Intelligence and the Rise of Judicial Intervention

Frederic F. Manget

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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*

It is actually not such an exercise in glorious outlawry as all that. But the belief is widely held beyond the Beltway, in the heartland of the country and even in New York, that the intelligence agencies of the US Government are not subject to laws and the authority of judges. No television cop show, adventure movie, or conspiracy book in two decades has left out characters who are sinister intelligence officials beyond the law's reach.

The reality, however, is that the Federal judiciary now examines a wide range of intelligence activities under a number of laws, including the Constitution. To decide particular issues under the law, Federal judges and their cleared clerks and other staff are shown material classified at the highest levels. There is no requirement that Federal judges be granted security clearances—their access to classified information is an automatic aspect of their status. Their supporting staffs have to be vetted, but court employees are usually granted all clearances that they need to assist effectively the judiciary in resolving legal issues before the courts.

Judges currently interpret the laws that affect national security to reach compromises necessary to reconcile the open world of American jurisprudence and the closed world of intelligence operations. They have now been doing it long enough to enable practitioners in the field to reach a number of conclusions. In effect, the judicial review of issues touching on intelligence matters has developed into a system of oversight.

FI, CI, and CA

Intelligence has several components. The authoritative statutory definition of intelligence is in Section 3 of the National Security Act of 1947, as amended, and includes both foreign intelligence and counterintelligence. Foreign intelligence means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons. Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or

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elements thereof, foreign organizations, or foreign persons, or international terrorist activities.

Covert action also is often lumped with intelligence because historically such activity has been carried out by parts of the Intelligence Community agencies, most notably by CIA. Covert action is now defined as activity of the US Government to influence political, economic, or military conditions abroad, where it is intended that the role of the US Government will not be apparent or acknowledged publicly, but not including traditional foreign intelligence, counterintelligence, diplomatic, law enforcement, or military activities.

Official Accountability

The term "oversight" describes a system of accountability in which those vested with the executive authority in an organization have their actions reviewed, sometimes in advance, by an independent group that has the power to check those actions. In corporations, the board of directors exercises oversight. In democratic governments, the classic model of oversight is that of the legislative branches, conducted through the use of committee subpoena powers and the authority to appropriate funds for the executive branches. Legislative oversight is unlimited, by contrast with the model of judicial oversight described here, which is limited.

Legislative oversight is policy-related, as opposed to judicial oversight and its concern with legal questions. And legislative oversight tends toward 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.

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Past Practices

Until the mid-1970s, judges had little to say about intelligence. Because intelligence activities are almost always related to foreign affairs, skittish judges avoided jurisdiction over most intelligence controversies under the political question doctrine, which allocates the resolution of national security disputes to the two political branches of the government. This doctrine was buttressed by the need to have a concrete case or controversy before judges, rather than an abstract foreign policy debate, because of the limited jurisdiction of Federal courts. The doctrine was further developed in the Federal Court of Appeals for the DC Circuit by then Judge Scalia, who wrote that courts should exercise considerable restraint in granting any petitions for equitable relief in foreign affairs controversies.

In addition, American intelligence organizations have historically had limited internal security functions, if any. Before CIA's creation, most intelligence activity was conducted by the military departments. In 1947, the National Security Act expressly declined to give CIA any law enforcement authority: ". . . except that the Agency shall have no police, subpoena, or law enforcement powers or internal security functions"—a prohibition that exists in the same form today. Without the immediate and direct impact that police activity has on citizens, there were few instances where intelligence activities became issues in Federal cases.

There is even a historical hint of an argument that, to the extent that intelligence activities are concerned with the security of the state, they are inherent in any sovereign's authority under a higher law of self-preservation and not subject to normal judicial review. Justice Sutherland found powers inherent in sovereignty to be extra-constitutional in his dicta in the *Curtiss-Wright* case.

Even that good democrat Thomas Jefferson wrote to a friend, "A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest* (emphasis in original). The laws of necessity, of self-preservation, of saving our country, by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are

enjoying them with us: thus absurdly sacrificing the end to the means. . . " This sense that somehow secret intelligence activities were governed by a higher law of self-preservation no doubt added to the Federal judiciary's reluctance to exert its limited jurisdiction in such areas.

