would have no problem But no, they wanted whatever authenticity could be gained from asserting the information as Marchetti's knowledge Other

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5. *(Continued)*

Marchetti Case

suggestions were made, such as deletion of names of people, substitution of a general geographical area for a specific capital or country, or deletion of certain details of operational projects These too were rejected, and by the end of the day it became clear that they were not going to make any changes One can wonder whether they came to negotiate, or simply to make a record that such a conference had been held The Agency in the next few days considered its position on the full 339 items, and made the decision that it would withdraw its objections to the "soft" items, which totalled 114. Later, after a thorough review of the remaining deletions, and more careful study by the four deputies and the lawyers as to what they would face as witnesses in the actual trial, CIA withdraw on another 57 items, leaving 168 deletions on which CIA stood fast

Marchetti, in submitting the manuscript, had included John D Marks as co-author Marks was a former State Department employee, who had worked in intelligence and had signed a secrecy agreement It also developed that Marchetti had signed a contract for the publication of the book with Alfred A Knopf, Inc

The court aspect of this second case now began with the filing of a legal action in the U.S. District Court for the Sourthern District of New York The plaintiffs were Knopf, Marchetti, and Marks, seeking an order which would permit publication of the remaining 168 deleted items. One can only speculate about the motives behind their choice of a court· sheer legal tactics, easier jurisdiction in terms of the subject matter, or physical convenience for plaintiffs' lawyers, who were all based in New York City. The case law and court rules clearly favored jurisdiction where the injunction had been issued on 15 March 1973 Upon motion and after oral argument, the action was transferred to the Eastern District of Virginia (Alexandria) where the first case had been tried and where it would come before Judge Bryan, who had tried the first case. So much for tactics or whatever

Now came the depositions preparatory for trial sworn testimony with lawyers from both sides present for cross-examination Among the witnesses were the four deputies, the DCI, Marchetti, and Marks Marks had been granting interviews to journalists and had appeared on radio and television discussing information similar to that contained in the manuscript Again, as earlier, it was argued that because the information was in the media it was no longer classified This was a bootstrap operation leak information in the manuscript, and then claim it is thereby declassified by publication. Marks, however, was put in a dilemma when asked whether he had given specific items to the press. If he admitted it, he could be subject to a citation of contempt under the original injunction inasmuch as he now was a co-author, if he denied it, he would be risking perjury charges. He resorted to pleading the Fifth Amendment on five occasions Later, at the trial, the judge took note of this, saying, in effect, you can't have it both ways

It is worthwhile to digress here for a moment to comment on the degradation and dilution of security that characterized this entire matter Obviously Marks, Marchetti's lawyers, and Knopf's lawyers had access to a mass of sensitive information It should be noted that Knopf's lawyer, Floyd Abrams, voluntarily undertook not to expose the manuscript to his client In court, not only the judge but his clerk, the bailiff, the stenographer, and others were exposed to sensitive classified information Papers and documents in the court and in the lawyers' offices were not stored under the rigidly controlled conditions prevailing at CIA Nor were most of these people trained, by experience or otherwise, in how to deal with highly classified information and documents The crowning blow came when CIA asked the District Court for access to the record of the first trial Back came the answer "We can't find it" And they never have!

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5. *(Continued)*

Marchetti Case

Now came the trial. It was clear from the briefs filed that the plaintiffs wished to re-litigate the First Amendment issue It was also clear that the judge would have none of this, but the issue was in the record for the inevitable appeal The four Deputy Directors were witnesses and collectively covered all the 168 deletion items They testified that the information was classified, and had been since the inception of the program or from the witness's first contact with it, and was still classified Then excerpts of classified documents were submitted as exhibits, heavily censored so as not to furnish new sensitive information. The witnesses than tied each of the deletion items to information in the various exhibits, which was the procedure Judge Bryan found acceptable at the first trial This time, however, Judge Bryan was having even greater difficulty in understanding the basic concept of classification and the procedure followed He appeared to think that the government should be able to punch a computer button that would result in a showing that a deletion had been classified by a proper official on a specific date in the past He accepted a few documents which specifically stated that certain types of information should be classified at certain levels. One such document, for example, was a DCI Directive specifying that locations of communications intelligence collection facilities would be classified "Secret " One such deletion item was thus accepted by the judge, together with an additional 25 In a decision stunning to the government, however, Judge Bryan found that the fact of classification of the remaining 142 items had not been proved

To CIA, it seemed self-evident that matters such as names of agents and details of ongoing clandestine collection operations were classified In his opinion, Judge Bryan stated that it seemed to him that the four Deputy Directors were making *ad hoc* classifications of material after having read the manuscript, although he recognized that the Deputy Directors had denied this No evidence or even assertions contradicted the four deputies. Could the judge have thought that they were lying? It was clear that the judge simply had not comprehended the classification system Further he had abandoned the method of proving classification which had been acceptable to him and to the defendants at the first trial, and had also been acceptable to the Circuit Court of Appeals In the second trial, however, he neglected to advise the government that he had so abandoned the procedure for proof, nor did he state what would be acceptable.

Preparations accordingly were made for the appeal The Department of Justice lawyers who had handled the trial, Irwin Goldbloom—by now Deputy Assistant Attorney General, Civil Division—and his assistant, David J Anderson, started writing appeal briefs. There was the continuing close working relationship between them and, for the Agency, John Greaney and me Greaney and I, working with the information supplied by the four Directorates, wrote the classified briefs; The Department of Justice lawyers wrote their unclassified briefs, then we exchanged them for comment We all wanted to make certain that we made clear to the Circuit Court what classification in the intelligence arena was all about The briefs and other documents constituting the record were duly filed, consisting of several thousand pages In any event it was an enormous record for the Circuit Court to review Oral argument was heard on 3 June 1974 before the same three judges who had heard the first case, Haynesworth, Winter and Craven. At the close of questioning Judge Winter made an observation to the effect that "When this matter was before us previously, none of us then realized how enormously complicated this matter of classification really is " This observation clearly foreshadowed parts of the opinion, such as, in speaking of their opinion in the first case,

> . we did not foresee the problems as they developed in the District Court We had not envisioned any problem of identifying classified information embodied in a document produced from the files of such an agency as the CIA . We perhaps misled the District Judge into the

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5. *(Continued)*

Marchetti Case

imposition upon the United States of an unreasonable and improper burden of proof of classification

Finally, after an almost unprecedented length of time—more than nine months—the Circuit Court on 7 February 1975 handed down its opinion. total and complete victory for CIA and the U S. Government on the fundamental issues The plaintiffs of course petitioned the U S Supreme Court for a writ of *certiorari*, but this was denied What were the basic issues decided?

1) The court declined to modify its "previous holding that the First Amendment is no bar against an injunction forbidding the disclosure of" classified information acquired by an employee of the U.S Government in the course of such employment, and "its disclosure would violate a solemn agreement made by the employee at the commencement of his employment " The Court held "he effectively relinquished his First Amendment rights "

2) The District Judge properly held that classified information obtained by the CIA or the State Department was not in the public domain unless there had been official disclosure of it . . It is one thing for a reporter or author to speculate or guess that a thing may be so, or even . . to say that it is so, it is quite another thing for one in a position to know of it officially to say that it is so.

3) The Court referred to

. . . the fact that Marks, on Fifth Amendment grounds, on five different occasions declined to answer whether he was the undisclosed source of information contained in five magazine articles offered by the plaintiffs to show that the information was in the public domain. A public official in a confidential relationship surely may not leak information in violation of the confidence reposed in him and use the resulting publication as legitimating his own subsequent open and public disclosure of this same information

4) . the individuals bound by the secrecy agreements may not disclose information, still classified, learned by them during their employments regardless of what they may learn or might learn thereafter.

Also

Information later received as a consequence of the indiscretion of overly trusting former associates is in the same category

5) The Court dwelt at some length on the well-established doctrine of presumption of regularity by a public official in his public duty

. . . in the absence of clear evidence to the contrary, courts presume that they [public officials] have properly discharged their official duties. . . That presumption leaves no room for speculation that information which the district court can recognize as proper for Top Secret classification was not classified at all by the official who placed the "Top Secret" legend on the document

The Court summarized by saying,

In short, the government was required to show no more than that each deletion item disclosed information which was required to be classified in any degree and which was contained in a document bearing a classification stamp

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5. *(Continued)*

> classified in any degree and which was contained in a document bearing a classification stamp

This summary not only is reasonable, but also reflects exactly the standard and procedure accepted by Judge Bryan in the first trial! How or why he rejected this standard in the second trial, one can only wonder

6) While it is not one of the primary issues, it is still important to note what the Court said about the deletions of additional and irrelevant information in the documents submitted as exhibits by the government

> Nor was it necessary for the government to disclose to lawyers, judges, court reporters, expert witnesses and others, perhaps, sensitive but irrelevant information in a classified document in order to prove that a particular item of information within it had been classified It is not to slight judges, lawyers or any one else to suggest that such disclosure carries with it serious risk that highly sensitive information may be compromised In our own chambers, we are ill-equipped to provide the kind of security highly sensitive information should have

7) The action of the Fourth Circuit Court of Appeals is embodied in the following

> For such reasons, we conclude that the burden of proof imposed upon the defendants to establish classification was far too stringent and that it is appropriate to vacate the judgment and remand for reconsideration and fresh findings imposing a burden of proof consistent with this opinion . .

Thus was written the penultimate chapter of the Marchetti case. The final chapter was the drafting* of proposed findings of the District Court, which act, it was hoped, would close the case Those readers who are lawyers can imagine the task In any event, the detailed findings of fact for court approval, involving some 142 specific fact situations, were filed On 22 October 1975 a final order was issued No appeals were filed, and the order became final It was reported in the press that in answer to a question about contesting the "findings of fact" and the order entered by the District Court, Knopf's lawyer answered that more than $150,000 in legal fees had been spent and that it did not seem appropriate to contest the matter further The basic constitutional issues were settled, and further legal action would only be nitpicking on factual issues The ACLU also had no stomach for further legal battling The book, meanwhile, had been published with gaps for the deletions and boldface type for the original deletions subsequently withdrawn by the CIA

Conclusion

What had all this accomplished and what were the implications for the future? For the first time CIA had taken the initiative in the courts to prevent the unauthorized disclosure of intelligence sources and methods The courts had affirmed in the particular circumstances the most fundamental of legal principles—the sanctity of a contract The courts had affirmed the right—and the duty—of the government to seek enforcement of that contract to protect its secrets, i e , sensitive classified information As previously mentioned, there was a degradation and dilution of security, and we have the acknowledgment by the Circuit Court itself that " . we are ill-equipped to provide the kind of security highly sensitive information should have " While it was not perfect, a highly useful tool had been fashioned

*Originally by Walter L Pforzheimer as a consultant to General Counsel

5. *(Continued)*

Marchetti Case

When the Rockefeller Commission (Commission on CIA Activities Within the United States) was established by the President on 4 January 1975, there were immediate discussions concerning procedures to be followed by the Commission in protecting CIA sensitive classification information The Commission and its professional staff were cooperative. CIA asked that all staff members sign secrecy agreements. Bowing to the inexorable logic of the question posed by CIA of what law or legal tool could be used to protect classified information *except* the secrecy agreement, the Commission directed its staff members to sign such agreements Next came the Senate Select Committee to Study Intelligence Activities, and the House Select Committee on Intelligence At the request of CIA, the chairmen of the two committees directed all staff members to sign secrecy agreements During this same period the Department of Justice was conducting an investigation of possible crimes by employees or former employees of CIA The Special Prosecutor investigating Watergate was also investigating possible crimes by Agency personnel. At the request of the CIA, the Attorney General and the Special Prosecutor directed all their employees having access to CIA information to sign secrecy agreements While there may have been some leaks, no books or published articles not submitted to proper authority have appeared attributed to any of the above sources But for the Marchetti case, it is not likely that secrecy agreements would have been obtained in all of the above situations, and one can only speculate about possible publications

In the meantime, CIA had been working closely with the Department of Justice on proposed legislation to provide criminal sanctions for the unauthorized disclosure of intelligence sources and methods As a part of that legislative package there was a provision for CIA to apply for an injunction when there were threatened violations of the proposed law Justice for two years would not concur in this provision, arguing that the Marchetti case established the principle of an injunction. CIA argued strongly the well-established fact that the other ten judicial circuits were not bound to follow the precedent established by just one circuit, the Fourth CIA wanted a firm statutory basis for an injunction in whatever jurisdiction a new case might arise Justice finally relented, and the President sent the legislative package forward to Congress with the injunction provision This was done in February 1976 with a recommendation for Congressional approval No action was taken in 1976, but it is hoped there will be some action in 1977

As a result of the various investigations of intelligence activities, the President on 19 February 1976 issued Executive Order 11905, entitled "United States Foreign Intelligence Activities" The order was to clarify the authority and responsibilities of intelligence activities—in other words, a listing of do's and don'ts Section 7(a) is pertinent here.

> (a) In order to improve the protection of sources and methods of intelligence, all members of the Executive Branch and its contractors given access to information containing sources and methods of intelligence shall, as a condition of obtaining access, sign an agreement that they will not disclose that information to persons not authorized to receive it

Section 7(c) provides that when there is a threatened unauthorized disclosure of intelligence sources and methods by a person who has signed a secrecy agreement, the matter will be referred "to the Attorney General for appropriate legal action, including the seeking of a judicial order to prevent such disclosure"

Section 7(a) directs all intelligence agencies to do what CIA had done since it was established on 18 September 1947 Section 7(c) directs all agencies to do what CIA

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5. *(Continued)*

had taken the initiative to do nearly four years ago—i.e., take a prospective violator of the secrecy agreement like Marchetti to court to prevent disclosure

I feel that the above paragraphs under the heading of "Conclusion" show vividly and graphically the impact of the Marchetti case, not only as a legal precedent but also as a guideline for the conduct of intelligence on a day-to-day basis No one will claim that the Marchetti case offers a panacea to prevent disclosure of classified intelligence information. The United States needs criminal sanctions, as discussed earlier, for unauthorized disclosure of intelligence sources and methods where the injunctive remedy cannot or has not been applied (This is clearly demonstrated by the recent Department of Justice announcement that Philip Agee will not be prosecuted, should he return to the United States, for publication abroad of a book replete with details of Agency operations) If an author publishes a book or article prior to submission to CIA for review as to classified information, obviously injunctive relief is valueless Current laws provide no usable criminal sanctions, thus the need for the "sources and methods" legislative package.

Nevertheless, the Marchetti case has provided an extremely valuable legal tool, helping the Agency in working with would-be authors and also helping to improve security in Agency relationships with other government entities and agencies, the Congress, and the Judiciary.

6. "The CIA and the Law: The Evolving Role of the CIA's General Counsel," Daniel B. Silver (Summer 1981, Volume 25/2)

THE CIA AND THE LAW:
THE EVOLVING ROLE OF THE CIA'S GENERAL COUNSEL

Daniel B. Silver

As with many other aspects of the intelligence business the role of the General Counsel of the Central Intelligence Agency was affected profoundly, and permanently, by the exposures and investigations of the mid-70's. The ordeal of the Intelligence Community in the past decade can be viewed in large perspective as an unprecedented experiment in subjecting the intelligence activities of the United States to the process of oversight and the comprehensive rule of law. Although the exact form of legal regulation of intelligence activities remains subject to modification, the broad lines are firmly established: extensive congressional oversight; an expanded role of the Attorney General in approving the use of "intrusive" techniques of investigation, and the existence of a pervasive, written—and, to a large degree, publicly debated—code of rules for the conduct of intelligence activities This code is composed of statutes, Executive orders and internal Agency regulations Of necessity, the CIA General Counsel has played, and will continue to play, a central role in the working out of this uniquely American encounter between the legal system and the Intelligence Community

Espionage and the law lie in the same bed uneasily, if at all. The activities of the CIA, after all, are conducted predominantly abroad, frequently in violation of the laws of the countries in which they take place. Both at home and abroad, much of the CIA's activity necessarily takes place in secret Secret law generally is deprecated by legal philosophers; secret legal proceedings fit uncomfortably with our notions of legal process; and, to an increasing degree, secrecy in public affairs is viewed as contrary to the spirit of our political system. Thus, the Agency and its activities are by the very nature of things in a state of almost constant tension with the normal conditions of American law and government.

Notwithstanding, the CIA always has maintained a degree of concern with legality that probably differs significantly from any other intelligence service in the world This is not surprising in view of the fact that CIA drew heavily in its early days from the American legal establishment and that lawyers have continued to be well represented in the ranks of its operating officers, as well as in the Office of General Counsel. As best I can judge from the historical record and the files of the Office of General Counsel, it would be erroneous to view the CIA in the pre-Church Committee period as an agency that considered itself outside the law or acted in a lawless manner To the contrary, the Agency's lawyers and senior officials tried to conform its activities to the law as they understood it, a difficult task given the sparse sources of legal authority.

Nevertheless, it is fair to say that, like the rest of the Agency, the pre-Church Committee Office of General Counsel operated in a vastly different world than prevails today. It was a world in which the demands of external accountability were very few. In contrast, today the Agency exists in a permanent spotlight of external

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scrutiny, exercised by a variety of entities the two permanent congressional committees on a broad scale and other committees of the Congress on an *ad hoc* basis, the Intelligence Oversight Board, Justice Department and White House within the Executive Branch, and, perhaps most important, the press, whose unremitting examination of the Agency is aided by a flood of information coming from leaks, the publications of former employees and the products of the Freedom of Information Act It is safe to assume that the Agency's former relative insulation from outside scrutiny and pressure, having been breached, can never be restored

The profound change that has occurred in recent years is manifested in the establishment of a detailed (and, to a large degree, public) legal code for the conduct of intelligence activities, constituted in large part through Executive order and internal Agency regulations. This code has been supplemented in several key respects by legislation, notably the Foreign Intelligence Surveillance Act of 1978 (FISA), which regulates intelligence-related electronic surveillance activities in the United States, and the Intelligence Oversight Act of 1980 (enacted as part of the Intelligence Authorization Act for FY 1981), which codified the oversight relationships between the intelligence agencies and the oversight committees in the Congress For the first time in American history, there exists a substantial body of publicly available legal rules that purport to govern the conduct of intelligence activities in the United States and abroad by U S intelligence agencies There is an even more voluminous body of implementing Agency regulations Not least of all, there is an intelligence court, established under the FISA, which deals only with intelligence-related electronic surveillance and conducts all its activities in secret It remains to be seen whether this court will serve as a model for future expansion of judicial involvement in intelligence activities.

Impact on the Office of General Counsel

The events of the last decade have led to a significant change in both the responsibilities of the General Counsel and the duties and composition of the Office of General Counsel One clear indicator of this change is size In 1980 the office had more than three times the number of lawyers it had had only six years earlier

This expansion, which started in mid-1974, is attributable to many causes In part, it reflects the impact of the 1974 amendments to the Freedom of Information Act and the dramatic growth thereafter in litigation affecting the Agency (In the thirteen years following the Agency's establishment, there were two cases to which the Agency was a party, in contrast, today there are more than 180) In part, it reflects the expanding relationship between the Intelligence Community and the Congress, in which the Office of General Counsel plays a significant role Over and above these factors, however, it reflects an important evolution in legal regulation of intelligence activities and in the roles of the General Counsel in the following areas.

a The General Counsel is the Agency official principally responsible for developing Agency-wide rules and regulations governing intelligence activities, as required by Executive Order 12036, and in negotiating the Agency's position on these rules with the Attorney General, whose approval is required under the Executive Order

b The General Counsel has been given oversight responsibilities, under both Executive Order 12036 and its predecessor, Executive Order 11905, to report to the President's Intelligence Board on intelligence activities raising

6. *(Continued)*

All concerned will profit

questions of legality or propriety In addition, the General Counsel must counsel the DCI concerning his responsibilities to report to the Congress, first under Executive Order 12036 and now under the recently-enacted Intelligence Oversight Act of 1980

c The General Counsel is required to ensure the legality and propriety of the Agency's activities It is particularly important in a time of increasing personal liability of government officials, and against a backdrop of criminal prosecutions of former senior intelligence officials, to ensure that potentially controversial activities are carried out in a fashion that will provide maximum legal protection to Agency officers

The Agency's General Counsel faces formidable challenges in trying to discharge and reconcile these responsibilities One is simply that of magnitude The legal problems and involvements of the CIA are massive both in number and complexity. Even as the number of litigated cases has grown, the predominant character of Agency litigation concurrently has shifted from routine FOIA cases to more esoteric areas of the law, such as enforcement of the Agency's secrecy agreement or, to cite a pending case, a challenge to the legality of the Agency's alleged provision of overhead photography to the Environmental Protection Agency for regulatory enforcement purposes At the same time there has been a great increase in the Agency's involvement in criminal cases as a potential source of information sought by either the government or the defense, or both

In all of this litigation, the main role of the Office of General Counsel is to ensure that the Agency's interests are properly represented, or taken into consideration, by the Justice Department This is not always easy. It requires that Agency lawyers stay abreast of all developments in a case, control the use and disposition of Agency information and be sufficiently steeped in the relevant law to be able to persuade the Justice Department to pursue the legal course that will contribute to development of the law in the manner most conducive to the Agency's interests Most of the cases in which the Agency is involved pit one public interest against another, as, for example, when the interests of criminal prosecution come into conflict with the need to protect national security information Thus, officials within the Justice Department, or other departments and agencies affected, frequently have strongly held views opposed to those of the Agency Confronting these policy differences—usually in a context where Agency lawyers feel that the Agency simply cannot afford to lose—requires advocacy that is forceful but that does not lead to a breach in the good working relations with the Justice Department which it is essential to maintain

Litigation frequently receives the most attention, but it is by no means the sole claim on the time and energies of the Office of General Counsel. At least as important as defending the litigation of today is to prevent the potential litigation of tomorrow Indeed, probably the most important responsibility of the Agency's lawyers is to ensure that the Agency's potential for the effective accomplishment of its mission is not impaired by legal difficulties in the future or by events that could provoke a recurrence of highly destructive investigations and criticisms There is no way to practice preventive law, or to ensure the legality and propriety of Agency activities, in a passive mode The Office of General Counsel must make sure that it is sufficiently informed of existing and proposed activities to be in a position to point out legal pitfalls In addition to purely legal considerations, the General Counsel must play a role—for which he is well suited as one of the Agency's principal bridges to the "outside world"—in discerning and calling attention to proposed activities which,

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although within the bounds of legality, could expose the Agency to criticism disproportionate to the value of the intelligence objective All this requires a degree of aggressiveness, principally in educating the clients to the ways in which lawyers can be useful

A second challenge is that the roles currently imposed on the General Counsel require maintaining a careful balance between zeal as an advocate and objectivity as an instrument of internal oversight Traditionally, a lawyer's principal loyalty is to his client, in this case the Agency Obviously, the General Counsel cannot properly discharge his function unless he is a strong advocate for the Agency's interests This advocacy role has been of particular importance during a period in which the Agency was encountering severe hostility and criticism, not only from the press and the Congress, but from within the Executive Branch.

Beyond the advocacy role, however, all lawyers owe certain obligations to the public good (for example, no lawyer knowingly can permit perjury by his client), and government lawyers, in particular, owe a duty to the public which is the ultimate client In the case of the CIA General Counsel, these inchoate obligations have been supplemented by Executive order provisions that clearly were intended to make the General Counsel an instrument of internal oversight. The internal oversight role poses a difficult balancing act whose difficulty has been intensified by widespread misunderstanding of what is involved. Under Executive Order 12036, the General Counsel is required to report to the Intelligence Oversight Board all Agency activities "that raise questions of legality or propriety " This language obviously goes far beyond requiring the reporting of undoubted illegalities It was intended to keep the Board informed of a range of ongoing activities found to be legal or proper but raising significant questions, so that the Board in turn could keep the President informed of how well the system of regulation was working and what sort of activities the intelligence agencies were able to conduct under the Executive Order. Notwithstanding the fact that the reporting is only within the Executive Branch, to a body with a very good record of discretion, and for the sole purpose of keeping the President informed, it is apparent that many Agency officers attach opprobrium to the reporting of an intelligence activity. This view may be attributable to the circumstances in which the Board was created (i.e , as a reaction to the investigations of the mid-70's), but it is nonetheless a misunderstanding. Reporting to the Board is not the same as putting intelligence officers "on report " Unless an activity is reported as a clear violation of the rules, reporting connotes no more than that the activity raises interesting questions—in many cases questions of whether the rules under the Exective Order are not excessively restrictive During my tenure as General Counsel, I have used the reporting requirement as a mechanism for attempting to give the Board a fair and balanced picture of both the successes and failures of regulation under Excutive Order 12036, in the hope that the imperfections in the system would be conveyed to the President and ultimately create a climate in which improvements could be made where needed

No amount of formal legal rule can withstand massive repudiation by those affected. Thus, it is not sufficient, in my view, for the Office of General Counsel simply to rest on the powers and responsibilities formally attributed by law or Agency regulation Instead, the Agency's lawyers must earn the trust and confidence of Agency components and thereby ensure that the Office of General Counsel retains the practical elements it needs to do its job broad insight into operational activities, ongoing access to relevant information, and an ability to indentify potential problems early enough to practice preventive, rather than merely reactive, law

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All concerned will profit

There is no magic formula for achieving this result I suggest that it is most likely to occur if the Agency's lawyers view their mission as congruent with the Agency's. The Office of General Counsel exists to help the DCI, the Intelligence Community Staff, the Directorate of Operations and other components perform their authorized functions The contribution the Office of General Counsel can make to that effort is to ensure that the Agency's mission is not impeded by avoidable legal difficulties, that individual officers are protected against risks of civil and criminal liability; and that unavoidable legal intanglements, such as lawsuits against the Agency, are handled with as little disruption of Agency activities as is possible In short, it is incumbent on the General Counsel and his staff to demonstrate to the Agency, through example and persuasion, that adherence to law is in everyone's best interest and that careful regard for legality is not synonymous with obstructionism

Afterword: The Future of Regulation

Judging from the large number of complaints one hears, there is little need to belabor the point that the pervasiveness of legal regulation has wrought a profound change in CIA There is no doubt that this change is widely perceived in the Agency; it is also misunderstood by many as imposing restrictions and limitations that substantively prevent the accomplishment of the Agency's mission In fact, the substantive restrictions are far fewer than many would think In extensive discussions with operating officials at Headquarters and in the field, I have been struck repeatedly with the fact that most of the specific cases cited, in which legal restrictions were alleged to impede necessary operations, turned out to relate to Executive Order 12036 or the Agency's implementing regulations Instead, they related to internal Agency or Directorate of Operations policies, not required by law Thus, in my opinion, it is not fair to indict the system of legal regulation, or the lawyers who administer it, as a major substantive impediment to the accomplishment of the Agency's mission There have been very few cases (although those few were distressing) in which worthwhile intelligence operations proved to be absolutely impossible from a legal point of view.

Moreover, the beneficial aspect of the present system far outweighs the disadvantages This beneficial aspect is the provision of legal certainty and protection to intelligence officers who otherwise would have to operate at great personal legal risk or not operate at all. The trend in federal law has been towards expanding personal liability of government officials for their acts, under evolving standards of behavior that expose officials to considerable hindsight criticism for actions that may have been assumed in good faith to be legal at the time they were carried out. The existence of a pervasive system of rules deriving from the authority of the President (and, in the case of electronic surveillance in the United States, from statute) renders it unlikely that any intelligence officer could be prosecuted for conducting an activity in accordance with those rules One of the most salutary features of the existing system of regulation is the requirement for written senior-level approval of most activities carried out in the United States or directed at U.S persons abroad Again, this "paper trail" insulates the officer in the field from exposure to liability and places accountability at the senior levels of the Agency Even the most senior officials, moreover, can expect to be safe in approving matters within the scope of existing rules upon advice of the Agency's General Counsel In other words, the current regulatory system, if it works properly, should leave no one but the General Counsel exposed to the risk of recrimination and liability That is a risk the General Counsel should shoulder willingly, if given the authority and responsibility to do the job properly.

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6. *(Continued)*

All concerned will profit

Despite the foregoing, the system in its present form fairly can be criticized for laying the hand of bureaucracy too heavily on an activity that requires flexibility and a capacity for quick reactions The endeavor to apply the rule of law to intelligence activities has been an experiment So far that experiment has erred in the direction of regulating too many aspects of the intelligence process and requiring too many bureaucratic approvals This is clearly recognized by the Agency's lawyers, who have been in the forefront of the effort to modify Executive Order 12036 and to simplify the Agency's implementing procedures In my view, the guiding factors in this effort should be selectivity and realism We should select those aspects of intelligence activities that pose the greatest potential threat to individual liberties or privacy and make sure that we have clear and easily understandable rules to guide Agency officers in these danger areas Given understandable guidance, I am convinced that Agency officers will be zealous in their desire to protect the legitimate rights of Americans and reluctant to repeat past experiences in which the Agency may have strayed from its classic mission Second, such rules as we have must be realistic There is little point in having volumes of Agency rules and regulations that are beyond the capability of officers to assimilate and that in many cases, for security reasons, cannot be available physically to officers in the field who need them the most Rules and procedures whose complexities lead to paralysis simply are unacceptable, they do not reflect a proper balance between the intelligence needs of the United States and the constitutional and privacy concerns of our citizens

One of the most encouraging developments of the last several years is that I perceive a growing recognition of these essential points in the Agency, the Intelligence Community and the concerned public (excluding the radical fringes of both extremes) On the side of intelligence officers, I think there is growing acceptance that a system of legal regulation can be a benefit rather than the contrary. In the rest of the Administration, in the Congress and in the responsible sectors of the public, there is a growing recognition that legal regulation of intelligence activities must not be guided by the counsels of perfection This recognition has led to the virtual disappearance of strong pressures for a comprehensive "charters" bill that would purport to regulate all aspects of intelligence activity in great detail The Carter Administration and the Senate Select Committee on Intelligence tried for three years to create such a bill and failed abysmally I doubt that this naive venture will be resumed with any enthusiasm in the near future

Today, the climate seems propitious for a helpful readjustment of the Executive Order on intelligence activities and the Agency's implementing procedures, but without strong pressure from within the Intelligence Community to discard the structure of legal regulation in its main features Intelligence officers in large numbers have come to recognize that sensible rules and procedures are beneficial Having witnessed the unedifying spectacle of the Felt-Miller trial, in which two former senior FBI officials were convicted of crimes because of inability to point to clear authorization for what they did, few intelligence officers are willing to run the risk that they too will become the victims of some future revisionist spasm in our national history (The fact that President Reagan has pardoned Messrs Felt and Miller does not appreciably reduce, in my view, the chilling effect this case will have on intelligence officers) I am persuaded that rules and regulations can be established to protect the rights of Americans, as well as afford equity to Agency officers, consistent with the Agency's needs for speed and flexibility, and that all concerned will profit as a result

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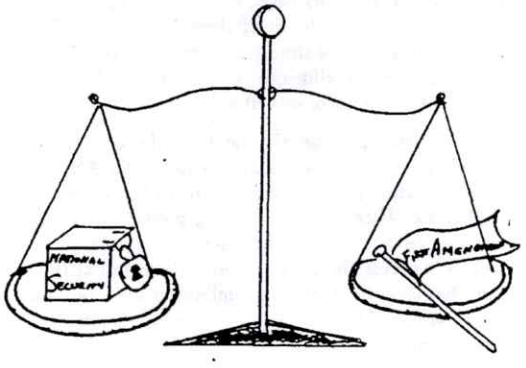
7. "National Security and the First Amendment," John S. Warner (Spring 1983, Volume 27/1)

Judicial views create a balance

NATIONAL SECURITY AND THE FIRST AMENDMENT

John S. Warner

The title of this paper is deliberately chosen to place national security first This is not to say that the First Amendment may be ignored in national security legal matters. Rather, it is to put some perspective on the fact that the U.S Supreme Court has consistently viewed First Amendment issues when in a national security context in a manner different than such issues in law enforcement or other domestic settings Also, in other situations, the U.S. Supreme Court has shown considerable deference to powers of the President in the foreign affairs and foreign policy arena, and especially so where the intelligence function is involved.



In order to be precise and avoid confusion in the mind of the reader whenever the term intelligence is used herein, it is referring to foreign intelligence, either the product itself or activities directed at foreigners (or agents of a foreign power) to gain information either of a positive nature or counterintelligence information. It does not encompass collection of information for law enforcement purposes

The Center for Law and National Security, University of Virginia, School of Law held its First Annual Seminar on 8-11 January 1982 at St. Thomas, United States Virgin Islands. That seminar was co-sponsored by the Center and the Standing Committee on Law and National Security and the International Law Section of the American Bar Association The subject of the seminar was "The First Amendment and National Security" Hence this paper, and its title as modified.

Some of the special interest groups represented at the seminar clearly asserted that constitutional rights, i.e , "the law" was absolute and immutable, failing to distinguish or even recognize that "national security" could in any

7. *(Continued)*

way impact on such rights Analogies were drawn and precedents cited from case law in many situations where there were no "national security" factors It is the purpose of this article to demonstrate that the presence of "national security" considerations leads the Judiciary to conclusions in constitutional rights cases which would not be reached absent such "national security" factors In other words, such considerations have led to judicial views which create a balance between "national security" imperatives and constitutional rights, the latter have been found not to be absolute

There will follow apparently lengthy quotations from judicial cases This is believed essential so that the reader can develop a reasoned concept of what our courts have been trying to tell us for two centuries, that "national security" is just as much a part of our Constitution as are the privileges and rights afforded our citizens The Constitution also places heavy responsibilities on the Executive to preserve and protect "national security " While we find no neat or clearly delineated definition of "national security," we do see sharp distinctions drawn between foreign policy activities and domestic security.

I

CONSTITUTIONAL ORIGINS OF NATIONAL SECURITY

It is appropriate to discuss the meaning of "national security" in the framework of law We first look to the words of the Constitution of the United States The preamble speaks of insuring "domestic tranquility" and providing for "the common defence."

Article II, Section 1, provides, "The executive power shall be vested in a President of the United States of America " Section 2 of that Article provides, "The President shall be Commander in Chief of the Army and Navy of the United States . . " and that, "He shall have Power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur, . "

Generally overlooked in discussing "national security" is Article I, Section 9, Clause 7 of the Constitution which provides

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law, and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time "

What does this clause have to do with "national security"? The last four words of Clause 7 were added as an amendment to permit a secret contingent fund for the President to expend for intelligence purposes and for delicate foreign activities

A. Halperin v. Central Intelligence Agency, 629 F. 2d 144, (DC Cir. 1980).

History is replete with examples of kings, sovereigns, and heads of nations using secret money to hire spies and to conduct delicate foreign relations The success of these activities depended upon maintenance of secrecy not only in the activities themselves but in accounting for the funds necessarily expended for such activities

7. *(Continued)*

National Security

There is an excellent historical review of the last four words, "from time to time," of Clause 7, and their intent and purpose to permit continuation of a secret contingent fund for the President That review is contained in *Halperin*, decided in the United States Court of Appeals for the District of Columbia Circuit on 11 July 1980 Those four words were proposed by James Madison as an amendment to Clause 7 during the final week of the Constitutional Convention Judge Wilkey in the *Halperin* opinion quotes Madison at the Virginia ratifying convention on 12 June 1788, "That part which authorized the government to withhold from the public knowledge what in their judgment may require secrecy, is imitated from the confederation " Wilkey then states, "Madison's language strongly indicates that he believed that the Statement and Account Clause, following his amendment, would allow government authorities ample discretion to withhold some expenditure items which require secrecy "

Judge Wilkey in continuing his review states, "First, it appears that Madison's comment on governmental discretion to maintain the secrecy of some expenditures, far from being an isolated statement, was representative of his fellow proponents of the 'from time to time provision ' Second, as to what items might legitimately require secrecy, the debates contain prominent mention of military operations and foreign negotiations, both areas closely related to the matters over which the CIA today exercises responsibility." Judge Wilkey then summarizes, "Viewed as a whole, the debates in the Constitutional Convention and the Virginia ratifying convention convey a very strong impression that the Framers of the Statement and Account Clause intended it to allow discretion to Congress and the President to preserve secrecy for expenditures related to military operations and foreign negotiations "

The review by Judge Wilkey then finds "yet further confirmation in the historical evidence of government practices with regard to disclosure and secrecy both before and after the enactment of the Constitution " It is then pointed out that "our nation's earliest intelligence activities were carried out by the Committee of Secret Correspondence of the Continental Congress." That Committee was created by the Continental Congress on 29 November 1775, and the Congress resolved to provide for expenses incurred by the Committee in sending "agents " The Wilkey opinion states, "The Committee exercised broad discretionary power to conduct intelligence activities independent of the Continental Congress and to safeguard the secrecy of matters pertaining to its agents . . " The opinion states further, "The importance of total secrecy in intelligence matters was appreciated in this era at the highest levels " The opinion then quotes from the increasingly well-known letter of 26 July 1777 which General Washington wrote to Colonel Elias Dayton issuing orders for an intelligence mission

> "The necessity of procuring good Intelligence, is apparent and need not be further urged All that remains for me to add is, that you keep the whole matter as secret as possible For upon secrecy, success depends in most Enterprises of the kind, and for want of it, they are generally defeated . . ."

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The Wilkey opinion points out that "as commander-in-chief of the colonial armies, Washington made full provision for intelligence activities and for proper funding." Considerable details are then set out in the opinion quoting from a letter to Washington from financier Robert Morris, member of the Committee of Secret Correspondence, dated 21 January 1788. That letter discloses that there was provided a cash account prior to specifying particular needs and a practice of drawing the funds in favor of a member of Washington's family in order to conceal the ultimate recipient of the funds. The Wilkey opinion then states, "Rather than viewing such arrangements as devious or criminal, it is clear that our highest officials in the War for Independence viewed them as entirely proper and moreover essential to the success of their enterprise."

It is then pointed out in the opinion that when the Constitution became effective in 1789, secret funding for foreign intelligence activities was formalized in the form of a "contingent fund" or "secret service fund" for use by the President. In a speech to both Houses of Congress on 8 January 1790, President Washington requested "a competent fund designated for defraying the expenses incident to the conduct of our foreign affairs." By the Act of 1 July 1790 (1 Stat. 128), Congress responded by appropriating funds for "persons to serve the United States in foreign parts." By that Act there was required of the President a regular statement and account of the expenditures, but provision was made for "such expenditures as he may think it advisable not to specify." This statute was re-enacted by the Congress on 9 February 1793 (1 Stat. 299) authorizing funds for the financing of secret foreign affairs operations. While the President was required to report expenses of "intercourse or treaty" with foreign powers, the President or the Secretary of State could make secret expenditures without specification upon execution of a certificate for the amount of the expenditure and such certificate to be deemed a "sufficient voucher" for the sums expended.

Such authority has continued to exist in one form or another throughout the existence of our nation. Current law provides such authority to the Director of Central Intelligence, 50 U.S.C.A. 403j, (1949):

> "The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds, and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified."

Similar authority exists with respect to other government officials. Section 107 of Title 31 of the U.S. Code authorizes the Secretary of State to certify expenditures with respect to "intercourse or treaty with foreign nations." (This language is identical with the 1790 and 1793 statute mentioned earlier.) By 28 U.S.C.A. 537, the Attorney General may certify expenditures of the Federal Bureau of Investigation for "expenses of unforeseen emergencies of a confidential character, . . ." Section 2017(b) of Title 42 of the U.S. Code authorized similar certification of expenditures in the atomic energy area by the

7. *(Continued)*

Department of Energy Similar authority is vested in the Secretary of Defense and Secretaries of the military departments by 10 U S C.A 140

Halperin involved a Freedom of Information Act (FOIA) request for Central Intelligence Agency documents detailing legal bills and fee agreements with private attorneys retained by the Agency. The Agency claimed exemption from disclosure under FOIA pursuant to section 102(d)(3) of the National Security Act (50 U S C 403(d)(3) 1947) which charges the Director of Central Intelligence with responsibility "for protecting intelligence sources and methods from unauthorized disclosure." The plaintiff argued that such statute was violative of the "statement and, account" Clause 7, Section 9, Article I of the United States Constitution Based on the historical review above, Judge Wilkey for the Court concluded, "that the Statement and Account Clause does not create a judicially enforceable standard for the required disclosure of expenditures for intelligence activities." And ". it is a nonjusticiable political question. Courts therefore have no jurisdiction to decide whether, when, and in what detail intelligence expenditures must be disclosed."

B. Totten v. United States, 92 U.S. 105, (1875).

While we need not deal in detail with all manifestations of Presidential responsibilities and powers under the Constitution, it is useful to look at some views as expressed by the United States Supreme Court Probably, the earliest pertinent case is *Totten* Here, recovery was sought as compensation for services rendered under an alleged contract with President Lincoln, made in July 1861, by which claimant was to proceed to the South and ascertain troop and fortifications information. In other words, he was a paid spy

The Supreme Court said it had no difficulty as to the President's authority and that he was "authorized during the war, as Commander-in-Chief of the armies of the United States, to employ secret agents . and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control " The Court objected, however, to the filing or maintenance of such a suit in a court of justice The Court then stated that the service under the contract was a secret service, with the information sought to be obtained clandestinely, and to be communicated privately Further, the employment and the service were to be equally concealed and both employer and agent must have understood that the lips of the other were to be forever sealed "This condition was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent."

7. *(Continued)*

Totten continues, "The secrecy which such contracts impose precludes any action for their enforcement." And " public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated "

It is to be noted that no statutes are cited in the opinion There is reference to the contingent fund which is fully discussed in *Halperin* above There is reference to the Constitution by implication by the Court's reference to the role of the President as Commander-in-Chief Here then is Supreme Court recognition of the inherent power of the President to act in national security matters, i e , to hire spies and conduct foreign relations and to do so *secretly*, and that such acts do not become a justiciable issue

It appears that *Totten* in saying "matters which the law itself regards as confidential" is taking judicial notice, aided by the Constitution and provision of the contingent fund by the Congress, of required secrecy thus denying the traditional rights of contract under the common law to be heard by the judiciary

C. DeArnaud v. United States, 151 U.S. 483, (1894).

A somewhat similar case came before the U S Supreme Court in *DeArnaud* This case arose out of Civil War services by DeArnaud for which he was paid by Major General Fremont, signing a receipt, dated 23 October 1861, which stated in part "for account of secret service rendered to the United States " While the Court disposed of the case on the basis of operation of the statute of limitations, nevertheless it alluded to *Totten* by stating it would be "difficult for us to point out any substantial differences between the services rendered by Lloyd (in *Totten*) and those rendered by Arnaud "

The time spent on *Totten* (and *DeArnaud*) is worthwhile since it is the earliest direct expression by the Supreme Court, and *Totten* has been repeatedly cited in cases up to modern times with no deviation in the thrust of its doctrine The *Totten* case (and *DeArnaud*) and the historical review in the *Halperin* case vividly and amply demonstrate that intelligence and foreign affairs activities, and the necessity for maintenance of secrecy, were an integral part of the framing of the United States Constitution Equally demonstrated are the inherent powers of the President to conduct or authorize such activities With many of the Framers involved, our first Congress acted to provide secret contingent funds by law and succeeding Congresses have provided similar funds Thus, secret intelligence, secret foreign activities, and secret funds are a fundamental and essential part of national security Any attempt to gauge the application of Constitutional protections and privileges without considering national security factors which may be involved is truly to dismiss what in fact is part of our law

It is now time to look at two of the leading U S Supreme Court cases concerning the President's authority and responsibility in foreign affairs and intelligence matters These cases are repeatedly cited when "national security" elements are involved in litigation

7. *(Continued)*

National Security

D. United States v. Curtiss-Wright Export Corp. 299 U.S. 304, (1936).

At issue here was the validity of a Presidential proclamation issued pursuant to a Joint Resolution of Congress authorizing the President to proscribe arms sales and exports to foreign countries, violation of which constituted a criminal offense It was argued by defendants that this was improper delegation by the Congress of its functions to the Executive The Court discussed "the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs That there are differences between them, and that these differences are fundamental, may not be doubted " The Court indicated that there are "inherent powers of external sovereignty" and in the field of international relations the President is "the sole organ of the federal government "

The Court then stated

> "It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family Otherwise, the United States is not completely sovereign "

The Court opinion continues

> "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war He has his confidential sources of information He has his agents in the form of diplomatic, consular and other officials Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results "

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7. *(Continued)*

The Court then concluded by stating that "the statute was not an unlawful delegation and the discretion vested in the President was warranted."

E. Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp. 333 U.S. 103, (1948).

In this case, the issue was whether judicial review of orders of the Civil Aeronautics Board as authorized by statute also included such orders granting or denying a certificate of convenience and necessity for overseas and foreign air transportation which are subject to approval by the President pursuant to that statute. The Court ruled in the negative, saying that such orders "are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate."

