

Intelligence and The Rise of Judicial Intervention

by
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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

INTRODUCTION

If only it were such an exercise in glorious outlawry as all that! It is widely believed that the intelligence agencies of the U.S. government are not subject to laws and the authority of judges to apply them. No television cop show, adventure movie, or conspiracy book in two decades has left out characters that are sinister intelligence officials beyond the reach of the law.

The reality, however, is that the federal judiciary now examines a wide range of intelligence activities under a number of laws, including the Constitution. In order 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 must be vetted, but court employees are usually granted all clearances necessary for them to effectively assist 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

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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. This article proposes that judicial review of issues touching on intelligence matters has developed into a system of oversight.

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 has very few limits, by contrast with the model of judicial oversight described here, which is significantly limited. Legislative oversight is policy-related, as opposed to judicial oversight, which is concerned with legal questions. Legislative oversight tends toward 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.

Until the mid-1970s, judges had very little to say about intelligence.¹ Since 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, not the judiciary.² 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.³ Justice Scalia, (as a federal appellate court judge) further developed the doctrine, opining that courts should exercise considerable restraint in granting any petitions for equitable relief in foreign affairs controversies.⁴

In addition, American intelligence organizations historically have had limited internal security functions, if any. Prior to the creation of the CIA, the military departments conducted most intelligence activities.⁵ In 1947, the National Security Act expressly declined to give the CIA any law enforcement authority: “... the Agency shall have no police, subpoena, or law enforcement powers or internal security functions;” a prohibition that exists in the same form today.⁶ 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 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 the 1936 *Curtiss-Wright* case.⁷ Even that good democrat Thomas Jefferson wrote:

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 enjoying them with us: thus absurdly sacrificing the end to the means....⁸

The debate continues today over the President's constitutional ability to authorize the National Security Agency to intercept international communications into and out of the U.S. of persons linked to certain terrorist organizations without using procedures established by the Foreign Intelligence Surveillance Act (FISA).⁹

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.

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 the CIA, as well as the Rockefeller Commission report on CIA activities.¹⁰ 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.¹¹ 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 the counter-terrorism, counter-narcotics, and non-proliferation activities of the law enforcement agencies of the U.S. government.¹²

The other cause was simply the increasing number of statutes that Congress passed dealing with the Agency 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 that generally contained permanent statutory provisions, a practice that continues today.¹³

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.¹⁴ When Congress passes laws to prevail in disagreements in foreign affairs, more judicial review will occur. De Tocqueville was right – all disputes in the U.S. inevitably end up in court.¹⁵

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.”¹⁶ 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 U.S. policy makers. The need for secrecy clashes directly with conventional trial procedures in which most of the efforts on both sides of a case go into developing the pre-trial 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 creates problems. The pattern has developed that judges review intelligence information when protection of its 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 decisions in the *Brady* and *Giglio* cases, federal prosecutors are required to turn over certain materials to the defense regardless of their secrecy.¹⁷ 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.¹⁸

CLASSIFIED INFORMATION PROCEDURES ACT

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.¹⁹ It was a response to the problem of

“greymail,” in which defendants threatened to reveal classified information unless prosecutions were dropped or curtailed. Prior to 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. 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* (meaning non-publicly, in chambers) and *ex parte* (meaning presented by one side alone without the presence of the other party).²⁰

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.²¹ 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. Prosecutions are in fact dropped or severely curtailed after judicial review of information under CIPA because the defendant cannot get a fair trial without publicly revealing information damaging to U.S. intelligence efforts.²²

SURVEILLANCE

Judges also scrutinize intelligence activities involving surveillance. Because of the Fourth Amendment guarantee against unreasonable searches and seizures, intelligence collection is also 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.²³ In 1967 the Supreme Court overturned *Olmstead*,²⁴ and the government began to follow specially-tailored search warrant procedures for electronic procedures.²⁵

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. The FISA requires that applications for such orders approving electronic surveillance include detailed information about the targets, and the means of conducting the surveillance. Applications are heard and either denied or granted by a special court composed of 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.²⁶