Increasing Scrutiny

In the 1970s this reluctance began to dwindle, driven by a number of causes. After the Watergate affair, the activities of the executive branch came under growing and skeptical scrutiny by the press, the public, and Congress. This scrutiny blossomed into the Church and Pike Committee investigations of CIA, as well as the Rockefeller Commission report on CIA activities.

The Federal judiciary was following right behind, in part due to a natural extension of the judicial activism that began in the 1960s. The expansion of due process rights of criminal defendants meant that judges would examine in ever-increasing detail the actions of the government in prosecutions. The American tendency to treat international problems as subject to cure by legal process became even more pronounced, and the Intelligence Community found itself increasingly involved in counterterrorism, counternarcotics, and nonproliferation activities of the law enforcement agencies of the US Government.

The other cause was simply the increasing number of statutes that Congress passed dealing with CIA and the Intelligence Community. The more statutes there are on a particular subject, the more judicial review of the subject there will be. For example, in the late 1970s, Congress began to pass annual authorization bills for the Intelligence Community which generally contained permanent statutory provisions, a practice that continues today.

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Congress Weighs In

Congressional inroads on all types of executive branch foreign affairs powers also increased in the 1970s. The constitutional foreign affairs powers shared by the executive and legislative branches wax and wane, but it seems clear that Congress began to reassert its role in international relations at that time.

The War Powers Resolution and the series of Boland Amendments restricting aid to the Nicaraguan Contras in the 1980s were statutory attempts by Congress to force policy positions on a reluctant executive branch. The Hughes-Ryan Amendment required notification of oversight committees about covert actions. When Congress passes laws to prevail in disagreements in foreign affairs, more judicial review will occur. De Tocqueville was right—all disputes in the United States inevitably end up in court.

The result is the current system of judicial oversight of intelligence. By 1980, then Attorney General Benjamin Civiletti could write that, "Although there may continue to be some confusion about how the law applies to a particular matter, there is no longer any doubt that intelligence activities are subject to definable legal standards." It is not nearly so comprehensive as legislative oversight, because Federal courts still have jurisdiction limited by statute and constitution. But it does exist in effective and powerful ways that go far beyond the conventional wisdom that national security is a cloak hiding intelligence activities from the Federal judiciary.

Criminal Law

Federal judges are required to examine the conduct of the government when it becomes a litigated issue in a criminal prosecution, and almost every case involves at least one such issue. Intelligence activities are no exception. What makes those activities so different is that they almost always require secrecy to be effective and to maintain their value to US policymakers.

The need for secrecy clashes directly with conventional US trial procedures in which most of the efforts on both sides of a case go into developing the pretrial phase called discovery. As a result, Federal judges review and decide a number of issues that regularly arise in areas where democratic societies would instinctively say that governmental secrecy is bad. The pattern has developed that judges review intelligence information when protection of its

secrecy could affect traditional notions of a fair trial.

For example, it would be manifestly unfair if the government could, without sanctions, withhold secret intelligence information from defendants that would otherwise be disclosed under rules of criminal procedure. In fact, under both Federal Rule of Criminal Procedure 16 relating to discovery and the *Brady* and *Giglio* cases, Federal prosecutors are required to turn over certain materials to the defense, regardless of their secrecy.

For a number of years, judges fashioned their own procedures to balance competing interests. In the *Kampiles* case, the defendant was charged with selling to the Russians a manual about the operation of the KH-11 spy satellite. The trial court did not allow classified information to be introduced at trial. The court issued a protective order after closed proceedings in which the Government presented evidence of the sensitive document that was passed to the Soviet Union, and of the FBI's counterintelligence investigation into the document's disappearance. The court of appeals upheld the espionage conviction based upon the defendant's confession that he had met with and sold a classified document to a Soviet intelligence officer and upon sufficient other evidence to corroborate the reliability of the defendant's confession.

CIPA

The Classified Information Procedures Act (CIPA) was passed in 1980 to avoid ad hoc treatment of the

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issues and to establish detailed procedures for handling such classified information in criminal trials. It was a response to the problem of greymail, in which defendants threatened to reveal classified information unless prosecutions were dropped or curtailed. Before passage of CIPA, the government had to guess the extent of possible damage from such disclosures because there were no methods by which classified information could be evaluated in advance of public discovery and evidentiary rulings by the courts.

Under CIPA, classified information can be reviewed under the regular criminal procedures for discovery and admissibility of evidence before the information is publicly disclosed. Judges are allowed to determine issues presented to them both *in camera* (nonpublicly, in chambers) and *ex parte* (presented by only one side, without the presence of the other party).