The rationale of the Court follows:

> "The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive, and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

This long review of the history of conduct of intelligence efforts and foreign affairs operations clearly establishes the fact of such activities as an inherent responsibility of the President and the need for secrecy and the embodiment of these principles in the Constitution with full awareness of the import of the words used. They were recognized as essential elements of sovereignty and existence as a nation. Then, our First Congress reaffirmed these principles in enacting law to provide the contingent fund for the President as the means to conduct intelligence and maintain secrecy. We see the clearly expressed distinction between the powers of the Executive in respect of foreign affairs and those in respect of domestic affairs. These principles are fundamental and become a part of the concept

. 7. *(Continued)*

II

FOURTH AMENDMENT — WARRANTLESS ELECTRONIC SURVEILLANCE AND PHYSICAL SEARCH

Consideration of judicial treatment of "national security" factors when faced with assertion of Fourth Amendment protection sheds some light and is relevant to judicial views of First Amendment assertions in "national security" cases Clear analogies can be drawn from judicial treatment of the national security issue when faced with either Fourth or First Amendment assertions Distinctions are made between domestic security issues and actions of foreign powers, i e., foreign intelligence and counterintelligence. The distinction between domestic and foreign will also show up in the travel/passport cases to be discussed.

The Fourth Amendment to the United States Constitution states

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized "

Recognition of the value of electronic surveillance in the national security field coupled with concern for Fourth Amendment implications was found in President Roosevelt's authorization of 3 September 1939 for the Federal Bureau of Investigation to conduct wiretaps and physical trespass either to install microphones or to conduct searches Succeeding Presidents approved or reissued this authority up until passage of the Foreign Intelligence Surveillance Act of 1978, 50 U.S C 1801, 25 October 1978

Various Court decisions raised doubts that continued reliance on Presidential authority to conduct electronic surveillance was sufficient in all types of cases Also, there were continuing developments in case law surrounding application of Section 605 of the Communications Act of 1934 (47 U S C 605) to federal investigations of domestic criminal activities As a result, in 1968 the Congress passed the Omnibus Crime Control and Safe Streets Act (18 U S.C 2510) containing provisions authorizing and requiring prior judicial authorization of any electronic surveillance in connection with law enforcement investigations That Act took particular note of the long used authority asserted by the President and used by the FBI to conduct electronic surveillance for "national security" purposes. Section 2511(3) provides as follows

> "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat 1143, 47 U S C 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United

7. *(Continued)*

> States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power "

This subsection neither adds to nor subtracts from the President's power to conduct electronic surveillance in the interest of national security No court decisions have indicated otherwise (There is here, however, an expression of Congress that explicitly includes foreign intelligence and counterintelligence in the concept of national security.)

A. United States v. United States District Court, 407 U.S. 297, (1972) – *Keith.*

In referring to Section 2511(3), the Court stated ". . . Congress simply left presidential powers where it found them." In this case, the Attorney General by affidavit stated he approved the wiretaps "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government " On the basis of that affidavit, the Government asserted that "the surveillance was lawful, though conducted without prior judicial approval, as a reasonable exercise of the President's power (exercised through the Attorney General) to protect the national security " Since there was no evidence of any involvement, directly or indirectly, of a foreign power, the Court concluded that any special circumstances applicable to domestic security surveillances would not warrant an exception to the general Fourth Amendment requirement that a warrant be obtained The Court made it clear that the President's powers with respect to surveillance of foreign powers were not at issue by saying

> "Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country "

B. United States v. Brown, 484 F. 2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960, (1974).

This issue was, however, squarely addressed in *Brown*. The Court referred to its earlier decision in United States v Clay, 430 F 2d 165 (5th Cir 1970) in which it "concluded that the President had such authority over and above the Warrant Clause of the Fourth Amendment We found that authority in the inherent power of the President with respect to conducting foreign affairs We took our text from Chicago and Southern Air Lines v Waterman SS Corp , 333 U S 103, (1948)." The *Brown* opinion then utilizes quotations from *Chicago and Southern* set forth in this paper. Continuing, the *Brown* opinion states that *Keith* teaches

> ". . in the area of domestic security, the President may not authorize electronic surveillance without some form of prior judicial

7. *(Continued)*

approval However, because of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm what we held in United States v Clay, supra, that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence. Accord, Zweibon v Mitchell, D.D C 1973, 363 F Supp 936, United States v Butenko, DNJ , 1970, 318 F Supp 66, restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere

"Our holding in Clay is buttressed by a thread which runs through the Federalist papers that the President must take care to safeguard the Nation from possible foreign encroachment, whether in its existence as a Nation or in its intercourse with other nations " See e g , The Federalist No 64, at 434-36 (Jay), The Federalist No 70 at 500 (Hamilton) (J. Cook ed 1961)."

In a specially concurring opinion in the Brown case, Circuit Judge Goldberg said

"There can be no quibble or quarrel with the findings and conclusions that the wiretap under consideration here had its origin and complete implementation in the field of foreign intelligence This Court and the able district judge have conducted inescapably independent reviews of the action of the then Attorney General in authorizing this warrantless electronic surveillance All agree in the determination that the wiretap was indeed directly related to legitimate foreign intelligence gathering activities for national security purposes, and that it was, therefore, a legal wiretap "

C. United States v. Butenko, 494 F. 2d 593 (3d Cir. 1974), *cert. denied sub nom.*, Ivanov v. United States, 419 U.S. 881, (1974).

Perhaps the most extensive judicial review of the law on warrantless electronic surveillance for gathering of foreign intelligence is contained in *Butenko* After trial and conviction of Butenko and Ivanov in 1964 of conspiring to violate the provisions of 18 U.S C 794(a) and (c), there were appeals and voluntary disclosure by the government that it had overheard conversations of Ivanov by means of electronic surveillance

1 The Court faced head-on the question of whether Section 605 of the Communications Act of 1934, 47 U.S C 605, was to be construed to restrict the President's authority to gather foreign intelligence information and use such information to assist in securing criminal convictions The Court pointed out that in enacting Section 605, the Congress did not address the statute's possible bearing on the President's constitutional duties as Commander-in-Chief and as administrator of the Nation's foreign affairs Had the Congress explored the question, the Court opines it would have recognized that any action by the Congress that arguably would hamper the President's effective performance of his duties in the foreign affairs field would have raised constitutional questions In the absence of such legislative consideration, the Court would not

7. *(Continued)*

ascribe to Congress an intent that Section 605 should reach electronic surveillance conducted by the President in furtherance of his foreign affairs responsibilities, and therefore concluded that Section 605 does not render them unlawful Thus, there are no limits placed on the uses to which material so obtained may be put.

2 The Court then turned to an analysis of the applicability of the Fourth Amendment to electronic surveillance conducted pursuant to the President's foreign affairs powers The Court reviewed the expansive language of *Curtiss-Wright* (cited and discussed earlier) but also discussed *Keith* (also cited and discussed earlier) agreeing with its conclusion that the Fourth Amendment is applicable even though unlike *Keith* the subject of the surveillance is not a domestic political organization The Court stressed the strong public interest, i.e., "the efficient operation of the Executive's foreign policymaking apparatus depends on a continuous flow of information." The Court then stated, "Also, foreign intelligence gathering is a clandestine and highly unstructured activity "

The Court pointed out that while the "Constitution contains no express provision authorizing the President to conduct surveillance, . . it would appear that such power is similarly implied from his duty to conduct the Nation's foreign affairs " The Court went on to say, "To demand that such officers . . must interrupt their activities and rush to the nearest magistrate to seek a warrant would seriously fetter the Executive in the performance of his foreign affairs duties " The Court then held in sum that prior judicial authorization was not required since the surveillances were "conducted and maintained solely for the purpose of gathering foreign intelligence."

3 The Court then dealt with the matter of probable cause, stating, "the crucial test of legality under the Fourth Amendment, is the probable cause standard," which is subject to post-search judicial review and such "review represents an important safeguard of Fourth Amendment rights . . " The Court went on to say of the probable cause standard, that, "Although most often formulated in terms of an officer's probable cause to believe that criminal activity has or will take place, the standard may be modified when the government interest compels an intrusion based on something other than criminal activity. ." The Court then states

> "The government interest here—to acquire the information necessary to exercise an informed judgment in foreign affairs—is surely weighty. Moreover, officers conceivably undertake certain electronic surveillance with no suspicion that a criminal activity may be discovered Thus, a demand that they show that before engaging in such surveillance they had a reasonable belief that criminal activity would be unearthed would be to ignore the overriding object of the intrusions Since the primary purpose of these searches is to secure foreign intelligence information, a judge, when reviewing a particular search must, above all, be assured that this was in fact its primary purpose and that the accumulation of evidence of criminal activity

7. *(Continued)*

was incidental If the Court, for example, finds that members of a domestic political organization were the subjects of wiretaps or that the agents were looking for evidence of criminal conduct unrelated to the foreign affairs needs of a President, then he would undoubtedly hold the surveillances to be illegal and take appropriate measures

"Since, interceptions of conversations of Ivanov were 'solely for the purpose of gathering foreign intelligence,' they are reasonable under the Fourth Amendment Because we have already concluded that a warrant was not required under the circumstances here, we, therefore, hold that Ivanov's Fourth Amendment rights were not violated "

4 The Court concluded

"Rarely, if ever, do the phrases of the Constitution themselves decide cases without at least some interpretative assistance from the judiciary. The Constitution speaks through the judges, but its phrases are seldom so cabined as to exclude all flexibility Charged with the assignment to make a choice, a judge must be responsible for the choice he makes

"The importance of the President's responsibilities in the foreign affairs field requires the judicial branch to act with the utmost care when asked to place limitations on the President's powers in that area As Commander-in-Chief, the President must guard the country from foreign aggression, sabotage, and espionage Obligated to conduct this nation's foreign affairs, he must be aware of the posture of foreign nations toward the United States, the intelligence activities of foreign countries aimed at uncovering American secrets, and the policy positions of foreign states on a broad range of international issues And balanced against this country's self-defense needs, we cannot say that the district court erred in concluding that the electronic surveillance here did not trench upon Ivanov's Fourth Amendment rights

"To be sure, in the course of such wiretapping conversations of alien officials and agents, and perhaps of American citizens, will be overheard and to that extent, their privacy infringed But the Fourth Amendment proscribes only 'unreasonable' searches and seizures

"Accordingly, the judgment of the district court denying Ivanov's request for disclosure and an evidentiary hearing will be affirmed "

D. United States v. Truong Dinh Hung and United States v. Ronald Louis Humphrey, 629 F. 2d 908, (4 Cir. 1980), *cert. denied*, 102 S. Ct. 1004.

The most recent chapter in the saga of the developing law of warrantless electronic surveillance and searches arises out of the companion cases of *Truong* and *Humphrey* who were convicted of espionage in violation of 18 U.S C 794(a) and (c) and other statutes They sought appeals on grounds which included warrantless electronic surveillance and searches

1 Truong, a Vietnamese citizen, living in the United States, had his telephone tapped and his apartment bugged by the federal government from

7. *(Continued)*

May 1977 to January 1978 No court authorization was sought or obtained for this telephone tap Through the tap, it was learned that Truong procured copies of classified documents from Humphrey, an employee of the United States Information Agency At Truong's request, Dung Krall received packages containing copies of the classified documents and delivered them to representatives of the Socialist Republic of Vietnam Unknown to Truong, Krall was a confidential informant employed by the CIA and the FBI Krall kept these agencies fully informed and gave the packages to the FBI for inspection, copying, and approval This operation continued from September 1976 until 31 January 1978 when Truong and Humphrey were arrested

2 The district court accepted the government's argument that there exists a foreign intelligence exception to the warrant requirement of the Fourth Amendment and that approval for the surveillance by the President's delegate, the Attorney General, was constitutionally sufficient The district court also decided the executive could proceed without a warrant only so long as the investigation was "primarily" a foreign intelligence investigation Based on an internal memorandum of 20 July 1977 indicating that the government had begun to assemble a criminal prosecution, the district court decided that thereafter the investigation was primarily criminal and excluded all evidence secured through warrantless surveillance after that date

3 The appeals court agreed with the district court but pointed out that the Supreme Court had never decided the issues However, they relied on the analysis conducted in the United States v United States District Court (Keith), 407 U S 297 (1972) which is discussed earlier in this paper, where the surveillance was against domestic organizations The appeals court here said

> "For several reasons, the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, 'unduly frustrate' the President in carrying out his foreign affairs responsibilities First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations
>
> "More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lay behind foreign intelligence surveillance The executive branch, containing the State Department, the intelligence agencies, and the military, is constantly aware of the nation's security needs and the magnitude of external threats posed by a panoply of foreign nations and organizations On the other hand, while the courts possess expertise in making the probable cause determination involved in surveillance of suspected criminals, the courts are unschooled in diplomacy and military affairs, a mastery of which would be essential to passing upon an executive branch request

7. *(Continued)*

that a foreign intelligence wiretap be authorized Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the 'probable cause' to demonstrate that the government in fact needs to recover that information from one particular source

"Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. The President and his deputies are charged by the Constitution with the conduct of the foreign policy of the United States in times of war and peace See United States v Curtiss-Wright Corp , 299 U S 304 (1936) Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic security surveillance, 407 U S at 316-18, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance

"In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance. *Accord, United States* v *Butenko*, 494 F. 2d 593 (3 Cir), *cert denied sub nom* , Ivanov v United States, 419 U S 881 (1974), *United States* v. *Brown*, 484 F. 2d 418 (5 Cir 1973), *cert denied*, 415 U S 960 (1974), United States v Clay, 430 F. 2d (5 Cir 1970), *rev'd. on other grounds*, 403 U.S 698 (1971) "

4 *Butenko*, *Brown* and *Clay* dealt only with overhearing of the defendants during the course of warrantless electronic surveillance for foreign intelligence purposes which was not directed at them as targets In each case, such surveillance was determined to be legal, and the result was that the defendants were not entitled to review the results, which were not a part of the evidence against them Here in *Truong-Humphrey* was the head-on confrontation—the evidence obtained in warrantless electronic surveillance directed at defendants, but conducted "primarily" for foreign intelligence purposes, was admissible evidence in the prosecutor's case against them

5. The reasoning set out by *Truong-Humphrey* in support of the lawfulness of such surveillance seems to be a strong argument against the wisdom and constitutionality of the Foreign Intelligence Surveillance Act of 1978, 50 U.S C 1801 (FISA) and its requirement for a judicial warrant by the Executive in order to conduct electronic surveillance for foreign intelligence purposes in the United States

Certiorari was denied as to *Butenko* and *Brown* prior to passage of FISA The reasoning of *Truong-Humphrey* accurately reflects *Butenko* and *Brown* and agrees, with no other circuit courts substantially in disagreement That part of FISA requiring a judicial warrant before the Executive is permitted to wiretap a known KGB agent, or for that matter the Soviet Embassy itself, flies directly in the face of these three cases which represent the best judicial law

7. *(Continued)*

on the subject Opponents of enactment of this part of FISA commented that the title of the Act should be changed to reflect its intended purpose, i e , to "An Act to Convey Fourth Amendment Rights on Foreign Embassies and all Foreign Intelligence Agents in the United States " Only the media hysteria and over-reaction of the mid-seventies could bring about such a result under the clarion call of "protecting the Constitutional Rights of Citizens "

E. Physical Search.

On the issue of physical search, the United States Foreign Intelligence Surveillance Court (FISC) established by FISA, by order of 4 June 1981, determined it had "no statutory, implied, or inherent authority or jurisdiction to review" an application for the FBI to undertake an intelligence physical search of property under control of a foreign power However, previously on at least two occasions judges of FISC have issued orders, at the request of the Justice Department, authorizing searches of personal property, (H R Rep No 1466, 96th Congress, 2d Session 1980) The Department of Justice in its Memorandum of Law, of 3 June 1981, accompanying its application, changed direction from the Justice Department under the previous administration and urged that FISC reject its application "because of its lack of jurisdiction " That memorandum went on to say, "The Department of Justice has long held the view that the President and, by delegation, the Attorney General have constitutional authority to approve warrantless physical searches directed against foreign powers or their agents for intelligence purposes," and that this power "has also been upheld by the only appellate court that has considered this question in the context of a physical search of the property of an agent of a foreign power" and cites the *Truong-Humphrey* case How, in legal logic, can a physical search be distinguished from electronic surveillance in Fourth Amendment terms? The answer is, it cannot

III

LEGISLATION AFFECTING NATIONAL SECURITY

Much effort is directed herein at the judicial view of "national security" and the role of the Executive as interpreted by the court Attention should now be turned to action by the Congress in legislating on various aspects of "national security " Not all such legislation can be catalogued here, but we will highlight action relating to those aspects of "national security" which touch on intelligence or foreign activities and the need for secrecy We have discussed previously the enactment since the first Congress of contingency funds for the Executive to carry out secret intelligence and foreign affairs activities

A. National Security Act of 1947, 50 U.S.C.A. 402.

Until passage of this law, there was no utilization of the word "intelligence" in the United States Code, other than a short reference to detail of Army officers to the fields of intelligence or counterintelligence, 10 U S C A 2065(b) Congress addressed itself fully to the question of intelligence as an integral part of "national security " It established a Central Intelligence Agency with a head thereof, titled the Director of Central Intelligence, under a new National Security Council presided over by the President

7. *(Continued)*

National Security

The CIA was given various duties for the purpose of coordinating the intelligence activities of the Federal Government "in the interest of national security." While the Congress, of necessity, decided to formalize "intelligence" and "national security," it could not bring itself to use the word "espionage," but this was a clearly intended duty of CIA as the classified Congressional Committee hearings accurately reflect At P 127 of Book I of the Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, April 26, 1976 (Church Committee), it is stated, "The Select Committee's record shows that the legislating committees of the House and Senate intended for the Act (The National Security Act of 1947) to authorize the Agency (CIA) to engage in espionage."

The Director of Central Intelligence was furnished little authority by this Act except for the ability to terminate employment of any CIA employee whenever he deemed it "necessary or advisable in the interests of the United States." This he could do notwithstanding the provisions of any other law. On the other hand, a proviso was added that charged him with the responsibility "for protecting intelligence sources and methods from unauthorized disclosure." This statutory charge was to play a large role in litigation to be discussed later

B. Central Intelligence Agency Act of 1949, 50 U.S.C.A. 403a.

In what was originally a part of the National Security Act in early drafts, the CIA Act of 1949 provided the Agency with tools and authority to accomplish its intelligence mission It was given needed procurement authority, ability to pay appropriate travel, allowances, and related expenses of its employees

1 To enable secret funding of its yearly appropriation, CIA was authorized to transfer to and receive from other government agency funds to perform its functions, and as to funds transferred to CIA such expenditures could be made under CIA authorities The principal such authority was permanent contingent fund provisions such as previously discussed From that time up through the present, CIA is the only government agency which expends a major part of its funds under contingent fund provisions which provide for a simple certificate of the Director as to the amount of such expenditures without further detail

2 Another authority which was essential was the provision (50 U S C A 403g) that

> "In the interest of the security of the foreign intelligence activities of the United States and in order further to implement the [sources and methods proviso]', the Agency shall be exempted from the provisions of any other law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency"

This provision was to become important in resisting requests for access under the Freedom of Information Act, 5 U S C 552 (FOIA)

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7. *(Continued)*

C. Criminal Disclosure Statutes.

For purposes of this article, I shall not discuss the espionage statutes, 18 U S C 793 and 794 enacted in 1917, except to indicate they are woefully inadequate to deal with cases of unauthorized disclosure or publication of classified information In many respects, they are even inadequate to deal with classic cases of espionage They have, however, withstood the challenge of being unconstitutional as violative of due process because of indefiniteness See Gorin v United States, 312 U S 19, (1941)

1 50 U.S C.A 783(b), enacted in 1950, makes it unlawful for an employee of the United States to disclose to a person whom such employee knows or has reason to believe to be an agent of a foreign government information of a kind which shall have been classified as affecting the security of the United States Note here the statutory words "classified" and "security " In Scarbeck v United States, 317 F 2d 546, (1963), *cert denied*, 83 S Ct 1897 (1963), the statute was tested and the defendant asserted that evidence should be heard on whether the information was properly classified and the burden was on the Government so to prove The Court rejected this argument, stating

> "The factual determination required for purposes of Section 783(b) is whether the information has been classified Neither the employee nor the jury is permitted to ignore the classification given under Presidential authority "

2 Section 798 of Title 18, also enacted in 1950, was intended to proscribe unauthorized disclosure of classified information pertaining to communications intelligence or cryptographic systems These terms were then defined in the law which made it a crime for anyone to disclose or communicate to an unauthorized person, or to publish such information In a recent case, United States v. Boyce, 594 F 2d (9 Cir 1979), the defendant who had been convicted under Section 798 raised the same objection as in *Scarbeck*, i e , that the documents were improperly classified The Court rejected this contention, stating "Under section 798, the propriety of the classification is irrelevant The fact of classification of a document or documents is enough to satisfy the classification element of the offense "

3 The Atomic Energy Act of 1954, 42 U S C A 2011 establishes a category of atomic energy information known as Restricted Data and defines such information The Act makes it a crime for anyone to communicate or disclose Restricted Data (i) "with intent to injure the United States or with intent to secure an advantage to any foreign nation" or (ii) "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation", 42 U.S C A 2274 Further, the Act provides at 42 U S C A 2280 authority for the government to seek an injunction for a threatened violation of these criminal provisions The recent case of United States v the Progressive, 467 F Supp 990, (7 Cir 1979) in which the government was granted an injunction under this statute will be discussed later in Part IV.

7. *(Continued)*

National Security

D. National Security Agency Act of 1959, 50 U.S.C.A. 402 Note.

Despite the fact that the National Security Agency was not created by statute, but rather by administrative action of the Secretary of Defense, the Congress acted in 1959 to grant its activities additional protection from public disclosure by the NSA Act of 1959 which provides

> " nothing in this Act or any other law shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such Agency " ,

(This closely parallels the CIA provision referred to earlier, 50 U.S C.A 403g) This provision would be helpful to NSA in later litigation under *FOIA*

E. Intelligence Identities Protection Act of 1982, P.L. 97-200.

The continuing development of "national security" law is reflected in most recent legislative action, i e., the Congress approving in 1982 the "Intelligence Identities Protection" legislation Similar proposed legislation had been introduced as early as 1975, and committees of three different Congresses have considered this issue The purpose of these bills was to prohibit unauthorized disclosure of information identifying United States personnel, including agents, informants, and sources and to protect the secrecy of these intelligence relationships That section of the bills relating to disclosures by persons not having had access to classified information was the subject of intense debate over four years

Many assertions were made by special interest groups and others that this latter section was flatly and facially unconstitutional, but support for this assertion by directly relevant case law was conspiciously absent Among those who urged this view were included those who also assert the First Amendment is an absolute Some of these interest groups made similar assertions in *Zemel v. Rusk, Cole v. Richardson, Laird v Tatum, Marchetti I and II, Snepp, Truong-Humphrey, Haig v Agee*, (all cited and discussed herein) and had their assertions rejected by the Supreme Court, which balanced "national security" against constitutional rights Having lost their First Amendment arguments at the bar of the Supreme Court, they attempted to win that argument in Congressional committee rooms, but finally lost that battle on the floor of the House and the Senate

The Intelligence and Judiciary Committees of both Houses, over more than a three-year period, carefully crafted well designed provisions to meet the objective of improving the effectiveness of U S intelligence, and protecting the safety of intelligence personnel At the same time, the provisions were deemed adequate and sufficient to pass Constitutional muster In a last minute effort to weaken the effectiveness of the proposed bills, those interests which had objected to such legislation on constitutional grounds were instrumental in

7. *(Continued)*

having amendments made to H R. 4 and S 391 as they were reported out by the committees In rousing and prolonged debate, particularly in the Senate, the amendments added by the committees were rejected in roll-call votes, and the provisions of S 391 as introduced by Senator Chafee and supported by the Administration were approved and signed into law on 23 June 1982 by President Reagan before assembled officers and employees of CIA at the Headquarters Building at Langley, Virginia *

The interest groups opposed to any measures to improve the effectiveness of intelligence won temporary victories in the Congressional committee arena Such groups include within their ranks exponents of the absolutist view of the First Amendment But it is interesting and significant that those forces lost on the floor of the House and the Senate on roll-call votes Those votes for the bills as amended on the floor were, in the House 354 to 56 and in the Senate 90 to 6 Thus, resounding majorities in both Houses voted their belief that this law is constitutional in the framework of protecting "national security" despite the shrill protests of the media and First Amendment absolutists

IV

FIRST AMENDMENT NATIONAL SECURITY CASES

We now begin to come face to face with judicial expressions of resolution of the apparent dilemma of the protective words of the First Amendment and the necessities of the survival of the nation through the exercise of Presidential powers under Article II of the Constitution

A. Near v. Minnesota, 283 U.S. 697, (1931).

Most treatises on the First Amendment include *Near v. Minnesota*, and so shall I While that case dealt with a state law proscribing publication of defamatory newspapers (which was struck down on First Amendment grounds), the Court took great care to make it clear that the First Amendment was not absolute The example they chose to illustrate an exception lay in the "national security" area, i e , military matters

> " . . the protection even as to previous restraint is not absolutely unlimited " and
>
> "No one would question but that a government might prevent actual obstruction to its recruiting efforts or the publication of the sailing dates of transports or the number and location of troops "

B. Kent v. Dulles, 357 U.S. 116, (1958).

Many point to *Kent v Dulles* as judicial vindication of an asserted First Amendment right to travel This it is not Factually, the issue concerned refusal of the Secretary of State to issue a passport based on the applicant's failure to file affidavits concerning membership in the Communist Party as required by law The Court held for the applicant, concluding that the statutes

* See "The President at Langley," *Studies in Intelligence*, Fall 1982, Volume 26, Number 3

7. *(Continued)*

did not give the Secretary of State the kind of authority exercised to deny travel "solely because of their refusal to be subjected to inquiry into their beliefs and associations." The Court stated it did not reach the question of the constitutionality of the statutes concerned. It did state

> "The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."

The Court then added

> "If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case."

In other words, if appropriate "national security" considerations were involved, such as the President's responsibilities for foreign affairs, the result might be different—and so it was as we shall see in the next case and in the later case of *Haig v. Agee*.

C. Zemel v. Rusk, 381 U.S. 1, (1965).

First Amendment rights were again asserted in a passport case where the Secretary of State refused to validate a passport for travel to Cuba in Zemel v. Rusk. The Court stated

> ". . . we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unreasonable to assume that it does not), it is an inhibition of action . . . The right to speak and publish does not carry with it the unrestrained right to gather information."

The Court, picking up on the "right to travel" as a liberty of a citizen referred to in *Kent v. Dulles*, discussed above, went on to say, "the fact that a citizen cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited." The Court in referring to the restriction on travel to Cuba then said, "the restriction is supported by the weightiest considerations of national security."

D. New York Times Co. v. United States, 403 U.S. 713, (1971).

Due to the haste with which this "Pentagon Papers" case was brought to the Supreme Court, there were many complaints in the opinions about such haste. It is difficult to draw clear lessons, abetted by the fact of six separate concurring opinions, all but two shared by more than one Justice and three separate dissenting opinions (two of them individual dissents). There were disparate views ranging from the absolute views of the First Amendment of a minority to the view of some Justices that they were "not prepared to reach the merits, . . ." The final result, of course, was that injunctions against the New York *Times* and the Washington *Post* were not sustained.

One can draw a lesson that the Government did not carry its burden of proving grave, immediate, and irreparable harm to the national security of the United States. Others would assert that this case stands for the principle that

7. *(Continued)*

there can be no prior restraint of the media However, as Justice White put it, with concurrence of Justice Stewart, "I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans and operations " He also noted that in this case, "a substantial part of the threatened damage has already occurred " Justice Marshall, in concurring with the result, conceded that "in some situations it may be that under whatever inherent powers the Government may have as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander in Chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to 'national security' however that term may be defined "

E. Cole v. Richardson, 405 U.S. 676, (1972).

In *Cole v. Richardson*, First Amendment rights were again asserted In this case, an employee of the State of Massachusetts refused to subscribe to a required oath of employment which provided in part that the subscriber will oppose the overthrow of the Government of the United States by force, violence, illegal, or unconstitutional method Other parts of the oath of office provided for upholding the Constitution of the United States The Court held that such an oath was not inconsistent with the constitutionally required oath of office "to uphold the Constitution "

F. Laird v. Tatum, 408 U.S. 1, (1972).

Just a few months later, the U S Supreme Court dealt with assertions of First Amendment rights in a case more directly related to "national security," i e , collection of intelligence by the U S Army in *Laird v Tatum*.

Here the Army had established a system for collecting intelligence, principally through monitoring the media, concerning civilians possibly involved in potential or actual civil disturbances No legally proscribed collection means were utilized The Court reviewed the various statutes which authorized the President to utilize the armed forces to quell insurrection The plaintiffs asserted that the chilling effects of the mere existence of this collection activity on their First Amendment rights were constitutionally impermissible The Court held

> "No logical argument can be made for compelling the military to use *blind* force When force is employed it should be intelligently directed, and this depends upon having reliable information—in time As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information It is his duty to obtain correct information ' "

Here again, the Court refused to spread the umbrella of First Amendment rights to exclude "national security" needs for intelligence

G. United States v. Marchetti, 466 F. 2d 1309 (4 Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972), hereinafter *Marchetti I*.

The competing demands of "national security" need for secrecy in intelligence matters, First Amendment rights, free speech, and prior restraint

7. *(Continued)*

were thoroughly analyzed and dealt with in *United States v Marchetti* * The Central Intelligence Agency sought an injunction requiring its former employee, Marchetti, to submit to the Agency any proposed writing relating to the CIA prior to release to anyone else, the purpose being to assure that such writing did not include any classified information CIA relied upon a secrecy agreement signed by Marchetti when he became a CIA employee wherein he agreed he would never divulge any classified information unless authorized by the Director of Central Intelligence. It was claimed that the First Amendment barred any such prior restraint and the *New York Times* case was cited in support of this claim

The Court in its opinion pointed out that free speech is not an absolute concept and referred to the type of exception for "national security" set out in *Near v. Minnesota* The Court then commented on the government's right to secrecy in foreign affairs matters and intelligence, citing *Curtiss-Wright Export* and *Chicago and Southern Air Lines* The Court pointed out that the Director of Central Intelligence is charged by law with the responsibility "for protecting intelligence sources and methods from unauthorized disclosure" 50 U S 403(d)(3) The Court stated such secrecy agreements as signed by Marchetti "are entirely appropriate" to implement the Congressional charge of responsibility The Court upheld the injunction, saying, "Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech The agreement is enforceable only because it is not a violation of those rights."

Thus, a valuable legal tool had been established, enforceable in a court, based on a simple contract concept This tool could prevent serious damage to the "national security" interests of the United States or threats to the personal safety of individuals, by acting in *advance* of a threatened disclosure—with no abridgement of First Amendment rights

H. Environmental Protection Agency et al v. Mink et al, 410 U.S. 73, (1973).

EPA v. Mink is discussed briefly here because of the reaction of Congress The Freedom of Information Act, 5 U S C 552 (FOIA) provided for exemption from forced disclosure matters "specifically required by an Executive Order to be kept secret in the interest of national defense or foreign policy" After discussing the legislative history of that act, the Court held " but the legislative history of that Act disposes of any possible argument that Congress

* See "The Marchetti Case New Case Law," by John S Warner, *Studies in Intelligence* Spring 1977, Volume 21, Number 1

7. *(Continued)*

intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them "

The Congress promptly amended the existing FOIA concerning the exemption relating to matters to be kept secret pursuant to an Executive Order to provide additionally, "and (B) are in fact properly classified pursuant to such Executive Order,", Public Law 93-502, 21 November 1974 That law also provided that any documents withheld under any of the exemptions may be examined by the court in camera and such "court shall determine the matter de novo "

The President's veto message of 17 October 1974 stated, ". the courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise " He stated this provision "would violate constitutional principles. " And, "It is my conviction that the bill as enrolled is unconstitutional and unworkable " There are many who agreed then and agree now on the basis of the spectacle that has been visited upon our judicial system by this revision

Consider the case of *Philip Agee v Central Intelligence Agency* decided in the District Court for the District of Columbia on 17 July 1981, Agee v CIA, 524 F Supp. 1290. The Court conducted a random *in camera* review of the 8,699 CIA documents responsive to the Agee request This review was done mainly at CIA Headquarters "because of the volume and sensitivity of the material " In granting the CIA's motion for summary judgment of dismissal, Judge Gerhard A Gesell said

> "As far as can be determined this is the first FOIA case where an individual under well-founded suspicion of conduct detrimental to the security of the United States has invoked FOIA to ascertain the direction and effectiveness of his Government's legitimate efforts to ascertain and counteract his effort to subvert the country's foreign intelligence program It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails "

In a footnote, Judge Gesell notes that as of January 1981 CIA had expended 25,000 manhours on the request involving salaries of $327,715 and computer costs of $74,750 with present total costs far exceeding such sum, none of which can be charged to Agee under the statute.

Here again, the hysteria and media over-reaction of the mid-seventies led to passage of a law vetoed as being unconstitutional and flying into the face of well-established case law that the determination of what is secret and must be protected in the interest of "national security" is a matter to be left to the Executive Branch

In testimony before the Senate Select Committee on Intelligence on 21 July 1981, the Deputy Director of Central Intelligence, Admiral B R Inman, pointed out that prior to the 1974 amendments, CIA had received virtually no FOIA requests and since then has been deluged with such requests and with resulting litigation with 1,212 new FOIA requests logged in 1980 Admiral

7. *(Continued)*

Inman concluded, "I believe it is absolutely clear that the FOIA is impairing our nation's intelligence efforts" Many of the same interests asserting First Amendment privilege in the passport cases, *Marchetti I and II*, *Snepp*, and in the vanguard of resisting passage of the Intelligence Identities Protection Act of 1982 are also leaders in the multiplicity of FOIA lawsuits filed against all of the national security agencies

I. Knopf v. Colby, 509 F 2d 1362 (4 Cir. 1975), cert. denied, 421 U.S. 992 (1975), to be known as *Marchetti II*.

We now come to *Marchetti II* where the author is requesting judicial review of deletions of classified information requested by CIA upon its review of the manuscript submitted pursuant to the injunction granted in *Marchetti I* The Court noted that in its consideration of the earlier case it had been "influenced in substantial part by the principle that executive decisions respecting the classifying of information are not subject to judicial review," and then cited *EPA v Mink*. It also noted the revisions to FOIA of 1974, indicating the new standard of review should be applicable. Even under this standard after review of some of the deleted items, the Court referred to the "presumption of regularity in the performance by a public official of his public duty" And, "That presumption leaves no room for speculation that information which the district court can recognize as proper for top secret classification was not classified at all by the official who placed the 'Top Secret' legend on the document" The effect of the Court's ruling was to approve all of the deletions of classified information requested by CIA.

The Court also declined to modify its previous holding (in *Marchetti I*) that the First Amendment is no bar against an injunction forbidding disclosure of classified information when such disclosure would violate a solemn agreement made by the employee at the commencement of his employment. The Court concluded

> "With respect to such information, by his execution of the security agreement and his entry into the confidential employment relationship, he effectively relinquished his First Amendment rights"

J. United States v. The Progressive, 467 F. Supp. 990 and 486 F. Supp. 5, (1979).

Here in *The Progressive* case a temporary restraining order, and later a preliminary injunction, was granted by a Federal District Court to prevent publication by a magazine of an article purported to contain the basic theory of why the hydrogen bomb works and how it is constructed The Court balanced the statements of the Secretary of Defense and the Secretary of State that publication would irreparably harm the national security of the United States against First Amendment assertions In granting the injunction, the Court stated

> "A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all In that event, our right to publish is moot" And " . ' one cannot enjoy freedom of speech, freedom to worship or freedom of the press unless one first enjoys the freedom to live"

7. *(Continued)*

The Court denied reconsideration, and we can only surmise what appellate rulings would have been in the Circuit Court and the Supreme Court, since substantially the same information was published by another author in another publication, and the case became moot However, the Court's opinion is worthy of noting in its attempt to balance "national security" and survival against First Amendment considerations

K. Snepp v. United States, 444 U.S. 507, (1980).

The enforceability of a secrecy agreement was again raised in *Snepp v. United States* Plaintiff makes the assertion that such agreement is unenforceable as a prior restraint on protected speech and thus violative of the First Amendment. Snepp was employed by CIA and signed a secrecy agreement similar to that in the two *Marchetti* cases After terminating his employment with CIA, Snepp published a book based on his experiences in CIA about certain CIA activities without submitting it to CIA for review for classified information The government sought an injunction as in *Marchetti I* but additionally requested that all profits attributable to the breach of contract by failure to submit his manuscript be impressed with a constructive trust. The Court found that Snepp's employment with CIA involved an extremely high degree of trust and that he "deliberately and surreptitiously violated his obligation. . ." The Court found undisputed evidence that a CIA agent's violation of his obligation to submit writings impairs the CIA's ability to perform its statutory duties. The Court referred to the finding of the District Court that publication of the book had "caused the United States irreparable harm and loss" The Court found it immaterial whether the book actually contains classified information—for the purposes of this case, the CIA did not contend in the case that Snepp's book contained classified material However, upon being questioned on this point at a hearing before the House Permanent Select Committee on Intelligence on 6 March 1980, a CIA witness made it very clear that the Snepp book did in fact contain a number of matters that were classified.

The Court approved the injunction as to all future writings relating to intelligence matters, thus putting its stamp of approval on the *Marchetti* cases It also approved the constructive trust as an appropriate remedy for both the Government and the former agent The Court said

> "If the agent publishes unreviewed material in violation of his fiduciary and contractual obligations, the trust remedy simply requires him to disgorge the benefits of his faithlessness Since the remedy is swift and sure, it is tailored to deter those who would put sensitive information at risk."

To deny this remedy "would deprive the Government of this equitable and effective means of protecting intelligence that may contribute to national security" The majority opinion in a footnote rejects a dissent which analogizes Snepp's obligation to a private employee's covenant not to compete by saying

> "A body of private law intended to preserve competition, however, simply has no bearing on a contract made by the Director of the CIA in conformity with his statutory obligation to 'protect intelligence sources and methods from unauthorized disclosure.'"

7. *(Continued)*

National Security

L. Haig v. Agee, 453 U.S. 280, (1981).

First Amendment rights are again asserted in connection with the revocation of Philip Agee's passport by the Secretary of State pursuant to departmental regulations in *Haig v Agee* The notice to Agee of revocation of his passport stated, his "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States " It was stated such action was based on Agee's stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States and evidence of facts and actions in carrying out that campaign The Court stated that beliefs and speech are only a part of Agee's campaign, contrasting it with *Kent v Dulles* The Court also stated, "for Agee's conduct in foreign countries presents a serious danger to American officials abroad and serious danger to the national security."

The Court stated that the freedom to travel abroad in the form of a passport "is subordinate to national security and foreign policy considerations." Further, it pointed out "that the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States " The former, i e., the freedom to travel outside, can be regulated within the bounds of due process. The Court went on to say, "It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation" and, "Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot be neatly compartmentalized "

The Court cites in this portion cases already cited herein, *Chicago and Southern, Curtiss-Wright Export, Zemel v. Rusk, Snepp,* and then jumps back to *Near v Minnesota* The Court in finding that Agee's First Amendment claim has no foundation stated

> "Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of personnel They are clearly not protected by the Constitution The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law To the extent the revocation of his passport operates to inhibit Agee, 'it is an inhibition of *action*,' rather than of speech "

CONCLUSION

While the term "national security" is of relatively modern origin, nevertheless its substance is fully embedded in our law beginning with the Constitution Article II provides for a President who shall be Commander in Chief of the Army and the Navy and states that he shall have power to make treaties with other nations These powers and responsibilities were granted as concomitant with other aspects of sovereignty in a world of contesting and

7. *(Continued)*

often hostile nations The duty was clearly and explicitly placed on the President to preserve and protect this nation by foreign activities and by force of arms if necessary, i.e , to protect the "national security "

In the very molding of the Constitution, it has been demonstrated that the Framers were mindful of the necessity for the conduct of intelligence activities and equally mindful of the necessity for secrecy of those activities The history set forth above relating to the amendment of the Statements and Accounts clause of Article I dramatically emphasizes that secret intelligence as an element of national security is an integral part of our Constitution Whenever other provisions of the Constitution are asserted as conveying privileges or rights, such assertions must be considered against the Constitution as a whole. Where Presidential duties involving national defense, foreign activities, and intelligence are present in situations where First Amendment (or Fourth Amendment) rights are asserted, it is the role of the Judiciary to balance what may seem to be conflicting Constitutional principles

From *Totten* on, the Supreme Court has trod most carefully where these national security issues are involved It has shown great respect for the powers and responsibilities vested in the President by the Constitution and by the fundamental concepts of sovereignty which enable a nation to exist and preserve its national security. In the landmark cases, *Curtiss-Wright Export* and *Chicago and Southern*, it laid the judicial groundwork for the later First Amendment, electronic surveillance and passport cases Here were made the distinctions between foreign affairs and internal affairs Also discussed was the relationship between intelligence concerning foreign matters and the exercise of Presidential powers.

Similar distinctions were made by the Judiciary in electronic surveillance cases In various Circuit Courts of Appeal (*Keith, Brown* and *Butenko*), it was determined that inherent Presidential power to authorize wiretaps and bugging in the interests of national security could not overcome the restraints of the Fourth Amendment in purely domestic security matters As to collection of foreign intelligence and counterintelligence from agents of foreign powers, the courts uniformly held that Presidential powers were paramount. In considering whether the general statute prohibiting disclosure of wire communications (*Communications Act of 1934*) was applicable, *Butenko* held that it could not ascribe to Congress an intent to intrude on such activities conducted by the President in his constitutional role as Commander-in-Chief and as administrator of the Nation's foreign affairs These courts drew reinforcement in reaching their judgments from *Curtiss-Wright Export* and *Chicago and Southern*, as did the Court in the 1980 decision in the *Truong-Humphrey* case which reaffirmed *Keith, Brown* and *Butenko*.

Congress clearly approved the concept of secret intelligence and related foreign activities by authorizing in the First Congress a secret contingency fund for the President for these purposes and thereafter providing similar funds throughout our existence as a nation Intelligence was formally recognized by Congress in establishing the Central Intelligence Agency in 1947 and giving it necessary authority to conduct intelligence and related activities and also the necessary authority to keep such matters secret Some of these authorities to keep matters secret were granted to the National Security

7. *(Continued)*

Agency in 1959 Criminal statutes were enacted with respect to disclosure of communications intelligence (18 U S C 798), classified information by government employees (50 U S C A 783(b)) and Restricted Data relating to atomic energy (42 U S C A 2274) Most recently, the Congress in 1982 (P L 97-200) made it a criminal offense to disclose the identity of intelligence personnel under cover By an overwhelming majority in roll-call votes in both Houses, the argument was rejected that this legislation was violative of the First Amendment

It is against this total background that "national security" and the First Amendment must be considered Certainly *Near v. Minnesota* is the precursor of the cases to come In the passport cases, *Kent'v Dulles*, *Zemel v. Rusk*, and finally in *Haig v Agee* where *First Amendment* rights were asserted, the Supreme Court balanced those rights against "national security " These same cases are relied on in the *Marchetti I and II* and *Snepp* cases

The array of decisions discussed must lead to a heightened awareness that secret foreign policy activities, intelligence, strategic military plans and operations were all of a part of the powers vested in the President by the Framers of the Constitution The Congress, from its inception, implemented those powers with necessary funds and the laws to maintain essential secrecy The Judiciary has consistently paid due deference to these powers vested in the Executive, recognizing the weighty responsibility placed on the Executive on which the existence of our nation depends Sharp distinctions have been drawn between purely domestic security and law enforcement as against foreign policy activities, including intelligence operations The Supreme Court has weighed and balanced most carefully the seeming dilemma of the privileges afforded citizens by the Constitution and the exercise by the Executive of its constitutional responsibilities for "national security "

For those who wish to explore seriously the subject of "Law and National Security," there is a wealth of judicial expression of philosophy on the subject *But*, the subject cannot be thoroughly examined by sole reference to law unless that law has been considered in the context of "national security " As aptly said in *Kennedy v. Mendoza-Martinez*, 372 U.S 144, (1963) and quoted in *Haig v. Agee*

> "While the Constitution protects against invasion of individual rights, it is not a suicide pact "

First Amendment absolutists should constantly be reminded with this quotation that the Judiciary performs the function of weighing the apparently competing demands of First Amendment rights and "national security" imperatives, as demonstrated by the cases dealt with herein

8. "Intelligence Gathering and the Law," Benjamin R. Civiletti (Summer 1983, Volume 27/2)

Conflict or compatibility?