Thus judges conduct extensive review of foreign intelligence-related electronic surveillance operations prior to their inception. Intrusive collection techniques make this area especially sensitive, and their review by federal judges is very important to reconciling them with Fourth Amendment protections against unreasonable searches. For example, in the espionage prosecution of Aldrich and Rosario Ames, published accounts of the investigation revealed that a search of Ames's house was made by FBI agents without a search warrant, based upon the authority of the Attorney General to approve physical searches in foreign counterintelligence investigations.²⁷ If Ames and his wife had not plead guilty, it is highly likely that the search would have been fully litigated in light of *United States v. Truong*, an espionage prosecution brought in the same federal district some twenty years earlier. In *Truong*, the FBI had tapped conversations of a State Department employee who was furnishing classified information to the North Vietnamese. The trial court heard arguments from both sides and held that when an investigation's primary purpose becomes prosecution (rather than counterintelligence), a criminal search warrant then becomes required for further intrusive electronic surveillance.²⁸

This primary purpose test was used for a number of years by the Department of Justice in reviewing FISA surveillance and maintaining a so-called "wall" between national security and counterintelligence activities and law enforcement activities. In May of 2002, the FISA Court issued an opinion imposing certain requirements and limitations accompanying an order authorizing electronic surveillance of a particular "agent of a foreign power" as defined in FISA. Those restrictions imposed a level of separation between intelligence and law enforcement activities that was unacceptable to the U.S. government, which appealed the order to the Foreign Intelligence Surveillance Court of Review for the first time since passage of FISA. The Court of Review extensively examined the law and practice of FISA surveillance, and issued a detailed opinion dismantling the wall as something not required by FISA or the Constitution.²⁹ The Court of Review heard from the American Civil Liberties Union, the Center for Democracy and Technology, and the National Association of Criminal Defense Lawyers, among others, who all filed friend-of-the-court briefs. The opinion (which included some deleted pages containing classified information) demonstrated without any doubt that a significant number of government attorneys did a large amount of explaining to federal judges what their clients were doing. That is full-fledged judicial review of the government's actions under federal statutes and the Fourth Amendment.

Explaining continues. In January 2006, the Department of Justice held a classified briefing for a number of FISA Court judges in response to concerns about the President's authorization for the National Security Agency to conduct electronic surveillance in certain counterterrorism operations without FISA Court approval. The *New York Times* noted with probable understatement that, "At Monday's briefing, judges were expected to question Justice Department officials intensely about the legal underpinnings of the program,..."³⁰

ARMED CONFLICT

After the 911 attacks on the United States, the ensuing global war on terrorism became a fertile ground for legal issues. On the one hand, unfettered and rapid action by the Executive Branch became essential to prevention of further terrorist attacks. On the other hand, the federal judiciary was asked to decide what are the legal boundaries to such executive action. As terrorists were captured on battlefields and in foreign venues around the world, federal courts stepped into the fray. Interrogation of captured combatants is a highly important intelligence method, especially when directed towards future threats of armed attack. The treatment of individuals incarcerated by the U.S. government is a highly important aspect of Constitutional due process rights. Federal courts are in the middle of addressing the issues that occur when these two principles meet.

In the *Hamdi* case³¹, the Supreme Court was asked to consider the legality of the Government's detention of an American citizen on American soil as an enemy combatant and to address the process that the constitution requires for challenging that status. The federal appeals court held that Hamdi's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant classification. The Supreme Court vacated the appeals decision and remanded the case, holding that while Hamdi could be detained, due process requires that a U.S. citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker.

That neutral decision maker would be a federal judge.

In a second case, *United States v. Moussaoui*, the defendant was charged with conspiracy related to the 911 attacks. The prosecutors and defense counsel fought a running discovery battle that resulted in the District Court issuing a series of rulings granting Moussaoui access to certain enemy combatant witnesses in U.S. custody for the purpose of deposing them. When the rulings were challenged by the government on appeal, the Court of Appeals issued an opinion that stated, "We are presented with questions of grave significance—questions that test the commitment of this nation to an independent judiciary, to the constitutional guarantee of a fair trial even to one accused of the most heinous of crimes, and to the protection of our citizens against additional terrorist attacks. These questions do not admit of easy answers."³² The appellate opinion went on to hold that enemy combatant witnesses who were foreign nationals in military custody outside the boundaries of the United States were not beyond the process power of federal district courts. It also held that ordering production of enemy combatant witnesses did not infringe on the Executive Branch's warmaking authority, in violation of separation of powers principles.