Under CIPA, the defendant is allowed to discover classified information and to offer it in evidence to the extent it is necessary to a fair trial and allowed by normal criminal procedures. The government is allowed to minimize the classified information at risk of public disclosure by offering unclassified summaries or substitutions for the sensitive materials. Judges are called upon to balance the need of the government to protect intelligence information and the right of a defendant to a fair trial. This is an area in which democratic societies would want judicial scrutiny of governmental assertions of national security equities, in order to preserve constitutional due process guarantees.

Looking at Surveillance

Judges also scrutinize intelligence activities in areas involving surveillance. Because of the Fourth Amendment guarantee against unreasonable searches and seizures, intelligence collection also is reviewed under standards applied to search warrants. The Federal judiciary has been reviewing surveillance in the context of suppression of evidence hearings for many years. For example, the issue of electronic surveillance was considered in 1928 in the Supreme Court case of *Olmstead,* which held that the government could conduct such surveillance without a criminal search warrant. In 1967 the Supreme Court overturned *Olmstead,* and the government began to follow specially tailored search warrant procedures for electronic surveillance.

FISA

In 1978 the Foreign Intelligence Surveillance Act (FISA) was passed to establish a secure forum in which the government could obtain what is essentially a search warrant to conduct electronic surveillance within the United States of persons who are agents of foreign powers. FISA requires that applications for such orders approving electronic surveillance include detailed information about the targets, what facts justify the belief that the targets are agents of foreign powers, and the means of conducting the surveillance.

Applications are heard and either denied or granted by a special court composed of seven Federal district court judges designated by the Chief Justice of the United States. There is a three-member court of review to hear appeals of denials of applications.

Thus, judges conduct extensive review of foreign-intelligence-related electronic surveillance operations before their inception. Intrusive collection techniques make this area especially sensitive, and their review by Federal judges is important to reconciling them with Fourth Amendment protections against unreasonable searches. In the Intelligence Authorization Act for Fiscal Year 1995, the FISA procedures were expanded to apply to physical searches.

Pleading Government Authorization

In another area, judges review secret intelligence activities in the context of whether defendants were authorized by an intelligence agency to do the very actions on which the criminal charges are based. Under rules of criminal procedure, defendants are required to notify the government if they intend to raise a defense of government authorization. The government is required to respond to such assertions, either admitting or denying them.

Should there be any merit to the defense, the defendant is allowed to put on evidence and to have the judge decide issues that arise in litigating the defense. This satisfies the notion that it would be unfair to defendants, who could have been authorized to carry out some clandestine activity, if they could not bring such secret information before the court.

For example, in the case of *United States v. Rewald,* the defendant was convicted of numerous counts of bilking investors in a Ponzi scheme. Rewald maintained that CIA had told him to spend extravagantly the money of investors in order to cultivate relationships with foreign potentates and wealthy businessmen who would be useful intelligence sources. The opinion of the Ninth Circuit Court of Appeals panel that reviewed the convictions characterized Rewald's argument as his principal defense in the case, and in fact Rewald did have some minor contact with local CIA personnel, volunteering information from his international business travels and providing light backstopping cover for a few CIA employees.

Rewald sought the production of hundreds of classified CIA documents and propounded more than 1,700 interrogatories, but after reviewing responsive records and answers, the trial court excluded most of the classified information as simply not relevant under evidentiary standards. The Ninth Circuit panel noted that, "This court has examined each and every classified document filed by Rewald in this appeal." It subsequently upheld the District Court's exclusion of the classified information at issue.

In two more recent criminal cases—the prosecutions of Christopher Drougoul in the BNL affair and the Teledyne case related to Chilean arms dealer Carlos Cardoen—press accounts have noted that the judges in both cases heard arguments from the defendants that sensitive intelligence and foreign policy information should be disclosed in those prosecutions as part of the defense cases. The press accounts further state that in both cases the judges disagreed, and, after reviewing the information at issue, ruled against the defendants.

The significance is not that the defendants lost their arguments, but that they had the opportunity to litigate them before a Federal judge. The Department of Justice does not prosecute defendants while the Intelligence Community denies them the information they need to have a fair trial. Who decides what a fair trial requires? An independent Federal judge, appointed for life, who reviews the secrets.