INTELLIGENCE GATHERING AND THE LAW *

Benjamin R. Civiletti

This article focuses on the evolving relationship between the rule of law and the intelligence-gathering activities of our government. The collection and utilization of intelligence information are essential ingredients of foreign policy and national security, and the dramatic increase in international tensions emphasizes our country's crucial need for timely and accurate foreign intelligence. Nevertheless, past excesses in the conduct of intelligence activities indicate that such operations cannot be implemented without careful regard for the rule of law.[1] The following analysis considers the complexities of developing a rule of law that comports with the genuine need of our government to engage in foreign intelligence activities and preserves the civil liberties and privacy interests of our citizens.[2]

I. THE NATURE AND ROLE OF INTELLIGENCE GATHERING

In the past, the line between foreign and domestic intelligence gathering often was not clearly drawn.[3] The Executive Branch, however, is now careful to distinguish these two concerns. Thus, intelligence is defined to include only foreign intelligence and counterintelligence,[4] both of which, in turn, are defined as information relating to "*foreign* powers, organizations or persons." [5] Recent bureaucratic reorganizations and the promulgation of rules, regulations, and guidelines have also reflected this sharp domestic/foreign distinction.[6] In the Federal Bureau of Investigation (FBI), for example, criminal and intelligence investigations are handled by two separate divisions [7] Similarly, the President's Executive Order on Intelligence Activities specifically provides that it does not "apply to or interfere with any authorized civil or criminal law enforcement responsibility of any department or agency."[8]

This distinction between foreign intelligence and domestic law enforcement reflects not only the attitude of the courts [9] and the legislature, [10] but also the present belief of the Executive Branch that the purposes of intelligence gathering are fundamentally different from those of domestic law enforcement and, therefore, require different regulations. Law enforcement is

* This article is adapted from the Tenth Annual John F Sonnett Memorial Lecture, delivered by Mr Civiletti, then Attorney General of the United States, at the Fordham University School of Law on 15 January 1980 Several attorneys in the Department of Justice, particularly Kenneth B Reisenfeld of the Office of Intelligence Policy and Review, assisted Mr Civiletti in preparing this paper The article was published in the Fordham University *Law Review*, Volume 48, Number 6, May 1980, and is presented here by permission of Mr Civiletti and the editors of the *Law Review* In the years since Mr Civiletti prepared the article, the status of some of the issues he addressed has changed A commentary taking note of these developments is appended to this article

8. *(Continued)*

intended to discover and punish acts which society deems unacceptable Intelligence activities are intended to acquire information so that the President and his advisors can make informed decisions in conducting international diplomacy, foreign relations, and national security affairs [11] In counterintelligence, however, there are some areas in which intelligence and domestic law enforcement interests overlap This intersection is particularly apparent when the government attempts to monitor clandestine information gathering by foreign agents in the United States because many forms of foreign espionage conducted within our nation's borders are crimes under federal law [12] The need to observe the activities of agents of foreign powers and to defend against their operations demands considerable caution [13]

Intelligence activities, which, as presently defined, pertain only to foreign affairs and national security issues,[14] must be kept strong and effective The government needs to obtain the best information available concerning the intentions and activities of foreign powers The ability of the United States to react to events in foreign lands is limited under any circumstances. Without timely and accurate information, the ability to react constructively is eliminated. Moreover, obtaining critical intelligence is exceedingly difficult Although it may be virtually impossible, given today's technology, for any country to conceal substantial troop movements, the transfer of funds and arms and the strategies of foreign governments are not as readily detectable Unless we possess current, accurate knowledge about the actions a foreign power is likely to take, our information base is limited, and the more limited our information base, the more speculative are our analyses, and the greater the danger to our security. Secrecy, however, is an essential element of effective intelligence gathering Even if we are able to gain information concerning a hostile foreign nation, our success will be shortlived if we disclose the facts of our success Further, if we reveal the information obtained, we will not only lose our advantage and risk changes in the acquired plans, but we will also jeopardize or perhaps destroy our sources and methods of gathering information [15]

What makes these seemingly self-evident observations controversial is that intelligence activities can come perilously close to intruding upon our most basic statutory and constitutional rights [16] This inherent danger is increased by the highly sophisticated technological advances, commonly used throughout the world today, that widen the range of possible intelligence-gathering activities. The necessity of secrecy, however, often prohibits any judicial review of questionable intelligence activities.[17] The Executive Branch, therefore, is required to redouble its efforts to ensure that intelligence activities are not exempted from all responsible checks and balances [18] The need to create durable mechanisms to regulate and review intelligence activities has led to the evolution of intelligence law

II. THE DEVELOPMENT OF INTELLIGENCE LAW

Although both law enforcement and intelligence activities have existed in this country since before the creation of the Republic,[19] they have developed largely along separate tracks because of their conflicting natures Law

8. *(Continued)*

enforcement emphasizes openness, stability, and a balancing of interests, its concerns are domestic and its scope is comprehensive Intelligence activities require secrecy, flexibility, and a single-mindedness of purpose, they focus on foreign developments and rapid adaptability to specific circumstances Given these disparities, it is no surprise that law enforcement and intelligence activities did not converge in the United States until recently

The first permanent peacetime intelligence organizations in the United States were created in the latter part of the nineteenth century [20] These were relatively ineffective, however, and during World War I the nation relied to a great extent on the intelligence capabilities of its allies [21] It was not until World War II that American intelligence efforts began to flourish under the Office of Strategic Services [22] Apart from various directives dealing essentially with organizational matters, there was almost no accompanying development of law relating to intelligence activities.[23]

After World War II, a permanent Central Intelligence Agency (CIA) was created by the National Security Act of 1947 [24] This statute was the first public declaration by any nation concerning the existence and functions of its intelligence service The Act is remarkably concise; in five short subparagraphs it instructs the CIA to collect intelligence information and to perform other related functions at the direction of the National Security Council.[25] The Act's sole express restriction is the proviso that the CIA should not have any police, subpoena, or law enforcement powers or internal security functions [26] This limitation was as much a concession to established law enforcement agencies as it was an effort to prevent the creation of an American secret police [27]

With the exception of espionage statutes enacted originally in 1917 and subsequently amended,[28] and administrative housekeeping laws enacted to facilitate the operation of the CIA and the National Security Agency, there were no other laws expressly relating to United States intelligence activities from 1947 until the 1970s [29] In fact, during this period laws were passed that, if taken literally, would have obstructed or prevented clearly legitimate and necessary intelligence programs [30] Faced with an absence of particularized law or precedent and an array of general purpose laws inappropriate to intelligence endeavors, the government and its intelligence agencies understandably ignored the broad range of legal strictures that apply in other areas of governmental activity The deference shown to intelligence matters for almost thirty years by the public, press, Judiciary, Congress, executive officials, various Presidents and Attorneys General considerably strengthened the assumption that intelligence efforts were so different or special that modified legal standards should be applied to them [31] Over the past few years, however, this perception has changed, and express legal principles have been specifically developed to govern intelligence activities Although there may continue to be some confusion about how the law applies to a particular matter, there is no longer any doubt that intelligence activities are subject to definable legal standards

The first comprehensive statement of intelligence law, which delineated various standards, authorizations, and prohibitions designed to govern our intelligence operations, was announced by President Ford on February 18,

8. · *(Continued)*

1976 [32] After two years of experience with President Ford's order, President Carter issued his own executive order which broadens and strengthens the controls over the intelligence community.[33] For example, this order requires that various procedures be developed, subject to the approval of the Attorney General, to govern the complete range of collection and dissemination practices by all intelligence agencies when the information collected or disseminated pertains to persons entitled to the protection of the United States Constitution.[34] The United States is the only country that has issued such a comprehensive statement

President Carter also ordered that the government's document classification system be changed.[35] This new executive order officially embraces the principle that even a properly classified document should sometimes be declassified if the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure.[36] The order also creates an administrative mechanism, complete with disciplinary sanctions, designed to eliminate any abuses of the system,[37] such as the unnecessary classification of documents.[38]

Congress has also played an important role in the development of intelligence law. In 1978, Congress enacted the Foreign Intelligence Surveillance Act (FISA),[39] which mandates judicial review of certain proposals from intelligence agencies regarding the conduct of intelligence-related electronic surveillance in the United States [40] Moreover, the Attorney General retains sole authority to approve agency-certified surveillance applications before they are submitted to the court.[41] This judicial and executive review process helps ensure that only necessary and carefully considered electronic surveillances will be initiated [42] Governing standards for intelligence operations are also provided by the Case-Zablocki Act, which requires that Congress be advised of any international agreement to which the United States is a party, including agreements between intelligence services.[43] Both the Senate and the House of Representatives have created independent committees with primary responsibility for overseeing the activities of the intelligence agencies.[44] The Freedom of Information Act [45] and the Privacy Act [46] have also had a significant effect on the information collection, dissemination, and storage practices of the intelligence agencies.

For the past three years (1976-1979), Administration and Congressional representatives have endeavored to develop comprehensive charter legislation that would delineate proper and improper intelligence activities [47] This goal, however, has proved far more elusive than many had anticipated. Intelligence agencies are called upon to operate in societies with vastly different cultures, most of which we do not fully understand, and to provide services in an atmosphere of international political tension and volatility. The effort to reach agreement on a charter that gives the agencies sufficient flexibility to meet changing situations to protect our security, without delegating virtually unlimited discretion, has been herculean

On February 8, 1980, Senators Huddleston, Mathias, Bayh, and Goldwater introduced the very complex and comprehensive National Intelligence Act of 1980 (S 2284) [48] With few exceptions, S. 2284 represented a consensus

8. *(Continued)*

nized [60] A final factor that weighs in the balance is the government's ability to pursue its goal in a manner less intrusive on fundamental personal liberties [61]

Utilizing this balancing standard, courts have held it constitutional for the United States to compel private citizens to disclose their contributions to presidential campaigns,[62] to require private lobbyists for foreign governments to register,[63] and to require citizens acting as agents of a foreign power to disclose the details of their agency and their activities [64] The law is less settled, however, when the government obtains information about an individual's activities without his consent, and under circumstances in which that person is not subject to legislative, judicial or administrative compulsion Judicial opinions indicate that it is not unconstitutional for an undercover agent in a law enforcement investigation to obtain information that a person is willing to disclose, even though that disclosure is induced by some form of deception [65] Nevertheless, when the information disclosed concerns political activities and is gathered by a law enforcement agency for purposes other than criminal prosecution the practice may be unconstitutional [66]

Although these decisions are helpful, they do not specifically address the different considerations that exist when the information is sought by an intelligence agency for intelligence-gathering rather than law-enforcement purposes [67] If the government can compel agents of foreign powers to register and describe their political activities, is it unconstitutional to place covert domestic agents in those same foreign agent groups to obtain information?[68] Case law indicates there is no absolute answer and that each situation must be carefully considered, balancing both the need of the government and the effect on the individual [69]

The Executive Branch has tried to provide some guidance in this area President Carter's Executive Order on United States Intelligence Activities generally prohibits an intelligence agency from covertly placing agents in any organization in the United States unless the organization is acting on behalf of a foreign power and is primarily composed of individuals who are not United States persons,[70] or unless the infiltration is undertaken on behalf of the FBI as part of a lawful bureau investigation [71] The order also permits agencies to have employees participate in organizations, without disclosure of their intelligence affiliation, in certain narrow circumstances under publicly available guidelines approved by the Attorney General [72] The CIA, for instance, is not required to disclose participation by agency employees in domestic organizations for the purpose of developing individual associations and credentials needed to substantiate a cover employment.[73] Approval of such undisclosed participation must be given by an appropriate CIA senior official, and all such approvals are subject to review by the Attorney General [74] These procedures go considerably beyond the requirements of any existing statute or judicial decision They reflect an awareness of the chilling effect that undisclosed government involvement may have on the exercise of First Amendment freedoms and privacy Thus, the procedures attempt to balance the competing interests of the individual and the government by defining categories of permissible participation and by requiring appropriate review in each case

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B. Fourth Amendment Issues

Another constitutional provision often at issue in intelligence gathering is the Fourth Amendment's prohibition against unreasonable searches and seizures [75] Intelligence techniques involve traditional searches as well as the utilization of new technology that has not yet been considered by the courts The FISA [76] requires that a court order be obtained for most traditional forms of wiretapping or eavesdropping conducted within the United States [77] Such a warrant is also required before the government employs most surveillance devices in the United States to gather information under circumstances where there is "a reasonable expectation of privacy and a warrant would be required for law-enforcement purposes "[78] For example, consider the instrument known as a beeper. This device is attached to a vehicle and emits periodic radio signals which enable the person monitoring the device to determine the location of the vehicle The FISA does not require a court order before a beeper can be used to determine the location of a foreign agent's car unless, under applicable decisions, a court order would be required if the FBI used such a device to locate a bank robber. Thus, while the Fourth Amendment's applicability to the use of beepers is not yet completely clear, these devices have been involved in numerous criminal cases and there is some judicial precedent to which intelligence agencies can turn for guidance [79]

The rapid development of technology, however, permits intelligence agencies to use surveillance devices that have never had the benefit of judicial review. As each new technique is considered, the Department of Justice must determine whether it is necessary to seek court approval before using the device. The FISA thus poses a problem The court's jurisdiction under the Act is limited to issuing orders for electronic surveillance as defined in the Act.[80] Yet the definition of electronic surveillance itself requires consideration of judicial interpretations of the Fourth Amendment, and there may not be any precedent covering a particular new technology. For example, case law indicates that a court order must be obtained before a microphonic surveillance device is used to intercept a private conversation if the communicant has a reasonable expectation of privacy.[81] The cases, however, do not clearly define the limits of such an expectation. Placing such a listening device in a home, office, or other private location requires a warrant.[82] Using a tape recorder to record a conversation that can be heard by an individual lawfully in an adjacent room does not require a warrant [83] Use of a parabolic microphone, such as those used by television crews to enhance the entertainment value of professional football, may well require a warrant.[84] It is often difficult, therefore, to determine when a particular surveillance technique requires a warrant. For instance, suppose an intelligence agency is able to use a normal, readily available tape recorder to listen to sounds that are discernible, though not intelligible, to the human ear without any physical intrusion, and then subject that recording to audio enhancement to render the sounds intelligible. Is that activity one which would require a warrant if undertaken for law enforcement purposes? The answer is not clear [85]

Consider a similar issue. No one would suggest that the FBI must obtain a warrant before reading the daily newspaper. The FBI may act on the basis of

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information contained in the paper without the slightest suggestion that it has undertaken a search. If members of a criminal conspiracy decide to use the classified advertisement section of the paper to communicate their plans, an FBI agent may certainly read that same section and, if clever enough, discover the conspiracy. The situation is undoubtedly the same if the advertisement is published in a foreign language. Suppose, however, the conspirators believe their advertisement is completely indecipherable by outsiders because it is written in a complicated mathematical code generated by a computer that is beyond the state of the art Assume further that the FBI is able to break that code by using an even more sophisticated computer. Surely most people would agree that the FBI has not undertaken a search within the meaning of the Fourth Amendment. The answer, however, is uncertain. It is, of course, possible to argue that the conspirators had a reasonable expectation that their communications were secret. Nevertheless, the decision to put those communications in the public domain, even though in cryptic form, may justify the conclusion that their privacy expectation is not one that the courts are prepared to protect from governmental surveillance. This analysis rests, in part, on reported cases which indicate that one who broadcasts a message on a radio, a public communications medium, does not have an expectation of privacy,[86] and in part, on cases which permit police, without a warrant, to take trash from outside a person's home and subject it to chemical analysis to determine whether any drugs have been discarded.[87]

These First and Fourth Amendment issues, many of which involve attempts to apply case law in novel contexts, are typical of those presented to the Department of Justice. The precedents developed and rules promulgated by the Justice Department, however, are often not subject to judicial review or public comment Thus, the American principle of checks and balances can be eviscerated when it comes to intelligence activities. It is extremely important, therefore, that we institutionalize in the Executive Branch a process for obtaining a multiplicity of views on the fundamental legal issues arising from intelligence activities.[88] For example, in the Justice Department, the Attorney General receives advice on these matters from former CIA employees, members of the American Civil Liberties Union, and the Department's Office of Intelligence Policy and Review. It is likewise important for intelligence agencies to encourage meaningful in-house criticism of their proposals The ability to argue against his client's project is one of the most difficult, but most important, skills a lawyer must acquire if his practice is to meet minimal standards of social responsibility.[89] This is particularly true in the government This process of debate, consideration of conflicting opinions, and careful review will help ensure that intelligence decisions are properly and legally made Although this process may not always result in perfect legal decisions, it will at least guarantee that the legal issues are considered, the appropriate questions asked, and reasonable conclusions reached

IV. THE FUTURE OF INTELLIGENCE LAW

The evolution of the law applicable to intelligence activities is directly influenced by world conditions The current emphasis on legal guidelines for

8. *(Continued)*

intelligence operations is a result of past excesses which were disclosed during a period in our history when a President was forced out of office and an unpopular war was prolonged despite vigorous public dissatisfaction [90] Current events, however, may provoke a different analysis Some may now argue that attempts to regulate intelligence activities are futile and self-destructive Others may seriously question the costs and benefits of regulation in view of the enormity of hostile acts abroad While such reexamination is necessary and constructive, it should not cause us to lose sight of the past Watergate did happen CHAOS and COINTELPRO were actual programs [91] Those abuses had their beginnings in action which appeared necessary and reasonable to the officials who began them As the programs grew, however, the justifications expanded and responsibility disappeared

The proliferation of law governing intelligence activities has not been entirely without cost It has limited some of the flexibility and ease of action formerly enjoyed by intelligence officials.[92] We have gained, however, much more than we have lost Intelligence agencies now operate under the most lucid statements of authority, and limitations thereon, ever available. The protection of individual rights and liberties from infringement by intelligence activities is at a high point. At the same time, there are few, if any, cases in which it has proved impossible under the law to collect truly vital intelligence information Rather, intelligence officials think more carefully and answer more precisely before proposing or authorizing particular activities

Nevertheless, there is still more work to be done in this area Existing law provides inadequate protections to the people who serve our nation as intelligence officers. They need, and deserve, better protection against those who would intentionally disclose their secret mission and jeopardize their safety by revealing their identities Although public comment and criticism of intelligence activities and specific operations is proper, exposing the identities of particular intelligence personnel and thereby placing them in danger serves no legitimate purpose. Our proper concern for individual liberties must be balanced with a concern for the safety of those who serve our nation in difficult times and under dangerous conditions [93] We must also adopt legal procedures to resolve the problem of graymail, where criminal defendants who have had access to classified information escape punishment by threatening to disclose secret information during a criminal trial [94] Although it is not impossible to prosecute such cases,[95] the court's ability to protect legally irrelevant secret information from unnecessary disclosure must be strengthened

Further protection for the intelligence community could also be achieved by a change in the Hughes-Ryan Amendment, which requires the timely reporting of covert action to seven congressional committees [96] This cumbersome procedure disseminates knowledge of intelligence operations to such a large number of persons that the secrecy essential to their success becomes doubtful A carefully crafted amendment to the statute should require reporting only to the Senate and House intelligence committees [97] This would give Congress the information it needs without unduly jeopardizing intelligence projects

8. *(Continued)*

While we pursue legislative solutions to these problems, the process of self-regulation in the Executive Branch must continue Many of the regulations are publicly available,[98] and as they gain wider review we will all benefit from the analysis and critical comment of others[99] The need for governmental self-regulation, however, will increase as modern technology grows ever more sophisticated The state of the art is already so advanced as to bear little relation to traditional Fourth Amendment analysis, and will continue to outstrip the development of decisional law for the foreseeable future Although these technological advances will benefit national security by providing increased efficiency of intelligence gathering, they will also increase the responsibility for fashioning proper safeguards in intelligence law The interpretation of constitutional provisions, statutes, executive orders, and procedures affecting intelligence gathering will evolve in response to changing perceptions and new experiences While we must guard against the adoption of an overly pliant construction of our self-imposed rules, I am confident that, in the light of experience, we can continue to devise new standards which do not compromise our essential liberties and which support a strong intelligence community equal to its critical mission

8. *(Continued)*

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1 A number of congressional committees and executive commissions have thoroughly investigated instances of misconduct by the intelligence agencies *E g*, S Rep No 755, 94th Cong, 2d Sess (1976) hereinafter cited as the Church Committee Report, *United States' Intelligence Agencies and Activities, Performance of the Intelligence Community, Hearings Before the House Select Comm on Intelligence*, 94th Cong, 1st Sess (1974), *Domestic Intelligence Operations for Internal Security Purposes, Hearings Before the House Comm on Internal Security*, 93rd Cong 2d Sess (1974), Staff of Subcomm on Constitutional Rights of the Senate Comm on the Judiciary, 92nd Cong 2d Sess Report on Army Surveillance of Civilians, A Documentary Analysis (1972), Commission on CIA Activities Within the United States, Report to the President (June 1975), (hereinafter cited as the Rockefeller Commission Report)

2 A number of authors have grappled with the evolving rule of law in the area of national security *E g*, Theoharis & Meyer, *The "National Security" Justification for Electronic Eavesdropping An Elusive Exception*, 14 Wayne L Rev 749 (1968), *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv L Rev 1130 (1972), Comment, *Privacy and Political Freedom Applicability of the Fourth Amendment to "National Security" Investigations*, 17 U C L A L Rev 1205 (1970), Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 Harv L Rev 976 (1974)

3 The difficulty of distinguishing between domestic and foreign intelligence-gathering operations has partially resulted from an inability to define clearly the terms applicable to various types of surveillances The confusion has generally been clarified as case law and statute have increasingly abandoned or defined the term national security For example, in Katz v United States, 389 U S 347 (1967), the Court reserved decision on the question of the applicability of the Fourth Amendment warrant requirement to national security electronic surveillance *Id* at 358 n 23

In United States v United States Dist Court (Keith) 407 U S 297 (1972), the Court analyzed the domestic aspects of national security but once again reserved "the issues which may be involved with respect to activities of foreign powers or their agents" *Id*, at 322 (footnote omitted), *see* United States v Smith, 321 F Supp 424, 429 (C D Cal 1971) (applicability of warrant requirement to *foreign* national security surveillance not decided, although warrant mandated for *domestic* security surveillances) *Keith* may have added to the confusion surrounding the meaning of national security The opinion emphasizes that it is often difficult to distinguish between domestic and foreign threats to the nation's security 407 U S at 209 n 8 The Court acknowledged that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U S C **2510-2520 (1976), uses the term national security to refer only to the activities of foreign powers *Id* * 2511(3) Nevertheless, the Court continued to apply the term national security to both domestic and foreign intelligence operations 407 U S at 309 n 8

In Zweibon v Mitchell, 516 F 2d 594 (D C Cir 1975) (en banc), *cert denied*, 425 U S 944 (1976), the court extended *Keith* and the warrant requirement to a wiretap of a domestic organization that is neither the agent of, nor acting in collaboration with, a foreign power, even if the surveillance is undertaken in the name of foreign intelligence gathering The court, in a very long footnote, attempted to distinguish between "internal security" or "domestic security" and "foreign security" *Id* at 613 n 42 The court's efforts failed, however, when it concluded "'National security' will generally be used interchangeably with 'foreign security,' except where the context makes it clear that it refers to both 'foreign security and internal security'" *Id* On remand, the district court established its own categorization and distinguished "domestic security," "domestic national security," and "foreign security" surveillances Zweibon v Mitchell, 444 F Supp 1296, 1299 n 3 (D D C 1978), *rev'd in part and remanded on other grounds*, 606 F 2d 1172 (D C Cir 1979)

8. *(Continued)*

Although these classifications appear to correlate roughly with the distinctions provided in Exec Order No 12036, 3 C F R 112 (1979), the terminology used may foster continued confusion

4 Exec Order No 12036, * 4-206, 3 C F R 112, 133 (1979)

5 *Id* ** 4-202, -205, 3 C F R 112, 133 (1979) (emphasis added) Foreign intelligence is defined as "information relating to the capabilities, intentions and activities of foreign powers, organizations or persons," *id* * 4-205, 3 C F R at 133, and counterintelligence is defined as "information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons " *Id* * 4-202, 3 C F R at 133 Intelligence organizations have not always had the benefit of such specific definitions Sherman Kent, former chairman of the CIA's Board of National Estimates, described intelligence in his pivotal book as comprising three definitional subjects knowledge that our nation must have regarding other nations to assure itself that planning and decisionmaking will not be conducted in ignorance, an organization structured to obtain, centralize, and evaluate that knowledge, and the activity of gathering such knowledge S Kent, Strategic Intelligence for American World Policy at ix (1949)

6 Although many of the regulations and guidelines are not available in published form, they can be obtained from the agency which they govern Requests should be made in the same manner as requests under the Freedom of Information Act

7 All foreign intelligence and counterintelligence investigations are handled by the Intelligence Division (Division 5), and all domestic security and international terrorism investigations are within the purview of the Criminal Investigation Division (Division 6) *See* note 6 *supra*

8 Exec Order No. 12036, * 4-107, 3 C F R 112, 133 (1979)

9 *See* note 3 *supra*

10 *See* notes 41-51 *infra* and accompanying text

11 Positive foreign intelligence surveillances differ markedly from those in criminal investigations For example, a foreign intelligence surveillance may be undertaken without probable cause to believe a crime has been committed, and may be of considerable duration and scope United States v. Humphrey, 456 F Supp 51, 56 (E.D Va 1978) Its purpose is to gather information about the intentions and capabilities of a foreign government, not to obtain admissible evidence of a crime *Id But see* United States v Stone, 305 F Supp 75, 82 (D.D C 1969) (foreign intelligence wiretap used as evidence in criminal trial), United States v O'Baugh, 304 F Supp 767, 768 (D D C 1969) (wiretap of embassy used as evidence in criminal proceeding) Foreign counterintelligence activities more closely parallel law enforcement activities Nevertheless, while it is true that many activities of the targets of counterintelligence surveillances may be criminal, *see, e.g.*, 18 U.S C * 641 (1976) (relating to unauthorized use of government property), *id* ** 792-799 (relating to espionage), *id* ** 2151-2157 (relating to sabotage), id ** 2381-2391 (relating to treason, sedition, and subversive activities), the primary objective of the surveillance is not preparation for prosecution *But see*, United States v Humphrey, 456 F Supp at 56 (distinguishing between foreign intelligence surveillance and domestic surveillance and stating that "It would seem rare that the government would engage in domestic electronic surveillance without some plans to prosecute *at some time* ") Zweibon v. Mitchell, 516 F.2d 594, 648 (D.C Cir 1975) (en banc) (claiming it is a "myth to characterize national security surveillance as purely non-prosecutorial in the criminal sense"), *cert denied*, 425 U S 944 (1976) The objective of a counterintelligence surveillance is to identify, isolate, and prevent breaches of security in the foreign intelligence and national defense apparatus The distinction between certain intelligence surveillances and law enforcement activities was carefully set forth in the Senate Report accompanying the Foreign Intelligence Surveillance Act, S Rep No 604, 95th Cong , 1st Sess 4-7 (1977), *reprinted in* 1978 U S Code Cong & Ad News, 3904, 3905-09

8. *(Continued)*

12 *See* note 11 *supra* There has been some concern regarding the adequacy of the espionage statutes in certain circumstances *See Espionage Laws and Leaks Hearings Before the Subcomm on Legislation of the House Permanent Select Comm on Intelligence*, 96th Cong , 1st Sess (1979) *See generally* Edgar & Schmidt, *The Espionage Statutes and the Publication of Defense Information*, 73 Colum L Rev 929 (1973), Nimmer, *National Security Secrets v Free Speech The Issues Left Undecided in the Ellsberg Case*, 26 Stan L Rev 311 (1974)

13 Only a small percentage of all counterintelligence cases can be considered for successful criminal prosecutions, and investigations of foreign intelligence agents are seldom conducted from the outset as they would be were eventual prosecution expected Many counterintelligence professionals believe that criminal prosecutions should never be brought against hostile agents because doing so may only result in their replacement by other, unknown agents of whose activities we may not be aware Moreover, criminal proceedings may not only confirm the accuracy of classified information that has been passed to a foreign power, but may also reveal at least some of the material to a far wider audience This problem is known as "graymail " *See* Senate Select Comm on Intelligence, 95th Cong , 2d Sess , Report on National Security Secrets and the Administration of Justice (Comm Pring 1978) Graymail problems, however, are not insurmountable For example, in United States v Kampiles, 609 F 2d 1233 (7th Cir 1979), the trial court's procedures and judgment avoided the graymail problem The trial court prevented classified information from being introduced at trial by issuing a protective order after in camera, ex parte proceedings in which the government presented evidence of the sensitive document that was passed to the Soviets and of the FBI's counterintelligence investigation into the document's disappearance *Id* at 1248 The court of appeals upheld the espionage conviction based upon the defendant's confession that he had met with and sold a classified document to a Soviet intelligence officer and upon sufficient other evidence to corroborate the reliability of the defendant's confession *Id.* at 1238

The Administration has introduced legislation to resolve the graymail problem and to establish a workable and fair procedure for handling classified information in criminal cases *See* note 94 *infra*

14 *See* note 5 *supra* and accompanying text

15 There is continuing debate concerning the need for and scope of legitimate government secrecy *Compare* Snepp v United States, 100 S Ct 763, 765 n 3 (1980) (stating "the government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service") *and* Colby, *Intelligence Secrecy and Security in a Free Society*, Int'l Security 3 (Fall 1976) (setting forth a conceptual framework for limiting unnecessary government disclosures) with Church Committee Report, *supra* note 9, (Bk I) at 16 (recognizing the dangers of excessive secrecy to a democracy) and M Halperin & D Hoffman, Top Secret National Security and the Right to Know (1977) (arguing that the secrecy veil of the intelligence community needs to be pierced) *See generally Investigation of Publication of Select Comm on Intelligence Report Hearings Before the House Comm on Standards of Official Conduct*, 94th Cong , 2d Sess (1976)

16 *See* pt III *infra*

17 The Foreign Intelligence Surveillance Act of 1978, 50 U S C A ** 1801-1811 (West Supp 1979), does provide judicial review of certain intelligence activities *See* note 40 *infra* The proposed National Intelligence Act of 1980, S 2284, 96th Cong , 1st Sess , 126 Cong Rec S 1307 (daily ed Feb 8, 1980) (hereinafter cited as S 2284), would expand the scope of judicial review to cover physical searches as well as electronic surveillance both within the United States and abroad *Id* * 801

18 Executive Order 12036 and its implementing regulations create an effective structure for oversight of intelligence activities within the Executive Branch The duty to identify, inspect, and report unlawful or improper activity is placed upon senior officers throughout

8. *(Continued)*

the intelligence community Exec Order No 12036, * 1-7, 3 C F R 112, 119-120 (1979) This obligation is reinforced and monitored by the Inspectors General and General Counsel for each agency *Id* * 3-2, 3 C F R at 131 These officers are required to investigate and report to the Intelligence Oversight Board any activities that raise questions of legality or propriety *Id* The executive order also gives the Attorney General substantial oversight and review responsibilities *Id* to establish and approve procedures for each agency which will ensure compliance with law and protection of constitutional rights and privacy *Id* * 3-305, 3 C F R at 131 To advise and assist the Attorney General in connection with his intelligence-related responsibilities, the Office of Intelligence Policy and Review was established 45 Fed Reg 13729 (1980) (to be codified in 28 C F R * 0 33) This office is currently staffed by ten attorneys and is under the direction of the Counsel for Intelligence Policy The Executive Branch oversight apparatus also includes the President's Intelligence Oversight Board (IOB), which is composed of three individuals appointed by the President Exec Order No 12036, * 3-1, 3 C F.R at 130 The IOB periodically reviews the oversight procedures and guidelines of each intelligence agency, forwards reports of illegality to the Attorney General, and informs the President of its findings and any serious questions of legality or propriety *Id.* * 3-102, 3 C.F R at 130-31 This comprehensive system of oversight within the Executive Branch is supplemented by extensive review in Congress *See* note 96 *infra*

19 There is clear evidence that General Washington authorized and relied upon substantial intelligence activities in the conduct of the American Revolution For an excellent account of the history and evolution of United States intelligence capabilities, see A Dulles, The Craft of Intelligence (1963) *See also* H Ransom, Central Intelligence and National Security (1958), Church Committee Report, *supra* note 1, (Bk VI) at 9-15

20 The first permanent intelligence agency was the Office of Intelligence established by the Navy in 1882 Church Committee Report, *supra* note 1, (Bk VI) at 309 Three years later the Army organized its own intelligence unit, the Military Intelligence Division *Id*

21 A Dulles, *supra* note 9, at 40-41.

22 H Ransom, The Intelligence Establishment 65-76 (1970)

23 A Dulles, *supra* note 19, at 42-44

24 50 U S C * 403 (1976)

25 *Id* * 403(d)(1)-(5)

26 *Id.* * 403(d)(3)

27. Rockefeller Commission Report, *supra* note 1, at 61 S 2284, *supra* note 17, proposes to replace the National Security Act provisions governing intelligence activities As Senator Huddleston noted when he introduced S 2284 "The National Security Act of 1947, the current 'charter' for intelligence activities, is vague and cursory As Clark Clifford, a primary author of that legislation, told this committee, that act was considered interim legislation that would be replaced once the Executive and Congress better knew what was required (In S 2284) we have given the intelligence community authority to do what needs to be done " 126 Cong Rec S 1305 (daily ed Feb 8, 1980)

28 18 U S C ** 792-794 (1976)

29 A key aspect of the present structure and functioning of the intelligence community is that of all the organizations engaged in foreign intelligence, only the CIA has been created by legislation The National Security Agency, the FBI, and the Defense Intelligence Agency have been operating without legislative charters

30 For example, there are a variety of statutes which, if applied literally, would limit the ability of the FBI to engage in undercover investigative operations for the collection of foreign intelligence or counterintelligence *E g.* 31 U S C * 484 (1976) (restricting the use of proceeds from government operations), *id* * 521 (restricting the deposit into banks of

8. *(Continued)*

proceeds from government operations), id * 869 (restricting acquisition or creation of proprietary corporations or business entities) In recent years, Congress has used the Department of Justice Appropriation Authorization Act to provide an annual waiver from these requirements for intelligence operations *See, e g*, Dep t of Justice, Appropriations Act, Fiscal Year 1980, P L 96-132, * 7(a), 93 Stat 1040, 1045-46, *reprinted* in (1979) U S Code Cong & Ad News

31 It was not until 1972 that the Supreme Court acknowledged the Executive Branch did not have full discretion to undertake intelligence operations to protect national security United States v United States Dist Court (*Keith*), 407 U S 297, 316-317 (1972) In fact, the Justice Department declined prosecution of individuals involved in two large-scale mail opening programs operating between 1953 and 1973 because of the ambiguity of the law as it related to intelligence operations during that period Dep t of Justice, Report Concerning Its Investigations and Prosecutorial Decisions With Respect to Central Intelligence Agency Mail Opening Activities in the United States (1977) Since *Keith*, however, the courts have attempted to define the constitutional limits of intelligence investigations *See* note 3 *supra*

32 Exec Order No 11905, 3 C F R 90 (1977)

33 Exec Order No 12036, 3 C F R 112 (1979) For example, President Carter's order goes well beyond President Ford's order in specifying the preconditions for targeting United States persons for electronic surveillance *Compare id* * 2-202, 3 C F R at 126 *with* Exec Order No 11905, * 5(b)(2), 3 C F R 90, 100 (1977) President Carter's order also governs, for the first time, television and movie surveillance, Exec Order No 12036, * 2-203, 3 C F R at 126, and covert procurement and contracting *Id* * 2-303, 3 C F R at 129

34 Exec Order No 12036, * 2-201, 3 C F R 112, 126 (1979)

35 Exec Order No 12065, 3 C F R 190 (1979)

36 *Id* * 3-303, 3 C F R 190, 197 (1979)

37 *Id* * 5, 3 C F R 190, 201-04 (1979)

38 *Id* * 1-3 to -6, 3 C F R 190, 193-95 (1979)

39 Foreign Intelligence Surveillance Act of 1978, Pub L No 95-511, 92 Stat 1783 (codified at 50 U S C A ** 1801-1811 (West Supp 1979))

40 FISA directs the Chief Justice to "publicly designate seven district court judges from seven of the United States judicial circuits who shall constitute a court which shall have jurisdiction to hear application for and grant orders approving electronic surveillance anywhere within the United States" 50 U S C A * 1803(a) (West Supp 1979) The Chief Justice is also directed to designate three judges "who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this Act" *Id* * 1803(b) The Attorney General, rather than the court, is authorized to approve electronic surveillance of certain communications transmitted by means of communications used exclusively between or among foreign powers and of technical intelligence from property under the open and exclusive control of a foreign power *Id* * 1802(a)(1)(A)-(B) The Attorney General must advise the court of his actions *Id* * 1802(a)(3)

41 *Id* * 1804

42 Experience has demonstrated that our intelligence agencies are functioning well under FISA The record refutes the argument that congressional consideration of such statutes would undermine the entire intelligence apparatus of the United States *See generally* S Rep No 379, 96th Cong, 1st Sess (1979)

43 1 U S C * 112(b) (1976 & Supp II 1978)

44 The Senate Select Committee on Intelligence was created by S Res 400, 94th Cong, 2d Sess, 112 Cong Rec 14673-75 (1976) The House Permanent Select Committee on Intelligence was established by H R Res 658, 95th Cong, 1st Sess, 123 Cong Rec H7104-06 (daily ed July 14, 1977)

8. *(Continued)*

45 5 U S C * 552 (1976)

46 *Id* * 552a

47 One of the purposes of the Church Committee was to create a record to serve as a foundation for drafting such legislation Church Committee Report, *supra* note 9

48 S 2284, *supra* note 17

49 President Carter stated there was "virtually complete agreement (between the Executive Branch and the Senate Select Committee on Intelligence) on the organization of the intelligence community and on the authorizations and restrictions pertaining to intelligence collection and special activities " 126 Cong Rec S 1307 (daily ed Feb 8, 1980) He continued, however, to state that "a few issues remain to be resolved " *Id* One of the primary disagreements between the administration and the authors of S 2284 relates to prior reporting to Congress of covert operations and sensitive collection operations *See* note 98 *infra*

50 *See* note 53 *infra*

51 For example, S 2284, *supra* note 17, prohibits assassination, *id* * 131, covert domestic propaganda, *id* * 133, covert contracting with educational institutions, *id* * 134, and accomplishing indirectly what cannot be done directly, *id* * 135

52 Fortunately for all Americans, the vast preponderance of the information our government seeks comes from foreign persons and organizations, most of them located outside the United States In all cases, the federal government collects the information this country needs without intentionally violating United States law United States law contains few limitations on the collection of intelligence from foreign sources *See, e g*, 50 U S C A * 1802(a)(1)(A)(i) (West Supp 1979) (electronic surveillance directed at communications exclusively between or among foreign powers may be approved by the Attorney General without court order), Exec Order No 12036, * 2-208, 3 C F R 112, 128 (1979) (restricting only the collection of nonpublicly available information concerning United States persons)

53 A United States person is defined in Executive Order 12036 as "a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association organized in the United States or substantially composed of United States citizens or aliens admitted for permanent residence, or a corporation incorporated in the United States " Exec Order No 12036, * 4-214, 3 C F.R 112, 135 (1979) FISA uses a similar definition 50 U.S C A. * 1801(i) (West Supp 1979) S 2294, *supra* note 17, however, provides a more limited definition of United States person, *Id* * 103(21) For example, it excludes corporations incorporated in the United States and unincorporated associations organized in the United States which are "openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments " *Id* One's status as a United States person is, in general, not determined by one's location Thus, a United States citizen abroad remains a United States person for intelligence law purposes, while a foreign visitor to this country does not automatically become a United States person upon entry into this country There are a number of restrictions in the law which protect foreign visitors from unwarranted intelligence activities in this country, but those limitations are significantly different from the ones applicable to United States persons For example, Executive Order 12036 protects United States persons and foreign visitors alike from unregulated covert electronic or mechanical monitoring, physical searches, mail surveillance in the United States, and from unlawful physical surveillance by the FBI Exec Order No 12036, ** 2-202 to 2-206, 3 C F R at 126-27 The protections provided for foreign visitors, however, are far more limited than those mandated for United States persons *See e g*, *id* * 2-208, 3 C F R at 128

54 *See e g*, Exec Order No 12036, ** 2-1 to -3, 3 C F R 112, 125-30 (1979)

55 The collection, retention, and dissemination of publicly available information is not regulated by Executive Order 12036 or by the procedures for the various intelligence agencies which were approved by the Attorney General pursuant to this order Exec Order

8. *(Continued)*

No 12036 * 2-201, -208, 3 C F R 112, 126, 128 (1979) Consequently, the definition of publicly available information is a threshold consideration to the application of legal standards to intelligence gathering The procedures for the CIA and the Department of Defense define the term publicly available similarly The Defense Department's definition provides "'Available publicly' means information that has been published or broadcast for general public consumption, is available upon request to a member of the general public, could lawfully be seen or heard by any casual observer, or is made available at a meeting open to the general public " *See* note 6 *supra* S 2284, *supra* note 17, fails to define what information is publicly available but provides the following standard for the collection and use of publicly available information "Publicly available information concerning any United States person may be collected by an entity of the intelligence community when such information is relevant to a lawful function of that entity, and may be retained and disseminated for lawful governmental purposes " *Id* * 211(c)

56 The First Amendment freedoms of association and of expression are implicated whenever the government compels an individual to delineate his political affiliations before a legislative committee, *e g*, Eastland v United States Servicemen's Fund, 421 U S 491, 509 (1975), Gibson v Florida Legislative Investigation Comm , 372 U S 539, 544-46 (1963), Sweezy v New Hampshire, 354 U S 234, 249-50 (1957), or a grand jury, *e g*, Branzburg v Hayes, 408 U S 665, 690-91 (1972), Bursey v United States, 466 F 2d 1059, 1085-86 (9th Cir 1972), *In re* Wood, 430 F Supp 41, 45-46 (S D N Y 1977), *In re* Verplank, 329 F Supp 433, 437-38 (C D Cal 1971), or to identify his political beliefs as a condition of exercising first amendment rights, *e g*, Lamont v Postmaster Gen , 381 U S 301, 305-07 (1965), NAACP v Alabama, 357 U S 449, 462 (1958), or of obtaining government employment, *e g*, Shelton v Tucker, 364 U S 479, 487-88 (1960) *See generally* L Tribe, American Constitutional Law * 12-2, at 581-82 (1978)

57 There are, however, severe limits on the government's right to compel information For example, it is unconstitutional for a state to compel a private political organization to furnish its membership list to the state where the effect of doing so would be to subject the organization's members to economic reprisal, loss of employment, or physical coercion *E g*, Louisiana *ex rel* Gremillion v NAACP, 366 U S 293, 295-96 (1961) (upholding temporary injunction restraining enforcement of statute requiring certain not-for-profit organizations to file membership list(s), Bates v City of Little Rock, 361 U S 516, 527 (1960) (invalidating occupational license tax statute which required membership list), NAACP v Alabama, 357 U S 449, 466 (1958) (reversing civil contempt judgment against NAACP for refusing to disclose its membership list in violation of foreign corporation registration statute) These foreseeable consequences would dramatically chill the individual's freedom of expression and of private political association

58 Bates v City of Little Rock, 361 U S 516, 525 (1960)

59 Gibson v Florida Legislative Investigation Comm 372 U S 539, 546 (1963)

60 Buckley v Valeo, 424 U.S 1, 64-68 (1976) (per curiam) Exacting ' scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure " *Id* at 65 (citing NAACP v Alabama, 375 U S 449, 461 (1958))

61 Lamont v Postmaster Gen 381 U S 301, 310 (1965) (Brennan, J , concurring), Shelton v Tucker, 364 U S 479 488 (1960) This ad hoc balancing test has been criticized for being "so unstructured that it can hardly be described as a rule of law at all " T Emerson, The System of Freedom of Expression 16 (1970) Nevertheless, the Supreme Court in Buckley v Valeo, 424 U S 1 (1976) (per curiam), used the balancing test and acknowledged that the governmental interest in disclosure must be weighed against not only the damage to the individuals involved but also the injury suffered by the public at large, *Id* at 64-68 *Buckley*, however, made it more difficult to prove a constitutional abridgement by requiring evidence of such probable harassment resulting from disclosure as was found in NAACP v Alabama, 357 U S 449, 462 (1958) 424 U S at 72 According to Chief Justice Burger, this

8. *(Continued)*

increased evidentiary burden on litigants challenging compelled disclosure marks a departure from the "historic safeguards guaranteed by the First Amendment " *Id* at 238 (Burger, C J , concurring in part and dissenting in part)

62 In Buckley v Valeo, 424 U S 1 (1976) (per curiam), the Supreme Court upheld the requirement of the Federal Election Campaign Act of 1971, 2 U S C ** 431-456 (1976), that political committees record and transmit to the government the names of individuals contributing in excess of ten dollars to political committees or independent candidates The Court considered the substantial governmental interest in maintaining the integrity of the electoral process to be of such magnitude as to outweigh the possibility of First Amendment infringements 424 U S at 66-68 The Court upheld the ten-dollar minimal threshold reporting requirement based upon a finding that it was not irrational *Id* at 83 This deference to a complex congressional judgment represents the Court's hesitation to substitute its judgment for that of the legislature *See* Shelton v Tucker, 364 U S 479, 490 (1969 (Frankfurter, J , dissenting), *cf id* at 488 ("legislative abridgement (of First Amendment freedoms) must be viewed in the light of less drastic means for achieving the same basic purpose") (footnote omitted)

In a slightly different context, *Shelton's* least restrictive alternative test has been more stringently applied In Pollard v Roberts, 283 F Supp 248 (E D Ark), *aff'd per curiam*, 393 U S 14 (1968), the district court enjoined a quasi-grand jury investigation which had subpoenaed essentially the contributor list of the Arkansas branch of the National Republican Party The prosecutor issued the subpoena in the course of his investigation of possible election law violations The court, relying on the principles of *Shelton*, held that "even if a (s)tate can legitimately compel a limited disclosure of individuals affiliated with a group, it does not follow that the (state) can compel a sweeping and indiscriminate identification of all of the members of the group in excess of the (s)tate's legitimate need for information " *Id* at 257.