A third case involved Jose Padilla, an American citizen who was arrested as an enemy combatant upon returning to the United States from Pakistan and Afghanistan, where he allegedly was, "... recruited, trained, funded, and equipped by al Qaeda leaders to continue prosecution of the war in the United States by blowing up apartment

buildings in this country."³³ The issue before the appeals court was whether the President possesses the authority to detain militarily an American citizen who was closely associated with a hostile terrorist group engaged in armed attacks against the United States and who traveled to the United States to further prosecute the armed conflict against American citizens and targets. The district court said no, but the appeals court reversed and said yes, based upon information collected and provided by the government.

These and other terrorism cases continue to create issues that are currently being litigated.³⁴ One matter that seems to have been firmly decided, however, is that attorneys for the United States will continue to explain to federal judges significant clandestine activities of the U.S. intelligence and national security communities for many years to come.

GOVERNMENT AUTHORIZATION

In yet 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 the rules of criminal procedure, defendants are required to notify the government if they intend to raise a defense of government authorization.³⁵ 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 vociferously maintained that the CIA had told him to extravagantly spend 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 over 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.³⁶ The Ninth Circuit panel noted that, "This court has examined each and every classified document filed by Rewald in this appeal."³⁷ It subsequently upheld the District Court's exclusion of the classified information at issue.

The significance is not that the defendants lost their arguments, but that they had the opportunity to fully 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. Judges generally defer to intelligence experts on intelligence judgments – e.g., whether information is classified. But the question of what a fair trial may require belongs to the judge alone.

CIVIL LAW

Although criminal law has the most direct and dramatic impact on individual citizens, civil law also requires judicial intervention in numerous 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 compensable 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 those 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.

FOIA

For example, under the Freedom of Information Act (FOIA)³⁸ and the Privacy Act,³⁹ 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,⁴⁰ but there is still a rigorous review of such material. The CIA prepares public indexes (called “*Vaughn* indexes” after the case endorsing them⁴¹) describing records withheld under the sensitive information exceptions that are reviewed by the courts. 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.⁴²

The *Knight* case illustrates this extensive process.⁴³ The plaintiff filed a Freedom of Information Act 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. The CIA declined to produce any such records, and plaintiff filed a suit to force disclosure. Both public and classified indexes were prepared by the Agency, 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 the CIA and the FBI for materials on the disappearance of Jesus de Galindez, a Basque exile 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.⁴⁴ That pattern has been repeated in numerous other cases.⁴⁵ 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.⁴⁶ Other statutory privileges also protect intelligence sources and methods.⁴⁷ Judicial review of US government affidavits that assert the state secrets privilege is regularly used to resolve disputed issues of privilege.⁴⁸

In *Halkin v. Helms*, former Vietnam War protestors sued officials of various federal intelligence agencies alleging violation of constitutional and statutory rights. Specifically, the plaintiffs 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.⁴⁹ 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 plaintiff's lost the case, but they had the full attention of both trial and appellate federal court judges on the assertion of governmental secrecy.⁵⁰

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 the CIA in the HTLINGUAL mail opening program that operated between 1953 and 1973. Plaintiffs were awarded \$1000 each in damages, and the award was upheld on appeal.⁵¹

Even suits against intelligence agencies by their own employees have given aggrieved individuals at least a half-day in court. 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 U.S. Supreme Court. The judicial review even

included limited evidentiary review pursuant to cross-motions for summary judgment.⁵² The Supreme Court noted that section 102(c) of the National Security Act of 1947 could not be read to exclude judicial review of Doe's constitutional claims. The Court went on to note that a serious constitutional question would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.⁵³

It is a rare event when the Supreme Court scrutinizes intelligence activities. Nevertheless, that does occur in precisely the areas in which a wary citizenry would want it. For example, two recent cases explored the boundaries of claims against the United States government for wrongful actions against individuals.