Civil Law

Criminal law has the most direct and dramatic impact on individual citizens, but civil law also requires judicial intervention in numerous

cases where intelligence activities, and the secrecy surrounding them, become issues. Private civil litigants may demand that the government produce intelligence information under the laws requiring disclosure of agency records unless they are specifically exempted. Individual civil plaintiffs may bring tort actions against the government under the Federal Tort Claims Act based on allegations that secret intelligence activities caused compensible damages. Private litigants may sue each other for any of the myriad civil causes of action that exist in litigious America, and demand from the government information relating to intelligence activities in order to support their cases.

In all such instances, Federal judges act as the arbiters of government assertions of special equities relating to intelligence that affect the litigation. Private civil litigants may not win their arguments that such equities should be discounted in their favor, but they can make their arguments to a Federal judge.

For example, under the Freedom of Information Act (FOIA) and the Privacy Act, there are exceptions to the mandatory disclosure provisions that allow classified information and intelligence sources and methods to be kept secret. Courts defer extensively to the executive branch on what information falls within those exceptions, but there is still a rigorous review of such material. CIA prepares public indexes (called *Vaughn* indexes, after the case endorsing them) describing records withheld under the sensitive information exceptions that are reviewed by the courts.

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If those public indexes are not sufficient for a judge to decide whether an exception applies, classified *Vaughn* indexes are shown to the judge *ex parte* and *in camera*. If a classified index is still not sufficient, then the withheld materials themselves can be shown to the judge.

Other FOIA Requests

The *Knight* case illustrates this extensive process. The plaintiff filed an FOIA request for all information in CIA's possession relating to the 1980s sinking of the Greenpeace ship *Rainbow Warrior* in the harbor in Auckland, New Zealand, by the French external intelligence service. CIA declined to produce any such records, and the plaintiff filed a suit to force disclosure. Both public and classified indexes were prepared by CIA, and, when they were deemed by the court to be insufficient for a decision in the case, all responsive documents were shown in unredacted form to the trial judge in her chambers. Her decision was in favor of the government, and it was affirmed on appeal.

Historian Alan Fitzgibbon litigated another FOIA request to CIA and the FBI for materials on the disappearance of Jesus de Galindez, a Basque exile and a critic of the Trujillo regime in the Dominican Republic who was last seen outside a New York City subway station in 1956. The case was litigated from 1979 to 1990, and, during the process, the district court conducted extensive *in camera* reviews of the material at issue. That pattern has been repeated in numerous other cases.

Thus, in areas where Federal laws mandate disclosure of US government information, Federal judges review claims of exemptions based on sensitive intelligence equities.

State Secrets Privilege

Federal courts also have jurisdiction over civil cases ranging from negligence claims against the government to disputes between persons domiciled in different states. In such cases, litigants often subpoena or otherwise demand discovery of sensitive intelligence-related information. The government resists such demands by asserting the state secrets privilege under the authority of *U.S. v. Reynolds*, a Supreme Court case that allowed the government to deny disclosure of national security secrets. Other statutory privileges also protect intelligence sources and methods. Judicial review of US Government affidavits that assert the state secrets privilege is regularly used to resolve disputed issues of privilege.

In *Halkin v. Helms,* former Vietnam war protesters sued officials of various Federal intelligence agencies

alleging violation of plaintiffs' constitutional and statutory rights. Specifically, they alleged that the National Security Agency (NSA) conducted warrantless interceptions of their international wire, cable, and telephone communications at the request of other Federal defendants. The government asserted the state secrets privilege to prevent disclosure of whether the international communications of the plaintiffs were in fact acquired by NSA and disseminated to other Federal agencies.

The trial court considered three *in camera* affidavits and the *in camera* testimony of the Deputy Director of NSA, and the case was ultimately dismissed at the appellate level based on the assertion of the privilege. The plaintiffs had their day in court. They lost the case, but they had the full attention of both trial and appellate Federal court judges on the assertion of governmental secrecy.

Allegations of Abuse

Federal courts also adjudicate the substance of legal claims brought by private citizens alleging abusive governmental actions. For example, in *Birnbaum v. United States,* a suit was brought under the Federal Tort Claims Act by individuals whose letters to and from the Soviet Union were opened and photocopied by CIA in a mail-opening program that operated between 1953 and 1973. Plaintiffs were awarded $1,000 each in damages, and the award was upheld on appeal.