63 The reporting requirements of the Foreign Agents Registration Act of 1938, as amended, 22 U S C ** 601-621 (1976), were upheld against a First Amendment challenge in Attorney Gen v Irish N Aid Comm , 346 F Supp 1384, 1389-91 (S D N.Y), *cert denied*, 409 U S 1080 (1972) The court found that the disclosure of defendant's activities bore a substantial relation to a legitimate government interest—informing the government and the public as to sources of foreign propaganda—and that the government interest outweighed "any possible infringement of the First Amendment rights of the defendant's members or contributors " *Id* at 1391 The court was careful to emphasize the vital governmental interest in safeguarding our political process from unacknowledged foreign influences and, on the basis of these concerns and the foreseeable complications with United States foreign policy, rejected the First Amendment claim *Id*

64 There are three basic statutes requiring the registration of individuals or organizations that serve as spokesmen or agents for, or receive money from, foreign governments First, 22 U S C * 612 (1976) provides that anyone who acts as an agent of a foreign principal must file a registration statement with the Attorney General The registration statement must contain a thorough description of the registrant's business and employees, the agency relationship, and the activities performed for the principal Second, 18 U.S C * 951 (1976) requires that anyone who acts as an agent of a foreign government must notify the Secretary of State Third, 18 U S C * 2386 (1976) provides that organizations which accept support from foreign governments must register with the Attorney General if they engage in activities designed to forcibly control or overthrow the United States government, or if they engage in activities constituting military training This statute has been successfully challenged under the fifth amendment *See* Albertson v Subversive Activities Control Bd , 382 U S 70, 77-78 (1965)

65 The use of informers or infiltrators in a criminal investigation does not give rise to any violation of the First or Fourth Amendments Handschu v Special Servs Div 349 F Supp 766, 769 (S D N Y 1972) For Fourth Amendment purposes, a person assumes the risk that any known party to a conversation concerning criminal conduct is an undercover police agent

8. *(Continued)*

E g , Hoffa v United States, 385 U S 293, 300-03 (1966), Lewis v United States, 385 U S 206, 211 (1966) The Fourth Amendment, however, does restrict the scope of permissible activities of an undercover agent *See, e.g* , Gouled v United States, 255 U S 298, 304-06 (1921) (informant overstepped constitutional bounds when he obtained entry into business office of suspect by deception and secretly ransacked office and seized incriminating documents) Infiltration for law-enforcement purposes into a political organization or rally which might dampen the exercise of First Amendment rights of the participants has also been upheld Socialist Workers Party v Attorney Gen , 419 U S 1314, 1319-20 (1974), United States v McLeod, 385 F 2d 734, 750 (5th Cir 1976) Nevertheless, because of the inherent danger that First Amendment activities may be significantly impaired, undercover investigations in university classes or political organization meetings will be sustained only if there is a substantial government interest to justify the probable impairment of First Amendment rights White v Davis, 13 Cal 3d 757, 768-73, 533 P 2d 222, 229-32, 120 Cal Rptr 94, 101-04 (1975) (in bank), *see* Socialist Workers Party v Attorney Gen , 419 U S at 1319

66 *Compare* White v Davis, 13 Cal 2d 757, 773, 533 P 2d 222, 232, 120 Cal. Rptr 94, 104 (1975) (in bank) (reversing demurrer of plaintiff's complaint and finding that police undercover surveillance on university campus, which gathered information that pertained to no illegal activity, was a prima facie violation of First Amendment rights) *with* Fifth Ave Peace Parade Comm v Gray, 480 F 2d 326, 332-33 (2d Cir 1973) (affirming dismissal of complaint and finding police surveillance of a large antiwar demonstration to be a perfectly lawful method of preserving public safety and deterring violence), *cert denied*, 415 U S 948 (1974) *and* Anderson v Sills, 56 N J 210, 229-31, 265 A 2d 678, 688-89 (1970) (reversing injunction of widespread police surveillance program and holding that, absent proof of bad faith or arbitrariness, the Executive Branch should perform detectional and preventive functions and gather any information reasonably believed to be necessary without judicial interference) *See generally* Note, *Domestic Intelligence Informants, the First Amendment and the Need for Prior Judicial Review*, 26 Buffalo L Rev 173 (1976), Note, *Governmental Investigations of the Exercise of First Amendment Rights Citizens' Rights and Remedies*, 60 Minn L Rev 1257 (1976)

67 *But cf* United States v United States Dist Court (Keith), 407 U S 297, 320 (1972) (extending Fourth Amendment to domestic security electronic surveillances), Zweibon v Mitchell, 516 F 2d 594, 611-13 (D C Cir 1975) (en banc) (extending Fourth Amendment to national security electronic surveillance), *cert denied*, 425 U S 944 (1976)

68 There is very little case law in this area because of the difficulty of proving sufficiently specific injuries to overcome the threshold case and controversy standing requirement as articulated in Laird v Tatum, 408 U S 1 (1972) Mere allegations of a subjective chilling impact of government surveillance on First Amendment activities is not an adequate basis for justiciability *Id* at 12-13 Allegations of disruption, harassment, or bad faith are generally required before one can litigate First Amendment rights when intelligence activities are involved *E g* , Berlin Democratic Club v Rumsfeld, 410 F Supp 144, 149-51 (D D C 1976)

69 In Buckley v Valeo, 424 U S 1 (1976) (per curiam), the Court refused to grant a blanket exemption from the federal contributor reporting requirements for all minor parties and independent candidates *Id* at 74 Instead, the Court established a case-by-case procedure which allows each such party to prove that disclosure of contributor lists would substantially impair its members' constitutional rights *Id* Since *Buckley*, political parties have had varying success in the lower courts *Compare* Wisconsin Socialist Workers 1976 Campaign Comm v McCann, 433 F Supp 540, 548-49 (E D Wis 1977) (injunction issued relieving party from complying with Wisconsin Campaign Financing Act) *and* Partido Nuevo Progressista v Hernandez Colon, 415 F Supp 475, 482-83 (D P R 1976) (per curiam) (injunction issued prohibiting the use of government inspectors to enforce Puerto Rico's political contribution and disclosure statute) *with* Oregon Socialist Workers 1974 Campaign Comm v Paulus, 432 F Supp 1255,1259-60 (D Or 1977) (injunction denied where Oregon Campaign Disclosure Act was found to have minimal impact on First Amendment rights of party)

8. *(Continued)*

70 *See* note 53 *supra*

71 Exec Order No 12036, * 2-207(a), 3 C F R 112, 127 (1979)

72 Executive Order 12036 and the procedures adopted pursuant to it have established formal controls over this sensitive form of information gathering Exec Order No 12036, * 2-207, 3 C F R 112, 127 (1979) Guidelines have been approved thus far for the CIA, the Department of Defense, and the FBI *See* note 6 *supra But see* Wisconsin Socialist Workers 1976 Campaign Comm v McCann, 433 F. Supp 540, 548 (E D Wis 1977) (prior to adoption of Executive Order 12036 and public procedures, the court expressed skepticism that harassment of dissident political groups had been terminated)

73 The CIA guidelines authorize undisclosed participation in organizations in the United States "to develop associations and credentials to be utilized for purposes relating to foreign intelligence as for example by joining an organization to which an employee would ordinarily be expected to belong if his cover employment were his true employment " Such undisclosed participation is also permitted "to obtain training or education relevant to CIA employment to obtain publications of organizations whose membership is open to the general public to maintain or enhance the qualifications of CIA employees, and to make it possible for them to stay abreast of developments in their fields of professional expertise to maintain the cover of CIA personnel, programs and facilities, which are not publicly acknowledged as such by the United States Government to utilize individuals on a witting or voluntary basis who are members of an organization within the United States to develop persons of foreign nationality as sources of contacts for purposes related to foreign intelligence to place employees in an organization within the United States to identify and develop persons of foreign nationality as sources or contacts for purposes related to foreign intelligence (and) to protect the degree of CIA interest in a particular foreign intelligence subject matter, but limited to participation in an organization that permits such participation by government employees in their official capacities " *See* note 6 *supra*

74 Exec Order No 12036, * 2-207 3 C F R 112, 127 (1979)

75 U S Const amend IV

76 *See* notes 39-42, *supra* and accompanying text

77 50 U S C A ** 1801-1804 (West Supp 1979)

78 *Id* * 1801(f)(1), (4), *see* note 40 *supra*. The drafters of FISA relied on the Supreme Court's decision in Katz v United States, 389 U S 347 (1967), and intended the statute to reflect evolving concepts of the Fourth Amendment as interpreted by the courts Thus, the legislative history of FISA manifests Congress' intention to incorporate the *Katz* standard for constitutionally protected privacy interests into the definition of electronic surveillance, which serves to activate the statute's requirements D Rep No 604, 95th Cong , 1st Sess 4-18 (1977), *reprinted* in (1978) U S Code Cong & Ad News 3904, 3905-20

79 Most circuits have recognized that the use of beepers to trace airplanes or automobiles on public thoroughfares does not implicate the Fourth Amendment primarily because there is no reasonable expectation of privacy in activities that are readily observable in public *E g* , United States v Bruneau, 594 F 2d 1190, 1197 (8th Cir) (airplane), *cert denied*, 100 S Ct 94 (1979), United States v Curtis, 562 F 2d 1153, 1156 (9th Cir 1977) (airplane), *cert denied*, 439 U S 910 (1978), United States v Hufford, 539 F 2d 32, 33 34 (9th Cir) (automobile), *cert denied*, 429 U S 1002 (1976) *But see* United States v Holmes, 521 F 2d 859, 864 (5th Cir 1975) ((automobile) (holding use of beeper to track vehicles impinges upon reasonable expectation of privacy), *aff'd en banc by equally divided panel*, 537 F 2d 227 (5th Cir 1976) (per curiam) Subsequent decisions, however, indicate that the original panel decision in *Holmes* is not the settled law of the Fifth Circuit United States v Conroy, 589 F 2d 1258, 1263 & n 5 (5th Cir), *cert denied*, 100 S Ct 60 (1979), United States v Cheshire, 569 F 2d 887, 888 (5th Cir), cert denied, 437 U S 907 (1978) The First Circuit has concluded that although the use of a beeper to track an automobile constitutes a search within the meaning of the Fourth Amendment, the lessened expectation of privacy

8. *(Continued)*

associated with an automobile justifies the use of a beeper without a warrant United States v Moore, 562 F 2d 106, 111-12 (1st Cir 1977), *cert denied*, 435 U S 926 (1978)

Similarly, the placement of a beeper inside contraband is not a search within the meaning of the Fourth Amendment because there can be no objectively justifiable expectation that the possession of an illicit item or stolen good will not be traced by government authorities *E g*, United States v Pringle, 576 F 2d 1114, 1119 (5th Cir 1978) (beeper placed in contraband mail), United States v Emery, 541 F 2d 887, 889-90 (1st Cir 1976) (beeper placed in contraband package), *see* United States v Dubrofsky, 581 F 2d 208, 211-12 (9th Cir 1978) (beeper placed in contraband package), United States v Bishop, 530 F 2d 1156, 1157 (5th Cir) (beeper inserted in stolen bait money), *cert denied*, 429 U S 848 (1976) The placement of a beeper in a lawfully possessed item, however, is a search within the meaning of the Fourth Amendment and requires a warrant, particularly when it can trace a person's movement within a home United States v Moore, 562 F 2d 106, 112-13 (1st Cir 1977) (beeper placed in noncontraband package), *cert denied*, 435 U S 926 (1978), United States v Bailey, 465 F Supp 1138, 1141 (E D Mich, 1979) (beeper placed in noncontraband package. *But see* United States v Perez, 526 F 2d 859, 862 (5th Cir) (beeper placed in television set received in exchange for contraband), cert denied, 429 U S 846 (1976) *See generally* Marks & Batey, *Electronic Tracking Devices Fourth Amendment Problems and Solutions*, 67 Ky L J 987 (1978-1979), Note, *Tracking Devices and the Fourth Amendment*, 13 U S F L Rev 203 (1978), Note *Tracking Katz Beepers, Privacy and the Fourth Amendment*, 86 Yale L J 1461 (1977)

80 50 U S C A * 1801(f) (West Supp 1979)

81 Katz v United States, 389 U S 347 (1967), is the seminal case prohibiting the warrantless use of electronic surveillance devices when the target has a reasonable expectation of privacy Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U S C ** 2510-2520 (1976), imposes criminal penalties, *id* * 2511, and authorizes recovery of civil damages, *id* * 2520, for the warrantless use of bugs or wiretaps in certain circumstances

82 *See* Berger v New York, 388 U S 41 (1967) (bringing eavesdropping within the purview of the Fourth Amendment)

83 United States v Carroll, 337 F Supp 1260 (D D C 1971) (using a tape recorder no more sensitive than the human ear, defendant recorded a conversation, which he could hear without assistance or contrivance from his adjacent hotel room)

84 *See* Lopez v United States, 373 U S 427, 465-66 (1963) (Brennan, J , dissenting) (highlighting danger which modern electronic surveillance devices pose to privacy interests and personal security), United States v Kim, 415 F Supp 1252, 1255-56 (D Hawaii 1976) (suggesting there might be a technological limit to reasonable government searches) *See generally* Westin, *Science, Privacy, and Freedom Issues and Proposals for the 1970's* (pts 1-2), 66 Colum L Rev 1003, 1205 (1977)

85 *See* note 84 supra

86 United States v Hall, 488 F 2d 193, 198 (9th Cir 1973) (holding there is no reasonable expectation of privacy in a radio- available radio-reception equipment), United States v Hoffa, 436 F 2d 1243, 1247 (7th Cir 1970) (holding there is no reasonable expectation of privacy in a telephone conversation from a mobile telephone unit that can be received by an ordinary commercial FM radio receiver), *cert denied*, 400 U S 1000 (1971)

87 United States v Crowell, 586 F 2d 1020, 1024-25 (4th Cir 1978), *cert denied*, 440 U S 959 (1979)

88 *See* note 18 *supra* and accompanying text

89 *See* ABA Canons of Professional Ethics No 5

90 *See* note 1 *supra* and accompanying text

91 *See* Church Committee Report, *supra* note 1, (Bk II)

8. *(Continued)*

92 *See, e g , Hearings on H R. 5129 Before the Subcomm on Government Information and Individual Rights of the House Government Operations Comm* , 96th Cong , 1st Sess (1980) (statement of Frank Carlucci, Deputy Director of Central Intelligence Agency, CIA) (reporting detrimental impact of Freedom of Information Act on security and efficiency of intelligence analysis process and on intelligence gathering from foreign intelligence services and sources, and recommending that CIA be relieved from certain of FOIA's provisions)

93 Several proposals have been introduced in Congress to criminalize disclosure of an intelligence agent's or source's identity *E.g* , S 2284, *supra* note 17, tit VII, Intelligence Reform Act of 1980, S 2215, 96th Cong , 2d Sess , 126 Cong , Rec S366, 369-70 (daily ed Jan 24, 1980) (hereinafter cited as S 2216), S 191, 96th Cong 1st Sess , 125 Cong Rec. S431 (daily ed Jan 23, 1979), H R 3762, 96th Cong., 1st Sess , 125 Cong Rec H2383 (daily ed Apr 26, 1979), H R 1068, 96th Cong , 1st Sess , 125 Cong Rec H187 (daily ed Jan 18, 1979)

Another proposal that has received considerable attention is the Intelligence Identities Protection Act, H R 5615, 96th Cong , 1st Sess , 126 Cong Rec H9324-25, 9331 (daily ed Oct 17, 1979) This bill seeks to restrict the disclosure of information identifying any covert intelligence agent, employee, or source by persons who presently have or formerly had authorized access to classified government information concerning covert identities *Id* * 501(a) The bill would also prohibit the disclosure of identifying information by any person, regardless of previous government service or access to classified information, who discloses it with an "intent to impair or impede the foreign intelligence activities of the United States" *Id* * 501(b) The House Permanent Select Committee on Intelligence has held hearings on this proposal

The Administration supports an alternative proposal which would (a) prohibit the knowing disclosure of identifying information by any person acting with knowledge that the disclosure is based on classified information, and (b) prohibit current and former government employees, who have had access to information concerning covert identities in the course of their employment, from making any disclosure concerning the identity of agents or sources to unauthorized persons, even if the particular disclosures were based purely on speculation or publicly available information *See Hearings on S 2284 Before the Senate Select Comm on Intelligence*, 96th Cong , 1st Sess (1980) This alternative would balance the need to protect the identities of covert agents and sources with the public's right to free and open discussion of intelligence policies and activities

94 There are several outstanding legislative proposals to resolve the graymail problem and to prevent the disclosure of classified information during a criminal proceeding *E g* , Classified Information Criminal Trial Procedures Act, H R 4736, 96th Cong 1st Sess , 125 Cong Rec H5780 (daily ed July 11, 1979) H R 4736 is a complex legislative proposal which, *inter alia*, creates a procedure for securing pretrial rulings to determine whether classified information may be disclosed at pretrial or trial proceedings, and authorizes the government to take interlocutory appeals from adverse district court orders relating to the disclosure of classified information The proposal also provides for appropriate protective orders to safeguard classified information disclosed to defendants H R 4736 is strongly supported by the Justice Department

95 *See* note 13 *supra*

96 The Hughes-Ryan Amendment, 22 U S C * 2422(a) (1976), requires that Presidential findings be made with regard to each proposed covert action operation of the CIA, and that notice of these findings be provided "to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives" *Id* Currently such reports are also made to the intelligence committees of both houses, the Senate and House appropriations committees, and the Senate Armed Services Committee, under arrangements between the CIA and these committees

97 S 2284, *supra* note 17, and S 2216, *supra* note 93, propose to repeal the Hughes-Ryan Amendment and replace it with a requirement that only the House and Senate intelligence

8. *(Continued)*

committees be notified of proposed covert operations S 2284, however, would require that Congress receive prior notice of all covert operations S 2284, *supra* note 17, ** 103(18), 125 This contrasts with the requirement of the Hughes-Ryan Amendment to report all such operations in "a timely fashion" to appropriate House and Senate committees 22 U S C * 2422(a) (1976) S 2284 would also codify requirements that the intelligence agencies furnish any information requested of them by the intelligence committees, and report to these committees information relating to illegal or improper intelligence activities *Id* * 142(a)

The prior notice provision of S 2284 might unduly jeopardize the safety and security of some covert operations which require the utmost secrecy When the Hughes-Ryan Amendment was originally enacted, Congress specifically rejected the language of the Senate bill, which clearly required prior reporting of covert operations *Compare* Conference Report on Foreign Assistance Act of 1974, H R Rep No 1610, 93rd Cong , 2d Sess 12, 42-43, *reprinted* in (1974) U S Code Cong & Ad News 6734, 6744-45, *with* S Rep No 1299, 93rd Cong , 2d Sess 43, 90-91, *reprinted* in (1974) U S Code Cong & Ad News 6674, 6707 The language adopted by Congress requires only timely reporting of covert operations Experience under the Amendment has proven the wisdom of that decision Although prior notice is, as a general rule, compatible with national interests, there are occasions where prior notice would jeopardize the safety of individuals involved in the activity or impair the effectiveness of an activity that reasonable people would clearly support In such cases, timely notice comports with the constitutional role of the President to execute the laws and of Congress to inform itself in order to legislate Prior notice is not essential to the legislative or oversight process, and subsequent timely notice may be critical to the successful execution of a covert operation

98 *See* note 6 *supra*

99 The entire corpus of unclassified rules, regulations and statutes that is emerging as the substantive field of intelligence law needs to be carefully reviewed by the academic community Such examination and evaluation is critical to the continued evolution of intelligence law

9. "Commentary on 'Intelligence Gathering and the Law' " by John S. Warner (Summer 1983, Volume 27/2)

Updates and differences

COMMENTARY ON "INTELLIGENCE GATHERING AND THE LAW"

John S. Warner *

For the benefit of those who read the preceding article by Mr. Civiletti it is appropriate that the status of the Executive Orders and proposed legislation to which he referred should be updated to reflect the passage of three years. Other critical comments are included to assist the reader.

Changes and new developments are simply noted below, with substantive comments as appropriate appearing in later paragraphs

1. Executive Order 12036 of 24 January 1978, issued by President Carter, was revoked by Executive Order 12333 of 4 December 1981. This new order on "United States Intelligence Activities" substantially modifies the previous order.

2. Executive Order 12331 of 20 October 1981 was promulgated to re-establish the President's Foreign Intelligence Advisory Board first established by President Eisenhower and continued by Presidents Kennedy, Nixon, and Ford but abolished by President Carter by Executive Order 11984 in 1977.

3 Executive Order 12065 of 28 June 1978 issued by President Carter changed the government's document classification system Such order was revoked by Executive Order of 2 April 1982, effective on 1 August 1982. The new order made substantive changes in the procedures for classifying information.

4. S. 2284 as introduced on 8 February 1980 was to provide charters for the intelligence community but did not become law. There were substituted, in committee, Congressional oversight provisions and a repeal of the Hughes-Ryan amendment as urged by Civiletti. These latter provisions became law on 14 October 1980 as a part of the Intelligence Authorization Act for Fiscal Year 1981 (P.L 96-450) These provisions constitute a new Title V of the National Security Act of 1947 as amended.

5 Civiletti refers to various legislative proposals to protect the identities of intelligence personnel under cover. After some five years of, at times, heated debate, the Congress approved the "Intelligence Identities Protection Act of 1982", Public Law 97-200, which President Reagan signed into law in a ceremony at Agency Headquarters on 23 June 1982. These provisions constitute a new Title VI of the National Security Act of 1947 as amended

* See "National Security and the First Amendment" by Mr Warner in the Spring 1983 issue of *Studies in Intelligence*, Volume 27, Number 1

9. *(Continued)*

Commentary

GENERAL ORDERS } HEADQUARTERS OF THE ARMY,
No. 64. } ADJUTANT GENERAL'S OFFICE,
Washington, August 25, 1880.

Hereafter, officers of the Army traveling or stopping in foreign countries, whether on duty or leave of absence, will be required to avail themselves of all opportunities, properly within their reach, for obtaining information of value to the military service of the United States, especially that pertaining to their own arm or branch of service. They will report fully in writing the result of their observation to the Adjutant General of the Army on their return to duty in the United States, if unable to do so at an earlier date.

BY COMMAND OF GENERAL SHERMAN:

R. C. DRUM,
Adjutant General.

OFFICIAL:

Assistant Adjutant General.

6 Civiletti also urged passage of "graymail" legislation to cope with problems raised in cases where criminal defendants threaten at their trial to disclose secret information to which at an earlier time they had authorized access Such legislation was approved by Congress as the "Classified Information Procedures Act," Public Law 96-456, 15 October 1980

• • •

Now, we turn to some substantive comments. As to the question of conflict or compatibility, Civiletti concludes that "we can continue to devise new standards which do not compromise our essential liberties and which support a strong intelligence community equal to its critical mission " With that view, I heartily concur Another way of putting it is to say that a careful balancing must be done to take into account national security needs and Constitutional rights of our citizens. But, reasonable men can differ on just where that balance is struck There are now listed some critical comments—a few on minor items and others of some importance

1. It is stated that the first peacetime permanent intelligence organizations in the United States were created in the latter part of the nineteenth century. These were simply administrative creations to serve the needs of the Army and the Navy and certainly filled no national needs in times of peace Until the passage of the National Security Act of 1947 the word "intelligence" did not appear in the entire body of Federal statutes, except for a short

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9. *(Continued)*

Commentary

reference in Section 3065(b) of Title 10 of the U.S Code to the detail of Army officers in the fields of intelligence or counterintelligence

2 In any discussion of intelligence and its origins we must go to our Constitution. Article I, Section 9, Clause 7 states "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time " The words "from time to time" were added as an amendment by James Madison to allow some flexibility to withhold details which required secrecy, and by this was meant military operations and foreign negotiations which involved secret agents There is a full discussion of this issue in the debates at the Constitutional Convention included in the truly excellent opinion written by Judge Malcolm Wilkey in the case of Halperin v Central Intelligence Agency, 629 F 2d 144, (D C Cir 1980) Included in that opinion is a discussion of the request for a "secret fund" by George Washington in a speech to a joint session of the Congress on 8 July 1790. Congress had approved such a contingent fund on 1 July 1790 (1 Stat 128) and similar funds have been authorized throughout our history, culminating in the contingency funds provisions contained in section 8(b) of the Central Intelligence Agency Act of 1949 Thus intelligence needs and secret funds are an integral part of our Constitution and earliest statutes

3 The statement that it was not until World War II that American intelligence efforts began to flourish under the Office of Strategic Services ignores the major activities of the intelligence services of the Army and Navy during this period

4. It is stated that the National Security Act of 1947 "instructs the CIA to collect intelligence information " The word "collect" is nowhere present in that statute in connection with the duties assigned to CIA

5 It is also stated that laws passed from 1947 until the 1970s would, if taken literally, have obstructed or prevented legitimate and necessary intelligence programs Section 8(b) of the CIA Act of 1949 states that "sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds " Possibly, Civiletti had in mind the FBI situation, but his statement as applied to CIA is not correct

6. Executive Orders 12036 and 12065 as promulgated by President Carter are praised by Civiletti, who certainly had a hand in the drafting As pointed out earlier, both of these were modified and replaced by President Reagan, giving greater flexibility to the intelligence community with no less regard for the rights of citizens and a more workable classification system Moreover, Civiletti, while discussing Executive Branch review of intelligence activities, fails to mention that President Carter abolished the President's Foreign Intelligence Advisory Board which, as noted earlier, has been re-established by Executive Order 12331

7 Civiletti states that the Freedom of Information Act (FOIA) has had a significant effect on the intelligence agencies, but he fails to state whether the effect is harmful or helpful In my opinion, FOIA has had serious detrimental

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9. *(Continued)*

effects on intelligence activities The amending act was vetoed by President Ford in a message of 17 October 1974 which said, among other things, it is "my conviction that the bill as enrolled is unconstitutional and unworkable " In litigation under FOIA, Philip Agee sought to require CIA to release certain documents, and Judge Gerhard A Gesell, in ruling for CIA and dismissing the suit stated, "It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails " (Agee v. CIA, 524 F. Supp 1290, July 17, 1981)

8. Civiletti discusses charter legislation, specifically S 2284 (in the 96th Congress) stating that with few exceptions it represents a consensus of the Executive Branch and the Senate Select Committee on Intelligence S 2284 with its more than 160 pages was seriously flawed and not one provision was left in it after it had been amended and approved by the Senate Intelligence Committee. As introduced and studied by the Committee with the benefit of witnesses testifying against many of its provisions, the Committee simply gave up on its effort to report favorably on any charter legislation The Committee in its report on S 2284 on 15 May 1980 deleted all provisions after the enacting clause and substituted provisions relating to Congressional oversight and repeal of Hughes-Ryan.

9 Civiletti devotes several pages and extensive footnotes to discussing First Amendment issues Never does he mention the two Marchetti cases (United States v. Marchetti, 466 F 2d 1309 (4 Cir 1974), *cert. denied*, 409 U S. 1063 (1972) and Knopf v. Colby, 509 F. 2nd 1362 (4 Cir 1975), *cert. denied*, 421 U.S 992 (1975) In the first case CIA sought and was granted an injunction requiring Marchetti, a former employee, to submit any proposed books to CIA prior to publication for review for possible classified information In the second case, Marchetti contested all the deletions which had been requested by CIA for security reasons. In both cases Marchetti argued First Amendment rights to publish—but to no avail. The Snepp case (Snepp v. United States 444 U.S. 507, 1980) is mentioned by Civiletti only in a footnote in another connection. Here, Snepp in fact published without CIA review and the Court granted the government all profits Snepp had gained from publishing the book and put him under an injunction to submit any future books to CIA prior to publication Snepp also argued First Amendment rights but the Supreme Court ruled against him, and in the process validated the two Marchetti cases The Haig v Agee case (453 U.S. 280, 1981) was in process at the time of Civiletti's article Agee's passport was revoked and it was argued this violated Agee's First Amendment rights. Since Agee's *actions* were held to be causing "serious damage to the national security or the foreign policy of the United States" the Court upheld the revocation. These were four landmark cases of tremendous importance to the intelligence community in enforcing security of classified information.

10. "Disclosure Problems in Espionage Prosecutions," George W. Clarke (Spring 1984, Volume 28/1)

To eliminate a dilemma

DISCLOSURE PROBLEMS IN ESPIONAGE PROSECUTIONS

George W. Clarke

Enforcement of the principal provisions of the United States espionage laws often poses a serious problem for our defense and intelligence agencies The statutes at issue, 18 U.S C §§793 and 794, are among the most often used in espionage prosecutions. Since these statutes actually or potentially necessitate damaging disclosures of national security information [1] to defense counsel and, through public trial, to foreign adversaries during the course of prosecution, the statutes should be reformulated to eliminate this dilemma unless such disclosures are required as a matter of law or for some other compelling reason

Statutes

Title 18 U.S.C §§793 and 794 (Appendix A), respectively, proscribe the gathering or obtaining of documents or information "relating to the national defense" [2] and the communication or delivery, or attempted communication or delivery of such documents or information to a foreign government or faction or an agent thereof To be proscribed, such acts must be done with "intent or reason to believe" that the documents or information are "to be used to the injury of the United States or to the advantage of a foreign nation " These requirements are a problem because they impose upon the government the obligation to prove to a jury in open court that the documents or information at issue are related to the national defense and that the defendant acted with the requisite intent or knowledge.

Elements of Proof

To obtain a conviction under 18 U.S C §§793 and 794, the government must prove that the documents or information at issue in the case meet the statutory standard In *United States* v *Gorin*, 312 U.S. 19 (1941), the Supreme Court adopted a broad definition of what information relates to the national defense

> National defense, the Government maintains, is a "generic concept of broad connotations, referring to the military and naval establish-

[1] "National security information" is intended to mean information which would be subject to the various espionage statutes As will be seen, as a practical matter this means classified information

[2] 18 U S C §793(a) uses the phrase "*respecting* the national defense" to describe the covered information and documents while 18 U S C §§793(d)-(f) and 794(a) use "*relating* to the national defense" and §794(b) uses "relating to the *public* defense" (emphasis added) No distinctions were intended by the use of these differing formulations

10. *(Continued)*

> ments and the related activities of national preparedness " We agree that the words "national defense" in the espionage act carry that meaning [3]

Under such a broad definition, however, it would be difficult for a person to know what specific acts are proscribed, since many foreign communications, dealings, and relationships in the private and commercial sectors pertain to military-related matters The Court disposed of such overbreadth objections in *Gorin*·

> . we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law The obvious delimiting words in the statute are those requiring "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation " This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established [4]

Since the obtaining and transfer of national defense information is thus proscribed only when done with the requisite "bad faith," in the absence of self-incriminating statements or a confession by the defendant, about the only way to convince a jury on this element is to prove that the information is so important that the defendant had to have an intent or reason to believe that his acts would injure the United States or benefit a foreign state

The cases subsequent to *Gorin* developed further what information was excluded from coverage and how the government could go about proving that information relates to the national defense. Thus, information released by the defense establishment or which is otherwise publicly available is not covered by the statutes, regardless of the defendant's intent.[5] On the other hand, the fact that the information at issue is classified is admissible as evidence of defense-relatedness,[6] although a jury would still have to determine as a separate matter that the defendant had an intent or reason to believe that the information would injure the United States or give advantage to a foreign nation

Costs of Disclosure

A CIA General Counsel once stated that "nobody doubts the proposition that some prosecutions, and due to the elements of the relevant offenses, virtually all espionage prosecutions, cannot be maintained except at the price of disclosing information that otherwise would and should remain secret for

[3] *Gorin* v *United States*, 312 U S at 28
[4] *Id* at 27
[5] *United States* v *Heine*, 151 F 2d 813 (2d Cir 1945), *cert denied*, 328 U S 333 (1946)
[6] *United States* v *Soblen*, 301 F 2d 236 (2d Cir), *cert denied*, 370 U S 944 (1962)

10. *(Continued)*

reasons of national security "[7] While this statement was made broadly with respect to all prosecutions that in some manner may require the disclosure of classified information to enable the case to go forward, it clearly represents a judgment that espionage cases in particular exact a high price While the Classified Information Procedures Act (CIPA)[8] has established a statutory framework to obtain pretrial and trial rulings concerning the relevancy of classified information claimed to be necessary in federal criminal prosecutions, it is primarily of benefit in non-espionage cases where the defendant seeks broad discovery of sensitive classified matters (often unrelated to any real issue concerning the government's case of any defense) in order to force the government to drop the case rather than disclose the requested information Obviously, when a central element of the offense involves classified information, as with 18 U S C 793 and 794, or is claimed to be necessary to enable the defendant to cross-examine the principal government witness called to establish how documents or information will injure the United States or give advantage to a foreign adversary, CIPA is of limited or no utility

In some relatively recent espionage cases, the government has avoided high disclosure costs that might have resulted had it not been for the tactics of defense counsel For example, in *United States* v *Moore*,[9] a former CIA employee was prosecuted under 18 U S C 794(a) for attempting to pass to the Soviet Union various documents relating to the national defense Two of the charges upon which he was convicted concerned portions of classified CIA phone directories containing the names of numerous employees under cover The defense counsel failed to cross-examine the government's principal witness who testified concerning the importance of the phone directories and the damage that passage to the Soviets would have caused While it is doubtful that defense counsel could have persuaded the jury that the documents did not relate to the national defense, he could have increased the cost to the government by exploring in open court whether it had been disclosed publicly that persons listed in the directory worked for CIA or if any had been compromised to the Soviets in other ways

Similarly, in *United States* v *Kampiles*,[10] another former CIA employee was prosecuted under 18 U.S C 794(a) for selling to an agent of the Soviet Union a top secret technical manual for the KH-11 satellite system. The government's principal witness concerning the importance of the compromised information was the CIA's Deputy Director for Science and Technology The witness gave general testimony concerning the importance of the KH-11 system and how the technical manual would help the Soviets take countermeasures Defense counsel did not seriously cross-examine on these points or press for a detailed explanation of how the manual would provide

[7] *Espionage Laws and Leaks Hearings before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives*, 96th Cong , 1st Sess 18, (1979) (letter of Anthony A Lapham to Philip B Heymann, Assistant Attorney General, Criminal Division, Department of Justice) (hereinafter cited as *Hearings*)

[8] 18 U S C App III

[9] Unreported D Md 1978

[10] 609 F 2d 1233 (7th Cir 1979) *rehearing and rehearing en banc denied* (1980)

10. *(Continued)*

additional help to the Soviets if they already knew the United States had reconnaissance satellites, or whether the United States had noted any decrease in the KH-11 effectiveness since the manual was compromised. Such questions would have clearly been permissible and would almost certainly have led to the additional disclosure of classified information While the defense tactics in both *Moore* and *Kampiles* may have resulted from conscious decisions not to contest the defense-relatedness of the information involved in order not to unnecessarily prejudice the jury against the defendant, these cases should make it clear that the current espionage statutes offer the government no assurances that it alone will be able to control the amount of sensitive information that will be disclosed at trial

Possible Reformulation of Statutes

It should be possible to proscribe the conduct that is covered by 18 U S C 793 and 794, at least insofar as those statutes are aimed at classical espionage, without requiring the United States to confirm specific damage to the national security or further exacerbate that damage. In their authoritative treatise on the espionage statutes, Professors Harold Edgar and Benno C Schmidt, Jr had the following to say about the broad manner in which classical espionage can be proscribed under our legal system

> The essence of classical espionage is the individual's readiness to put his access to information of defense significance at the disposal of agents of foreign political organizations Granted that the harm that results from his conduct is a function of the importance of the information transferred, there should be no hesitation, regardless of the banal quality of defense information involved, to punish the citizen whose priorities are so ordered or foreigners whose job it is to risk apprehension We believe, therefore, that the information protected against clandestine transfer to foreign agents should be defined broadly, probably more broadly than in current law In this context, we see no dispositive objection to making knowing and unauthorized transfer of classified information to foreign agents an offense, without regard to whether information is properly classified That a spy might earn complete immunity by stealing secrets so serious that their significance cannot be disclosed in court—a clear possibility under current law, and also under S 1 and S 1400—is an outcome that should be avoided, if possible.[11]

In some contexts, the knowing passage of classified information to foreign agents is an offense under current law without regard to the propriety of the classification Thus, under 18 U S C. 798, the passage to a foreign government of classified information concerning devices used for cryptographic or communications intelligence purposes is an offense without regard to whether the

[11] The Espionage Statutes and the Publication of Defense Information 73 Colum L R 929, 1084 (1973) Professors Edgar and Schmidt would support a revision of the current law to streamline the proscription of classical espionage *See* Statement of Harold Edgar and Benno Schmidt, Jr in *Hearings*, *supra*, note 7, at 112-13

10. *(Continued)*

Prosecutions

information is properly classified [12] This is also the case under 50 U S C 783(b) with respect to passage of classified information by employees of the United States to certain foreign representatives [13] Since it is difficult to see any First Amendment issues in such cases,[14] the only concerns in drafting an appropriate statute to broadly cover communication of classified information to a foreign power and associated preparatory conduct should be the mental state or scienter needed to establish the offense and the sentencing process and severity of punishment to be imposed Presumably, since the government would not have to prove the underlying significance of the information to the jury, it should be required to show that the defendant knew that the United States accorded a specific degree of protection to the information and that the defendant's action was intended to benefit some foreign organization Finally, in order not to impose a severe penalty out of proportion to the offense, provisions for *in camera* proceedings prior to sentencing should be considered to allow the court to determine the importance of the classified information involved A draft statute which contains these requirements is at Appendix B

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[12] *United States v Boyce*, 594 F 2d 1246 (9th Cir), *rehearing denied* (1979)

[13] *Scarbeck v United States*, 317 F 2d 546 (D C Cir), *cert denied*, 374 U S 856 (1963)

[14] One of the main purposes of the freedom of speech and press clause of the First Amendment was to ensure the unfettered discussion of matters of importance and interest to the public The public interest and the First Amendment, likewise, permit legislative efforts to prevent acts, be they characterized as speech or otherwise, which are harmful to the public The Supreme Court recognized very early in its development of First Amendment law that there are "evils that Congress has a right to prevent " *Schenck v United States*, 249 U S 247 (1919) In view of the unquestioned appropriateness of proscribing espionage, the only real issue becomes one of ensuring that no legitimate speech or press activities are swept within the proscription

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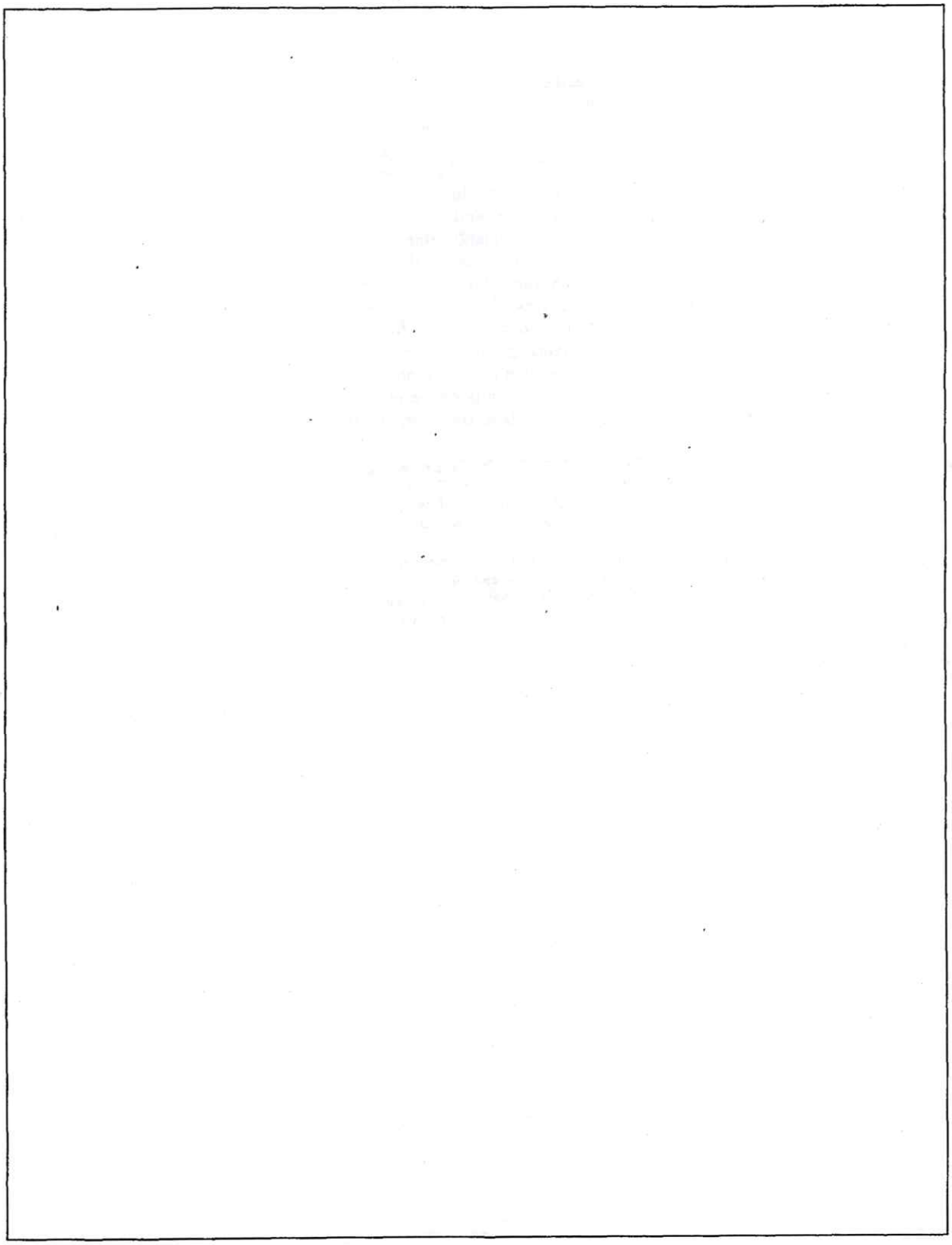
10. *(Continued)*



10. *(Continued)*

Prosecutions

APPENDIX A

Espionage Laws

18 U.S.C. 793

§ 793 Gathering, transmitting, or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense, or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense, or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter, or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which *information the possessor has reason to believe could be used to the*

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10. *(Continued)*

injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it, or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it, or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy

June 25, 1948, c. G16, 02 Stnt 730, Sept 23, 1950, c 1024, Title I, § 18, GI Stat. 1003

18 U.S.C. 794

§ 794 Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States, or to the advantage of a foreign nation,

10. *(Continued)*

communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy

June 25, 1948, c 645, 62 Stat 737; Sept 8, 1954, c 1261, Title II, § 201, 68 Stat 1219

10. *(Continued)*

APPENDIX B

Draft Statute

H.R._____/S._____

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Espionage Prevention Act of 1984"

SEC 2 Chapter 37 of title 18, United States Code, is amended by adding at the end thereof the following sections.

§ 800 *Espionage*

(a) Whoever, without authorization, knowingly collects or attempts to collect classified information with the intent that such information be communicated to a foreign power or an agent of a foreign power shall be punished by imprisonment for any term of years or for life

(b) Whoever, without authorization, knowingly communicates, or attempts to communicate, classified information to a foreign power or an agent of a foreign power shall be punished by imprisonment for any terms of years or for life

(c) Prosecution under this section shall be barred unless, prior to the return of an indictment or the filing of an information, the Attorney General and the head of an appropriate department or agency responsible for the classified information jointly certify in writing to a court with jurisdiction that, at the time of the commission of the offense, the classified information involved was properly designated as classified information.

§ 801 *Defense to Espionage*

Whoever, in the course of official duties on behalf of the United States, engages in conduct described in Section 800 of this Chapter with a reasonable belief as to the authority to do so shall not be guilty of an offense under section 800

§ 802. *Sentencing*

(a) For purposes of sentencing an individual convicted of an offense defined in section 800, the court shall consider the nature of the classified information involved in the offense Cases which involve classified information deserving a high degree of protection shall, absent especially mitigating factors, receive a greater sentence than cases which involve information requiring lesser degrees of protection

(b) Life imprisonment shall not be imposed except in time of war declared by Congress or when the court determines that the classified information involved poses an exceptionally grave danger to the national security or to the life of any person

10. *(Continued)*

Prosecutions

(c) For purposes of determining an appropriate sentence the court is authorized to conduct such *in camera* proceedings as it determines are necessary for a full understanding of the nature of the classified information involved in the offense Upon request of the United States for good cause, such proceedings or portions thereof may be held *in camera ex parte*

§ 803 *Definitions*. For purposes of section 800 of this Title—

(a) The term "authorization" means having authority, right or permission pursuant to the provisions of a statute, executive order, directive of the head of any department or agency who is empowered to classify information, order of any United States court, or provisions of any rule of the House of Representatives or resolution of the Senate which governs release of classified information by the respective House of Congress

(b) The term "classified information" means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or executive order (or a regulation or order issued pursuant to a statute or executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

(c) The term "communicate" means to disclose, impart, transfer, convey or otherwise make available to another, but does not include publication by the media

(d) The term "foreign power" means—

(1) a foreign government or any component thereof, whether or not recognized by the United States,

(2) a faction of a foreign nation or nations,

(3) an entity that is directed or controlled by a foreign government or governments;,

(4) a group engaged in international terrorism or activities in preparation therefor; or

(5) a foreign-based political organization

(e) The term "agent of a foreign power" means any person who acts on behalf of a foreign power for the purpose of obtaining classified information

(f) The term "Attorney General" means the Attorney General of the United States (or Acting Attorney General) or the "Deputy Attorney General"

SEC 3 The table of sections for chapter 37 of title 18, United States Code, is amended by adding at the end thereof the following

§ 800 *Espionage*

§ 801. *Defense to Espionage*

§ 802 *Sentencing*

§ 803 *Definitions*

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11. "The Supreme Court and the 'Intelligence Source' " by Louis J. Dube and Launie M. Ziebell (Winter 1986, Volume 30/4)

A source by any other name is still a source

THE SUPREME COURT AND THE "INTELLIGENCE SOURCE"

Louis J. Dube and Launie M. Ziebell

On 16 April 1985, The United States Supreme Court handed down its decision in *Central Intelligence Agency vs. Sims*, a decision of extraordinary importance for the Agency. *Sims* involved a Freedom of Information Act (FOIA) request for the names of principal researchers and institutions used by the CIA in connection with MKULTRA, a project concerning research into human behavior modification between 1953 and 1966. CIA refused to release the names, claiming that the individuals and institutions were "intelligence sources" and, thus, privileged from disclosure under the DCI's authority to protect intelligence sources from unauthorized disclosure.