In one case, a husband and wife filed suit against the United States and CIA, asserting estoppel and due process claims for CIA's alleged failure to provide them with the assistance it had promised in return for their espionage services.⁵⁴ Using the pseudonyms "John and Jane Doe", they claimed to be former citizens of a "foreign country" that at the time was considered to be an enemy of the United States, and John Doe was a diplomat for the country. After they expressed interest in defecting to the United States, CIA officers allegedly persuaded them to remain at their posts and conduct espionage for the United States for a specified period of time, promising in return that the United States would provide them financial and personal security for life. The Does alleged that after a number of years working in the United States, John Doe was laid off in a corporate merger and contacted CIA for a renewal of financial assistance. The request was denied, and the Does then sued, alleging CIA violated their procedural and substantive due process rights by denying them support and refusing to provide them with a fair internal process for reviewing their claims for assistance.

The Government moved to dismiss the Does' complaint based upon a Civil War-era case, *Totten v. United States*.⁵⁵ In that case, the administrator of the estate of William A. Lloyd sued the United States for compensation for services that Lloyd allegedly conducted as a spy during the Civil war. Lloyd's administrator claimed that Lloyd had entered into a contract with President Lincoln in 1861 to spy behind Confederate lines, for which he was to receive \$200 a month. The Supreme Court dismissed the claim and stated that the very essence of the alleged contract between Lloyd and the United States was that it was secret and had to remain secret. Since the nature of the contract was secrecy, it was incompatible for the courts to allow a former spy to sue to enforce it.

This defense finally prevailed when the Does' case reached the Supreme Court (in a unanimous decision). But the Does achieved an extensive review of their claims in three separate federal courts. Both the District Court and the Court of Appeals for the Ninth Circuit accepted the Does' argument that *Totten* did not bar some of their claims, including those related to the Government's failure to allow them due process (a constitutional claim).⁵⁶ Both of those courts allowed the case to proceed.

The Supreme Court also heard the case of a widow of a Guatemalan rebel leader who vanished in his country in 1992.⁵⁷ She alleged that U.S. government officials intentionally deceived her by concealing information that he had been detained, tortured,

and executed by Guatemalan army officers paid by CIA, and that this deception denied her access to the courts by leaving her without information with which she could have brought a lawsuit that might have saved her husband's life. She sued a number of U.S. government officials and departments, alleging common law and international law tort claims and constitutional tort claims.⁵⁸ The legal theories she advanced to support her claims were unusual (the District Court described her various requests for relief as "nearly unintelligible"⁵⁹). Yet she was able to convince the District Court and the Court of Appeals that at least some of her claims should survive the government's challenge. She did not prevail in the end, but there is no question that the federal judiciary gave her every chance to bring a legal claim against the government for what were allegedly covert intelligence activities conducted in a foreign country.

The same can be said of the case brought in federal court by survivors of General Rene Schneider, the Commander-in-Chief of the Chilean Army, who died of wounds suffered in a failed kidnapping attempt in 1970.⁶⁰ The plaintiffs brought suit against the United States and former Secretary of State Henry Kissinger, alleging that General Schneider died as a result of covert actions directed by high-level United States officials and CIA in connection with an attempted coup in Chile. The United States moved to dismiss the case for failure to state a legal claim. In such cases, the court is required to accept as true all of a plaintiff's factual allegations and draw all reasonable inferences in favor of the plaintiff. In spite of that, the court held that the political question doctrine rendered the claim non-justiciable. The political question doctrine is a powerful defense against claims relating to sovereign actions of United States overseas, but at least a federal judge examined the plaintiffs' claims, assumed the facts plead by the plaintiffs were true, and measured them against the doctrine. A federal judge—not the Executive or Legislative Branches—made that call.

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. Two separate lawsuits by former CIA employees Victor Marchetti and Frank Snepp challenged the contract as a forbidden prior restraint on publication. After extensive appellate review, the contract restrictions on freedom of speech were held reasonable and constitutional.⁶¹ 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 Ralph 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 convince the world that the "revolt of the poor natives against a ruthless U.S.-backed oligarchy" in El Salvador was really "a

Soviet/Cuban/Bulgarian/Vietnamese/PLO/Ethiopian/Nicaraguan/International Terrorism challenge to the United States.”⁶² McGehee offered a few examples of CIA operations to support his assertion, and some were deemed classified by the Agency and permission to publish those portions of the article were denied.

