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Intelligence and the Rise of Judicial Intervention

by Frederic F. Manget[1]

INTRODUCTION

The belief out there — beyond the Beltway, in the heartland of America, even up in New York — is widely held 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 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 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.

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 counter-intelligence. Foreign intelligence means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons. Counter-intelligence refers to information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.[2]

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 the CIA. Covert action is now defined in US law as activity of the US government to influence political, economic, or military conditions abroad, where it is intended that the role of the government will not be apparent or acknowledged publicly. It does not include traditional foreign intelligence, counter-intelligence, diplomatic, law enforcement, or military activities.[3]

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, 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.[4] 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.[5] 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.[6] The doctrine was further developed in the Federal Court of Appeals for the District of Columbia Circuit by then-Judge Scalia, who wrote that courts should exercise considerable restraint in granting any petitions for equitable relief in foreign affairs controversies.[7]

In addition, American intelligence organizations historically have had limited internal security functions, if any. Prior to the creation of the CIA, most intelligence activity was conducted by the military departments.[8] 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.[9] 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 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 the 1936 *Curtiss-Wright* case.[10] 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 . . ..[11]

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.[12] 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.[13] 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 US government.[14]

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 which generally contained permanent statutory provisions, a practice that continues today.[15]

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.[16] When Congress passes laws to prevail in disagreements in foreign affairs, more judicial review will occur. De Tocqueville was right — all disputes in the US inevitably end up in court.[17]

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."[18] 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 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 is bad. 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.[19] 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.[20]

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.[21] 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 discover}' 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).

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.[22] 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 US intelligence efforts.[23]

Judges also scrutinize intelligence activities in areas 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.[24] In 1967, the Supreme Court overturned *Olmstead,*[25] and the government began to follow specially-tailored search warrant procedures for electronic

surveillance.[26] 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, 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.[27]

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.[28] That search would have been fully litigated had the case gone to trial, much the same way the issue had been litigated in *United States* v. *Truong*, an espionage prosecution brought in the same federal district some twenty years earlier. 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 counter-intelligence), a criminal search warrant then becomes required for further intrusive electronic surveillance.[29] This is full-fledged judicial review of the government's actions under the Fourth Amendment. Defendants may not win such litigation, but a judge has heard their side of a story.[30]

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 rules of criminal procedure, defendants are required to notify the government if they intend to raise a defense of government authorization.[31] 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.[32] The Ninth Circuit panel noted that, "This court has examined each and every classified document filed by Rewald in this appeal."[33] It subsequently upheld the District Court's exclusion of the classified information at issue.

In two more recent criminal cases, 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.[34]

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 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 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.

For example, under the Freedom of Information Act (FOIA)[35] and the Privacy Act,[36] 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,[37] but there is still a rigorous review of such material. The **CIA** prepares public indexes (called *"Vaughn* Indexes"' after the case endorsing them[38]) 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.[39]

The *Knight* case illustrates this extensive process.[40] 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 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.[41] That pattern has been repeated in numerous other cases.[42] Thus in areas where federal laws mandate disclosure of US government information, federal judges review claims of exemptions based on sensitive intelligence equities.

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.[43] Other statutory privileges also protect intelligence sources and methods.[44] Judicial review of US government affidavits that assert the state secrets privilege is regularly used to resolve disputed issues of privilege.[45]

In *Halkin* v. *Helms,* former Vietnam War protesters sued officials of various federal intelligence agencies alleging violation of plaintiffs' constitutional and statutory rights. Specifically, they alleged that 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.[46] The trial court considered three *in camera* affidavits and the *in camera* testimony of the Deputy Director of NS A, and the case was ultimately dismissed at the appellate level based on the assertion of the privilege. The plaintiffs lost the case, but they had the full attention of both trial and appellate federal court judges on the assertion of governmental secrecy.[47]

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 SI000 each in damages, and the award was upheld on appeal.[48] Even suits against intelligence agencies by their own employees give 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 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.[49]

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 the Agency. The settlements made moot a full judicial review of all government actions, but both sides clearly believed that a full-scale judicial review could occur.[50]

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.[11] 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."[52] 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 District of Columbia Circuit Court of Appeals 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."[33] 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.*[54] 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 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.

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 exces.[55]

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. Those nations currently 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.