All nine Justices of the Supreme Court agreed that CIA could legally refuse to release the identities of the researchers and institutions A majority of seven Justices agreed on a definition of an intelligence source as one that "provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations." In explaining the majority's decision, Chief Justice Burger stated, "Congress simply and pointedly protected all sources of intelligence the Agency needs to perform its statutory duties with respect to foreign intelligence and further that without such protection the Agency would be virtually impotent."

The Supreme Court held that the DCI, as the official responsible for the conduct of foreign intelligence activities, must have broad authority to protect all intelligence sources from the risk of compelled disclosure. The Court explicitly recognized the vital importance of the Agency's mission to the security of our country and the devastating impact upon that mission which court-ordered disclosures of sources would have. The Court concluded that the judiciary, lacking expertise in intelligence collection, must give great deference to the DCI's judgment that disclosure of a particular source could harm the Agency's mission.

The *Sims* opinion provides the strongest affirmation of the DCI's authority to protect intelligence sources against unauthorized disclosure The implications of the *Sims* opinion go beyond the FOIA issue involved. The Court's opinion should apply in any instance where a question is raised over the need to maintain secrecy in the conduct of intelligence operations, especially where the protection of intelligence sources is involved.

The Supreme Court positively addressed the concerns of exposure that agents and prospective agents have expressed over the years since the passage of the FOIA. Under *Sims*, the CIA has the legal ability to meet the full expectations of those who confide in the Agency.

• • •

11. *(Continued)*

Source

CENTRAL INTELLIGENCE AGENCY et.al. v. SIMS et al
No. 83-1075. Argued 4 December 1984 – Decided 16 April 1985

Until the amendment to the Freedom of Information Act (FOIA) in 1974, the secrecy of CIA was seldom challenged, much less threatened, in court The Agency, for that matter, was rarely forced to establish the legal validity of any of its operating precepts With the advent of the amendment, individual citizens could challenge the Agency's justification for its secrecy.

In several hundred law suits in the decade following the enactment of the 1974 FOIA amendment, CIA was typically required to justify withholding records concerning secret intelligence activities. The test for CIA was usually to show, in an unclassified forum, how the withheld information, if disclosed, could expose an intelligence source. In *Sims v. CIA* the issues developed differently. The scope of issues raised in *Sims v CIA* was not limited to the standard question: *who* is the intelligence source? It focused ultimately on the more basic question. *what* is an intelligence source?

For about three decades, the Agency—the Office of General Counsel in particular—had only occasionally been called upon to produce a legal definition of "intelligence source." The definitions which were drafted varied and generally reflected the factual setting in which they were to be used Indeed, there had never been a need to devise a definition which would encompass every conceiveable "intelligence source" and circumstance.

Any uncertainty about the definition for "intelligence source" was finally settled in the *Sims* case by the Supreme Court. The decision was a legal triumph of major proportions for the CIA and has a profound significance for the legal footings of CIA's foreign intelligence activities

With the publication of the *Sims* decision, the media carried some predictable emotional reactions. The American Civil Liberties Union staff attorney, who, at a minimum, had provided moral support to Sims and company, said: "It's a disaster! This [ruling] gives the Agency complete authority to define what it wants to keep secret " * One of the attorneys for Sims said: "This comes close to being a complete exemption of the CIA from the Freedom of Information Act." **

A senior operations officer, with several decades of experience in recruiting and handling agents, and enough experience with the FOIA to have a better than average awareness of the significance of the *Sims* case, went out of his way to compliment officers who he knew had been involved in the case He added, as a closing observation, that he had been on the verge of retiring because he realized that the initial judicial rulings in the case, had they survived, would make it impossible to honestly assure any agent of his confidentiality and thus of his safety. It would have been a betrayal of the agents he had recruited and managed, and a breach of his personal integrity. The officer felt personally vindicated by the Supreme Court decision in *Sims* and comfortable with the prospect of continuing his professional career.

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* Boston *Globe*, 18 April 1985, and Philadelphia *Inquirer*, 17 April 1985

** Los Angeles *Times*, 17 April 1985

11. *(Continued)*

Source

Despite the emotional media coverage, the decision was received with unaffected calm by the typical CIA employee There had not been much in-house uncertainty on the matter. In more than 100 FOIA law suits before the *Sims* decision, the Agency had never been seriously challenged to define and defend "intelligence source." The US Circuit Court of Appeals for the District of Colombia Circuit, in its first review of this case, said ". . we have never before been asked to construe this term (intelligence source) . . " Curiously, the Court ignored the fact that, although it had never been asked to "construe this term," it had implicitly and routinely accepted CIA's characterization of various entities as "intelligence sources" in many previous cases, without qualification or reservation

From a philosophical point of view, the *Sims* case is notable That such a favorable court opinion should have its origin in such a grim segment of CIA history is remarkable. The imagery created in congressional hearings, expanded dramatically by the media, might even have strained some judicial impartiality. The Circuit Court of Appeals, in *Sims II*, referred to the factual background of the case as "grisly" and characterized the Agency's unwillingness to release the names of its principal researchers as "recalcitrance " •

There is an axiom that courtroom experience teaches: bad facts make bad law! The *Sims* case proves a second axiom: there are exceptions to some axioms!

Issue

The issue in the case rose from CIA's refusal to produce a list of the principal researchers and unacknowledged institutions involved in the MKULTRA project, in response to an FOIA request in 1977. The MKULTRA project was established in 1953 to conduct research in "human behavior modification." The impetus for that research was concern inspired by "communist brain-washing" and interrogation techniques used on prisoners in the Korean conflict Additionally, there was continued reporting of Soviet efforts to make use of such techniques in intelligence and counterintelligence operations. Initially the Agency's focus was defensive; an interest in protecting its own people. Gradually, however, the offensive possibilities became evident and were added to the research.

MKULTRA eventually consisted of 149 subprojects in which at least 80 institutions and 185 private researchers participated. Soon after the project wound down, about 20 years after its inception, the files of MKULTRA were ordered destroyed, but the effort to comply with that order was not entirely successful In 1975, a Presidential Commission on CIA Activities Within the United States, sometimes referred to as the Rockefeller Commission, published a report to the President The report included a short discussion of the CIA experimentation with behaviour-influencing drugs That report inspired FOIA requests to the CIA and congressional hearings. In responding to the FOIA request and congressional queries, a painstaking search of archival records

• The *Sims* case was heard twice in the District Court and twice in the Circuit Court of Appeals The courts' proceedings, including their opinions, in their first hearings are identified as *Sims I* and, their second, as *Sims II* Throughout appellate proceedings the title changes, i e , *Sims v CIA* or *CIA v Sims*, reflect only which party's motion is being decided

11. *(Continued)*

Source

turned up a previously undiscovered collection of MKULTRA finance records The finance records provided a broad, but non-substantive and incomplete record of MKULTRA activities Even so it was clear that only 69 subprojects out of the total of 149 were related in some way to research on the effects of drugs and only six of the subprojects, directed by one Bureau of Narcotics and Dangerous Drugs (BNDD) officer, involved the testing of drugs on "unwitting" subjects.

The media exploitation of the disclosures was distorted. The media and congressional attention focused almost exclusively on the testing of drugs on unwitting subjects The morality of the activity was questioned and the Agency was severely criticized.* Even the judiciary seemed to be touched by the emofion involved. In the midst of this FOIA litigation, concerned only with a legal debate over the denial of access to official records, one of the judges asked several times whether there wasn't some way to compensate the victims.

So much for "bad facts!"

On instructions from the Subcommittee on Health and Scientific Resources of the Senate Committee on Human Resources, the Agency contacted all of the research institutions and asked their permission to have their participation publicly acknowledged. Some institutions held press conferences to acknowledge their participation while others threatened to sue the Agency if their involvement were disclosed All told, 59 institutions consented to be acknowledged. Although the media, the plaintiffs, and others failed to notice, the congressional committees, significantly, honored the Agency's request to treat the names of the individual researchers and the unacknowledged institutions as confidential.

In 1977, while dealing with the congressional inquiries, the Agency received an FOIA request for access to records on MKULTRA. The requesters were Sims and Wolfe of the Public Citizen Health Research Group. A dogged and determined litigative effort was expected and that expectation proved realistic. The FOIA request ultimately focused on the identities of the principal researchers and the unacknowledged institutions which had been successfully protected in the heat of congressional inquiries.

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* MKULTRA generated some extravagant political indignation Some of the facts became seriously distorted In a letter to the Chairman of the Senate Select Committee on Intelligence, on 10 May 1979, Director of Central Intelligence (DCI) Turner provided an unemotional summary of his findings regarding MKULTRA, an activity terminated before his appointment to the Agency In his letter he stated

> " the picture that emerges overall is one in which the research conducted was performed in a responsible manner Rather consistently it appears that subjects of research were volunteers and that the type and amount of drugs administered were not likely to have caused long-term after-effects.
>
> " . in most cases the research conducted at private institutions would have gone forward without support from CIA funds Typically, research programs were initiated and sponsored by the institution itself prior to supporting funds being made available from external contributors In many cases programs involving CIA funds were funded previously, concurrently or subsequently by other contributors In general, then, the research was conceived, planned and carried out in accordance with institutional protocol and procedures, without direction or control by CIA In those cases in which the knowledge to be acquired was defined by CIA, the methods employed and procedures followed nonetheless remained under the control of the institution or individual researcher Our review discloses no case in which the research conducted stands out as a departure from professional and ethical standards of the time Results were available generally to those interested with concealment only of the fact of CIA interest and support "

11. *(Continued)*

Source

The Agency decided it was necessary to continue to protect the identities from public disclosure. The test in the litigation, which commenced in November 1978, would be whether the names of the researchers and the unacknowledged institutions could be protected under the terms of the FOIA exemptions Several FOIA exemptions seemed to provide lawful justification for withholding the identities from public disclosure

The first considered was the FOIA exemption (b)(1) It protects information which is currently and properly classified in the interest of national security or foreign policy A decision was made not to assert exemption (b)(1) to protect the identities

Asserting classification might have been viable but its rationale was troubled The principal, classifiable secret of MKULTRA was the nature of the scientific research in which CIA was interested Most of the details of that work, however, had already been declassified and made public in connection with CIA congressional testimony and professional publication by researchers Moreover, the Agency was particularly sensitive to the provision of the new Executive Order 12065 which specifically prohibited the use of classification to conceal evidence of wrongdoing. Congressmen and the media had angrily criticized CIA's involvement in MKULTRA as amoral, if not immoral In the minds of many, MKULTRA was synonymous with unlawful drug experiments—scientific tinkering of Frankensteinian proportions The outcome of a legal debate on the propriety of asserting classification was uncertain at best It seemed entirely possible that the legal issue could become obscured or even lost in the heat of the evident emotion. In short, asserting classification posed many uncertainties. It became more plainly evident later that asserting classification might have been a very damaging choice.

The FOIA exemption (b)(3) was the next logical possibility. This exemption applies when another statute requires that a specific kind of record be protected from public disclosure. The National Security Act of 1947 provides in part.

> That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthrized disclosure.

That statute had repeatedly been successfully used by the Agency as a (b)(3) statute in FOIA litigation to protect a broad variety of intelligence sources

In an affidavit filed with the District Court, in *Sims I*, DCI Turner explained that "the term" 'intelligence sources' is a phrase of art, encompassing a variety of entities. By that I do not mean that it is so vague or imprecise as to shroud whatever the CIA may wish to conceal. But certainly, it includes more than simply those individuals directly involved in collecting and reporting foreign 'intelligence information.' " Turner went on to point out that "CIA must engage in a variety of related activities " He illustrated the point by describing a variety of intelligence roles, such as couriers, safehouse keepers, unwitting sources, and others. He explained that the diversity of intelligence activities, in effect, determined the span of intelligence roles that the term "intelligence sources" must encompass

5

11. *(Continued)*

Source

To illustrate the point the DCI offered a definition previously drafted by the Special Coordination Committee of the National Security Council It had been approved by the President and provided to the Senate Select Committee on Intelligence for inclusion in a draft Senate Bill S.2525 of the 95th Congress as part of a proposed Intelligence Charter for the CIA. That definition read:

> The term "intelligence source" means a person, organization, foreign government, material or technical or other means from which foreign intelligence, counterintelligence or counter terrorism intelligence is being, has been or may be derived

Turner further explained that "[t]he ability and willingness of the CIA to protect the identity of intelligence sources is the linchpin that enables the Agency to collect human source intelligence . . . Source protection is an absolute." In brief, it was essential that the Agency have the authority to protect all of its intelligence sources and that the definition of "intelligence source" had to be broad enough so as not to limit CIA's ability to accomplish its broad and changeable objectives.

FOIA exemption (b)(6) was also a logical choice. This exemption is used to protect "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." * Given the taint the media had placed upon MKULTRA, there was little reason to doubt that individual researchers who might be identified with the project would personally experience some unjustified, negative consequences On the other hand, a possible disclosure of the identities did not seem to offer the probability of any real benefits to the general public

Taking these considerations into account, the Agency decided to assert both exemptions (b)(3) and (b)(6) to justify withholding the identities of the principal researchers and the unacknowledged institutions.

Definitions

In the District Court, CIA offered a definition of an intelligence source, as follows;

> [a]ny individual, entity or medium that is engaged to provide, or in fact provides, the CIA with substantive information having a rational relation to the nation's external national security.

This carefully crafted definition reflected a prime concern with anticipated counter-arguments and, secondarily, the need to express a broad concept in simple terms. CIA also pointed out, with regard to privacy, that both the individual researchers and the institutions were likely to experience damaging consequences if publicly identified with MKULTRA On the other hand, it did not seem likely that there would be an over-balancing benefit to the general public if the information were disclosed.

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* Section 102(d)(3) of the National Security Act of 1947, codified at 50 U S C 403(d)(3)

11. *(Continued)*

Source

The District Court found that neither the reseachers nor the institutions were "intelligence sources." The Court also determined that the privacy exemption did not apply. The Court, however, did invite CIA to reconsider the possibility of asserting national security classification, the FOIA exemption (b)(1). The Court further instructed both parties to submit briefs on the possibility that a contract theory concerning CIA's assurances of confidentiality might apply as a constitutional protection against disclosure of the identities, a novel notion in the context of FOIA litigation.

Both parties appealed the District Court's decision to the Circuit Court of Appeals *

On appeal the Circuit Court of Appeals determined that the District Court had ruled properly in denying the application of the privacy exemption (b)(6)

The Circuit Court further ruled that the District Court had not applied the proper legal standard regarding "intelligence sources " The Circuit Court then provided a new definition of "intelligence source", as follows,

> an intelligence source is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it

The Circuit Court ordered the case remanded to the District Court for further proceedings. The Circuit Court noted that the District Judge had given the Agency additional time to reconsider its decision not to rely on the FOIA (b)(1) exemption and that the Agency had chosen not to pursue that suggestion. The inference that the Agency should be more attentive to the District Court's suggestion was not subtle.

Although confidentiality was a new element in the definition of "intelligence source," the role of confidentiality had not been ignored in Agency affidavits and briefs Directorate of Science and Technology affidavits filed in the case had explained that confidentiality traditionally surrounded CIA's relationship with its intelligence sources, including those who were scientists doing laboratory research, and the reasons why it was essential.

At this stage the Agency had several other choices ** but decided to return to the District Court, as instructed by the Circuit Court, and try to demonstrate how the MKULTRA researchers fell within the boundaries of the Circuit Court definition. The Agency reasoned that there was no disagreement on whether the researchers met the first standard of the definition. They had provided information the Agency needed to fulfill its mission. Indeed, both the District and the Circuit Courts had agreed on that point. As to the second standard, the Agency felt comfortable, if not confident, that it could demonstrate the necessity for guaranteed confidentiality.

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*We forgo further discussion of the (b)(6) exemption and privacy since it was no longer an issue when the case reached the Supreme Court nor was it incorporated in the Court's opinion

** Decisions were made and actions taken usually only after agonizing debate over the alternatives and their consequences

11. *(Continued)*

Source

The District Court demonstrated that reasonable minds could differ That Court ruled that the confidentiality standard would be met if the Agency could provide proof that the researchers (1) requested and (2) were given assurances of confidentiality by the Agency In brief, the District Court had concluded that the preference of the individual source would determine whether confidentiality was necessary The court reasoned that if a source insisted on assurances of confidentiality, then confidentiality was clearly necessary.

With due deference, the Agency expressed its contrary conviction that the Circuit Court could not have intended to leave it entirely to the personal preference of the individual as to whether or not he would insist on confidentiality and, consequently, whether he was legally an intelligence source. The Agency made its position plain; only the DCI could make that determination The Agency argued that a determination to expose a government intelligence operation could not be left to the personal preference of an individual participant, ignoring all the damaging consequences possible to other participants, as well as to the government's interests

To meet the demands of the District Court to find proof of the circumstances defined by the Court, full-scale name trace searches were done on all of the principal researchers. Until this point only the MKULTRA finance records had been at issue and consequently no attempt had been made to consider everything that might be recorded on all of the researchers. Upon completing the traces it became clear that about half of the researchers had also been active sources of disseminated intelligence reports or had otherwise been operationally active for various components of the Agency, particularly the Directorate of Operations, in addition to their MKULTRA work.

Detailed statements and voluminous collections of retrieved records were presented to the Court. The District Judge engaged the Directorate of Operations witness in four vigorous, *in camera, ex parte* * hearings concerning the evidence found in the retrieved records and the related operating policies of the Agency. The Judge personally inspected the many documents retrieved in the name trace search.

In affidavits and during the relatively informal hearings with the District Court, Agency representatives tried to illustrate how the demand for documentary proof of negotiations regarding confidentiality was neither reasonable nor realistic. The records involved were, in many cases, 20 to 30 years old Intelligence activities conducted in the early days of the project were frequently not recorded in great detail. Moreover, people working in or with the Agency were all very conscious of the importance of secrecy or confidentiality. Like fidelity in a happy marriage, it didn't have to be written down. In many cases it wasn't! Indeed, many individuals collaborating with the Agency resisted, even objected to, having a record made of the fact

Further Agency representations were made as to why a source's expectation of confidentiality could not be a matter of prime concern, and certainly not the

* An *in camera* hearing is a non-public hearing An *ex parte* hearing is one in which one of the contending parties is not present, in this case the plaintiffs (requesters)

11. *(Continued)*

Source

sole determinant There were too many kinds of intelligence sources, animate and inanimate, to which such a consideration could not be uniformly applied. A concealed microphone obviously was incapable of worrying about confidentiality, much less negotiating over its necessity; nor could an individual, whose remarks were secretly acquired by the microphone, be consulted. Other examples were described: the unwitting source, one who doesn't realize that what he knows and talks about is being relayed to the CIA; the source who believes he is reporting to CIA's opponents, or the source who reports because he suspects he will be exposed as an intelligence source if he doesn't, to mention but a few.

The District Court, on several occasions, reminded the Agency representatives that the case only involved American scientists conducting scientific research in laboratories on American university campuses. The Court seemingly felt that the future application of the precedent of this case would be limited to the same or similar sets of circumstances or, conversely, that the definition would not be applied to other kinds of more traditional intelligence sources. Each time this line of reasoning was suggested, the Agency representatives pointed out that no such limitations or expectations were included in the definition itself. Further, that the Circuit Court and the District Court had both treated the definition as generic; one that could and would be applied to any intelligence sources, not just those whose circumstances resembled those of the researchers in MKULTRA. This rather basic difference was never conclusively resolved in the District Court.

The Court was eventually persuaded that disclosure of the MKULTRA activities of a researcher, who was also engaged in additional, more traditional, intelligence activities, would be tantamount to disclosing participation in the latter activity as well. The Court accordingly agreed that the latter activity met the standards of the Circuit Court definition and hence the researchers' relationship with the Agency, including their MKULTRA role, was to be protected. Therefore, the Court held that the identities of such unacknowledged researchers and institutions should be protected against disclosure and not released

The District Court granted partial summary judgment to the CIA, allowing it to withhold the identities of the principal researchers and their related, unacknowledged institutions but only if documentary proof of assurances of confidentiality was available, or if individuals had been engaged in the more traditional capacity of collection of information in addition to their MKULTRA activities For those on which no documentary proof was found, the identities were ordered disclosed Sims and company appealed that portion of the order allowing identities to be withheld. The Agency appealed that portion of the order requiring the disclosure of certain identities

The case was now back in the D.C. Circuit Court of Appeals

Atmosphere

An appearance in the Circuit Court of Appeals is not a convivial affair After all, one or both of the contending parties are there to question the wisdom of the judiciary in the lower court The proceedings are highly formal. The attorneys do not control the process nearly to the extent they do in the District Court.

9

11. *(Continued)*

Source

Moreover, the Circuit Court sits in a panel of three judges, each of whom is free and often inclined to put enormous pressure on the participants

In this instance the atmosphere seemed more inhospitable than typical As the proceedings commenced it became obvious that the Circuit Court was not pleased with the outcome of the proceedings in the District Court The District Court had not performed as expected and the Agency's actions apparently struck the Circuit Court as defiant.

Simply put, the District Court had decided that if the Agency had documentary evidence that the individual had demanded and received assurances of confidentiality, CIA would thus have proof that confidentiality was necessary, and the individual thus qualified as an intelligence source If on the other hand, the information had been obtained without the assurance of confidentiality, then the assurance was not necessary and the individual did not qualify as an intelligence source.

CIA, even while attempting to satisfy the District Court's demand for proof, kept insisting that the necessity for confidentiality was a determination to be made by the DCI, not by the individual source; and that such a judgment had to be based on Agency operational and policy considerations

The Circuit Court responded with a longer version of "you're both wrong!"

The Circuit Court opinion commenced assuring the reader that "Almost all of the District Court's various rulings were judicious and proper." All, that is, except for the ruling allowing the Agency to withhold certain identities. The Circuit Court explained that "One aspect of its [the District Court's] analysis, however, was flawed; the court misconceived the level of generality at which the definition of 'intelligence source' should apply." The Circuit Court patiently pointed out that in its opinion in *Sims I*, it had shown that the Court must first define the class or kind of information involved. Then, the trial court, "can and should consider whether the agency could reasonably expect to obtain information of that type without guaranteeing its providers confidentiality."

By way of further explanation the Circuit Court stated that "Much of the information obtained by the CIA obviously could only be gathered through some kind of covert activity. There is no question that the agency in general could not reasonably expect to obtain data of that type without guaranteeing secrecy to those who provide it." It began to seem possible that the Circuit Court did not believe that the researchers in MKULTRA met their criteria for sourcehood It became even more likely when the Court continued: "It is only in cases like the present, where a great deal of information is not self-evidently sensitive, where the reasons why its sources would desire confidentiality principally from fear of a public outcry resulting from revelation of the details of its past conduct, that the CIA will be obliged to adduce extrinsic evidence in order to demonstrate its entitlement to the statutory exemption "

Here the Circuit Court seemed again to be suggesting, as the District Court had earlier, that the definition would apply only in limited circumstances Again the Agency pointed out that the plain language of the definition was not limited.

10

11. *(Continued)*

Source

The Court continued. "Second, there is the fact that, if revelation of the identity of a source of information would in any way impair national security, the agency can easily justify withholding his name by invoking exemption 1 of the FOIA." Exemption 1 being for national security classification

The Circuit Court criticized the District Court for accepting the rationale that the individual's demand for confidentiality was an absolute qualification for intelligence sources. The Circuit Court felt that the mere demand for such confidentiality could not automatically qualify the individual as an intelligence source, even though he was otherwise qualified.

In a footnote the Circuit Court seemingly faulted the Agency by pointing out that "The CIA never complied with the District Court's repeated suggestions that, in order to obtain some evidence of the status of the individual researchers, the agency should contact them and ascertain their understanding of the terms of their past relationship with the CIA." Curiously, the Court next suggested that "A further reason for not automatically allowing the CIA to shield the identities of informants who request anonymity is the possibility of collusion between the agency and its sources." Later in its opinion the Court also suggested that "First, there is a serious potential for widespread evasion of the letter and spirit of the FOIA that would be created by the rule advocated by the dissent." * More on the dissent later.

The Circuit Court seemed willing to assume the worst of the Agency. In fact, it was becoming difficult to ignore the suspicion that the Court perceived CIA's foreign intelligence function as an effort undertaken solely to acquire information it could then withhold from FOIA requesters

Dissent

For the Circuit Court *Sims II* hearing, the three-judge panel consisted of judges who had not previously been involved in the case. The new panel was not unanimous in its decision. A two-judge majority wrote the opinion in the case. The third judge concurred in part and dissented in part. That dissenting opinion found that many of the arguments the Agency had previously presented unsuccessfully were, in fact, persuasive

For example, the dissenting opinion stated. "But the majority is incorrect, I believe, in holding that an informant-solicited promise of secrecy does not automatically qualify the informant as an intelligence source. This seems to me to follow both from precedent and common sense." The dissenting opinion cited "This court's opinion in *Holy Spirit Ass'n v CIA*, 636 F2d 838 (D.C.Cir 1980) applied the *Sims I* definition of 'intelligence source'. . . and focused on the type of information obtained in explaining its conclusion that certain of the documents at issue were properly withheld because their release would disclose intelligence sources . . ." The dissent reminded the Court that "It relied solely on the existence of those [confidentiality] promises." That "Only by straining and by supplying missing language can the *Holy Spirit* opinion be read as treating a promise of confidentiality as mere evidence."

* The dissent was a seperate opinion by one member of the three-judge panel. The rule advocated by the dissent was that a demand for confidentiality necessarily qualified an informant as an intelligence source

11. *(Continued)*

Source

The dissent continued· "Without it [the promise-of-confidentiality test], individuals who give information to the CIA cannot rely on the promise of confidentiality if the information turns out to be the sort the CIA can get elsewhere without promising secrecy, something the sources of information will often not be in a position to know. There is, moreover, no guarantee that a judge, examining the situation years later and deciding on the basis of a restricted record, will come to an accurate conclusion. . . The CIA and those who cooperate with it need and are entitled to firm rules that can be known in advance rather than vague standards whose application to particular circumstances will always be subject to judicial second-guessing " Referring to the ordered disclosure of certain of the names of researchers, the dissent said "This is no honorable way for the government of the United States to behave and the dishonor is in no way lessened because it is mandated by a court of the United States "

In dealing with the Circuit Court's use of the "practical necessity of secrecy" test, the dissent said: "I know of no reason to think that section 403(d)(3) was meant to protect sources of information only if secrecy was needed in order to obtain the information."

The dissent concluded that ". . . the CIA's litigating position is hardly frivolous and disagreement with the CIA's assessments either of its intelligence needs or of its legal obligations is insufficient reason to cast doubt on the CIA's good faith belief in those assessments. In these circumstances it is inappropriate for the court to suggest that CIA's position was adopted in bad faith."

The Agency found the dissenting opinion familiar and persuasive Unfortunately, despite its eloquence, it was a minority opinion and the District Court would have to implement the terms of the majority opinion for "expeditious reconsideration of the researchers' statuses "

Still optimistic, the Agency filed a motion for a rehearing *en banc* * with the Circuit Court. Such a rehearing of all the arguments made on the appeal would occur only if a majority of the 13-judge panel voted in favor. In fact, only three did

The Agency was now faced with two options. We could return to the District Court and try to convince the Court that the MKULTRA researchers met the standards as now defined by the Circuit Court, or we could appeal to the Supreme Court of the United States To return to the District Court meant tacit acceptance of the newly expatiated Circuit Court definition of "intelligence source." Moreover, the Agency would surely be foreclosed from any further debate over the validity of the definition, probably indefinitely In the District Court, the Agency would face the near impossibility of convincing the Court that the MKULTRA researchers provided information that could only have been obtained through secrecy. On the other hand, appealing to the Supreme Court would be the last roll of the dice.

We picked the dice!

* A rehearing before all (13) judges of the D C Circuit Court

11. *(Continued)*

Source

The Agency requested the Solicitor General of the United States to authorize a petition for *certiorari* * to the Supreme Court. The span of the Agency concerns which warranted mention in the petition was considerable The Agency's initial legal concern rose from the fact that the Circuit Court opinion ignored the plain language of the statute and the congressional intent in enacting 50 U. S C. 403(d)(3). It thus violated two basic legal and common-sense principles in interpreting legislation However, the prime concern of the Agency was the destructive impact the definition of "intelligence source" would have on the Agency's ability to do its business and the fact that the opinion constituted an unprecedented and unacceptable judicial interference with the DCI's explicit statutory responsibility to protect intelligence sources and methods from unauthorized disclosure.

Conferences with the Department of Justice, Civil Division and the Solicitor General's office took place The Agency was challenged to defend its proposal to petition for *certiorari* and was faced with intentionally skeptical questions In responding to those challenges and questions, the Agency explained that the net effect of the Court's definition was to limit the DCI's choice of intelligence sources to those meeting a federal judge's approval—which could only be obtained after the fact in the event the Agency's judgment were challenged in the context of an FOIA request. In short, an informant whose intelligence report might become subject to an FOIA litigation might consequently be ordered exposed by a Federal District Judge. The judge could so order if he decided that the information in that particular report did not require secrecy to obtain. The DCI could not meet his statutory responsibilities hobbled by such uncertainties. How could the DCI give a source the necessarily absolute assurances of confidentiality while knowing such assurances were actually conditional, and beyond the control of the DCI? Is it possible that the framers of the Freedom of Information Act meant to use the Act to empower any Federal District Judge with the authority to limit the DCI's choice of intelligence sources needed to meet the national security needs of the nation?

The problem took on the proportions of a nightmare with recognition of the fact that some 30 years of records had been created with no awareness of the problem which had only now been created. Justice Department logically asked. "Given the damaging conditions this opinion creates, what instructions have you sent to your field stations to remedy the situation?" Our answer was, "None! There is no lawful remedy for the situation " In fact the only practical remedy for the situation would have been to destroy the 30 years of accumulated records, which probably couldn't be accomplished without violating a criminal statute, and to operate without creating records in the future, which, for an intelligence agency, was totally untenable.

Ultimately the Solicitor General was persuaded and a petition for *certiorari* was filed with the Supreme Court. A legal brief was presented summoning up all of the most persuasive arguments and precedents available from the record of the proceedings in the lower courts. In the Supreme Court you are dependent

* A review of the lower court record by a superior court

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11. *(Continued)*

Source

principally upon the established record—the facts and arguments used in the lower courts

Decision

Certiorari was granted and the oral argument took place on 4 December 1984 The Agency was represented by an Assistant Attorney General. With unusual dispatch, the Supreme Court decided the case on 16 April 1985 Even more unusual, the Court ruled, 9 to 0, in the Agency's favor! The Chief Justice delivered the opinion with two Justices presenting a separate but concurring opinion.

The following are verbatim extracts of the decision itself The language is clear and expresses principles quite familiar to Agency employees.

> The plain meaning of the statutory language, as well as the legislative history of the National Security Act, however, indicates that Congress vested in the DCI very broad authority to protect all sources of intelligence information from disclosure. The Court of Appeals' narrowing of this authority not only contravenes the express intention of Congress, but also overlooks the practical necessities of modern intelligence gathering—the very reason Congress entrusted this Agency with sweeping power to protect its intelligence sources and methods
>
> Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence. . . . The reasons are too obvious to call for enlarged discussion, without such protections the Agency would be virtually impotent
>
> The Court of Appeals narrowed the Director's authority under Sect. 102(d)(3) to withhold only those "intelligence sources" who supplied the Agency with information unattainable without guaranteeing confidentiality. That crabbed reading of the statute contravenes the express language of Sect. 102(d)(3), the statute's legislative history, and the harsh realities of the present day. . . . Under the Court's approach the Agency would be forced to disclose a source whenever a court determines, after the fact, that the Agency could have obtained the kind of information supplied without promising confidentiality. . . To induce some sources to cooperate, the Government must tender as absolute an assurance of confidentiality as it possibly can . . We seriously doubt whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information . . There is no reason for a potential intelligence source, whose welfare and safety may be at stake, to have great confidence in the ability of judges to make those judgments correctly
>
> The Court of Appeals also failed to recognize that when Congress protected "intelligence sources" from disclosure, it was not simply protecting sources of secret intelligence.

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11. *(Continued)*

Source

> . . . Under the Court of Appeals' approach, the Agency could not withhold the identity of a source of intelligence if that information is also publicly available. This analysis ignores the realities of intelligence work, which often involves seemingly innocuous sources as well as unsuspecting individuals who provide valuable intelligence information.
>
> . . . The Director, in exercising his authority under Sect. 102(d)(3), has power to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source. . . . The decisions of the Director, who must of course be familiar with the "whole picture," as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.
>
> Congress did not mandate the withholding of information that may reveal the identity of an intelligence source; it made the Director of Central Intelligence responsible only for protecting against *unauthorized* disclosures.
>
> . . . The national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources. And, it is the responsibility of the DCI, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process

The Supreme Court provided the authoritative, legal definition of an intelligence source, in familiar and unequivocal terms:

> *An intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations*

The broad authority of the DCI, now confirmed by the Supreme Court opinion, was made even more apparent in some of the language of the separate but concurring opinion of two of the Justices The separate opinion criticized the majority for "playing into the hands of the Agency" and not taking into consideration the fact that the Executive Order for National Security Classification is intended to protect national security information and that Congress, in crafting the FOIA, provided the (b)(1) exemption for the protection of information related to national security.

The separate opinion stated that the Agency ought to be required to assert classification, the FOIA (b)(1) exemption, to protect intelligence sources because a national security interest is being served This, however, ignores several practical considerations. Information which might, in combination with other information, lead to the exposure of the identity of an intelligence source might not necessarily meet the criteria for classification under a current Executive Order The Executive Order which establishes the criteria for classification has proven to be relatively fluid and controversial—having been rewritten three times between 1972 and 1982 In brief, assurances of confidentiality based upon the frequently amended Executive Order can only be defined as tenuous By way

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11. *(Continued)*

Source

of contrast, section 102(d)(3) of the National Security Act remains as written in 1947.

The separate opinion does not acknowledge another consequence of its position If an individual doesn't meet the criteria to be an "intelligence source" under 102(d)(3), that individual might also be judged to have failed to meet the criteria for classification under E.O.12356. The pertinent category of classifiable information in E.O.12356 is in Section 1.3(a)(4) which reads "intelligence activities (including special activities), or intelligence sources or methods." To meet the criteria for classification, information would have to fall within that category, i e. be an "intelligence source." This circumstance would obviously deny the protection of classification to those individuals not meeting the criteria for an "intelligence source."

It becomes obvious then that the Circuit Court definition of intelligence source would have denied the MKULTRA researchers the protection of 102(d)(3), as well as classification under E.O 12356; notwithstanding the repeated suggestions by the lower courts that the Agency should have asserted classification.

The separate opinion proposed an alternative definition, reminiscent of that of the Circuit Court. The separate opinion suggested that . . "the phrase 'intelligence source' refers only to sources who provide information either on an express or implied promise of confidentiality, and the exemption protects such information and material that would lead to disclosure of such information." Strangely this definition of "intelligence source" seems to protect information rather than intelligence sources, despite the language of the statute and the Executive Order Fortunately it is not the law of the case

Although fashioned as criticism, the separate opinion provides the most graphic description of the practical effect of the majority opinion. The following is, again verbatim, from the separate opinion.

> The Court identifies two categories of information—the identity of individuals or entities, whether or not confidential, that contribute material related to Agency information-gathering, and material that might enable an observer to discover the identity of such a "source"—and rules that all such information is *per se* subject to withholding as long as it is related to the Agency's "intelligence function " The Agency need not even assert that disclosure will conceivably affect national security, much less that it reasonably could be expected to cause at least identifiable damage. It need not classify the information, much less demonstrate that it has properly been classified Similarly, no court may review whether the source had, or would have been to have had (sic) any interest in confidentiality, or whether disclosure of the information would have any effect on national security No court may consider whether the information is properly classified or whether it fits the categories of the executive order.
>
> —It is difficult to conceive of anything the Central Intelligence Agency might have within its many files that might not disclose or enable an observer to discover something about where the Agency gathers information.

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11. *(Continued)*

Source

—The result is to cast an irrebuttable presumption of secrecy over an expansive array of information in Agency files, whether or not disclosure would be detrimental to national security, and rid the Agency of the burden of making individualized showings of compliance with an executive order.

The majority opinion of the Supreme Court, in conclusion, ruled that the DCI properly invoked Section 102(d)(3) of the National Security Act of 1947 to withhold disclosure of the identities of MKULTRA researchers as "intelligence sources." The Court also ruled that the institutional affiliations were properly withheld, since that disclosure could lead to an unacceptable risk of disclosing the sources' identities. The rulings of the Circuit Court of Appeals which were adverse to the Agency were reversed.

In August 1985, in compliance with the ruling of the Supreme Court, the United States District Court for the District of Columbia issued the following

ORDER

Pursuant to the mandates of the Supreme Court and the Court of Appeals, it is this 21st day of August, 1985, hereby

ORDERED: that judgment should be, and hereby is, entered for defendant, and it is further

ORDERED AND ADJUDGED. that this action should be, and hereby is DISMISSED.

Significance

Seven years of litigation left the Agency with a landmark decision, the significance of which goes far beyond the relatively narrow concerns of the Freedom of Information Act.

The DCI's authority to maintain the kind of secrecy which is essential to successful intelligence activities has been authoritatively affirmed by the Supreme Court. The value of that decision was enormously enhanced by the Chief Justice's comprehensive explanation of the reasoning and detailed description of the practical necessities which impelled the decision.

Historically, the United States involvement in intelligence activities has been sporadic but the 200-year record, commencing with the Revolutionary War, makes it fairly clear that secrecy concerning intelligence sources has long been recognized as a practical necessity. That common knowledge allowed the courts to recognize the need to protect intelligence sources in the several hundred FOIA law suits which preceded the *Sims* case.

Now, with the *Sims* decision there can be little question that the DCI has the responsibility and, necessarily, the authority to protect any and all sources of information and related services which the Agency needs to fulfill its mission, against unauthorized disclosure. Further, that any information which tends to show an observer the identity of an intelligence source is similarly protectable, even when the information standing alone may be quite innocuous and innocent of meaning. It seems equally obvious that the same kind of privileged status

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11. *(Continued)*

Source

surrounds information concerning intelligence methods used by the Agency in the conduct of its intelligence activities, including innocuous or innocent information which acquires a protectable status when seen in the context of Agency intelligence activities

Even more importantly, the DCI's choice of foreign intelligence sources, needed to meet the national security needs, can not be arbitrarily restricted by the unintended application of an unrelated statute, e.g the Freedom of Information Act.

This Supreme Court opinion is destined to have an impact The publication of such a perceptive commentary on the very basic principles of such an arcane, though ancient, profession will have a cumulative benefit for all involved in US intelligence activities It provides the assurance that intelligence activities are neither a fad nor an art form understood only by its practicioners It demonstrates the imperative of secrecy for all who are involved in such activities; indeed, even for those who only become witting by reading the product of such activities. Case officers can speak with confidence and credibility when assuring their intelligence sources of the confidentiality of their relationship The beneficial effect will be gradual and cumulative, but inevitable.

The definition of "intelligence source" stands without qualifications or exceptions, limitations or conditions precedent. It is as positive and flexible as the Agency has to be to meet its ever changing intelligence responsibilities.

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12. "Lawrence R. Houston: A Biography," Gary M. Breneman (Spring 1986, Volume 30/1)

LAWRENCE R. HOUSTON: A BIOGRAPHY

Gary M. Breneman

"A lawyer without history or literature is a mechanic, a mere working mason, if he possesses some of these, he may venture to call himself an architect"

— Walter Scott *

On 1 February 1974, at the request of the President, the Director of Central Intelligence presented the National Security Medal to Lawrence R. Houston, the Agency's first General Counsel who had retired the previous year.[1] Houston was also awarded CIA's Distinguished Intelligence Medal These events capped an extraordinary career of public service starting with the Office of Strategic Services during World War II, continuing through the OSS remnant, the Strategic Services Unit (SSU) in the War Department, and the Central Intelligence Group (CIG), and extending for 26 years as the General Counsel of the Central Intelligence Agency

Those in attendance who knew Larry Houston well understood the contradictory forces at play in the man that day Undoubtedly he was proud of the two awards and pleased that the country and his colleagues had chosen to honor him but he was also a private man who preferred to work in a quiet and reserved manner and avoid the public eye This was an attribute which had served him well over the years, for he had survived as the General Counsel—the trusted adviser—to nine decidedly different DCIs [2] Houston's comments at the ceremony cannot be found but almost certainly his thoughts were akin to the remarks he made in accepting the National Civil Service League Award four years earlier "For one involved for so many years in the CIA's philosophy of anonymity, it is somewhat traumatic to find oneself in such a bright limelight."

Some have called him a legal architect, for he was the principal drafter of the section of the National Security Act of 1947 which created the Central Intelligence Agency and also the substantive law, embodied in the CIA Act of 1949, necessary for the Agency to function But Houston was more than a legislative draftsman He was a convincing advocate with a vision of a Central Intelligence Agency, a vision based on historical perspective and personal experience

Family and Early Years

Lawrence Reid Houston was born on 4 January 1913 in St Louis His father, David F Houston, was chancellor of Washington University and had been president of Texas A&M College and of the University of Texas Woodrow

* Scott, Walter, *Guy Mannering* (New York E P Dutton & Co , 1906), p 259

[1] Houston was the sixteenth recipient of this medal which was established via Executive Order by President Truman in the final days of his administration to honor an individual for his "distinguished achievement or outstanding contribution in the field of intelligence relating to the national security"

[2] Souers and Vandenberg at CIG, Hillenkoetter, first of CIG and then CIA, Smith, Dulles, McCone, Raborn, Helms, and Schlesinger

12. *(Continued)*

Wilson, newly elected President of the United States, appointed David Houston as Secretary of Agriculture and the family moved to Washington The infant Lawrence had a brother, David F., Jr , and a sister, Helen The senior Houston was Secretary of Agriculture until 1920 and then served for a year as Secretary of the Treasury Larry Houston was eight years old when the family left Washington for New York, where the senior Houston was first vice-president of AT&T and president of Bell Telephone Securities Company, then from 1930 to 1940, president of Mutual Life Insurance Company of New York The family lived at 165 East 74th Street but also had a summer home at Oyster Bay, Long Island, the site of Teddy Roosevelt's famous Sagamore Hill estate and not far from the summer home of another of the country's famous public families, the Dulles' at Cold Spring Harbor

Larry Houston was sent off to Milton Academy in Boston for his pre-college education Supplemental to his formal education were the rich and instructive experiences he had during his formative years among the elite of New York's corporate officialdom Summers were for sailing, first off Cape Cod and later at Oyster Bay Houston is an avid sailor who helped race ocean-going yachts in major regattas and, in later years, crewed on various yachts

Houston entered Harvard University in 1931 and took his degree in modern European history in 1935 He then went on to the University of Virginia and received his LL.B in 1939. At Charlottesville he met Jean Wellford Randolph and they were married just after his graduation Houston sat for and passed the New York Bar and then joined the prestigious Wall Street law firm of White and Case as an associate

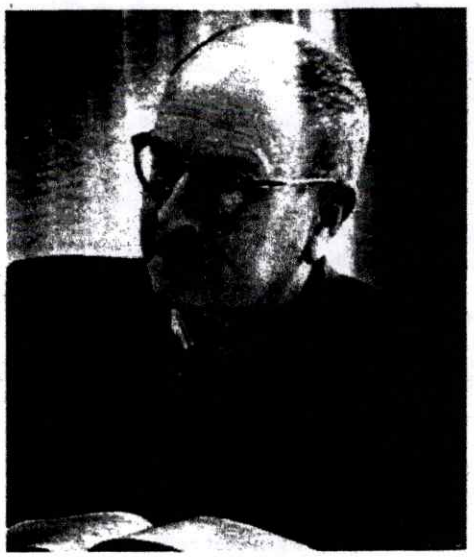
His parents died in 1940 Houston has proud memories of their accomplishments His mother had been prominent in work with orphans and in other charities, including the Robert E Lee Memorial Foundation, Inc for the preservation of Stratford, the ancestral home of the Lees of Virginia In his home, Houston keeps on display several denominations of currency his father had signed as Secretary of the Treasury and two works written by him, *Eight Years With the Wilson Cabinet*, and *An Estimate of Woodrow Wilson*

Intelligence

Larry Houston's induction into the world of intelligence and espionage occurred through inadvertence In 1942, classified 1-A, he went to the draft board, explained that he and Jean did not have any children, and asked if they would take him, they did not He then tried to enlist in the "sailing" Coast Guard but was rejected because of newly adopted, stringent eye requirements Finally he was drafted into the Army in 1943 and assigned to the Army Finance School He contracted pneumonia and his completion of the course was delayed During this time, the Judge Advocate General recruiters were looking for law school graduates and had lowered the eye requirements for officer candidate school, so Houston sent in an application Several times he inquired as to why he had not heard about his application and later learned that it had been lost in a wooden file drawer This delay, while irritating at the time, was propitious, because his

12. *(Continued)*

Houston



Lawrence R. Houston

OCS class was the first to have any of its students' profiles released for review by OSS. Out of a class of about two hundred, Larry Houston was one of three selected for OSS.