McGehee sued, seeking a declaratory judgment that the CIA prepublication and classification procedures violated the First Amendment. He lost, but the federal appeals court stated: “We must 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.”⁶³ 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.*⁶⁴ 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 very difficult to obtain but will subject any petition for such relief to very strict scrutiny by the federal courts.

CONCLUSIONS

The exposure of federal judges to intelligence activities leads to 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, in contrast to expansive 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 society in a powerful way.

The basic conundrum for intelligence is that it requires secrecy to be effective, but widespread 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. Excessive government secrecy can make excessive government activities more likely, because it hides them from the usual checks and balances.⁶⁵

In the United States, federal judges dampen the tendency toward excess in secret government. They counterbalance the swing in that direction. 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. Nations devising statutory charters and legislative oversight of their foreign intelligence services might well 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.

¹ For example, Loch Johnson characterizes the first phase of modern intelligence in the US (1947-74) as, "the Era of Trust...a time when the intelligence agencies were permitted almost complete discretion to chart their own courses...". Loch K. Johnson, *America's Secret Power: The CIA in a Democratic Society* (New York: Oxford University Press, 1989), p. 9.

² *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S.103 (1848); *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

³ *Japan Whaling Assn v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

⁴ *Sanchez-Espinosa v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985)

⁵ John Ranelagh, *The Agency: The Rise and Decline of the CIA* (New York: Simon & Schuster, 1987), pp. 29, 110; Anne Karalekas, "History of the Central Intelligence Agency," in William M. Leary ed., *The Central Intelligence Agency: History and Documents*, (Tuscaloosa, AL: University of Alabama Press, 1984), p. 13.

⁶ 50 U.S.C.A.. Section 403-4a(d)(1) (Westlaw 2006).

⁷ *U.S. v. Curtiss-Wright*, at note 3. Justice Sutherland's observations were *dicta*, not essential to the majority's holding in the case, and his theory has not been accepted by most legal authorities as a basis for wide executive discretion in foreign affairs. See also *The Chinese Exclusion Case*, 130 U.S. 581, 603-04 (1889), in which the Supreme Court held that Congress could legislate to exclude aliens because jurisdiction over its own territory is an incident of every independent nation.

⁸ Letter to J.B. Colvin, 20 September 1810, cited in *The Life and Selected Writings of Thomas Jefferson* (New York: Random House, 1944), pp. 606-7. Lincoln had similar musings: "Was it possible to lose the nation and yet preserve the Constitution?," quoted in Johnson, *America's Secret Power*, p. 252, n. 4.

⁹ See *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, U.S. Dept. of Justice White Paper (January 19, 2006); Loch Johnson, *Spy Law Works; Don't Bypass It*, ATLANTA JOURNAL-CONSTITUTION, January 30, 2006, at A14.

¹⁰ See Loch K. Johnson, *A Season of Inquiry: The Senate Intelligence Investigation* (Lexington, KY: University of Kentucky Press, 1985).