Endnotes

1. This article has been reviewed by the Central Intelligence Agency. That review neither constitutes CIA authentication of information nor implies CIA endorsement of the author's views.
2. *50 U.S.C. Section 401 a* (1988).
3. *50 U.S.C. Section 4I3b(e)* (1988).
4. For example. Loch Johnson characterizes the first phase of modem 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.
5. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U.S. 103 (1848); *US. v. Curtiss-Wright Export Corp.,* 299 **U.S.** 304 **(1936).**
6. *Japan Whaling Ass'n* v. *American Cetacean Soc'y,* 478 U.S. 221, 230 (1986).
7. *Sanchez-Espinosa v. Reagan,* 770 F.2d 202 (D.C. Cir. 1985).
8. 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. Lean.', ed.. *The Central Intelligence Agency: History and Documents,* (Tuscaloosa, AL: University of Alabama Press. 1984), p. 13.
9. *50 U.S.C. Section 403-31 d)(l)* (1988).
10. *U.S. v. Curtiss-Wright,* note 5. 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.
11. 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.
12. See Loch K. Johnson. *A Season of Inquiry: The Senate Intelligence Investigation* (Lexington, KY: University of Kentucky Press, 1985).

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

14. See *United States v. Yams,* 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 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."

15. See *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. Section 403q).*

16. 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.*

17. The Office of General Counsel at CLA has grown from a handful of attorneys in the early 1970s to more than seventy, an increase far above the changes in CIA personnel or activity.

18. Benjamin Civiletti, "Intelligence Gathering and the Law," *Studies In Intelligence,* 27 (Summer 1983), pp. 13, 15. The 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. Unclassified articles from it are in the process of being published. Civiletti*s article can also be found in the *Fordham Law Review,* 48, no. 6 (May 1980), pp. 883-906.

19. *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.

20. *United States* v. *Kampiles,* 609 F.2d 1233 (7th Cir. 1979).

21. *18 U.S.C. App. Ill Section 1 et seq.* (1988).

22. See, for example. *United States v. Smith,* 780 F.2d 1102 (4th Cir. 1985).

23. 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.

24. *Olmstead v. United States,* 277 U.S. 438 (1928).

25. *Katz v. United States,* 389 U.S. 347 (1967).

26. *Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. Sections 25102521* (1988).

27. *50 U.S.C. Section 1801 note* (1988).

28. James Adams. *Sellout: Aldrich Ames and the Corruption of the CIA* (New York: Viking. 1995). chapt. 15.

29. 629 F. 2d 908, 915-16 (4th Cir. 1980).

30. In the *Intelligence Authorization Act for Fiscal Year 1995. Pub. L. No. 94-359. 108 Stat. 3423* (1994), the *Truong* 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.

31. *Fed. R. Crim. Proc. 12.3.*

32. *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. He remains in prison after unsuccessful appeals.

33. Ibid., at 852.

34. Douglas Frantz. "'Judge Rejects Teledyne Unit's Claims" *Los Angeles Times. 2* September 1993, p. A-5. The article stales that a federal judge rejected claims by a division of Teledyne. Inc., that its role in the sale of 24.000 cluster bombs to Iraq was legal because the transactions were pan of a secret US policy to arm Iraq before the Persian Gulf War. The article goes on to say that the judge agreed that intelligence material should not be disclosed because it was irrelevant to the case and would seriously damage national security. The second case mentioned in the article is the prosecution of former *Banca Nazionale Lavoro* manager Christopher Drougoul. in which a federal judge refused to allow testimony about US foreign policy.

35. *5 U.S.C. Section 552* (1988).

36. 5 *U.S.C. Section 552a* (1988).

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

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

39. 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.

40. *Knight v. CIA.* at note 30.

41. *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.

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

43. 345 U.S. 1 (1953).

44. For example. *The National Security Act of 1947.* as amended, *50 U.S.C. Section 4033(c)(5),* which states that the Director of Central Intelligence shall "protect intelligence sources and methods from unauthorized disclosure." See also *50 U.S.C. Section 403g* (The *Central Intelligence Agency Act of 1949.* as amended).

45. *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 268,169 (4th Cir. 1980).

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

47. Ibid., pp. 5-7.

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

981 F. 2d 1316 (D.C. Cir. 1993).

See, for example. "CIA to Settle Charges Involving 300 Women." *Miami Herald,* 31 March 1995, p. 20A; "The Angry Women of the CIA," *US. News & World Report,* 10 April 1995, pp. 47-49.

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

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

Ibid., at 1148.

403 U.S. 713 (1971).

American examples from the 1980s include the Iran/Contra Affair and the mining of the Nicaraguan harbors. However, they pale into insignificance compared to the Russian experience. See William R. Corson and Robert T. Crowley, *The New KGB: Engine of Soviet Power* (New York: William Morrow. 1985) pp. 21-26, 129-30, 174-75; Harry Rositzke, *The KGB: The Eyes of Russia* (New York: Doubleday. 1981) pp. 79-81. 945.

Frederic F. Manget is Chief of Intelligence Support Division. Office of General Counsel, **CIA.**