Lieutenant Houston was ordered to report to the OSS in June 1944 and met the head of OSS, Brigadier General William J. "Wild Bill" Donovan,* a lawyer and former Assistant Attorney General. By September 1944, Houston was assigned to the OSS Headquarters of the Mediterranean Theater (MEDTO), which was billeted near an old palace in the city of Caserta just north of Naples. Technically, both Cairo and Athens were under the OSS command at Caserta, but the OSS base in Cairo had the main responsibility for Greece. In December 1944, the situation in Greece was tense, communist forces surrounded Athens, and the British forces in the city were very edgy. In addition, there were considerable stirrings in the Arab world as the war began to wind down. Donovan arranged for Houston to go to Cairo in January 1945 to serve as deputy to Colonel Harry S. Aldrich, the head of the OSS Middle East Theater contingent. Houston served there until September of 1945 when he was assigned to OSS Headquarters in Washington.

It was during his stay in Cairo that Houston became particularly concerned with the manner in which postwar Washington would deal with the various forces at work throughout the Middle East, Greece, and Europe. Donovan had been discussing for some time the need for a permanent intelligence department of some sort and Houston's deliberations and observations during this period led him to conclude Donovan was right—there was a need for a permanent,

* Donovan was promoted to major general in November 1944.

12. *(Continued)*

centralized intelligence establishment, separate and apart from the military departments and the Department of State

Via Executive Order 9621, 1 October 1945, President Truman terminated OSS and transferred its functions to various elements of the Department of State and the military Larry Houston became General Counsel of the Strategic Services Unit (SSU) in the War Department and, when President Truman issued another directive on 22 January 1946, establishing the Central Intelligence Group (CIG), Houston moved over to the job of General Counsel of CIG

CIG was headed by Rear Admiral Sidney W Souers, and, while he had seen the possibility of some independence for CIG, whose stated functions were almost totally in coordinating intelligence reporting, he did not strongly challenge the plain meaning of Truman's 22 January directive. He did, however, write a farewell report dated 7 June 1946 which pointed out CIG's shortcomings When Lieutenant General Hoyt Vandenberg replaced Admiral Souers, he seized on the matters discussed in Souers' report and took it upon himself to push for legislation that would establish a new organization with a centralized intelligence function

Houston's deputy at SSU and CIG was John S Warner, who had distinguished himself as a bomber pilot in Europe Their professional relationship and trust is an unusual story in itself and has lasted to this day For all 26 years in which Houston was the Agency's General Counsel, John Warner was its Deputy General Counsel. In 1957, Allan Dulles made Warner CIA's Legislative Counsel but told him to continue as Deputy General Counsel Houston acted as Legislative Counsel in Warner's absence; Warner acted as General Counsel in Houston's absence This unusual arrangement was often described by Houston "John is my deputy for legal matters, I am his deputy for legislative matters " Warner says only Larry Houston could have made such an arrangement work

It was Warner who, while working on other problems, discovered a federal statute, the Independent Office Appropriations Act of 1945, which provided that a governmental entity set up by a presidential directive could not exist for more than one year without legislation from the Congress This discovery applied to CIG That realization, along with the general impotency of CIG to do anything more than coordinate, added to the urgency of getting legislation for a centralized intelligence agency

Houston in a 13 June memorandum described in very bleak terms CIG's lack of authority in almost all areas relating to its personnel, travel, and contracts Tom Troy's *Donovan and the CIA* states that Vandenberg commissioned the preparation of a bill to create a Central Intelligence Agency and sent it to Truman's special counsel, Clark Clifford Houston's recollection of this event is somewhat different He recalls that he and John Warner had written a substantial part, if not all, of the legislation prior to Vandenberg's arrival on the scene With Vandenberg's new impetus for the creation of a Central Intelligence Agency, they touched up the legislation they had already written and presented it to Vandenberg for forwarding to the White House Houston then visited with Clark Clifford, who was concerned about the proposed bill, and persuaded Clifford that the original concept of a coordinating function only for CIG would not work and that a larger, permanent agency with broader powers was needed

12. *(Continued)*

Houston

Throughout the fall of 1946, Houston and others continued to push for the legislation needed to create a Central Intelligence Agency Walter Pforzheimer became a key player in this process, serving primarily as a legislative counsel selling the idea to the Congress

Early in January 1947, this effort took on new meaning and it became clear there was going to be an administration bill on national security (the National Security Act) and that a centralized intelligence organization would be a part of it Key to the discussions and concerns during the winter and early spring of 1947 was whether a CIA and all of its functions would be included within the President's bill or whether the creating part only would be within the bill and the substantive, housekeeping authorities of the new agency would be placed in a subsequent piece of legislation Houston recalls a White House meeting he and Pforzheimer attended on 23 January 1947 Present were General Vandenberg, Vice Admiral Forrest Sherman representing the Navy, Major General Lauris Norstad representing the War Department, and Charles Murphy, who had just been put in charge of the legislation on behalf of the White House General Norstad formally suggested putting only the creating part in the National Security Act with the functional parts of the Agency's authorities to follow in a second bill, and the suggestion was adopted Houston also recalls with some amusement that the Central Intelligence Agency did not exist until 18 September 1947, a year and nine months after the creation of CIG by presidential directive Technically CIG was an entity without legal standing from 22 January until 18 September 1947

Unique Legislation

Once the Central Intelligence Agency was established, Houston became its General Counsel and turned his attention to securing the second half of the legislation needed for the efficient functioning of an intelligence agency Some people have called the CIA Act of 1949 the special legal tool required by an intelligence organization operating within a democratic framework Indeed, within the CIA Act of 1949 there are unique sections without which the Agency simply could not function Of particular note is Section 8 which provides a confidential funds authority for the Director of Central Intelligence Under this section, the DCI has the authority to expend funds for objects of a confidential, extraordinary, or emergency nature, and account for them solely on his own certificate Without this provision, there would be no way for the Agency to conduct clandestine operations or create, manage, and terminate covert proprietary projects which are so essential to its mission Without this provision, other government agencies would be conducting audits of the Agency's activities and expenditures

A second unique feature is Section 7 which permits the Director of Central Intelligence, with the concurrence of the Attorney General and the Commissioner of Immigration, to bring up to 100 aliens and their immediate families into the United States for permanent residence notwithstanding their inadmis-

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sibility under the immigration or other laws [3] The only requirement is that the entry of the alien must be in the interest of the national security or central to the furtherance of the national intelligence mission This permits the Agency to bring defectors and political refugees of interest to the United States and provide for their resettlement and eventual citizenship Directorate of Operations officers often refer to defectors as "P.L 110 cases " While such a designation is not technically correct, it has persisted through the years The reference to P L 110 is to the entire Central Intelligence Agency Act of 1949, which was Public Law 81-110, 20 June 1949 (Some 25 years ago, a few lawyers within the Office of General Counsel determined that a fitting tribute to Larry Houston would be a specialized District of Columbia license plate for the tan, 1946 Lincoln Continental convertible that he drove to work They arranged to secure a plate carrying the designation "P.L 110 " Houston was amused, kept the plates on the car for several years, and still has them)

One early controversy emerged over the two Houston memorandums on covert action In opinion number one, Houston advised DCI Hillenkoetter he could find no specific language in the National Security Act authorizing the Agency to engage in covert action as opposed to intelligence activities In opinion number two, while some have claimed he reversed himself, he maintains that he simply clarified the earlier opinion by saying that if, within the statute, the President in the furtherance of his constitutional responsibility in the area of foreign affairs issued a proper directive to the Agency, and the Congress appropriated the necessary funds, then covert action could be a permissible activity of the Agency

A perusal of the early Office of General Counsel opinion books reminded this author that Houston, Warner, and others had worried over, researched, and written opinions on the basic legal questions confronting the Central Intelligence Agency, questions which seem to come back for review every five or ten years *

An Independent Office

From 1947 until 20 March 1962, the Office of General Counsel was under the Deputy Director for Administration (sometimes called the Deputy Director for Support) How Houston was able to function and how the office was able to perform its assigned Agency-wide responsibilities working within the support directorate and not having, at least on paper, direct access to the Director and Deputy Director was in part the result of the stature and nature of the man who was the General Counsel Houston, above all, was self-confident and self-assured with respect to his relative importance within the Agency and within the Washington bureaucracy He knew that he had access on a personal or professional basis to anyone within the Agency, or for that matter, within the US

[3] Technically, the law permits any one of the three to initiate an action and effect the admission of the alien into the US if the other two concur In practice, it is usually the DCI who initiates the action

* Houston, a skilled and prolific writer, has left a rich literary legacy to those who follow him in the profession of intelligence In addition to the legislation he drafted and the legal opinions he wrote, he contributed articles on the issues he dealt with to *Studies in Intelligence* "Executive Privilege in the Field of Intelligence," Fall 1958, "Impunity of Agents in International Law," Spring 1961, "*United States v Harry A Jarvinen*," Winter 1971, "The John Richard Hawke Case," Special Edition, 1972, and CIA, the Courts and Executive Privilege, ' Winter 1973

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Government Thus, he was not overly concerned about wiring diagrams and where his office fit in the scheme of things Other lawyers in his office argued that it should be an independent office within the Office of the Director

During this period, an event occurred which probably altered Houston's thinking on this issue DCI Walter Bedell Smith brought in a DDA from outside the Agency This was Walter Reid Wolf, a New York banker who suspected that Houston's legal advice might be lacking something because Houston had never been a partner in a major New York law firm Wolf decided to conduct a thorough review of the Office of General Counsel and the services it was providing. He hired for this purpose Fred Eaton, a former New York district attorney and partner in the New York firm, Shearman and Sterling Eaton and another member of his firm reached a conclusion which probably did not comport totally with the DDA's views It is reported that when Eaton met with the DCI and Wolf to present his findings, he stated "If you (the DCI) will fire Houston, Shearman and Sterling will make him a partner the next day "

Another part of Houston's reluctance to push the separation of the General Counsel's office from the DDA until later was his professional respect for the A/DDA and later DDA, Colonel Lawrence K "Red" White [4] When Wolf departed with Smith and a search commenced for Wolf's replacement, it again focused outside the Agency Ellsworth Bunker accepted on a Friday, only to decline on Monday, saying that he had been made president of the American Red Cross At this point the position was given to Colonel White

Proprietaries

High on the list of achievements for Larry Houston was his involvement in the creation, operation, and dissolution of the major proprietaries owned by the Agency Houston was in on the ground floor providing conceptual approaches to the purchase or creation of proprietaries, and for a number of them this involvement continued throughout the entire operation to sale or dissolution

Of these, none was dearer to Larry Houston than the air proprietary complex Much of the early history of the air proprietaries is found in the well-researched book, *Perilous Missions* (William M Leary, University of Alabama Press, 1984), including Houston's involvement in the purchase and legal structuring of the first air proprietary, Civil Air Transport (CAT) Houston recalled recently that the whole thing started when CIA became associated with Claire Chennault, Whiting Willauer, and CAT CAT had been set up after World War II and operated out of Shanghai, but as the communist forces moved across China in pursuit of Chiang Kai-shek's Nationalist forces, CAT was forced to move first to the island of Hainan and then to Taiwan

About November 1949, the Agency signed a charter contract with CAT to provide a specified number of hours of flying time By January 1950, CAT was on the verge of bankruptcy and some personal funds of Chennault and Willauer had to be infused to try to keep it afloat On 24 March 1950, CIA signed a new

[4] See "Colonel Lawrence K White," by R Jack Smith, *Studies in Intelligence*, Winter 1981, Volume 25, Number 4

12. *(Continued)*

contract with CAT for additional hours of flying time, but the contract contained an option for CIA to purchase the airline in June1950 if it desired to do so Toward the end of June, DCI Hillenkoetter, after clearing it with the Department of State, approved the purchase Larry Houston, together with outside counsel, began to write and compile the necessary legal documents In addition, he worked with the outside counsel in developing the project's eventual legal structure a Delaware holding company, a Delaware operating company, a Chinese (Taiwanese) corporation to own the property and the repair facility, organized under the Chinese Foreign Investment Law which permitted a majority of owners and board members to be foreigners, thus ensuring direct, US control; and a Chinese (Taiwanese) corporation with a majority of Chinese (nominee) owners to operate the Chinese (Taiwanese) flag air rights internationally The wrenching and hauling in the Washington bureaucracy with respect to the new proprietary, how it would be run, and who was in charge, etc , cannot be overstated There were tremendous arguments between the Agency and Department of State and between the Agency and the civilian managers of CAT in the field Also involved in the bureaucratic process was the Civil Aeronautics Board asserting its statutory mandate to regulate civilian carriers

Tangential to this issue was the fact that one of the two operational elements of the Agency, the Office of Policy Coordination (OPC) was a hybrid within the community It was attached to the CIA for purposes of its budget and allocations of personnel, but its director was appointed by the Secretary of State In addition, it received its policy direction from the Departments of State and Defense When General Walter Bedell Smith replaced Hillenkoetter in October 1950, one of the first things he did was end OPC's peculiar position by bringing it totally within the Agency and making it directly subordinate to him Later, in 1952, he merged OPC with the Office of Special Operations and created the Directorate for Plans Houston assisted Smith considerably in this regard by sending him a memorandum which detailed the three problem areas—coordination, national estimates, and covert action

In the summer of 1954, Houston traveled to Japan and Taiwan to review CAT's management policies as they were affected by law and Agency direction, and at the specific direction of DDCI General Charles P Cabbell, to have a look at CAT's president, Alfred T Cox, and make recommendations with respect to his retention or dismissal Houston concluded that Cox should probably be replaced and recommended as his successor, Hugh Grundy Despite his dismissal, Al Cox remained a good friend of Houston

During the start-up years of the air proprietary complex which grew to include Air America, Inter-Mountain Aviation, and Southern Air Transport, there were tremendous problems of management and direction and friction between Headquarters and the field No one before in government had ever tried to run proprietaries in the commercial world The field officers had to be constantly reminded that commercial business was simply a cover to mask the operational activities of the various air proprietaries and reined in from their pursuit of business which was often in direct competition with US flag carriers The internal CIA direction of the air proprietaries, "the direction of the owners,"

12. *(Continued)*

came from the Executive Committee on Air Proprietaries (EXCOMAIR), composed of a very senior group of Agency officers The chairman of EXCOMAIR for most of its existence was Larry Houston Among the factors that made the EXCOMAIR task so difficult was that in the early 1950s the Agency hired as manager of the air proprietary complex a man Houston recalls as being extremely skilled in all aspects of aviation and particularly at negotiating air routes, but one who quickly earned the reputation of not being able to make a decision

During the later years of Houston's tenure as General Counsel, he oversaw the dissolution and termination of a number of proprietary projects and the corporations within them which had served the Agency well over the years It was the Agency's special spending authority as contained in Section 8 of the CIA Act of 1949 that made it possible to have proprietary corporations and spend money either for their creation or purchase and their maintenance without regard to other laws regulating government expenditures In like fashion, when it came time to terminate a proprietary, it was necessary either to sell the stock of a corporation which included all of its assets, or to sell all the assets individually Both methods appeared to be in conflict with those provisions of the Federal Property and Administrative Services Act which directed the manner in which the government was to dispose of surplus property Working with lawyers in his office, Houston developed the theory that Section 8 of the CIA act, which contained the authority to make covert purchases on behalf of the Agency, had within it the inherent, implied authority to dispose of such property covertly without recourse to the Federal Property and Administrative Services Act Thus, the sale of the assets of the stock of the various proprietary corporations went forward without divulging the Agency hand unnecessarily and without reference to the General Services Administration which was required by the statute to assume responsibility for federal surplus property At the request of Congress, these disposals were later reviewed by the General Accounting Office The GAO commented favorably on how they were handled

Contributions

When this author asked Larry Houston to name what he thought were significant contributions he and the Office of General Counsel had made to the conduct of intelligence, contributions which were not well known, Houston replied there were two basic roles he and the office had played which were neither well understood nor much appreciated The first of these dealt with the position of the DCI within the intelligence community In the very early days of the Agency, the military, FBI, and the Department of State wanted the DCI to remain in an overall coordinating and cooperating posture They viewed him and wanted him viewed as one of a number of co-equals within the intelligence community Houston felt strongly that such a posture was wrong, would not work, and that the DCI's position should be one of preeminence with respect to intelligence

Pushing this position, having it recognized and accepted, and then solidifying it involved all sorts of disputes, conflicts, and verbal arguments Houston states that he spent a lot of time trying to strengthen the DCI's position He got considerable outside help from Secretary of the Navy James A Forrestal and

12. *(Continued)*

others In the summer of 1950, Forrestal had written a letter which he sent to DCI Hillenkoetter describing his views concerning the DCI's role as the top intelligence officer within the bureaucracy Hillenkoetter allegedly read the letter at a meeting of the senior intelligence chiefs, whereupon an Army general who headed G-2 looked up and said, "What's the problem, Hilly? You're the boss "

A second contribution which Houston views as significant for the office is the function of hand-holding and counseling Because of the rotational assignment policy elsewhere within the Agency, the General Counsel's office was one of the few islands of constancy In Houston's words "We were the only ones who were around for the whole time " This constancy put the office in a position of having witnessed the big picture over a long period of time and thus being able to provide counseling and legal guidance on the basis of both knowledge and experience

A substantial contribution Houston should have mentioned concerns his personal involvement in the U-2 project In the world of espionage, few success stories surpass the events surrounding the US decision to establish its first high altitude reconnaissance capability, the construction of the U-2 reconnaissance platform, and its operational deployment Most readers will recall the downing of Francis Gary Powers' U-2 over Sverdlovsk in central Russia on 1 May 1960 Few, however, have any idea of the origins of the U-2 and fewer still, the contributions this capability made to the national security Larry Houston played a major role in the birth of the U-2

Old hands will remember and younger officers may have studied "Open Skies," a US foreign policy proposal during the Eisenhower administration Behind it was the notion that each nation could fly over and photograph the other's fixed military installations, thereby ensuring no surprises The USSR would have none of this From these events flowed the idea that perhaps the US could build a special aircraft which could fly over and photograph the Soviet Union with impunity, far above the capability of Soviet fighters to intercept it and too high for Soviet ground to air missiles to reach it

Government working groups and at least one non-government committee, headed by Edwin Land of Polaroid fame, studied the feasibility of such an aircraft When the concept began to take shape, the responsibility for procuring and eventually deploying the aircraft fell upon the CIA, primarily because the Air Force concluded it could not provide the security deemed essential to do the job successfully

CIA officers, among them Richard Bissell, commenced work with one of the most innovative airplane designers in history, Kelly Johnson, of Lockheed Aircraft Corporation's famous "skunkworks " In December 1955 the President gave his approval to the project and in January 1956 Larry Houston met with Kelly Johnson to work out the contract for a number of U-2s Because of the sensitive nature of the project, for a considerable period Houston was the only attorney to get a clearance for it and thus had to write all the documents himself—the letter of intent, the contract, etc In a unique twist of contract requirements, CIA did not provide Lockheed with technical specifications of what it wanted Rather, it provided *performance* specifications which had to be met The

12. *(Continued)*

Houston

Agency did not care what the aircraft looked like, but the Agency knew what it wanted the aircraft to do

Houston told Johnson that he did not want a succession of change orders or enhancements which would increase costs once work on the contract was commenced without prior approval Johnson led off saying the Lockheed comptroller had determined the first 19 planes would cost between 26 and 27 million dollars Houston replied "That's too much, I only have 22 million to spend" Johnson said he thought he could do the job for less than the projected 26 to 27 million dollars The two men negotiated for some time and then resolved the impasse by inventing and employing a unique feature of contract law They established 22 million dollars as the total target or contract price, a figure which contained both cost and profit factors, and agreed they would review the entire matter about two-thirds through the contract If Lockheed's costs were running above the 22 million figure, CIA could lower Lockheed's profit factor If Lockheed was below the 22 million target figure, CIA could raise the profit factor Thus, there was a built-in incentive for Lockheed to hold costs below the target figure Houston recalls that CIA got the first 19 U-2s for about 19 million dollars and that Lockheed never asked the Agency to raise the profit factor

Through the skill, trust, and imagination of all involved, the first U-2 flew in August 1956, just nine months after the project was started This feat was and continues to be unparalleled in large systems design and development

Another case that Houston worked personally involved recouping a loss occasioned by the Agency when it was defrauded in an ore deal A delegation came to Frank Wisner, Director of OPC, and advised him that Japanese officers had squirreled away stores of tungsten ore during World War II This news came during a period when the US Government was building up its stockpiles of various ores, and other government departments expressed a clear interest in securing the ore Initially, the sellers produced one third of the contracted amount of ore which was assayed after delivery and found to be good tungsten When the remaining two thirds arrived, it was basically sludge with no monetary value at all, largely because operations people did not insist on the full terms of the contract as written by Houston Thus, the US Government was out a substantial amount of money. Colonel White, the DDA, charged Houston with developing and then implementing a plan to recoup the US Government's losses Houston went off to Tokyo for introductions into the Japanese business community, but after a number of discussions and negotiations, no satisfactory conclusion was reached Later, the Japanese came to Washington to negotiate further and Houston enlisted the aid of Phillips & Company, a New York firm which engages in arbitrage arrangements in ores

Phillips had been trying without success to break into the Japanese metals market, particularly the titanium market With US Government support, Phillips agreed with the Japanese if Phillips could secure a contract to purchase large quantities of titanium from Japan for the stockpiling effort, it would undertake, at no additional charge, to make available an amount of tungsten to the US Government equivalent to the dollar amount the government had lost on the bogus tungsten This rather anomalous proposal was eventually accepted and the US Government was made whole

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Times of Trouble

During Houston's tenure as General Counsel, not all Agency activities were successful and deserving of praise One monumental failure for the Agency, and indeed for the nation, was the effort to topple the Fidel Castro regime in Cuba and, in particular, the Bay of Pigs invasion in April 1961 Within the context of these efforts was the extremely controversial activity which was brought to the attention of the office prior to Houston's retirement—the attempt to assassinate Castro * The genesis of this effort is not known but in its first stage, it reposed in the Office of Security under then Director of Security Colonel Sheffield Edwards Castro had come to power in 1959 and by August of 1960 Edwards had been tasked by the then Deputy Director for Plans, Richard Bissell, to find someone who could assassinate Castro. The Office of Security officers assigned this task turned to a Las Vegas resident, Robert A Maheu, a private investigator and ex-FBI agent who worked for Howard Hughes, to line up people who could do the job Who first pointed to underworld figure John Rosselli is unclear but Rosselli was known to Maheu and Maheu apparently told Rosselli "certain senior government officers needed Rosselli's help in getting rid of Castro " Rosselli in turn introduced Maheu to "Sam Gold", true name, Momo Salvatore "Sam" Giancana, a gangster from Chicago, and "Joe", true name, Santos Trafficante, the reported Mafia chief of Cuba who was responsible for overseeing numerous gambling operations Through a series of misadventures and possibly even feigned attempts, the effort to do Castro in by putting poisoned pills in his food ultimately failed prior to the Bay of Pigs invasion

While a number of people, including Larry Houston, thought the operation had been closed down, it was in fact transferred to the Directorate of Plans under William Harvey of Berlin tunnel fame, and phase two commenced Harvey in April of 1962 reportedly asked to be put in touch with Rosselli Again, several schemes were examined and possibly attempted the poison pills for a second time, a proposed exploding seashell to be planted in Castro's favorite skin-diving spot, a diving suit which contained a breathing apparatus laced with tubercule bacillus to be given to Castro as a present By mid-February 1963, all of these either had failed or were squelched and Harvey terminated the operation

Larry Houston was first pulled into the operation in early April 1962 because during phase one Maheu had engaged a Florida private investigator to place an illegal bug in a Las Vegas hotel room Arthur J Balletti, an employee of the private investigator, had been caught, arrested, and was about to be tried Realizing that the whole matter could come unraveled if the trial went forward, Director of Security Edwards approached Houston for assistance, specifically, he wanted the Department of Justice to drop the prosecution of Balletti Thus, in April 1962, when Harvey was starting phase two, Houston was meeting with Justice to see what could be done about turning off Balletti's prosecution from phase one He met with Herbert J Miller, Assistant Attorney General (Criminal Division) and reported back to Edwards that Miller thought the prosecution could be stopped Via a 24 April 1962 memorandum, Miller advised Attorney

* The account given here is based primarily on the report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee) *Alleged Assassination Plots Involving Foreign Leaders* (US Government Printing Office, 1975)

12. *(Continued)*

General Robert F Kennedy that the national interest would probably preclude any prosecution based upon the wiretap Then on 7 May 1962, Houston and Edwards met with the Attorney General to explain the operation and how prosecution for the illegal wiretap in Las Vegas would be damaging to the national security This was a time when Bobby Kennedy was exerting enormous pressure and sparing no manpower to get a handle on organized crime, and Houston's mission obviously ran against the tide Houston relates that Kennedy was clearly upset, but not because of an effort to assassinate Castro and not because of attempts to use the Mafia for this purpose Kennedy was upset because he had not been consulted and was concerned some of his efforts to prosecute major Mafia figures would be jeopardized if the CIA had other undercover operations involving the Mafia If CIA was going to get involved with Mafia personnel again, Kennedy wanted to be informed first. Concerning Kennedy's demeanor, Houston stated· "If you have ever seen Mr. Kennedy's eyes get steely and his jaw set and his voice get low and precise, you get the definite feeling of unhappiness " Notwithstanding, the Attorney General agreed to help and the prosecution ended

By way of epilogue to this story, exactly who did what to whom in this operation may never be known Sheff Edwards and Bill Harvey are both dead of natural causes John Rosselli testified about his involvement in the operation before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee) on 21 and 24 June 1975 Sam Giancana, described as the Chicago crime syndicate boss, who reportedly was scheduled to testify before the Church Committee, was found dead in his suburban Oak Park, Illinois home on 28 June 1975 with one bullet hole in the mouth and five in the neck John Rosselli went out for a routine round of golf in early August 1976 and turned up 10 days later, stuffed into a 55-gallon oil drum found floating in the Intercoastal Waterway in south Florida. So far as the author knows, of the main group involved in the assassination attempt, only Santos Trafficante is still alive

McCarthy Era

A difficult time for the Agency and Houston occurred during the McCarthy era when there were dozens of so-called loyalty board cases Walter Pforzheimer handled the lion's share of these, but Houston became directly involved in two of them The first is the case of Cord Meyer, which is amply documented in Meyer's book, *Facing Reality* Meyer was a long-time Agency employee who rose to the rank of A/DDP before retiring An FBI report had been presented to the Agency's Director of Security which indicated Meyer had taken several unpopular and pro-Russian positions in a 1946-47 timeframe Meyer was suspended without pay for a considerable period of time but, following a loyalty board review, was exonerated and reinstated Houston, asked recently for his recollections and comments on the case, replied simply that the Director of Security at the time "had overreacted "

A second case was that of William Bundy, an analyst The issue was Bundy's possible involvement with Alger Hiss Hiss's brother, Donald, was a partner and William Bundy's father-in-law, Dean Acheson, was a senior partner in the prestigious Washington law firm, Covington and Burling When Alger Hiss first

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had to testify before Congress and was later tried and convicted of two counts of perjury concerning his relationship with Soviet spy Whittaker Chambers, Covington and Burling set up a defense fund to help pay for his legal expenses William Bundy contributed $200 on each occasion, a fact he had told the Agency during processing of his security clearance The FBI had a list of contributors to the defense fund and eventually the list found its way to the House Un-American Activities Committee

Reportedly, one day in July 1953, McCarthy needed a big, headline-producing story to cover or draw attention away from the sudden resignation of his committee's chief investigator, J B Matthews Walter Pforzheimer received a call about 9.15 a m. from Roy Cohn who asked that William Bundy be on the Hill by 11 a m. to testify Pforzheimer quickly realized the Agency's situation and went to the DDI, Bundy's supervisor The DDI, in turn, called DCI Allen Dulles who was at the White House

Dulles ordered Bundy on leave immediately and suggested strongly that he leave town for a few days Pforzheimer called Cohn back and advised him that Bundy was away on leave, whereupon Cohn stated that was "very funny" because he (Cohn) had called Bundy's office prior to his call to Pforzheimer and was told Bundy had just stepped out for a few minutes Cohn then demanded that Pforzheimer and Bundy's secretary be on the Hill to testify by 3 p.m Pforzheimer refused This produced the headlines McCarthy wanted He stood on the floor of the Senate and castigated Bundy and Pforzheimer By 5 p m , Pforzheimer had received a subpoena from the committee.

DCI Allen Dulles was very concerned about this and spoke to the White House Dulles and Houston then met with Senators McCarthy, Mundt, and others to try to work out a solution They expected a hostile reception Dulles led off by telling them bluntly that Bundy would not be a witness, whereupon McCarthy, who was apparently having one of his better days and no longer needed the headline, said "Okay, Allen " In addition, through the assistance of William Rogers, a Deputy Attorney General, and one of the members of the committee, Francis Fripp, Pforzheimer's subpoena was withdrawn

The case did not end there, however, and there was still the requirement to convene a loyalty board of five people from other government agencies. This was done and while it was determined there was no adverse information concerning Bundy, the board recommended that his employment be terminated anyway Frustrated, Dulles then turned to Houston for a solution, asking what he could do and could the Agency legally convene its own loyalty board Houston determined the Agency had the legal authority to do this, and the Attorney General agreed Accordingly, a board was put together composed of Agency employees and the case was equitably resolved

As a footnote to the Bundy case, McCarthy also requested (or issued a subpoena) for the CIA file on Bundy Allen Dulles, undoubtedly with advice from Houston, informed President Eisenhower that he would resign before he would turn over the file. The President backed Dulles and some say this was a turning point in the McCarthy phenomenon

12. *(Continued)*

Houston

Earlier in the McCarthy era CIA became involved in its first major court case, that of *United States v Harry A Jarvinen* Jarvinen, a source of CIA's Seattle contact office, worked for a travel agency and reported from time to time on the travels of certain of his clients In June 1952, he informed two CIA officers that a local attorney had made arrangments and purchased tickets for Owen Lattimore, a man McCarthy had claimed was a major Soviet espionage agent, to travel to Moscow While this was totally false, Jarvinen having made it up just "to tell someone something sensational and exciting," before the falsity of the story became known, Jarvinen had repeated it to the FBI, a report was made to the Department of State, and then a version of the story leaked to the press When the sensationalism died down and the facts began to be understood, the Department of Justice was directed to take action against Jarvinen It obtained a felony indictment under 18 USC 1001—generally, making false statements to a government officer

CIA concern, which took a while to crystalize because too many people seemed to be running with the action, focused on the possible testimony which would be required of the two CIA officers who first heard Jarvinen's tale The DDI and the IG, who both happened to be lawyers, were negotiating with the Department of Justice When this was sorted out and the Office of General Counsel was finally seized with the problem, Houston immediately recognized the seriousness of the case for the Agency Jarvinen was a CIA source and he had been promised source protection To renege on that promise even in this case would have had a chilling effect on the Agency's ability to retain sources and develop new ones

Without success, Houston argued with Department of Justice attorneys and the special prosecutor that the testimony of the FBI officer should be sufficient for prosecution purposes and that the two CIA officers were not needed Houston advised then DCI Smith to order each officer in writing to appear, if subpoenaed, give his name and address, but refuse to answer any further questions

At trial the officers did just as directed whereupon the judge stated he would probably have to hold them in contempt The prosecutor had promised Houston if this occurred that he (Houston) would be given an opportunity to argue on behalf of the officers Houston did so and outlined the points of law which supported a source protection theory, but the judge would not buy it Again, the witnesses refused to testify and the trial went on without them, resulting in a jury acquittal of Jarvinen

The judge then scheduled a hearing on the contempt issue and Houston, working with a prominent Seattle trial attorney, argued on their behalf The judge heard their arguments but still found the two officers in contempt and sentenced them to two weeks in jail At this, Houston enlisted the help of his former OSS chief, General William J Donovan, of the New York law firm, Donovan, Leisure, Newton and Irvine, who agreed to participate *pro bono* in an appeal of the case

Separate reviews of the law and facts surrounding the case led to the conclusion that this was not a good case to appeal and an adverse appellate opinion could result in a lot of bad law which would haunt the Agency for years But what about the two officers and their jail sentences? The only option left was

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12. *(Continued)*

a pardon by the President of the United States Houston recommended this action to the DCI and was strongly supported by Donovan and the Seattle trial attorney, the DCI directed Houston to get it done

After several frustrating weeks of dealing with the Justice Department and with Counsel to the President, Houston confessed to DCI Smith that he was getting nowhere Shortly thereafter Houston inexplicably received warrants of pardon for the two officers from the Pardon Attorney at the Department of Justice even though none of the formal documents requesting same had been filed The effect of a pardon is not only that an individual is forgiven for the crime and does not have to go to jail, but that the slate is wiped clean as if there had been no crime at all

Houston learned later from DCI Smith that a chance meeting between the DCI and the Attorney General in the White House had been the catalyst for the pardons The Attorney General had told the DCI he needed a little public support in Pennsylvania and the DCI, who was going to Pennsylvania a few days later to give a speech, suggested he could provide this if the Attorney General, in turn, would do a favor for him According to Houston, such a thing "could only happen in Washington "

Recollections

A number of senior Agency officers, some of whom are retired, were interviewed with respect to their recollections of Larry Houston Richard Helms described him as

> a lawyer who was constructive and helpful but not intrusive He kept his nose out of those things which did not concern him He was very steady and did not shake easily but more than anything else you got the feeling of substantial integrity when dealing with him

Houston is remembered by "Red" White as

> the kind of guy who was just as devoted and interested in rendering a correct legal opinion about little things that affected individual employees as he was about the big problems You could always count on him for his best effort whatever the facts

One senior officer has suggested if one made a careful study of the Agency's laws, regulations, and policies concerning personnel, insurance, pay, and all of the other administrative matters which have an impact daily upon CIA employees, he would find evidence of Larry Houston's vision and wisdom in all of them Houston participated on early panels and executive committees which established the basic career service concept that exists within the Agency today He was also instrumental in establishing the concept of a training program wholly contained within the Agency Also, when the Agency picked up the pieces and dealt with the survivors of the Bay of Pigs effort, Larry Houston moved out smartly to help the widows of the four Alabama Air National Guardsmen who were killed in the invasion while making bombing runs The widows were compensated in a manner akin to the benefits which are available to widows of staff employees killed in the line of duty He also worked to provide similar

12. *(Continued)*

benefits for the widows and children of the Cuban anti-Castro brigade members who were killed in the invasion

As the General Counsel, Houston had a certain stature and presence which permitted him to be embroiled in the most distasteful, unpleasant controversy and yet remain above the controversy and guide it to a successful resolution Indeed, he is a lawyer who solved problems The National Security Act (Sec 102(c)) contained a section giving the DCI peremptory authority to fire Agency employees Though time and administrative abuse have diluted the provisions somewhat, the section gives the DCI the authority to terminate the employment of any officer or employee of the Agency whenever he "deems such termination necessary or advisable to the interests of the United States " One clear purpose of this section is to terminate the employment of people who are security risks There were several early challenges to this authority but the Agency's view concerning its peremptory nature was sustained by the courts Subsequently, however, the Supreme Court ruled with respect to a Department of State termination case, *Service v Dulles*, that if an agency had regulations concerning the manner in which an employee was to be terminated, then those regulations must be followed

One former member of the Office of General Counsel, Milan C "Mike" Miskovsky, recalls writing a series of memorandums on this point and arguing in the first instance that the writing of regulations concerning termination caused a diminution of the DCI's special authority, and, secondly, if such regulations existed or were to exist, then the Agency, by law, would be bound to follow them Shortly thereafter the then Director of Personnel, Emmet Echols, wished to discharge a number of employees and have the DCI exercise his special termination authority, an action in which there was some question whether the regulatory procedures extant at that time had been followed In a meeting with Miskovsky and Houston, the Director of Personnel stated emphatically he was going to fire the individuals and no lawyer could tell him what his authority was in that regard In one of the few breaks with the reserved manner, Houston responded "Damn it, you will not fire these people," and they were not fired

Houston was willing to use a mix of the laws available to him to try to achieve a legitimate management purpose The Civil Service Retirement and Disability Act, which establishes the retirement annuities of most government employees, provided that an employee may retire at age 55 with 30 years service but could work until age 70 (Under the current law, there is no upper age limit) The CIA Disability and Retirement Act (CIARDS), which did not become law until October 1964, provides generally that an employee who is a participant may retire as early as age 50 but *must* retire at age 60 Agency management, believing that it was important to provide for flow-through of employees and headroom for younger employees, addressed the issue whether the Agency could adopt for its own purposes an administrative rule which *required* employees under Civil Service Retirement and Disability Act to retire at age 60, notwithstanding the language of the statute

After careful deliberations and Houston's review of the legal implications, such a rule was adopted and became known as the "age 60 policy " As might be expected, this "policy" was not popular with a number of employees and

12. *(Continued)*

many disputes arose Houston recalls the DCI designated him as the officer to talk to employees who wanted to challenge the policy and further, that many of them were "damned mad about it when they came into my office and still mad when they left "

Some have suggested that the club or lever which the Agency held over the heads of uncooperating employees to force them to retire at age 60 was the Director's special termination authority, Section 102(c) of the National Security Act of 1947, as amended While this issue almost always arose in Houston's conversations with these employees, he advised them the Director probably would not use his special authority in such a case and in fact, he, Houston would recommend that the Director not exercise it for the purpose of forcing an age 60 retirement

Despite its unpopular nature and the fact it is no longer applied, while it existed the "age 60 policy" helped assure an orderly flow-through of Agency careerists and provided the visible headroom which permitted the Agency to attract and retain bright young officers Houston himself retired at age 60

Style

Houston's managerial style both as to people and projects has been much discussed over the years Some former attorneys in Houston's office viewed his style of management as somewhat aloof, and yet a style which gave them free rein to use their intellect and legal skills to solve legal problems with only a casual reference to the boss to keep him informed Some have said that Houston did not like or felt uncomfortable in dealing with personnel matters and often delegated these to his deputy, John Warner One former member of the office, Walter Pforzheimer, relates that he believed he was a management problem for Houston because of his rather abrasive, outspoken manner On the other hand, he believes that he helped Houston "loosen up a little" over the years There are many examples of the Houston free-rein managerial style Paramount among these were two important prisoner exchanges which members of the office worked on with only general, directional input from the boss The first was the Abel-Powers exchange in which the United States exchanged a Soviet illegal intelligence officer, Colonel Rudolph Abel, for U-2 pilot Francis Gary Powers This was controversial inasmuch as Abel had been tried and convicted and had reposed in the Federal Penitentiary in Atlanta without giving the US Government any information about the intelligence he had gathered or the intelligence apparatus he worked for Notwithstanding, an OGC lawyer worked almost full time on the exchange for a number of months with an outside lawyer, James B Donovan, the former General Counsel of OSS, and the exchange was finally made Donovan, of the Brooklyn law firm, Waters and Donovan, had been Abel's court-appointed lawyer in his espionage trial and had taken the case all the way to the Supreme Court only to lose in a 5-4 decision A second case was the exchange of the Bay of Pigs prisoners for medical supplies A substantial number of OGC lawyer hours were expended on this arrangement with James B Donovan again playing a large role, and Larry Houston, in his management style, providing general, directional guidance

12. *(Continued)*

Houston

Those who thought Houston's quiet and reserved manner and free-rein management style implied a lack of toughness were in for a rude awakening It was unwise to push him too far A case in point is that of an officer who had been selected to be the OGC representative in the Far East He was a lawyer who had not been in OGC prior to his selection for the assignment Following training and integration into OGC, and following the shipment of his household effects to the Far East, the officer met with Houston and said he would not go on the assignment unless he first received a promotion His timing apparently was chosen to ensure the maximum leverage against the General Counsel It is reported that Houston had two or three conversations with the individual, who kept pushing Houston stopped talking and abruptly canceled the assignment

OGC had a touch football team which played in an intra-Agency league Someone suggested courtesy required that the General Counsel be asked if he would like to play To everyone's surprise Houston accepted, showed up at the game, and played well, catching several passes Following the game, there was another surprise Houston went with the rest of the team to the nearby apartment of a junior officer where they all showered, changed, and got at the beer The contrast between this setting and Houston's reputation for aloofness was mind-boggling to those who were there Years later, they still talk about it

Following his retirement in 1973, Houston has participated in numerous intelligence-related panels, given informal advice to follow-on General Counsels, and has written articles and letters to the editor clarifying intelligence activities and law He is active in a number of charitable endeavors Chief among these have been the society to preserve the Woodrow Wilson house in Northwest Washington and the Family and Child Services of Washington, Inc Houston provides *pro bono* legal services to the latter organization and often represents it in court

He is, then, a man whose interests and endeavors parallel those of his parents Houston the public servant Houston the supporter of charities involving the house of a famous person and the welfare of orphans We who follow him in intelligence and, indeed, his country are fortunate to have had his service for so long as the Agency's first General Counsel Lawrence R Houston made a difference

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Jo Clare Bennett, Office of the General Counsel, assisted Mr Breneman in the research for this article.

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13. "Presidential War Powers," Fred F. Manget (Summer 1987, Volume 31/2)

A constitutional basis for foreign intelligence operations

PRESIDENTIAL WAR POWERS

Fred F. Manget

Two hundred years ago a group of lawmakers sat down in the high heat of a Philadelphia summer and drafted the most remarkable document in the history of democracy, the United States Constitution Anniversaries are occasions for reflection on the original events and their past and current influence. For members of the intelligence services, this Bicentennial provides an appropriate time to consider the constitutional connections of their profession

The legal bases of all federal activity are found in the separation of powers established by the Constitution. The fear of tyranny led the founders to create a system of checks and balances that is reflected in the Constitution's allocation of federal governmental powers among three coequal branches—executive, legislative, and judicial This essay proposes that the most important constitutional sources of authority for the Executive Branch to conduct foreign intelligence operations are the war powers granted to the President

Foreign Intelligence Operations

Definitions of foreign intelligence operations as functions of the Executive Branch are as varied as those who write about intelligence In its broadest sense, intelligence means knowledge, the kind of knowledge that "our state must possess regarding other states in order to assure itself that its cause will not suffer nor its undertakings fail because its statesmen and soldiers plan and act in ignorance "[1] Intelligence deals with all the things that should be known before a course of action is initiated It is that information, gathered and analyzed for policymakers in government, that illuminates the range of choices available and enables the policymakers to exercise judgment.[2] In addition to the collection and analysis of information, foreign intelligence operations now include counterintelligence and covert action functions[3] The best synthesis of the definitions is that foreign intelligence operations are (i) activities involving the collection and analysis of information about the intentions and capabilities of foreign governments, groups, and individuals, (ii) secret actions designed to influence events abroad, and (iii) counterintelligence—the countering of intelligence operations directed against the United States by foreign governments or organizations

[1] S. Kent, *Strategic Intelligence for American World Policy* 3 (1948)

[2] Task Force on Intelligence Activities of Second Herbert Hoover Commission, quoted in A Dulles, *The Craft of Intelligence* 9 (1963), Report of Rockefeller Commission 6 (1975)

[3] S Rep No 755, 94th Cong , 2d Sess , Book I at 31 (1976) (hereinafter cited as "Church Committee Report"), K deGraffenreid, "Intelligence and the Oval Office," 7 *Intelligence Requirements for the 1980's· Intelligence and Policy* 11-12 (1986)

13. *(Continued)*

The essential fact common to all definitions of foreign intelligence operations is that such operations are concerned with the relationships between the United States and the rest of the world Because of that, the Constitution implicitly allocated the power and authority to conduct such operations to the President, and through him to the individuals and organizations that make up the intelligence community in the Executive Branch.