¹¹ See, for example, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

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- ¹² See *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988); G. Gregory Schuetz, "Apprehending Terrorists Overseas Under United States and International Law: A Case Study of the Fawaz Yunis Arrest," *Harvard International Law Journal*, 29, no. 2 (Spring 1988), pp. 499-531. In the late 1980s and early 1990s, CIA created the Counterterrorist Center, the Nonproliferation Center, and the Counternarcotics (now Crime and Narcotics) Center in order to centralize the efforts of the intelligence community and enhance its support to law enforcement in those areas of "thugs, bugs, and drugs."
- ¹³ See, e.g., Intelligence Authorization Act for Fiscal Year 1990, which established the position of the CIA inspector General as a presidential appointee [codified at 50 U.S.C.A. Section 403q, (Westlaw 2006)].
- ¹⁴ The Hughes-Ryan Amendment (Section 662 of the Foreign Assistance Act of 1961, 22 U.S.C. Section 2422) was repealed when the National Security Act was amended by the Intelligence Authorization Act for Fiscal Year 1991 to codify and consolidate oversight provisions in title V of the National Security Act.
- ¹⁵ The Office of General Counsel at CIA has grown from a handful of attorneys in the early 1970s to more than one hundred, an increase far above the proportional growth of CIA personnel or activity.
- ¹⁶ Benjamin Civiletti, "Intelligence Gathering and the Law," *Studies In Intelligence*, 27 (Summer 1983), pp.13, 15. This article was adapted from the Tenth Annual John F. Sonnett Memorial Lecture delivered by Mr. Civiletti at the Fordham University School of Law on 15 January 1980. *Studies In Intelligence* is an official publication of the Central Intelligence Agency. Civiletti's article can also be found in the *Fordham Law Review*, 48, no. 6 (May 1980), pp. 883-906.
- ¹⁷ *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1974). Under these cases, the government has a constitutional responsibility to search for and produce to a criminal defendant admissible exculpatory and impeachment material.
- ¹⁸ *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1979).
- ¹⁹ 18 U.S.C.A. App. III Section 1 et seq. (Westlaw 2006).
- ²⁰ See Jonathan Fredman, "Intelligence Agencies, Law Enforcement, and the Prosecution Team", 16 YALE L. & POL'Y REV. 331 (1998), for a thorough treatment of CIPA.
- ²¹ See, for example, *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985).
- ²² The Iran-Contra cases are examples. See especially *United States v. Fernandez*, No. CR89-0150-A (E.D. Va. April 24, 1988); *Final Report of the Independent Counsel for Iran/Contra Matters*, vol. 1, pp. 283-93.
- ²³ *Olmstead v. United States*, 277 U.S. 438 (1928).
- ²⁴ *Katz v. United States*, 389 U.S. 347 (1967).
- ²⁵ Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. Sections 2510, 2521 (Westlaw 2006).
- ²⁶ FISA is codified in 50 U.S.C.A. ch. 36 (Westlaw 2006).
- ²⁷ James Adams, *Sellout: Aldrich Ames and the Corruption of the CIA* (New York: Viking, 1995), ch. 15. In the *Intelligence Authorization Act for Fiscal Year 1995*, the issue of Attorney General physical search authority was overtaken by events when Congress extended the FISA process to include not only electronic surveillance but physical searches, as well. The FISA Court will now provide judicial review in advance for searches such as that done in the Ames' house. 50 U.S.C.A. Sections 1821-1829 (Westlaw 2006).
- ²⁸ 629 F.2d 908, 915-16 (4th Cir. 1980).
- ²⁹ *In re Sealed Case No. 02-001*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002)
- ³⁰ Eric Lichtblau, *Judges and Justice Dept. Meet Over Eavesdropping Program*, THE NEW YORK TIMES, January 10, 2006, at A14.
- ³¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- ³² *United States v. Moussaoui*, 382 F.3d 453, 456 (4th Cir. 2004), cert. den., 125 S. Ct. 1670 (Mar. 21, 2005).
- ³³ *Padilla v. Hanft*, Case No. 05-6396 (4th Cir. Sept.9, 2005), at 3.
- ³⁴ See Jerry Markon, *Terror Defendant Seeks Hearing To Find Whether He Was Spied On*, THE WASHINGTON POST, January 10, 2006, at B1 (The story relates to a filing in federal district court by a U.S. citizen, Ali Al-Timimi, previously convicted on terrorism charges based upon his inciting his Northern Virginia followers to train for violent jihad against the United States; he claims that he was the target of a warrantless electronic surveillance program authorized by the President).
- ³⁵ Fed. R. Crim. Proc. 12.3.
- ³⁶ *United States v. Rewald*, 889 F.2d 836, 838-9 (9th Cir. 1989). Rewald was convicted on 94 (out of 100) counts of various mail, securities, and tax fraud crimes, as well as perjury.

³⁷ *Ibid.*, at 852.

³⁸ 5 U.S.C. Section 552 (Westlaw 2006).

³⁹ 5 U.S.C. Section 552a (Westlaw 2006).