Constitutional Authority To Conduct Foreign Intelligence Operations

When the chain of authority for conducting foreign intelligence operations is examined, most searches stop at the level of statutory or executive order authorities The National Security Act of 1947 and the Central Intelligence Agency Act are enactments of statutory law by the US Congress authorizing foreign intelligence operations, and for each fiscal year since 1979 Congress has enacted a statute authorizing appropriations for intelligence activities that has often contained substantive authorities [4] Executive Order 12333 is an enabling grant of similar authority from the President that sets out approved activities of the organizational members of the intelligence community [5]

But there are deeper sources of authority that lie in the Constitution itself and that would operate in the absence of any act of Congress or executive order to authorize foreign intelligence operations Conventional legal analysis describes four constitutional sources that grant the President the authority to conduct such operations

(1) The executive power [6]

(2) The execution-of-laws power [7]

(3) The foreign affairs power [8]

(4) The war powers [9]

The constitutional authority to conduct foreign intelligence operations in peacetime is usually implied from a combination of the first three powers listed above, with the most weight ascribed to the foreign affairs power.[10] But it is the

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[4] Specific authorities are located in the National Security Act of 1947, as amended, at 50 U S C § 402(d) and in the Central Intelligence Agency Act of 1949, as amended, at 50 U S C § 403f and § 403g For an example of a specific substantive directive from Congress in an Intelligence Authorization Act, *see* Intelligence Authorization Act for Fiscal Year 1984, Pub L 98-215, § 108, 97 Stat 1473 (1983)

[5] Exec Order No 12333, 3 C F R 200 (1981 Comp), *reprinted in* 50 U S C A § 401 Note (1986)

[6] US Constitution, art II, § 1, cl 1, *The Federalist* No 75 at 476 (A Hamilton), 5 *T Jefferson, Writings* 162 (Ford ed 1892), 7 Hamilton, Works 76, 81, E Corwin, *The President, Office and Powers 1787-1957*, at 416-18 (4th ed 1957), L Henkin, *Foreign Affairs and the Constitution* 42-43 (1972)

[7] US Constitution, art II, § 3, L Henkin, *supra* note 6, at 54-56

[8] US Constitution, art II, § 2, cl 2, *United States v Curtiss-Wright Export Corp* , 299 U S 304, 319 (1936), L Henkin, *supra* note 6, at 45-50

[9] US Constitution, art II, § 2, cl 1, L Henkin, *supra*, note 6, at 50-54

[10] Church Committee Report, Book I at 33-35, Note, *The Extent of Independent Presidential Authority to Conduct Foreign Intelligence Activities*, 72 Geo L J 1855, 1868-1874 (1984)

13. *(Continued)*

war powers that give the most direct and fundamental authority to the Executive Branch to conduct foreign intelligence operations at any time.

The War Powers

A. *Historical Development*

The President's war powers stem from the Commander in Chief clause of the Constitution

> "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States "[11]

When the Constitution was drafted, the leading theorist of presidential powers, Alexander Hamilton, wrote that the Commander in Chief clause meant nothing more than the establishment of the President as the civilian commander of the forces for wars declared by Congress [12] In that early view, the President would only carry out the policy of war as set by Congress

In the 200 years that have passed, the scope of presidential war powers has expanded greatly The role of the President as Commander in Chief is the principal foundation for that expansion, and is included in a larger panoply of powers related to war that belong to the President The war powers allocated by the Constitution are shared by both the President and Congress,[13] but the founders generally believed that in areas of foreign policy and war the President would have to assume the leading role [14] Madison and Jefferson, as well as others, believed that the most serious threat to their concept of separation of powers was the usurpation of power by the Legislative Branch [15] The Constitution makes Congress responsible for raising and supporting armed forces and *declaring* war, but it is the President who has always been responsible for *making* war [16]

American history has numerous instances of the President acting first and citing authority later For example, President Thomas Jefferson dispatched a squadron of frigates to the Mediterranean to deal with pirate ships of the Barbary States, which had been attacking American merchant ships Jefferson told Congress later that he lacked the power to have the Navy go beyond purely defensive action without congressional sanction Despite that claim of limited war powers, Jefferson's orders to Commander Dale, who was in command of the squadron of US Navy ships, were assertions of expansive warmaking power Dale was ordered that, should he discover all or any of the Barbary States had declared war on the United States, his ships were to "chastise their insolence by

[11] US Constitution, art II, § 2, cl 1

[12] *The Federalist* No 69 (A Hamilton)

[13] US Constitution, art I, § 8

[14] Goldsmith, "Separation of Powers and the Intent of the Founding Fathers," *Congress, the President and Foreign Policy*, 7 (ABA Proceedings 1984)

[15] *Id* at 6

[16] The framers of the Constitution actually substituted "declare" for "make" in art I, § 8, which described the war powers allocated to the Congress *Id* at 8

13. *(Continued)*

sinking, burning, or destroying their ships wherever you shall find them "[17] (It is interesting to note that, nearly 200 years ago, the forces of the Barbary States referred to themselves as *mujahedin*—"holy warriors ") That order was issued by President Jefferson without authorization by Congress Since that time the development of the President's war powers has matched the development of war

Lincoln in particular asserted extraordinary powers in the unprecedented national crisis of civil war [18] During the World Wars both Wilson and Roosevelt exercised expanded powers under their authority as Commander in Chief.[19] Since Jefferson's dispatch of Commander Dale, presidents have claimed the authority to send troops abroad in more than 125 instances without congressional approval [20] Naval vessels have shown the flag around the world A fleet under Commodore Perry was sent to open up Japan to Western trade and influence Troops protected American lives in China during the Boxer rebellion Marines landed in Nicaragua in the 1920s, in Lebanon in 1958 and again in 1984, and our armed forces entered the Dominican Republic in 1965 A naval quarantine was imposed during the Cuban missile crisis in 1962 Initial American involvement in the Korean and Vietnamese hostilities was based on presidential authority alone It is also clear that the President has the authority to enter armistice agreements and even wartime agreements that determine major postwar political systems and dispositions of conquered enemies [21]

It is also evident that Presidents have delegated to their subordinates almost every part of their war powers authority. Courts have not been inclined to invalidate such delegations [22]

Thus, there is little dispute that members of the intelligence community who during a time of declared war conduct foreign intelligence operations in aid of military objectives are operating under constitutional authority that comes directly from the war powers of the President These war powers grew broadly in response to historical necessities, and support the President's authority each time he sends in the troops But most foreign intelligence operations during this century have in fact occurred during times when no war has been declared Despite extensive armed conflict in Korea and Vietnam and

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[17] Quoted in *id* at 11

[18] L Henkin, *supra* note 6, at 51, L Fisher, *Constitutional Conflicts Between Congress and the President* 289 (1985)

[19] S Morrison, H Commager and W Leuchtenburg, *The Growth of the American Republic*, at 377-410 and 549-617 (6th ed 1969); L Fisher, *supra* note 18, at 289-290

[20] H R Rep No 127, 82nd Cong , 1st Sess 55-62 (1951), Tansill, *War Powers of the President of the United States With Special Reference to the Beginning of Hostilities*, 45 Pol Sci Q 1, 37, 47 (1930), *Wall Street Journal*, Jan 15, 1987, at 22, col 1 Congress made an attempt to check the growth of Presidential war powers by passage of the War Powers Resolution in 1973 It restricts the executive's authority to involve the United States in foreign hostilities without Congressional approval War Powers Resolution, 50 U S C A §§ 1541-48 It has not generally been a success, and is subject to a Presidential claim that the resolution improperly infringes on his inherent constitutional war and foreign affairs powers See,J Nowak, R Rotonda, J Young, *Constitutional Law* 217 (2d ed 1983), W Reveley, *War Powers of the President and Congress* 248-262 (1981)

[21] L Henkin, *supra* note 6, at 52

[22] Russell Motor Car Co v United States, 261 U S 514 (1923), Rose v McNamara, 375 F 2d 924 (D C Cir 1967), *cert denied* 389 U S 859

13. *(Continued)*

lesser hostilities all around the world, the only declared wars since 1900 have been the two World Wars Yet foreign intelligence operations have been conducted constantly and have expanded enormously in scope since the end of World War II

As a result, for most foreign intelligence operations, lines of constitutional authority are less clear They generally are traced from the President's foreign affairs power In a landmark case, the United States Supreme Court refused to sanction unlimited presidential prerogatives based on national security, and a concurring opinion by Justice Jackson set out the controlling legal analysis of the respective foreign affairs powers of the President and Congress [23] When the President acts pursuant to an expressed or implied authorization of Congress, his authority is at its maximum because it includes all of his power in his own right plus all that Congress can delegate When the President acts without congressional authorization, he is in a gray zone where he can rely only on his own independent powers When the President takes actions incompatible with the expressed or implied will of Congress, his power is at its lowest because he can rely only on his own constitutional powers minus any constitutional powers of Congress

Reliance on the foreign affairs power alone for constitutional authority may not be sufficient if foreign intelligence operations fall into either of the situations of lessened presidential authority Because Congress is ill-equipped to act swiftly to provide specific authorities to the President, to keep secrets, and to provide clear and consistent foreign affairs policies, it is likely that when the President conducts foreign intelligence operations he will often have to operate in the gray area where Congress has not acted or even in the face of congressional opposition In the conduct of foreign intelligence operations, the President's strongest authorities are the executive war powers

B *Judicial Interpretation of War Powers Authority*

There are a limited number of cases dealing with the specific war powers authority of the Executive Branch Nevertheless, several clear principles have emerged from them

1 Conduct of War

The President has very wide discretion in conducting wars. The strategy, objectives, and methods of waging war are squarely within his constitutional authority. The Supreme Court has stated that

> As Commander in Chief, (the President) is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy [24]

Other federal courts have been in accord [25] The President has wide

[23] Youngstown Sheet and Tube Co v Sawyer, 343 U S 579 (1952) (Jackson, J , concurring)

[24] Fleming v Page, 50 U S (9 How) 603, 615 (1850)

[25] E g , Nordmann v Wodring, 28 F Supp 573, 576 (D Ok 1939) See L Tribe, *American Constitutional Law* 174 (1978)

13. *(Continued)*

latitude in action because the nature of modern warfare requires centralized command and control for the successful prosecution of a war [26] The total war power shared by the President and Congress grants them authority to use all means necessary to weaken the enemy and to bring the struggle to a successful conclusion, and has very few limits [27] "While the Constitution protects against invasions of individual rights, it is not a suicide pact "[28] Thus, *how* a war is to be waged is a matter of presidential authority subject only to regular constitutional restrictions

2 Self-Defense

The President has constitutional authority to order defensive military action in response to aggression without congressional approval This theory of self-defense has justified many military actions, from the Barbary Coast to the Mexican-American War to the Tonkin Gulf [29] The Supreme Court has agreed In *The Prize Cases*, it found that President Lincoln had the right to blockade southern states without a congressional declaration of war "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority "[30] In a case arising out of the Vietnam war, the defendant claimed that draft law was unconstitutionally applied to him because Congress had not declared war The court rejected that claim, stating that on the basis of the Commander in Chief power, "Unquestionably the President can start the gun at home or abroad to meet force with force "[31] When the President acts in defense of the nation, he acts under war powers authority

3 Protection of Life and Property

The President also has the power to order military intervention in foreign countries to protect American citizens and property without prior congressional approval [32] This theory has been cited to justify about 200 instances of use of force abroad in the last 200 years [33] The theory was given legal sanction in a case arising from the bombardment of a Nicaraguan port by order of the President in 1854, in retaliation for an attack on an American consul The court stated that it is the President to whom " citizens abroad must look for protection of person and property The great object and duty of

[26] Schueller v Drum, 51 F Supp 383, 387 (E D Pa 1943)

[27] United States v MacIntosh, 283 U S 605, 622 (1931), Ebel v Drum, 52 F Supp 189, 194 (D Mass 1943)

[28] Kennedy v Mendoza-Martinez, 372 U S 144, 160 (1983) See Hirabayashi v United States, 320 U S 81 (1943)

[29] *The "Yale Paper" – Indochina The Constitutional Crisis*, 116 Cong Rec S7117-S 7123 (May 13, 1970), L Fisher, *supra* note 18, at 292-4, L Tribe, *supra* note 25, at 175

[30] The Prize Cases, 67 U S (2 Black) 635, 668 (1863) See "The Brig Amy Warwick," 67 U S (2 Black) 674 (1863)

[31] United States v Mitchell, 246 F Supp 874, 898 (D Conn 1965)

[32] *The "Yale Paper," supra* note 29

[33] L Fisher, *supra* note 18, at 294

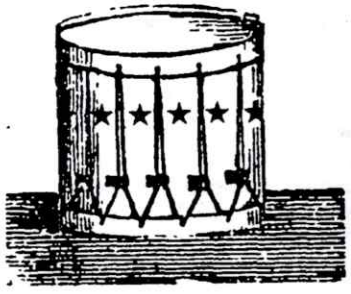
13. *(Continued)*

Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home "[34] Other cases have been in accord [35] The President may use force or any other means to protect American citizens in foreign countries under his war powers authority This extends even to a retaliatory military strike against a country supporting terrorist acts against Americans, which occurred in April 1986 when US Navy and Air Force aircraft bombed the modern Barbary Coast nation of Libya

4 Collective Security

The President may also authorize military operations without prior congressional approval pursuant to collective security agreements such as NATO or OAS treaties Unilateral presidential action under these agreements may be justified as necessary for the protection of national security even though hostilities occur overseas and involve allies [36]

5 National Defense Power



The President's war powers authority is actually a national defense power that exists at all times, whether or not there is a war declared by Congress, an armed conflict, or any other hostilities or fighting In a recent case the Supreme Court upheld the revocation of the passport of a former CIA employee (Agee) and rejected his contention that certain statements of Executive Branch policy were entitled to diminished weight because they concerned the powers of the Executive in wartime The Court stated "History eloquently attests that grave problems of national security and foreign policy are by no means limited to times of formally declared war "[37] Another court has said that the war power is not confined to actual engagements on fields of battle only but embraces every aspect of national defense and comprehends everything required to wage war successfully [38] A third court stated "It is—and must be—true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means "[39]

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[34] Durand v Hollins, 4 Blatch 451, 454, 8 Fed Cas 111 (no 4186) (C C S D N Y 1860)

[35] See *In re* Neagle, 135 U S 1 (1890), Slaughter-House Cases 83 U S (16 Wall) 36, 79 (U S 1872)

[36] United States v Mitchell, 246 F Supp 874, 898 (D Conn 1965), *The "Yale Paper," supra*, note 29

[37] Haig v Agee, 453 U S 280, 303 (1981) Cessation of hostilities is not necessarily the end of war Woods v Cloyd W Miller Co , 333 U S 138, 141 (1948)

[38] Schueller v Drum, 51 F Supp 383, 386-7 (E D Pa 1943) See Ebel v Drum, 52 F Supp 189, 194 (D Mass 1943), United States v Mitchell, 246 F Supp 874, 898 (D Conn 1965)

[39] Overseas Media Corp v McNamara, 385 F 2d 308, 314 (D C Cir (1967))

13. *(Continued)*

Thus, the Executive Branch's constitutional war powers authority does not spring into existence when Congress declares war, nor is it dependent on there being hostilities It empowers the President to prepare for war as well as wage it, in the broadest sense It operates at all times

6 Role of Military

The fundamental function of the armed forces is to fight or to be ready to fight wars [40] The Supreme Court has recognized the existence of limited, partial, and undeclared wars [41] Thus, there is a judicially recognized and legitimate activity of the armed services in times of no armed conflict that stems directly from the war powers authority of the President That activity is the preparation for the successful waging of war, which may come in any form or level of conflict Any actions of the Executive Branch that are part of the fundamental functions of the armed services in readying for any type of hostility are based on constitutional war powers authority of the President

7 Foreign Intelligence Operations

The President is authorized to conduct foreign intelligence operations by his constitutional war powers This authority is derived from the Constitution itself and does not depend on any grant of legislative authority conferred on the President by Congress [42] In a case where CIA sued a former employee (Marchetti) to enjoin him from publishing a book in violation of his secrecy oath and agreement, the court stated "Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the nation as the Chief Executive and as Commander in Chief of our armed forces Const , art II, 2 "[43]

In another case, the court said

> Congress and the court recognize that in this time of global tension and distrust, the United States must have an efficient means of acquiring information about other countries, information not obtainable except by covert means It is a legitimate function of the Executive to provide for such intelligence operations and to maintain their secrecy [44]

The conclusion to be drawn from the principles outlined above is that to the extent foreign intelligence operations are directed toward preparation for

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[40] Curry v Sec'y of the Army, 595 F 2d 873, 877 (D C Cir 1979), citing Toth v Quarles, 350 U S 11, 17 (1955)

[41] Talbot v Seeman, 5 U S (1 Cr) 1 (1801), Bas v Tingy, 4 U S (4 Dall) 36 (1800)

[42] Chicago & Southern Air Lines, Inc v Waterman S S Corp , 333 U S 103, 111 (1948), United States v Curtiss-Wright Export Corp , 299 U S 304, 319-20 (1936), Totten v United States, 92 U S 105 (1875), U S v Butenko, 318 F Supp 66, 71 (D N J 1970), *aff'd* 494 F 2d 593, *cert denied* 419 U S 881 Note, however, that cases acknowledging sweeping Presidential foreign affairs powers generally involve situations where Congress has implicitly or explicitly ratified the actions taken by the President, either prospectively or after the fact There is no well-developed body of case law about the limits of Presidential foreign affairs and war powers in the gray area where congressional approval or even acquiescence cannot be implied

[43] United States v Marchetti, 466 F 2d 1309, 1315 (4th Cir 1972), *cert denied* 409 U S 1063

[44] Bennet v U S Dept of Defense, 419 F Supp 663, 666 (S D N Y 1976)

13. *(Continued)*

any armed conflict or the conduct of any military or paramilitary activities, they spring directly from the powers granted to the Executive by the war powers clause of the Constitution This chain of authority exists and operates in the absence of congressional action and even despite congressional opposition to particular foreign intelligence operations And, in fact, almost all foreign intelligence operations are directed toward war or the potential for war because of the nature of modern armed conflict and the current state of relations between nations

Foreign Intelligence Operations as War

A *Historical Role*

Foreign intelligence operations have been an integral part of the conduct of armed conflict throughout history As described in the Old Testament, Moses was in the wilderness with the children of Israel when he was directed by God "to spy out the land of Canaan "[45] Moses sent a ruler of each of the tribes of Israel to gather intelligence on the Canaanites, who would soon be his enemies, to see the land and the people, and to determine whether they were strong or weak [46] Joshua sent men into Jericho to "spy secretly" before his great assault on the walled city They stayed in the house of Rahab, the harlot, who concealed them and later got them out of the city with their intelligence The Israelites destroyed Jericho and its people utterly, except for Rahab and her family [47]

Four centuries before Christ, a Chinese military strategist named Sun Tzu wrote a classic treatise on war and included a chapter entitled "Employment of Secret Agents "[48] In that treatise, Sun Tzu wrote

> The reason the enlightened prince or the wise general conquer the enemy whenever they move and their achievements surpass those of ordinary men is foreknowledge What is called "foreknowledge" cannot be elicited from spirits, nor from the gods, nor by analogy with past events, nor from calculations It must be obtained from men who know the enemy situation [49]

The history of the great wars fought by the Greeks is filled with examples of foreign intelligence operations that were integral parts of the struggles They range from mythology (the Trojan Horse) to historical descriptions by Herodotus of intelligence gathered for use in battles fought against Xerxes, such as Thermopylae and Marathon [50] Hannibal, Edward III at Crecy, and Queen Elizabeth I were some of the wartime leaders who depended on intelligence to win vital battles [51] When the history of foreign intelligence operations is

[45] *Numbers* 13

[46] *Id*

[47] *Joshua* 2 See also 1 *Samuel* 28 for an example of God providing Saul with military intelligence before his last great battle with the Philistines

[48] Sun Tzu, *The Art of War* ch 13 (S Griffith trans 1963)

[49] *Id*, at 144-45

[50] A Dulles, *supra* note 2, at 14

[51] *Id*, at 16-20

13. *(Continued)*

discussed, it is inevitably a story of war [52]

The American experience is similar George Washington used intelligence operations as a natural part of his strategy in defeating the British Army, writing to one of his officers

> The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is that you keep the whole matter as secret as possible For upon secrecy, success depends in most enterprises of the kind, and for want of it they are generally defeated [53]

The War of Independence generated many foreign intelligence operations that were important to the ultimate American victory, including the exploits of an American sculptress in London and a Swiss journalist at The Hague [54] Lincoln used his constitutional authority to hire secret agents in the Civil War [55] There is also a painful memory One of the great failures of US intelligence was the surprise attack on Pearl Harbor, which brought America into World War II [56]

Professional intelligence officers who have written studies of American intelligence operations comment extensively on the connection between war, military operations, and intelligence activity For example, former Director of Central Intelligence Allen Dulles attributed the paramount modern emphasis on the military aspects of foreign intelligence to the growth in the 19th century of large armed forces [57] Ray Cline, another former high-ranking CIA official, describes how the central intelligence establishment in the United States was born in World War II because the lack of coordination hampered the intelligence activities of each armed service [58] A former Executive Director of CIA writes that, "Unless we have advance and accurate intelligence, we could well prepare for the wrong war, at the wrong place, and the wrong time "[59]

Also, covert action operations are often military in character. Paramilitary activities in Chile, Angola, Congo, Iran, Cuba, Laos, Dominican Republic, Guatemala, South Vietnam, and Nicaragua have been publicly described They involved aspects of armed conflict ranging from supplying war material to

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[52] S Breckinridge, *The CIA and the U S Intelligence System* 3 - 5 (1986)

[53] *Writings of George Washington* 8 478-479 (J Fitzpatrick ed 1933) This was a letter to Col Elias Dayton dated 26 July 1777 *See* CIA v Sims, 471 U S 159, 105 S Ct 1881, 1889 n 16 (1985) where the letter is quoted

[54] Central Intelligence Agency, *Intelligence in the War of Independence* 17 (1976)

[55] Totten v United States, 92 U S 105 (1875)

[56] L Kirkpatrick, *The Real CIA* 258 (1968)

[57] A Dulles, *supra* note 2, at 22 *See* M Lowenthal, *The Central Intelligence Agency Organizational History* 2 (1978) (Congressional Research Service Report No 78-168F)

[58] R Cline, *The CIA Under Reagan, Bush and Casey* 23-129 (1981) Cline cites an appropriate descriptive analogy of intelligence guiding the "shield" and "sword" of the nation, at 12

[59] L Kirkpatrick, *supra* note 56, at 285 Former high-ranking intelligence officials uniformly comment on the martial aspects of foreign intelligence operations E g , W Colby, *Honorable Men* 470-471 (1978), V Walters, *Silent Missions* 612-613, 621 (1978)

13. *(Continued)*

training troops for combat to actual operations in support of armed forces [60]

It is clear that almost every foreign intelligence operation in American history has been concerned with matters relating directly or indirectly to the intentions and capabilities of foreign groups or nations to wage war against America or its allies.[61] Foreign intelligence operations have been and remain an innate part of war and the preparation for war, and thus the President may conduct such operations under constitutional war powers authority

B *Nature of Modern Warfare*

The nature of modern warfare makes foreign intelligence operations more than ever an integral part of making war and providing for national security. Because of the role such operations play in all aspects of expanded national security necessities, the constitutional war powers of the Executive Branch extend to encompass the activities of the intelligence community

1. Total War

Students of the history of war agree that the nature of warfare has changed significantly during the 200 years since the Constitution was written [62] Since the time when armies were small and generally composed of professional soldiers, the scope of participation of otherwise civilian populations in warfare has grown enormously Strategic objectives have expanded beyond merely defeating an army on a relatively narrow field of battle to the destruction of cities and industrial bases, the decimation of civilian populations, and the wrecking of entire economic and political systems [63] Weapons have become incredibly potent, and with the development of nuclear weapons and missile delivery systems no area on Earth is beyond the reach of an all-out superpower war Technological advances in warfare have ensured that entire populations can be affected directly and quickly.[64] World Wars I and II were general wars characterized by total involvement entire populations mobilizing, huge armed forces composed of many millions of combatants, battles fought all over the world; entire economies geared for production of war material, and development and use of new weapons of vast power and destructiveness against civilian targets [65]

In an era of nuclear weapons involving the strategies of deterrence and mutual assured destruction, the avoidance of war is as important a constitu-

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[60] S Breckinridge, *supra* note 52, at ch 15, 16, Tovar, "Covert Action," *Intelligence Requirements for the 1980's Elements of Intelligence* 67 (1979), See "Military Construction Appropriations Act for Fiscal Year 1987," title II, Pub L 99-500 (reprinted in 132 Cong Rec H10685 *et seq* (daily ed Oct 15, 1986), renumbered as Pub L 99-591, Cong Q November 15, 1986, at 2920, See President's message to Congress regarding Pub L 99-591 in 132 Cong Rec 51558 (daily ed Feb 25, 1986), B Smith, *The Shadow Warriors* xvi, 418, 419 (1983), Church Committee Report, *supra* note 3, at Book I, 35-38

[61] Church Committee Report, *supra* note 3 at Book VI, 7, 21, 24, 64, 76, 137, 243

[62] E g, Q. Wright, *A Study of War* (1941), M Howard, *Studies in War and Peace* 35-36, 186-190, B Liddell Hart, *The Revolution in Warfare* (1946), Smoke, "The Evolution of American Defense Policy," in *American Defense Policy* 94, 97-98, 100-103 (5th ed 1982)

[63] E g, M Howard, *The Causes of War* 87, (1983), Smoke, *supra* note 62, at 101-102

[64] E g, Inspector General of the Army Report, *Use of Volunteers in Chemical Agent Research* 18 (March 10, 1976)

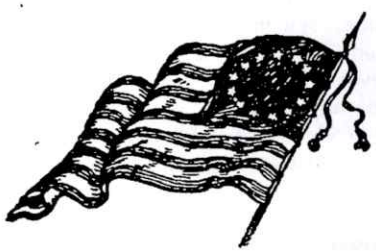
[65] E g, M Howard, *supra* note 62, at 190-193, Smoke, *supra* note 62, at 97

13. *(Continued)*

tional responsibility of the President as is the making of war In a total, general war involving a massive exchange of atomic weapons there would be no victory, only defeat, and the likelihood that the United States could not survive as a nation [66] Part of the oath required of the President by Article II, section 1 of the Constitution states that the President swears to preserve, protect, and defend the Constitution Preserving, protecting, and defending the Constitution would be meaningless if the American nation and government were destroyed by a general nuclear war Avoiding such a war is part of the national defense entrusted to the President Thus the President's war powers, used in national defense, give him the authority to conduct foreign intelligence operations designed to avoid general war at least to the same extent that they give him the authority to wage war

In addition, because general war is a comprehensive and all-encompassing undertaking, there is very little that is not relevant to the conduct of a general war Matters that arguably might not be martial in a time of general peace could nonetheless assume significance to a President commanding a total war effort Intelligence operations to determine the annual crop yield of a country are clearly part of strategic military activity in a general war when an army of 10 million soldiers must be fed by that crop yield

2 Cold War



Another part of modern warfare in the post-World War II era has been the cold war It is a corollary of the nature of total war. when the price for a general war is prohibitive, nations inimical to each other will clash on all levels short of armed hostilities A cold war is a struggle for ascendancy involving all aspects of national security economic, political, technological, sociological, and ideological Military competition is also pervasive, and extends up to a point just short of actually conducting warfare The United States since 1945 has been locked in a cold war of varying levels of intensity with the USSR and its satellite countries In fact, the United States has never been really at peace with the communist countries, wrote Allen Dulles [67] The threat of communist expansion gave meaning to all modern American military alliances and was central to all post-World War II strategic national defense planning [68] The USSR became the United States' "principal adversary" in peace [69] The evolution of the US

[66] M Howard, *supra* note 63, at 94-96, H Kissinger, *Nuclear Weapons and Foreign Policy* (1957), Jervis, "Why Nuclear Superiority Doesn't Matter," 94 *Pol Sci Q* 617 (1979-80)

[67] A Dulles, *supra* note 2, at 54

[68] M Bundy, "Friends and Allies," 41 For Aff 39 (1962), Subcomm on National Security and International Operations of Senate Comm on Government Operations, 89th Cong , 1st Sess , Conduct of National Security Policy, Selected Readings 100 (Truman Doctrine), 104 (Marshall Plan) (1965)

[69] Church Committee Report, *supra* note 3, Book I at 19

13. *(Continued)*

intelligence community after World War II is a major part of the history of the American effort to come to grips with the spread of communism and the growing power of the USSR.[70] Our relationship with Russia is one of a protracted conflict.[71] Indeed, Russian and American naval forces brush each other daily, a situation described by Admiral James Watkins (former Chief of Naval Operations) as an "era of violent peace."[72]

War by proxy has also developed as a collateral of the cold war. In certain third-world countries, superpowers support opposing armed forces with material and training. The fighting is thus done by proxy, with victory meaning domination of a country by forces supposedly owing loyalty to the superpower supporting them. Nicaragua, Afghanistan, Ethiopia, and Angola are countries where war by proxy has occurred.[73]

Thus, to the extent foreign intelligence operations involve the cold war, they derive from the constitutional war powers of the President, which give him authority and responsibility for national security in the expanded arena of the struggle with a powerful and implacable enemy, despite the lack of a shooting war.

3. Defensive War

Post-World War II military and war-related activities have been conducted essentially as a defense against a perceived external threat to the national security. The threat of communist expansion and the aggressive communist initiatives for achieving that goal have been clear and present dangers for all US administrations since World War II.[74] Foreign intelligence operations have long been justified as responses to the threat.

For example, Allen Dulles wrote that, even between the two World Wars, the intelligence services became the major instruments abroad in probing, and preparing the United States to counter, the expansion of the totalitarian dictatorships (Germany, Italy, Japan, and the USSR).[75] He also referred to the "massive attacks" that the intelligence and security services of the Communist Bloc countries were making against the United States in the 1960s.[76] This fact is often mentioned by other authorities on modern intelligence activities. For example, Cline states that a realistic view of the world "recognizes the existence of nations firmly persuaded that our free society will perish, and that some of those nations employ large, ambitious secret intelligence organizations to collect information on our political and social weaknesses" in order to further their goals.[77]

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[70] *Id.*

[71] *Id.*, at 24. T. Powers, *The Man Who Kept the Secrets* 208 (1979).

[72] Quoted in Halloran, "A Silent Battle Surfaces," New York *Times* Magazine, Dec. 6, 1986, at 60.

[73] Lamb, "The Nature of Proxy Warfare," *The Future of Conflict in The 1980's* 169 (1982).

[74] M. Bundy, *supra* note 68, at 39.

[75] A. Dulles, *supra* note 2, at 27.

[76] *Id.*, at 28.

[77] R. Cline, *supra* note 58, at 315; see S. Breckinridge, *supra* note 52, at ch. 13; S. Turner, *Secrecy and Democracy* 163-165, 269 (1985); V. Walters, *supra* note 59, at 613.

13. *(Continued)*

Congressional findings are similar. The Church Committee Report described the actions of the US intelligence community after World War II as responses to external threats to the United States, all of which were war threats (war and political turmoil in Europe, the Korean conflict, and nuclear weapons in foreign hands)[78] It is clear that the USSR conducts espionage and active measures (covert action) on a huge scale against its main enemy—the United States[79] A recent report of the Senate Select Committee on Intelligence sets out in detail the immense damage done to national security by hostile intelligence operations, mainly from the Soviet Bloc.[80] The report calls 1985 the "Year of the Spy" because of the large number of espionage operations uncovered by US counterintelligence (for example, the Walker Ring, Chin, Pollard, Scranage, Howard, and Pelton) The report goes on to say.

> The Committee's findings underscore a fundamental challenge to the nation The hostile intelligence threat is more serious than anyone in the Government has yet acknowledged publicly. The combination of human espionage and sophisticated technical collection has done immense damage to the national security[81]

Thus, to the extent foreign intelligence operations are directed against a real and vital foreign threat to national security, they are defensive in nature and justified by the President's constitutional responsibility to act on his own war powers authority to counter aggression

Conclusions

Foreign intelligence operations are conducted under a direct line of authority from the war powers granted to the President by the Constitution Although some justification for such operations may be found in other constitutional powers granted to the President, it is his war powers that provide the strongest constitutional link War powers are allocated to both Congress and the President by the Constitution, but the President is clearly first among equals As external threats to US security have grown, so have the war powers of the Executive Branch Today, these powers clearly and directly authorize foreign intelligence operations

For intelligence professionals, the constitutional origins and authorities of their work are often forgotten. The Constitution is considered only as the subject of distant legal battles between lawyers or on occasions of anniversaries of seminal events in American government Yet every act in the secret and often dangerous intelligence services is a direct result of the original grant in the Constitution of power and authority to the government by the people Every day the Constitution speaks to those embarked on the nation's business For 200 years, the Constitution has adapted to the necessities of war and the avoidance of war It was just as important to an agent counting British warships in 1812 as it is to an intelligence analyst counting Russian missile silos in 1987 Then, as now, the intelligence community performed its duties by virtue of the great original charter given to the American Government by its citizens—the United States Constitution

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[78] Church Committee Report, *supra* note 3, at Book I, 22-23

[79] *Id*, at Book I, Appendix III, 557

[80] S Rep No 522, 99th Cong, 2d Sess 12-17 (1986)

[81] *Id*, at 3

14. "Intelligence and the Rise of Judicial Intervention," Fred F. Manget (Spring 1995, Volume 39/1)

Another System of Oversight

Intelligence and the Rise of Judicial Intervention

Frederic F. Manget

"In effect, the judicial review of issues touching on intelligence matters has developed into a system of oversight."

"Perhaps the best way to give you a conception of our power and emplacement here is to note the state and national laws that we are ready to bend, break, violate, and/or ignore. False information is given out routinely on Florida papers of incorporation; tax returns fudge the real sources of investment in our proprietaries; false flight plans are filed daily with the FAA, and we truck weapons and explosives over Florida highways, thereby violating the Munitions Act and the Firearms Act, not to speak of what we do to our old friends Customs, Immigration, Treasury, and the Neutrality Act . . . As I write, I can feel your outrage It is not that they are doing all that—perhaps it is necessary, you will say—but why . are you all this excited about it?"

Norman Mailer, *Harlot's Ghost*

It is actually not such an exercise in glorious outlawry as all that. But the belief is widely held beyond the Beltway, in the heartland of the country and even in New York, that the intelligence agencies of the US Government are not subject to laws and the authority of judges No television cop show, adventure movie, or conspiracy book in two decades has left out characters who are sinister intelligence officials beyond the law's reach

The reality, however, is that the Federal judiciary now examines a wide range of intelligence activities under a number of laws, including the Constitution. To decide particular issues under the law, Federal judges and their cleared clerks and other staff are shown material classified at the highest levels. There is no requirement that Federal judges be granted security clearances—their access to classified information is an automatic aspect of their status. Their supporting staffs have to be vetted, but court employees are usually granted all clearances that they need to assist effectively the judiciary in resolving legal issues before the courts.

Judges currently interpret the laws that affect national security to reach compromises necessary to reconcile the open world of American jurisprudence and the closed world of intelligence operations. They have now been doing it long enough to enable practitioners in the field to reach a number of conclusions. In effect, the judicial review of issues touching on intelligence matters has developed into a system of oversight.

FI, CI, and CA

Intelligence has several components The authoritative statutory definition of intelligence is in Section 3 of the National Security Act of 1947, as amended, and includes both foreign intelligence and counterintelligence. Foreign intelligence means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons. Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or

Frederic F. Manget works in the DCI area He retains a fully footnoted copy of this article

14. *(Continued)*

elements thereof, foreign organizations, or foreign persons, or international terrorist activities

Covert action is also often lumped with intelligence because historically such activity has been carried out by parts of the Intelligence Community agencies, most notably by CIA. Covert action is now defined as activity of the US Government to influence political, economic, or military conditions abroad, where it is intended that the role of the US Government will not be apparent or acknowledged publicly, but not including traditional foreign intelligence, counterintelligence, diplomatic, law enforcement, or military activities.

Official Accountability

The term "oversight" describes a system of accountability in which those vested with the executive authority in an organization have their actions reviewed, sometimes in advance, by an independent group that has the power to check those actions In corporations, the board of directors exercises oversight. In democratic governments, the classic model of oversight is that of the legislative branches, conducted through the use of committee subpoena powers and the authority to appropriate funds for the executive branches. Legislative oversight is unlimited, by contrast with the model of judicial oversight described here, which is limited.

Legislative oversight is policy related, as opposed to judicial oversight and its concern with legal questions. And legislative oversight tends toward

"But a rule of thumb for a simple country lawyer is that when you have to go and explain to someone important what you have been doing and why, that is oversight, regardless of its source. Today, Intelligence Community lawyers often do just that."

micromanagement of executive decisions, where judicial oversight is more deferential. But a rule of thumb for a simple country lawyer is that when you have to go and explain to someone important what you have been doing and why, that is oversight, regardless of its source. Today, Intelligence Community lawyers often do just that. But it has not always been that way.

Past Practices

Until the mid-1970s, judges had little to say about intelligence Because intelligence activities are almost always related to foreign affairs, skittish judges avoided jurisdiction over most intelligence controversies under the political question doctrine, which allocates the resolution of national security disputes to the two political branches of the government This doctrine was buttressed by the need to have a concrete case or controversy before judges, rather than an abstract foreign policy debate, because of the limited jurisdiction of Federal courts. The doctrine was further developed in the Federal Court of Appeals for the DC Circuit by then Judge Scalia, who wrote that courts should exercise considerable restraint in granting any petitions for equitable relief in foreign affairs controversies.

In addition, American intelligence organizations have historically had limited internal security functions, if any. Before CIA's creation, most intelligence activity was conducted by the military departments. In 1947, the National Security Act expressly declined to give CIA any law enforcement authority: ". . . except that the Agency shall have no police, subpoena, or law enforcement powers or internal security functions";—a prohibition that exists in the same form today. Without the immediate and direct impact that police activity has on citizens, there were few instances where intelligence activities became issues in Federal cases.

There is even a historical hint of an argument that, to the extent that intelligence activities are concerned with the security of the state, they are inherent to any sovereign's authority under a higher law of self-preservation and not subject to normal judicial review. Justice Sutherland found powers inherent in sovereignty to be extra-constitutional in his dicta in the *Curtiss-Wright* case.

Even that good democrat Thomas Jefferson wrote to a friend, "A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest* (emphasis in original). The laws of necessity, of self-preservation, of saving our country, by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are

14. *(Continued)*

enjoying them with us thus absurdly sacrificing the end to the means . . . " This sense that somehow secret intelligence activities were governed by a higher law of self-preservation no doubt added to the Federal judiciary's reluctance to exert its limited jurisdiction in such areas.

Increasing Scrutiny

In the 1970s this reluctance began to dwindle, driven by a number of causes. After the Watergate affair, the activities of the executive branch came under a growing and skeptical scrutiny by the press, the public, and Congress This scrutiny blossomed into the Church and Pike Committee investigations of CIA, as well as the Rockefeller Commission report on CIA activities

The Federal judiciary was following right behind, in part due to a natural extension of the judicial activism that began in the 1960s The expansion of due process rights of criminal defendants meant that judges would examine in ever-increasing detail the actions of the government in prosecutions The American tendency to treat international problems as subject to cure by legal process became even more pronounced, and the Intelligence Community found itself increasingly involved in counterterrorism, counternarcotics, and nonproliferation activities of the law enforcement agencies of the US Government

The other cause was simply the increasing number of statutes that Congress passed dealing with CIA and the Intelligence Community The more statutes there are on a particular subject, the more judicial review of the subject there will be. For example, in the late 1970s, Congress began to pass annual authorization bills for the Intelligence Community which generally contained permanent statutory provisions, a practice that continues today

"When Congress passes laws to prevail in disagreements in foreign affairs, more judicial review will occur. De Tocqueville was right—all disputes in the United States inevitably end up in court."

Congress Weighs In

Congressional inroads on all types of executive branch foreign affairs powers also increased in the 1970s. The constitutional foreign affairs powers shared by the executive and legislative branches wax and wane, but it seems clear that Congress began to reassert its role in international relations at that time.

The War Powers Resolution and the series of Boland Amendments restricting aid to the Nicaraguan Contras in the 1980s were statutory attempts by Congress to force policy positions on a reluctant executive branch. The Hughes-Ryan Amendment required notification of oversight committees about covert actions When Congress passes laws to prevail in disagreements in foreign affairs, more judicial review will occur De Tocqueville was right—all disputes in the United States inevitably end up in court

The result is the current system of judicial oversight of intelligence By 1980, then Attorney General Benjamin Civiletti could write that, "Although there may continue to be some confusion about how the law applies to a particular matter, there is no longer any doubt that intelligence activities are subject to definable legal standards " It is not nearly so comprehensive as legislative oversight, because Federal courts still have jurisdiction limited by statute and constitution. But it does exist in effective and powerful ways that go far beyond the conventional wisdom that national security is a cloak hiding intelligence activities from the Federal judiciary

Criminal Law

Federal judges are required to examine the conduct of the government when it becomes a litigated issue in a criminal prosecution, and almost every case involves at least one such issue Intelligence activities are no exception. What makes those activities so different is that they almost always require secrecy to be effective and to maintain their value to US policymakers.

The need for secrecy clashes directly with conventional US trial procedures in which most of the efforts on both sides of a case go into developing the pretrial phase called discovery As a result, Federal judges review and decide a number of issues that regularly arise in areas where democratic societies would instinctively say that governmental secrecy is bad The pattern has developed that judges review intelligence information when protection of its

14. *(Continued)*

secrecy could affect traditional notions of a fair trial.

For example, it would be manifestly unfair if the government could, without sanctions, withhold secret intelligence information from defendants that would otherwise be disclosed under rules of criminal procedure In fact, under both Federal Rule of Criminal Procedure 16 relating to discovery and the *Brady* and *Giglio* cases, Federal prosecutors are required to turn over certain materials to the defense, regardless of their secrecy

For a number of years, judges fashioned their own procedures to balance competing interests. In the *Kampiles* case, the defendant was charged with selling to the Russians a manual about the operation of the KH-11 spy satellite. The trial court did not allow classified information to be introduced at trial. The court issued a protective order after closed proceedings in which the Government presented evidence of the sensitive document that was passed to the Soviet Union, and of the FBI's counterintelligence investigation into the document's disappearance The court of appeals upheld the espionage conviction based upon the defendant's confession that he had met with and sold a classified document to a Soviet intelligence officer and upon sufficient other evidence to corroborate the reliability of the defendant's confession

CIPA

The Classified Information Procedures Act (CIPA) was passed in 1980 to avoid ad hoc treatment of the issues and to establish detailed procedures for handling such classified information in criminal trials. It was a response to the problem of greymail, in which defendants threatened to reveal classified information unless prosecutions were dropped or curtailed Before passage of CIPA, the government had to guess the extent of possible damage from such disclosures because there were no methods by which classified information could be evaluated in advance of public discovery and evidentiary rulings by the courts

"Judges are called upon to balance the need of the government to protect intelligence information and the rights of a defendant to a fair trial. This is an area in which democratic societies would want judicial scrutiny of governmental assertions of national security equities, in order to preserve constitutional due process guarantees."

Under CIPA, classified information can be reviewed under the regular criminal procedures for discovery and admissibility of evidence before the information is publicly disclosed. Judges are allowed to determine issues presented to them both *in camera* (nonpublicly, in chambers) and *ex parte* (presented by only one side, without the presence of the other party)

Under CIPA, the defendant is allowed to discover classified information and to offer it in evidence to the extent it is necessary to a fair trial and allowed by normal criminal procedures. The government is allowed to minimize the classified information at risk of public disclosure by offering unclassified summaries or substitutions for the sensitive materials. Judges are called upon to balance the need of the government to protect intelligence information and the rights of a defendant to a fair trial. This is an area in which democratic societies would want judicial scrutiny of governmental assertions of national security equities, in order to preserve constitutional due process guarantees

Looking at Surveillance

Judges also scrutinize intelligence activities in areas involving surveillance. Because of the Fourth Amendment guarantee against unreasonable searches and seizures, intelligence collection also is reviewed under standards applied to search warrants. The Federal judiciary has been reviewing surveillance in the context of suppression of evidence hearings for many years For example, the issue of electronic surveillance was considered in 1928 in the Supreme Court case of *Olmstead,* which held that the government could conduct such surveillance without a criminal search warrant In 1967 the Supreme Court overturned *Olmstead,* and the government began to follow specially tailored search warrant procedures for electronic surveillance

14. *(Continued)*

FISA

In 1978 the Foreign Intelligence Surveillance Act (FISA) was passed to establish a secure forum in which the government could obtain what is essentially a search warrant to conduct electronic surveillance within the United States of persons who are agents of foreign powers. FISA requires that applications for such orders approving electronic surveillance include detailed information about the targets, what facts justify the belief that the targets are agents of foreign powers, and the means of conducting the surveillance.

Applications are heard and either denied or granted by a special court composed of seven Federal district court judges designated by the Chief Justice of the United States There is a three-member court of review to hear appeals of denials of applications

Thus, judges conduct extensive review of foreign-intelligence-related electronic surveillance operations before their inception. Intrusive collection techniques make this area especially sensitive, and their review by Federal judges is important to reconciling them with Fourth Amendment protections against unreasonable searches In the Intelligence Authorization Act for Fiscal Year 1995, the FISA procedures were expanded to apply to physical searches.

Pleading Government Authorization

In another area, judges review secret intelligence activities in the context of whether defendants were authorized by an intelligence agency to do the very actions on which the criminal charges are based Under rules of criminal procedure, defendants are required to notify the government if they intend to raise a defense of government authorization. The government is required to respond to such assertions, either admitting or denying them.

Should there be any merit to the defense, the defendant is allowed to put on evidence and to have the judge decide issues that arise in litigating the defense This satisfies the notion that it would be unfair to defendants, who could have been authorized to carry out some clandestine activity, if they could not bring such secret information before the court

For example, in the case of *United States v. Rewald*, the defendant was convicted of numerous counts of bilking investors in a Ponzi scheme Rewald maintained that CIA had told him to spend extravagantly the money of investors in order to cultivate relationships with foreign potentates and wealthy businessmen who would be useful intelligence sources. The opinion of the Ninth Circuit Court of Appeals panel that reviewed the convictions characterized Rewald's argument as his principal defense in the case, and in fact Rewald did have some minor contact with local CIA personnel, volunteering information from his international business travels and providing light backstopping cover for a few CIA employees

Rewald sought the production of hundreds of classified CIA documents and propounded more than 1,700 interrogatories, but after reviewing responsive records and answers, the trial court excluded most of the classified information as simply not relevant under evidentiary standards. The Ninth Circuit panel noted that, "This court has examined each and every classified document filed by Rewald in this appeal " It subsequently upheld the District Court's exclusion of the classified information at issue.

In two more recent criminal cases—the prosecutions of Christopher Drougoul in the BNL affair and in the Teledyne case related to Chilean arms dealer Carlos Cardoen—press accounts have noted that the judges in both cases heard arguments from the defendants that sensitive intelligence and foreign policy information should be disclosed in those prosecutions as part of the defense cases. The press accounts further state that in both cases the judges disagreed, and, after reviewing the information at issue, ruled against the defendants

The significance is not that the defendants lost their arguments, but that they had the opportunity to litigate them before a Federal judge. The Department of Justice does not prosecute defendants while the Intelligence Community denies them the information they need to have a fair trial. Who decides what a fair trial requires? An independent Federal judge, appointed for life, who reviews the secrets.

Civil Law

Criminal law has the most direct and dramatic impact on individual citizens, but civil law also requires judicial intervention in numerous

14. *(Continued)*

cases where intelligence activities, and the secrecy surrounding them, become issues. Private civil litigants may demand that the government produce intelligence information under the laws requiring disclosure of agency records unless they are specifically exempted. Individual civil plaintiffs may bring tort actions against the government under the Federal Tort Claims Act based on allegations that secret intelligence activities caused compensible damages. Private litigants may sue each other for any of the myriad civil causes of action that exist in litigious America, and demand from the government information relating to intelligence activities in order to support their cases.

In all such instances, Federal judges act as the arbiters of government assertions of special equities relating to intelligence that affect the litigation Private civil litigants may not win their arguments that such equities should be discounted in their favor, but they can make their arguments to a Federal judge.

For example, under the Freedom of Information Act (FOIA) and the Privacy Act, there are exceptions to the mandatory disclosure provisions that allow classified information and intelligence sources and methods to be kept secret. Courts defer extensively to the executive branch on what information falls within those exceptions, but there is still a rigorous review of such material. CIA prepares public indexes (called *Vaughn* indexes, after the case endorsing them) describing records withheld under the sensitive information exceptions that are reviewed by the courts.

“Private litigants may sue each other for any of the myriad civil causes of action that exist in litigious America, and demand from the government information relating to intelligence activities in order to support their cases.”

If those public indexes are not sufficient for a judge to decide whether an exception applies, classified *Vaughn* indexes are shown to the judge *ex parte* and *in camera*. If a classified index is still not sufficient, then the withheld materials themselves can be shown to the judge

Other FOIA Requests

The *Knight* case illustrates this extensive process The plaintiff filed an FOIA request for all information in CIA's possession relating to the 1980s sinking of the Greenpeace ship *Rainbow Warrior* in the harbor in Auckland, New Zealand, by the French external intelligence service CIA declined to produce any such records, and the plaintiff filed a suit to force disclosure. Both public and classified indexes were prepared by CIA, and, when they were deemed by the court to be insufficient for a decision in the case, all responsive documents were shown in unredacted form to the trial judge in her chambers Her decision was in favor of the government, and it was affirmed on appeal.

Historian Alan Fitzgibbon litigated another FOIA request to CIA and the FBI for materials on the disappearance of Jesus de Galindez, a Basque exile and a critic of the Trujillo regime in the Dominican Republic who was last seen outside a New York City subway station in 1956 The case was litigated from 1979 to 1990, and, during the process, the district court conducted extensive *in camera* reviews of the material at issue That pattern has been repeated in numerous other cases

Thus, in areas where Federal laws mandate disclosure of US government information, Federal judges review claims of exemptions based on sensitive intelligence equities.

State Secrets Privilege

Federal courts also have jurisdiction over civil cases ranging from negligence claims against the government to disputes between persons domiciled in different states. In such cases, litigants often subpoena or otherwise demand discovery of sensitive intelligence-related information. The government resists such demands by asserting the state secrets privilege under the authority of *U S v Reynolds*, a Supreme Court case that allowed the government to deny disclosure of national security secrets Other statutory privileges also protect intelligence sources and methods. Judicial review of US Government affidavits that assert the state secrets privilege is regularly used to resolve disputed issues of privilege

In *Halkin v Helms*, former Vietnam war protesters sued officials of various Federal intelligence agencies

14. *(Continued)*

alleging violation of plaintiffs' constitutional and statutory rights. Specifically, they alleged that the National Security Agency (NSA) conducted warrantless interceptions of their international wire, cable, and telephone communications at the request of other Federal defendants. The government asserted the state secrets privilege to prevent disclosure of whether the international communications of the plaintiffs were in fact acquired by NSA and disseminated to other Federal agencies.

The trial court considered three *in camera* affidavits and the *in camera* testimony of the Deputy Director of NSA, and the case was ultimately dismissed at the appellate level based on the assertion of the privilege. The plaintiffs had their day in court They lost the case, but they had the full attention of both trial and appellate Federal court judges on the assertion of governmental secrecy.

Allegations of Abuse

Federal courts also adjudicate the substance of legal claims brought by private citizens alleging abusive governmental actions For example, in *Birnbaum v United States,* a suit was brought under the Federal Tort Claims Act by individuals whose letters to and from the Soviet Union were opened and photocopied by CIA in a mail-opening program that operated between 1953 and 1973. Plaintiffs were awarded $1,000 each in damages, and the award was upheld on appeal

In *Doe v Gates,* a CIA employee litigated the issue of alleged discrimination against him based on his homosexuality. Doe raised two constitutional claims—whether his firing violated the Fifth Amendment equal protection or deprivation of property without compensation clauses He was heard at every Federal court level, including the US Supreme Court The judicial review even included limited evidentiary review pursuant to cross-motions for summary judgment (The case has been litigated for years and is not yet final, but the government is expected to prevail)

"When individual rights are affected, Federal courts have not been reluctant to assert oversight and require Intelligence Community agencies to visit the courthouse and explain what they are doing."

In two more recent cases, the chance of losing litigation over alleged gender-based discrimination led the parties to settle claims with one female officer in the CIA's Directorate of Operations (the "Jane Doe Thompson Case") and with a class of female operations officers in CIA. The settlements made moot a full judicial review of all government actions, but both sides clearly believed that judicial review would occur.

The First Amendment

Federal judges also look at First Amendment protections of freedom of speech and the press as they relate to intelligence. One context is the contract for nondisclosure of classified information that employees, contractors, and others sign when they are granted access to sensitive information by agencies of the Intelligence Community The contract requires prepublication review of nonofficial writings by the government in order to protect sensitive information That is a prior restraint on publication which was challenged in two separate lawsuits by former CIA employees Victor Marchetti and Frank Snepp After extensive appellate review, the contract restrictions on freedom of speech were held reasonable and constitutional It is clear that Federal courts will entertain claims of First Amendment violations from Intelligence Community employees, and will examine the claims closely

For example, in 1981 a former CIA officer named McGehee submitted an article to CIA for prepublication review pursuant to a secrecy agreement he had signed in 1952, when he joined the Agency The article asserted that the CIA had mounted a campaign of deceit to persuade the world that the "revolt of the poor natives against a ruthless US-backed oligarchy" in El Salvador was really "a Soviet/Cuban/Bulgarian/ Vietnamese/ PLO/Ethiopian/Nicaraguan/International Terrorism challenge to the United States " McGehee offered a few examples of CIA operations to support his assertion; some were deemed classified by the Agency, and permission to publish those portions of the article was denied

McGehee sued, seeking a declaratory judgment that the CIA prepublication and classification procedures violated the First Amendment He lost, but the DC Circuit Court of Appeals stated "We must

14. *(Continued)*

accordingly establish a standard for judicial review of the CIA classification decision that affords proper respect to the individual rights at stake while recognizing the CIA's technical expertise and practical familiarity with the ramifications of sensitive information. We conclude that reviewing courts should conduct a *de novo* review of the classification decision, while giving deference to reasoned and detailed CIA explanations of that classification decision." When individual rights are affected, Federal courts have not been reluctant to assert oversight and require Intelligence Community agencies to visit the courthouse and explain what they are doing.

The second context involving the First Amendment is government attempts to restrain publication of intelligence information by the press. When *The Pentagon Papers* were leaked to the news media in 1971, the attempt to enjoin publication resulted in the Supreme Court case of *New York Times v U S*. Because of the number of individual opinions in the case, the holding is somewhat confusing. Nonetheless, it seems clear that an injunction against press publication of intelligence information will not only be difficult to obtain but also will subject any petition for such relief to strict scrutiny by the Federal courts.

Conclusions

The exposure of Federal judges to intelligence activities leads to a number of conclusions. One is that judicial oversight operates to an extent overlooked in the debate over who is watching the Intelligence Community. Judicial oversight is limited compared to unlimited Congressional oversight. Judicial oversight deals with legal issues, as opposed to policy issues. Judges are deferential to the executive branch in intelligence matters, something not often true of Congress. But judges do act as arbiters of governmental secrecy in a powerful way.

> **"Nothing concentrates the mind and dampens excess so wonderfully as the imminent prospect of explaining one's actions to a Federal judge."**

The basic conundrum for intelligence is that it requires secrecy to be effective, but government secrecy in a Western liberal democracy is generally undesirable. Government secrecy can destroy the legitimacy of government institutions. It can cripple accountability of public servants and politicians. It can hide abuses of fundamental rights of citizens. In fact, secret government tends to excess.

In the United States, Federal judges counterbalance the swing toward such excess. In those areas most important to particular rights of citizens, they act as arbiters of governmental secrecy. The Federal judiciary ameliorates the problems of government secrecy by providing a secure forum for review of intelligence activities under a number of laws, as surrogates for the public.

The developing history of judicial review of intelligence activities shows that it occurs in those areas where government secrecy and the need for swift executive action conflict with well-established legal principles of individual rights: an accused's right to a fair criminal trial; freedom from unreasonable searches and seizures; rights of privacy, freedom of speech and the press.

Judges thus get involved where an informed citizenry would instinctively want judicial review of secret intelligence activities. The involvement of the Federal judiciary is limited but salutary in its effect on executive branch actions. Nothing concentrates the mind and dampens excess so wonderfully as the imminent prospect of explaining one's actions to a Federal judge.

The Constitution's great genius in this area is a system of government that reconciles the nation's needs for order and defense from foreign aggression with fundamental individual rights that are directly affected by intelligence activities. Those nations currently devising statutory charters and legislative oversight of their foreign intelligence services might do well to include an independent judiciary in their blueprints. Federal judges are the essential third part of the oversight system in the United States, matching requirements of the laws to intelligence activities and watching the watchers.

15. "Covert Action, Loss of Life, and the Prohibition on Assassination, 1976-96," Jonathan M. Fredman (1996, Volume 40/2)

POLICY AND LAW

Covert Action, Loss of Life, and the Prohibition on Assassination, 1976-96 (U)

Jonathan M. Fredman

> **"In no case was CIA assassination plotting ultimately successful."**

From the early days of the CIA, its officers contemplated the use of lethal force against named, specific individuals. At various times during the first three decades of the Agency's existence, plans were made along these lines and actions taken to implement them. Among the most notorious of the political assassination proposals were the several schemes to assassinate Fidel Castro, the pre-empted plot against Congo's Patrice Lumumba, and even the reported consideration paid at midlevels to an attempt on the life of Joseph Stalin

In no case was CIA assassination plotting ultimately successful The Agency quietly abandoned some of its political assassination proposals before taking effective action, and even the case that progressed most fully to completion, the planned assassination of Lumumba, saw the CIA attempts superseded when Lumumba's other enemies reached him first

CIA also maintained covert relationships with others who independently planned or completed political assassinations The Agency provided arms to the dissidents who later assassinated Dominican leader Rafael Trujillo, and encouraged the coup attempt by Chilean military officers that ultimately resulted in the death of Gen Rene Schneider CIA also had been aware of the coup plans that resulted in the deaths of South Vietnamese President Ngo Dinh Diem and his brother Nhu, although in that instance the Agency had refused to assist the coup plotters once it learned that they were contemplating assassination.

Beyond its involvement in assassination attempts, CIA conducted a number of additional activities that endangered lives. These included paramilitary activities, such as the invasion by Cuban exiles at the Bay of Pigs and the covert support to UNITA fighters in Angola. The Agency also sponsored propaganda broadcasts into Communist nations to encourage resistance against the Soviet Union and supported successful coups in Guatemala and Iran. Each of these types of CIA operations carried with it the potential for casualties, and many produced significant loss of life

In 1975, the Senate committee investigating CIA activities, chaired by Senator Frank Church, concluded that the Agency had not acted independently in conducting its paramilitary operations, support for foreign coups, and plans for political assassination. Rather, the Church committee found that those CIA activities had implemented US Government policies approved at the Cabinet level, for example, the committee reported that senior US officials had known about, and in some instances encouraged, the CIA or indigenous plots against Castro, Lumumba, and Trujillo, as well as the coup attempts in South Vietnam and Chile

JONATHAN M. FREDMAN is in CIA's Office of General Counsel.

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By 1976, the disclosures about official US participation in assassination attempts led President Ford to prohibit any further government involvement in political assassination Since that time, however, neither the President nor Congress has forsworn the use of certain other types of operations, such as paramilitary activities, assistance in coup preparations, or the dissemination of deception and propaganda As a result, when directed by the President, pursuant to US law, the Agency still may conduct a number of activities that risk the loss of life.

This article examines the assassination prohibition as it has been applied in practice since 1976, the date of its first promulgation, and since 1978, when the scope of the prohibition was expanded It also explores CIA's experience during the past 20 years with the separate and serious policy considerations that apply whenever its activities may cause the loss of life, whether or not that loss, strictly defined, would constitute assassination

The End of Assassination as an Instrument of US Policy

CIA assassination plots commonly involved the potential *political* assassinations of foreign leaders. In response, when in the mid-1970s Congress considered whether to provide a detailed statutory charter for the US Intelligence Community (IC), the legislators considered imposing a blanket prohibition against US Government involvement in political assassination But the effort to enact a statutory charter for intelligence eventually failed, and no subsequent legislation has directly addressed the subject of officially sponsored assassination

"... when directed by the President, pursuant to US law, the Agency still may conduct a number of activities that risk the loss of life."

Rather, in 1976, President Ford dealt with the issue administratively, in the first of a series of Presidential Executive Orders (E.O s) setting forth the parameters within which US intelligence may operate E O 11905[1] expressly provided

> *Sec 5 Restrictions on Intelligence Activities*
>
> *(g) Prohibition on Assassination No employee of the United States Government shall engage in, or conspire to engage in, political assassination*

E O 11905 clearly proscribed political assassination, but it did not define the term. Nor did it specifically address other types of lethal activities, such as support to indigenous coup attempts or paramilitary operations, although another portion of section 5 provided that the Order did "not authorize any activity not previously authorized and [did] not provide exemption from any restriction otherwise applicable " Indeed, a search in the late 1980s by CIA attorneys of relevant Ford administration records at the National Archives in Washington and the Presidential Library in Ann Arbor located no additional written insight into the scope of the term "political assassination "

Nevertheless, the meaning of the prohibition on political assassination was clearly understood in 1976 the President no longer would authorize CIA to engage in the assassination of foreign political leaders or support those who do But in 1978, when President Carter replaced E.O 11905 with E O 12036,[2] he modified the provision in two important respects. First, the new Order explicitly recognized the already existing understanding that the prohibition constrained not only US Government employees, but also their agents Second, in an expansion of the literal scope of the prohibition, the modifier "political" was dropped

> *2-305 Prohibition on Assassination No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination* [3]

President Reagan retained that language without change as section 2 11 of E O 12333,[4] which he issued in 1981 and which remains in effect today [5] As a result, whatever contextual limitation may have been placed upon the prohibition by the inclusion of the modifier "political" in 1976 vanished by 1978

The Prohibition and Related Policies

Promulgation of the Ford, Carter, and Reagan E O s reflected moral and ethical objections to the official US Government use of political assassination, as well as reaction to the violence that had rocked the United States itself during the 1960s and concern about retaliation from leaders or countries targeted by this country Pragmatic calculations of costs and benefits also impelled the change It is not clear, for example, that a hypothetical assassination in 1938 of Adolf Hitler would have

15. *(Continued)*

produced an enduring peace, it is equally possible that Rudolf Hess or Martin Bormann would have replaced him without any change in Nazi behavior

Even so, the United States retained the options of encouraging coups, supporting indigenous paramilitary groups, disseminating propaganda abroad, and working with unsavory persons to collect intelligence, and, pursuant to US law, the President still may authorize CIA to conduct operations abroad that endanger the lives of others The textual expansion of the assassination prohibition in 1978 therefore continues to engender discussion among CIA, the White House, other Executive Branch agencies and departments, and the Congressional oversight committees, for while political assassination is clearly understood and avoided, the parameters of simple "assassination" are not always so clear [6]

Furthermore, Agency activities that pose a risk to life raise serious policy concerns far beyond the specific terms of the assassination prohibition. These policy considerations reflect the moral and ethical requirement to minimize the risk of casualties among noncombatants or other innocent people As a result, where the President has directed CIA to conduct such an activity, the Agency has to comply both with the prohibition on assassination and with the separate policy requirement to limit the prospects of any unwarranted violence

The Experience Since 1976

By its terms, the assassination prohibition is not limited to CIA or the IC The provision has been analyzed

> **"Lawfully authorized CIA activities to support US military forces also may raise issues under the assassination prohibition and related policies."**

at length since its promulgation, particularly in the context of US military operations,[7] and close attention also has been devoted to the prohibition as applied to the original author of such plans—the CIA [8] Nonetheless, the full ramifications of the assassination prohibition and the related policy concerns have rarely been described as the Agency applies them in practice

When specifically authorized by US law, the Agency may engage in lawful activities that can result in the death of foreign nationals Such activities normally fall within the rubric of "covert action," which comprises CIA activities intended to influence foreigners abroad and requires specific authorization by the President,[9] although at times a risk to life may result from other types of Agency activities as well

Covert actions that may produce casualties can constitute activities considered inherently *lethal*, such as providing arms, ammunition, military training, or related support to an indigenous group of insurgents, or demolition equipment to be used in sabotage of an industrial facility They may also comprise activities considered *nonlethal* in nature, such as providing food, shelter, financial assistance, or political support to a foreign group not engaged in armed conflict, or disseminating propaganda abroad to further US interests Even *nonlethal* activities may indirectly present a risk to life, such as where a CIA-sponsored radiobroadcast made in the name of an opposition group may cause a foreign regime to react harshly against those it believes responsible

US armed services also may undertake activities that result in death, and they similarly have to review proposed operations in light of the E O. prohibition and relevant policies There is, however, one crucial difference in this respect between the Agency and the US military as part of its assigned responsibilities, the military prepares for and may at times engage in lawful killing The law of war provides the armed services with clearly delineated distinctions between lawful and unlawful killing, with "assassination" in the military context but one subset of the latter [10]

Accordingly, where the President has authorized CIA to provide paramilitary support to an armed faction, the Agency simply applies the correlative military rules in training the supported group But as a civilian agency, CIA faces unique issues when it engages in other forms of lethal or nonlethal activities that may lead to casualties For example, an activity designed to achieve a specific political result, such as the replacement of one foreign regime with another, may require that CIA assist military officers planning a coup, although it may not be certain at the outset whether the coup will be bloodless or violent

Lawfully authorized CIA activities to support US military forces also may raise issues under the assassination prohibition and related policies These concerns can arise, for example, when the Agency acts to sow distrust among members of a hostile army in order to weaken its ability to

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resist US troops, or places articles or radiobroadcasts into media outlets overseas, hoping to increase tensions among a set of murderous foreign leaders, if the intended audience may retaliate violently against their perceived enemies

Each of these scenarios bears the possibility, if not necessarily the intent, that identifiable or nonidentifiable persons may be killed as a direct or indirect result of the Agency's activities The severe nature of the potential harm, coupled with the lack of clearly articulated analogues in the intelligence sphere to the law of war, requires that all such CIA operations be reviewed closely to ensure that they are consistent with US law and policy This analysis encompasses not only E O 12333 and the related desire to avoid unnecessary harm, but also other relevant law and policy The review takes place both at CIA and elsewhere in the government, including the Department of Justice, and assesses the likelihood of any specific outcome, whether that outcome would be produced directly by the CIA operation, or is simply a conceivable result of some superseding event—the issue lawyers refer to as proximate cause, and the general humanitarian considerations that may be implicated [11]

Four Major Categories

The E O prohibition and the underlying reasons for the original ban on political assassination are well understood by the Executive Branch and the Congress As a result, rarely—if ever—since 1975 have proposed covert actions presented the option of political assassination But the 1978 expansion of the provision and the related policy requirement to limit the risk of unnecessary casualties have rendered the issue of political assassination only one part of the inquiry

The review is triggered wherever loss of life is possible, whether or not the loss would constitute "assassination "[12] Moreover, as required by the Order's section 2 12, the analysis is performed regardless of whether CIA will directly engage in the activity, or will support cooperating second parties such as coup plotters or paramilitary groups

Four major categories of CIA operations raise these concerns The first two involve Agency activities that are *lethal* by their very nature, while the latter two consist of operations in which CIA and its contacts engage in activities that themselves are *nonlethal* but which could set in motion a chain of events culminating in death

The first lethal category comprises activities by CIA or cooperating individuals that directly pose a strong possibility of death or serious personal injury Such activities may include the provision of paramilitary support to insurgent groups, or assistance to foreign military officers planning to use force to depose their country's political leadership

The second lethal category also involves inherently dangerous actions by CIA or its contacts but in circumstances designed to minimize the danger of death or serious personal injury For example, this category could include a CIA-supported sabotage and destruction of an explosives factory belonging to a foreign terrorist group, at a time when it is believed no persons are inside, or support to a coup attempt abroad where it is believed that the foreign nation's political leaders will not be harmed

The first nonlethal category comprises nonviolent activities, such as the broadcast of deception or propaganda, intended to induce unwitting third parties to take nonviolent action against identifiable individuals Because CIA does not control those third parties, the danger exists that they may react violently For example, the Agency may seek to cast doubt upon the loyalty of a hostile military commander, hoping that the enemy authorities will remove the officer from command, instead, those authorities may opt for execution Intelligence collection or sharing activities may fall within this category as well, in cases where they require CIA to work with others who may engage in violence

The second nonlethal category also consists of nonviolent CIA operations that are intended to influence unwitting third parties but in situations where those activities are *not* directed against specific individuals Even in such circumstances, violence may result for example, CIA-sponsored radiobroadcasts directed to an oppressed minority, intended to encourage peaceful resistance against a repressive government, may engender violent retaliation

Lethal Operations Directly Risking Loss of Life

When authorized by the President, CIA may engage in several types of activities within this category For example, pursuant to law the Agency may provide paramilitary equipment and training to a Third World insurgent group, such as the Nicaraguan

15. *(Continued)*

contras or the Afghan mujahidin, or supply arms and ammunition to foreign nationals planning to overthrow a despot The death of hostile forces normally is expected in the course of paramilitary operations, even where a nonviolent coup is planned, lives may be lost as the operation progresses

Paramilitary operations In supporting paramilitary operations, CIA draws from the relevant US military guidance, applies it as appropriate to its covert activities, and warns those with whom it works that violation of those rules will jeopardize continued CIA assistance. For example, where CIA lawfully provides arms, materiel, training, and support to a paramilitary group, a military operation that is permitted under the law of war should violate neither the assassination prohibition nor the related policies against risk to noncombatants Accordingly, the ambush of hostile forces by the supported group, or an attack directed against an enemy military commander during a time of hostilities, should violate neither the E O nor the related policies

In contrast, paramilitary operations designed to kill every enemy soldier, with surrender to be refused even if offered, clearly would be prohibited Nor would CIA condone the use by a supported group of car bombs to spread terror among an enemy population

Moreover, in keeping with the policy against unnecessary risk to innocents, at the conclusion of any paramilitary program the United States has to minimize any residual dangers to foreign nationals or its own citizens For example, the press has reported that CIA is offering large sums for the return of numerous Stinger missiles that it previously provided to Afghan fighters for their use against Soviet forces The press also has reported that certain veterans of the Afghan war now apply their expertise to criminal or terrorist activities abroad, with serious consequences to the West Because US efforts to contain the fruits of its paramilitary operations may not always succeed, when it designs and implements this form of covert action the Agency also has to consider the likely ramifications after the program is terminated

Retaliation by the opposition Somewhat different issues may arise when CIA is authorized to support a paramilitary group that itself respects the laws of war but is engaged in hostilities against an opponent that does not If enemy forces routinely commit atrocities against the civilian population in retaliation for lawful attacks, the Agency has to evaluate carefully whether and how the resistance should proceed

Although the E O prohibition per se will not apply in this type of situation, the need to limit the danger of innocent casualties necessitates a careful assessment of the likely enemy reaction In the most extreme instances, CIA may need to direct the supported group to suspend its attacks against the opposition forces

Coup preparations Coup planning presents still another set of concerns, illustrated in some detail by the failed 1989 attempt by Panamanian military personnel to depose Gen Manuel Noriega After that attempt, it was widely reported in the press that dissident Panamanian officers had sought US assistance for their plans but been turned down, allegedly for fear that E O 12333 would be violated should Noriega be killed during the coup Two months later, President Bush sent American troops into Panama to depose the General

After the invasion, many believed that the prohibition on assassination had prevented the United States from availing itself of a cheap and easy way to remove Noriega from office

[redacted] (b)(3)

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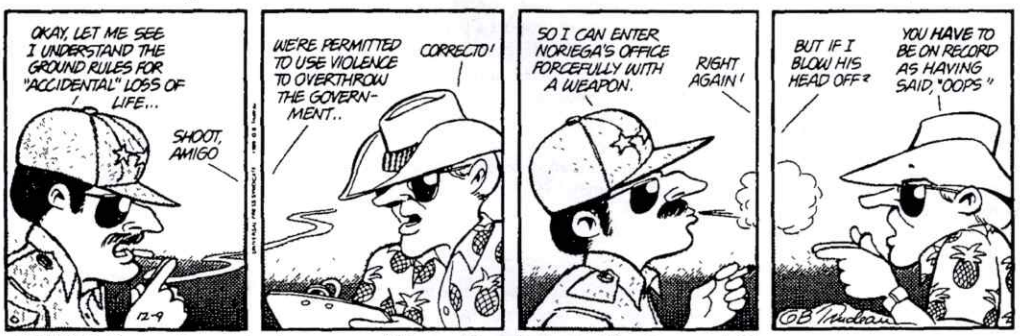
The flurry of attention extended to the pen of cartoonist Garry Trudeau In *Doonesbury*, he graphically depicted the presumed quandary that had faced the coup plotters (See next page)

Regardless of whether CIA worked with the Panamanian rebels in 1989, the public debate accurately reflected the attention devoted within the government to these types of issues If, pursuant to law and explicit Presidential direction, the Agency provides arms and training to a foreign faction, it has to provide clear instruction on the requirements of US law and policy, including the prohibition on assassination CIA will

15. *(Continued)*

Doonesbury BY GARRY TRUDEAU

Doonesbury BY GARRY TRUDEAU



underscore that the object of a coup attempt has to be to replace the existing government without bloodshed if possible, rather than by simply killing its leaders While the coup plotters may defend themselves in the face of armed opposition, they also have to be willing to accept a peaceful surrender if one is offered In working with such individuals, the Agency will make it clear that it cannot assist those who do not comply [14]

Lethal Operations Indirectly Risking Loss of Life

Loss of life is not always the foreseeable result of a covert action involving violence, if the use of violence is designed in such a manner as to minimize the risk For example, demolition of an enemy's industrial facility at a time when it is believed to be unoccupied may carry the risk, but not the likelihood, that casualties will result Pursuant to law, therefore, the President may direct CIA to carry out covert activities that employ violence but pose minimal risk to life

Counterproliferation operations Suppose a hostile nation is seeking to acquire nuclear weapons or the capability to construct them The United States may try to dissuade third countries and private parties from assisting in that effort, ultimately, however, the President may conclude

15. *(Continued)*

that the American efforts will fail Pursuant to law, the President then may direct CIA to respond to the threat by various means, including covert action

The Presidential authorization will clearly state the terms within which the Agency will operate. CIA may be directed to enhance its clandestine efforts to obtain intelligence about supplier networks, to broaden its liaison relationships with friendly foreign security services, and to place nonattributable items in foreign press outlets in order to influence the policies of other nations. But the President also may direct CIA to disrupt the foreign nation's supply networks, destroy weapons components in transit, interfere with the hostile nation's nuclear research, or sabotage defense technology and subsystems in the foreign weapons plant.

The latter techniques clearly entail a measure of physical risk to individuals engaged in the foreign acquisition effort (and potentially to the CIA officers or others working on the operation). A carelessly designed sabotage proposal, for example, may needlessly endanger foreign workers who are not responsible for their government's decisions. Consequently, regardless of the identity or location of potential victims, the Agency has to limit the unnecessary risks to persons or property when it mounts these Presidentially authorized operations.

To this end, CIA will explore the feasible alternatives. For example, operations may be designed to intercept controlled munitions in transit, render explosive materials inert, or clandestinely replace such items with nonsensitive substitutes Similarly, the Agency may seek to sabotage foreign chemical weapons facilities at times when those complexes normally are empty. Although careful planning cannot wholly guarantee the absence of casualties, it can reduce that risk substantially.

Counterterrorist operations. Similar issues can arise in the course of Presidentially authorized operations intended to prevent attacks by international terrorists. Even where a planned operation would not involve a direct strike upon a terrorist group, but rather the use of clandestine measures to disrupt their capabilities, a risk to life may remain In such a case, CIA would seek to employ comparable measures to reduce that danger, both complying with the overall policies against unnecessary loss of life and respecting the prohibition on assassination.

At times, however, the fight against terrorism may raise direct issues of self-defense similar to those that arise during a coup. Where the President has authorized CIA or other Federal agencies to conduct counterterrorist operations, those officers and their agents may need to defend themselves. Recent overseas apprehensions of terrorist suspects by US law enforcement authorities reflect this consideration in the context of arrest, at times, intelligence operations abroad may present similar issues. While assassination remains prohibited and innocent lives have to be protected, neither E O 12333 nor the related policies protecting innocent life constrain those acting for the United States from exercising their lawful rights of self-defense

Nonlethal Operations Directed at Identifiable Persons

Some of the most difficult E.O and policy issues derive from the use of nonlethal deception or propaganda methods directed against named or identifiable persons In time of crisis, for example, US armed forces may be deployed abroad against an enemy with the fear of substantial American casualties in the event of hostilities. To reduce the threat to US troops, without attribution to the United States CIA may cast aspersions on the loyalty of specific enemy commanders or a particular group of hostile leaders If successful, the Agency operation may induce distrust and suspicion, undermine enemy morale, and lead the hostile nation to remove capable officers from command

Specific targets. Deception operations aimed at specific enemy officers may have the greatest chance for success Clandestine CIA efforts may lead the political leadership of the target country to focus upon particular persons, especially if the Agency is able to cite enough specific information about those individuals to make the charges plausible. Depending upon the likely reaction of the foreign government, this type of operation can raise issues under the assassination prohibition as well as the related policies against the loss of innocent life.

Some governments, doubting the reliability of senior officers, will remove them from command, thereby unwittingly fulfilling the purpose of the covert operation But other governments may imprison, torture, or execute such officers, and even retaliate against their families Where the death of a targeted individual is likely, even if unintended by the

15. *(Continued)*

United States, the operation may fall too close to the E O boundary to proceed Similarly, where severe retribution may befall innocent family members, the related policies also may counsel restraint

To some extent, the calculation in any specific instance may turn upon whether the person at risk is a military commander or a political official and whether hostilities in fact have erupted [15] The mere risks of physical injury or lengthy imprisonment will not necessarily preclude an operation· nor will an attenuated risk of execution, so long as a peaceful removal from office or nonbrutal prison term are more likely. In each instance, the analysis will balance all the relevant considerations, including the potential reduction in the threat to US personnel, and will strive to harmonize the various interests

Collection activities Beyond covert action, this category of nonlethal operations also may include certain intelligence collection activities For example, to obtain warning of planned terrorist attacks, CIA may secure advance notice from an aspiring or recruited member of a particular terrorist organization. To preserve the reporting channel, as well as the life of the cooperating individual, information about that person's relationship with CIA has to be kept absolutely secret

At times, however, terrorist groups require their members to prove their dedication by committing acts of violence. Accordingly, where the Agency has recruited an "asset" whom the terrorists then direct to carry out an assassination or other attack, these issues fall starkly into focus [16] Clearly, E O 12333 prohibits CIA and its assets from engaging in assassination or otherwise violating US law, including the several statutes directed against international terrorism The challenge is how simultaneously to preserve the life of the asset, retain a reporting-channel from the terrorist group, and maintain strict compliance with US law The third requirement is an absolute and normally poses the least difficulty, the first two often prove more problematic

Dissemination The dissemination of intelligence to foreign governments may present similar concerns, especially when the recipients rely upon US information to support their own law enforcement activities. Counternarcotics and counterterrorist operations bring this issue to the fore

Colombia, for example, has struggled for years with its domestic narcotics traffickers, and, with significant assistance from the United States, has scored some impressive successes This military, intelligence, and law enforcement assistance has provided the Colombians information about

certain major traffickers The apprehension of those traffickers can be difficult and often results in violence, as was demonstrated when efforts by Colombian authorities to apprehend Medellin cartel leader Pablo Escobar ended in his death

Because of the high risk of violence, CIA's procedures in this area resemble those pertaining to the authorized support of foreign coup attempts Neither the assassination prohibition nor the related policies prevent the Agency from providing intelligence to assist in the arrest of international traffickers or terrorists, even if suspects may resist and blood be shed. Rather, CIA may provide such information, so long as the recipient governments are willing to accept surrenders if offered and have set in place bona fide procedures by which to do so

A related example involves the decision by the United States in 1994 to stop providing real-time flight tracking data to the Governments of Colombia and Peru Until that time, those governments had supported US counternarcotics efforts by directing their air forces to intercept aircraft suspected of carrying narcotics. Relying upon the US-provided tracking information, the Colombian and Peruvian Air Forces had been authorized to challenge suspect aircraft in the air or on the ground, and the operations clearly carried the risk of casualties.

When they reviewed the intelligence-sharing programs in 1994, the Defense and Justice Departments concluded that the United States could not continue to provide the data to Colombia and Peru Their conclusions were based on certain US criminal statutes that had been enacted in order to implement various international agreements safeguarding civil aviation. In their respective analyses, Defense and Justice determined that those statutes also could impose liability on US or South American personnel who provided intelligence in support of the drug interdiction programs, even if the two nations' Air Forces indeed challenged only those aircraft that were suspected of smuggling drugs As a result, the intelligence-sharing arrangements were suspended for several months, until Congress enacted new statutory provisions to permit them to resume

(b)(3)

15. *(Continued)*

Although controversial, the Defense and Justice actions reflected concern both for US law and for the safety of civil aviation, as did the Congressional response of crafting only a narrow counternarcotics exception While the intelligence-sharing episode was founded upon different considerations from the assassination prohibition, these events illustrate the type of approach that also is applied to proposed CIA operations that may implicate that prohibition or the related policies

Nonlethal Operations Not Directed at Identifiable Persons

Most remote from the E O. prohibition, but still raising the related policy concerns, are those nonlethal CIA operations that may contribute to eventual violence or death. For example, US deception or propaganda activities that are not directed against specific individuals may implicate these issues although particular efforts to stimulate insecurity among hostile foreign elites may not identify anyone by name, the foreign security forces may retaliate against innocent suspects. To minimize that risk, CIA-sponsored radiobroadcasts or press placements may suggest that opposition groups exist but are widely dispersed, or that discontent is rampant among some but not all members of a particular faction The aim would be to increase uncertainty among the ruling classes, without providing them ready targets for retaliation.

As with the narrowly focused deception operations, the review will assess the potential risk to innocent individuals If the likelihood of retributive violence is great, policy considerations may cause the operation to

> **“By ensuring compliance with US law and policy, the comprehensive review protects the Agency and its officers from charges of criminality or impropriety.”**

stand down, even though the fact that it is not directed against any specific individual avoids any conflict with the E O prohibition. On the other hand, the mere potential for third party violence may not require restraint, where a nonviolent response is more probable

Similarly, a lawful, Presidentially authorized covert action may direct the Agency to broadcast into a hostile nation radio programs intended to bolster the morale of an oppressed people. Although not the US objective, such broadcasts may contribute to a decision by those people to rebel, and many may die during the insurrection It has been argued, for example, that broadcasts by the CIA-funded Radio Free Europe in 1956 may have encouraged the Hungarian freedom fighters, thereby leading them to continue their struggle and prolonging the bloodshed The public statements by Western political leaders following the Gulf war in 1991 may have encouraged Iraqi Kurds and Southern Shia to pursue their separate uprisings against Saddam Hussein. The West did not intervene militarily in any of those situations, and each of the rebellions ultimately was crushed with great loss of life

Accordingly, even nonlethal operations intended to encourage democracy may raise the policy requirement not to risk unnecessary harm. Here, as well, the potential dangers require strict balancing of the projected consequences, and in specific instances the balance may weigh against proceeding.

Conclusion

Although political assassination no longer is a foreign policy option for the United States, proposed US intelligence activities still may implicate the E.O prohibition on assassination and the related policy requirement to minimize gratuitous loss of life Moreover, the assassination prohibition itself may not be interpreted solely with respect to the specific cases that underlay its first enunciation in 1975; because of the change in 1978 from "political assassination" to "assassination," whether a particular death might be construed as a political killing cannot be the only criterion

Even so, many covert actions appropriately may be compared to military operations, and in those cases the laws of war can supply the terms of reference But many intelligence activities do not readily compare to the military framework, and there may be no clear lines of authority by which CIA may evaluate certain proposals Rather, the broad scope of the E O and policy concerns, along with the serious physical ramifications, requires the Agency to examine individually each potential operation The absence of any specific intent to attack particular individuals will be only the starting point, and the inquiries frequently will involve a broad set of issues quite apart from assassination per se

15. *(Continued)*

Founded upon the E O prohibition but extending well beyond its parameters, this application of law and policy serves the national interest By ensuring compliance with US law and policy, in appropriate consultation with the White House, the Justice Department, and other Executive Branch agencies, as well as the Congressional oversight committees, the comprehensive review protects the Agency and its officers from charges of criminality or impropriety And, of supreme importance, the process helps to ensure that covert US activities continue to reflect American values and law

NOTES

1 3 C F R 90 (1977), reprinted in 50 U S C § 401 (1976)

2 3 C F R 112 (1979), reprinted in 50 U S C § 401 (Supp III 1979)

3 As had sections 4 and 5 of E O 11905, sections 2-102 and 4-107 of E O 12036 made clear that the order did not confer any new legal authority on US intelligence agencies And, removing any potential ambiguity about the scope of the order, section 2-307 further provided that "[n]o agency of the Intelligence Community shall request or otherwise encourage, directly or indirectly, any person, organization, or government agency to undertake activities forbidden by this Order or by applicable law "

4 3 C F R 200 (1982), reprinted in 50 U S C § 401 (1982)

5 Section 2 12 of E O 12333 complements the assassination prohibition by providing that "[n]o agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order " As used in text, therefore, "E O 12333" generally refers to its sections 2 11 and 2 12, although the order also provides specific direction to the US Intelligence Community about a number of additional subjects outside the scope of this article

6 At the time E O 11905 was promulgated, neither Congress nor the Department of Justice could identify any statutory authority prohibiting the US Government from authorizing the Intelligence Community to assassinate foreign nationals That aspect of the legal landscape has not changed, so that with no Federal legislation specifically barring the practice, the current Order appears to be the sole source of the prohibition Title V of the National Security Act (described below at note 9) explicitly authorizes the conduct of covert action, which includes the types of activities described in text but is silent on the specific subject of assassination Moreover, Title V itself provides that covert actions have to comply with the Constitution and Federal statutes The Act therefore cannot be read to either authorize or foreclose the option of assassination Nonetheless, the Supremacy Clause of the Constitution provides that duly enacted Federal statutes, together with the Constitution itself and lawfully made treaties, are "the supreme Law of the Land ," and Title V clearly authorizes the President to direct CIA to conduct covert actions For these reasons, if a president were to revoke the E O 12333 prohibition, Congress once again would need to decide whether to enact a similar prohibition into law

7 See, e g , W Hays Parks, "Memorandum of Law Executive Order 12333 and Assassination," *The Army Lawyer*, December 1989, LCdr Patricia Zengel, "Assassination and the Law of Armed Conflict," 134 Mil L Rev 123 (1991) See also Abraham D Sofaer, "Terrorism, the Law, and the National Defense," 126 Mil L Rev 89, 116-21 (1989), Lori Fisler Damrosch, "Covert Operations," 83 A J I L 795, 800-01 (1989)

8 See, e g , Russell J Bruemmer, "The Prohibition on Assassination A Legal and Ethical Analysis," published in *the Name of Intelligence Essays in Honor of Walter Pforzheimer* 137 (Hayden B Peake & Samuel Halpern, eds , 1994), and sources cited therein

9 A thorough review of the legal provisions governing the authorization and conduct of covert action is beyond the scope of this article It may, however, be observed that current law requires explicit presidential approval in advance for the conduct of any covert action, provides that the president shall ensure timely notification of the covert action to the intelligence committees of the House and Senate, and states that no presidential approval of covert action may authorize a violation of the Constitution or any US statute See generally sections 501, 503, and 504 of the National Security Act

10 The international law of war lends meaning to the term "assassination," and military operations that are permitted by that law should not run afoul of the prohibition Zengel, supra n 7, at 130-41 reports that international law prohibits military forces from employing "treacherous means," such as attacks by nonuniformed personnel, to attack enemy soldiers, alternatively, she writes, that law may proscribe simply the use of the more limited set of "perfidious attacks," such as feigning noncombatant status and appearing to be unarmed Drawing from similar sources, Parks, supra n 7, at 5 observes that "the death of noncombatants ancillary to the lawful attack of a military objective is neither assassination nor otherwise unlawful " These modes of analysis can serve well for purposes of E O 12333 and have been employed by CIA as appropriate since the prohibition was issued

15. *(Continued)*

Although not central to this article, it should be noted that Zengel contends that the E O , which is captioned "United States Intelligence Activities," does not encompass military operations, so that its prohibition on assassination should not be construed to limit US military options That proposition may be debated, for despite its title section 2 11 of the Order does not apply solely to intelligence officers but to all persons "employed by or acting on behalf of the United States Government " Compare Parks, supra n 7, at 4, stating that his memorandum "provide[s] guidance in the revision of U S Army Field Manual 27-10, *The Law of Land Warfare*, consistent with Executive Order 12333 " Even so, Zengel's approach to the underlying issues of definition appears sound and is not inconsistent with the E O prohibition

11 Although a military operation, not an intelligence activity, the 1993 US attack by cruise missiles against the headquarters of the Iraqi intelligence service reflected this mode of analysis In planning its retaliation for Iraq's attempt to murder former President Bush, the United States first concluded that the attack would be permitted under both domestic US and international law, targeted no specific Iraqi national in the retaliation, and mounted the attack at a time of night in which the building would be least likely to be occupied

12 As one moves away from reasonably foreseeable death or personal injury toward situations in which property damage is the most likely result, the analysis may take on a somewhat different cast

13 See Bruemmer, supra n 8, at 152-54

14 These issues also arise where a foreign national advises CIA that he or she independently plans to remove a leader from office In such an instance, CIA representatives overseas are instructed to remind their contacts of the E O rules, and emphasize that the US Government will neither violate the prohibition on assassination nor condone those who, acting on their own, engage in assassination

15 Zengel, supra n 7, at 137-42, 148-49, observes that an attack upon a hostile military commander during a time of lawful hostilities, to be carried out by uniformed military personnel or by clearly marked warplanes, would not be prohibited by the laws of war and therefore should not constitute assassination She cautions, however, that an attack upon the same commander, to be performed solely by civilians or by nonuniformed military personnel, might cross that line and be prohibited

16 Where CIA has recruited an existing member of such an organization, this also may pose significant questions concerning the use of so-called dirty assets, an issue beyond the scope of this article but one that has received widespread attention Newly revised Agency guidelines address the subject by generally requiring that, for the relationship to be maintained, the likely gain to US intelligence has to be substantial, with the appropriate Executive Branch agencies and Congressional committees informed of the decision