⁴⁰ *CIA v. Sims*, 471 U.S. 159 (1985).

⁴¹ *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

⁴² See, for example, *Knight v. CIA*, 872 F.2d 660 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976); *Miller v. Casey*, 730 F.2d 773, (D.C. Cir. 1984). The executive branch has taken the position that *de novo* review of the classification decision of the executive branch raises serious constitutional separation of powers issues. This position was strengthened by the case of *Dept. of the Navy v. Egan*, 484 U.S. 518, 527 (1988), in which the Supreme Court said that, “(The President’s) authority to classify and control access to information bearing on the national security...flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.” Nevertheless, executive branch affidavits asserting classification are still required and reviewed by judges.

⁴³ *Knight v. CIA*, at note 36.

⁴⁴ *Fitzgibbon v. CIA*, 911 F.2d 755, 757 (D.C. Cir. 1990). The CIA and FBI prevailed in withholding the information under FOIA exemptions after extensive District Court review of the records at issue, which related to intelligence sources and methods.

⁴⁵ See, for example, *Patterson v. FBI*, 893 F.2d 595, 599-600 (3d Cir. 1990); *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1385 (D.C. Cir. 1979); *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

⁴⁶ 345 U.S. 1 (1953).

⁴⁷ For example, the National Security Act of 1947, as amended, 50 U.S.C.A. Section 403-1(i) (Westlaw 2006), states that the Director of National Intelligence shall “protect intelligence sources and methods from unauthorized disclosure” (previously a duty imposed on the Director of Central Intelligence prior to the creation of the position of the Director of National Intelligence). See also Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. Section. 403g (Westlaw 2006).

⁴⁸ *Kerr v. United States District Court*, 426 U.S. 394, 405-06 (1976); *United States v. Nixon*, 418 U.S.683, 714-15 (1974); *Farnsworth-Cannon, Inc. v. Grimes*, 635 F.2d 268, 269 (4th Cir. 1980).

⁴⁹ *Halkin v. Helms*, 598 F.2d 1, 5 (D.C. Cir. 1978).

⁵⁰ *Ibid.*, pp. 5-7.

⁵¹ *Birnbaum v. United States*, 588 U.S. 319 (2d Cir. 1978).

⁵² 981 F.2d 1316 (D.C. Cir. 1993). The petitions of the plaintiff for a rehearing by the full Court of Appeals and for a writ of certiorari from the Supreme Court were denied.

⁵³ *Webster v. Doe*, 486 U.S. 592, 603 (1988).

⁵⁴ *Tenet v. Doe*, 544 U.S. 1 (2005).

⁵⁵ *Totten v. United States*, 92 U.S. 105 (1876).

⁵⁶ 99 F. Supp. 2d 1284, 1289-1294 (W.D. Wash. 2000), and 329 F. 3d 1135 (9th Cir. 2003), respectively.

⁵⁷ *Christopher v. Harbury*, 536 U.S. 403 (2002).

⁵⁸ Constitutional torts are called “Bivens” actions, after the Supreme Court case of *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Such actions are based upon the theory that under the Constitution itself, without further statutory waiver of sovereign immunity, courts may impose tort-like liability upon individual U.S. government employees when they egregiously violate protections guaranteed to individuals by the Constitution. Such actions are rarely successful.

⁵⁹ *Supra*, note 4, at 418.

⁶⁰ *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004), *aff’d*, 412 F.3d 190 (D.C.Cir. 2005).

⁶¹ *U.S. v. Snapp*, 444 U.S. 507 (1980); *U.S. v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 93 S.Ct. 553 (1972).

⁶² *McGehee v. Casey*, 718 F.2d 1137, 1139 (D.C. Cir. 1983).

⁶³ *Ibid.*, at 1148.

⁶⁴ 403 U.S. 713 (1971).

⁶⁵ See William R. Corson and Robert T. Crowley, *The New KGB: Engine of Soviet Power* (New York: William Morrow, 1985) pp. 21-26, 129-130, 174-75; Harry Rositzke, *The KGB: The Eyes of Russia* (New York: Doubleday, 1981) pp. 79-81, 945.