In *Doe v. Gates,* a CIA employee litigated the issue of alleged discrimination against him based on his homosexuality. Doe raised two constitutional claims—whether his firing violated the Fifth Amendment equal protection or deprivation of property without compensation clauses. He was heard at every Federal court level, including the US Supreme Court. The judicial review even included limited evidentiary review pursuant to cross-motions for summary judgment. (The case has been litigated for years and is not yet final, but the government is expected to prevail).

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In two more recent cases, the chance of losing litigation over alleged gender-based discrimination led the parties to settle claims with one female officer in the CIA's Directorate of Operations (the "Jane Doe Thompson Case") and with a class of female operations officers in CIA. The settlements made moot a full judicial review of all government actions, but both sides clearly believed that judicial review would occur.

The First Amendment

Federal judges also look at First Amendment protections of freedom of speech and the press as they relate to intelligence. One context is the contract for nondisclosure of classified information that employees, contractors, and others sign when they are granted access to sensitive information by agencies of the Intelligence Community. The contract requires prepublication review of nonofficial writings by the government in order to protect sensitive information. That is a prior restraint on publication which was challenged in two separate lawsuits by former CIA employees Victor Marchetti and Frank Snepp. After extensive appellate review, the contract restrictions on freedom of speech were held reasonable and constitutional. It is clear that Federal courts will entertain claims of First Amendment violations from Intelligence Community employees, and will examine the claims closely.

For example, in 1981 a former CIA officer named McGehee submitted an article to CIA for prepublication review pursuant to a secrecy agreement he had signed in 1952, when he joined the Agency. The article asserted that the CIA had mounted a campaign of deceit to persuade the world that the "revolt of the poor natives against a ruthless US-backed oligarchy" in El Salvador was really "a Soviet/Cuban/Bulgarian/Vietnamese/PLO/Ethiopian/Nicaraguan/International Terrorism challenge to the United States." McGehee offered a few examples of CIA operations to support his assertion; some were deemed classified by the Agency, and permission to publish those portions of the article was denied.

McGehee sued, seeking a declaratory judgment that the CIA prepublication and classification procedures violated the First Amendment. He lost, but the DC Circuit Court of Appeals stated: "We must accordingly establish a standard for judicial review of the CIA classification

decision that affords proper respect to the individual rights at stake while recognizing the CIA's technical expertise and practical familiarity with the ramifications of sensitive information. We conclude that reviewing courts should conduct a *de novo* review of the classification decision, while giving deference to reasoned and detailed CIA explanations of that classification decision." When individual rights are affected, Federal courts have not been reluctant to assert oversight and require Intelligence Community agencies to visit the courthouse and explain what they are doing.

The second context involving the First Amendment is government attempts to restrain publication of intelligence information by the press. When *The Pentagon Papers* were leaked to the news media in 1971, the attempt to enjoin publication resulted in the Supreme Court case of *New York Times v. U.S.* Because of the number of individual opinions in the case, the holding is somewhat confusing. Nonetheless, it seems clear that an injunction against press publication of intelligence information not only will be difficult to obtain but also will subject any petition for such relief to strict scrutiny by the Federal courts.

Conclusions

The exposure of Federal judges to intelligence activities leads to a number of conclusions. One is that judicial oversight operates to an extent overlooked in the debate over who is watching the Intelligence Community. Judicial oversight is limited compared to unlimited Congressional oversight. Judicial oversight deals with legal issues, as opposed to policy issues. Judges are deferential to the executive branch in intelligence matters, something not often true of Congress. But judges do act as arbiters of governmental secrecy in a powerful way.

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The basic conundrum for intelligence is that it requires secrecy to be effective, but government secrecy in a Western liberal democracy is generally undesirable. Government secrecy can destroy the legitimacy of government institutions. It can cripple accountability of public servants and politicians. It can hide abuses of fundamental rights of citizens. In fact, secret government tends to excess.

In the United States, Federal judges counterbalance the swing toward such excess. In those areas most important to particular rights of citizens, they act as arbiters of governmental secrecy. The Federal judiciary ameliorates the problems of government secrecy by providing a secure forum for review of intelligence activities under a number of laws, as surrogates for the public.

The developing history of judicial review of intelligence activities shows that it occurs in those areas where government secrecy and the need for swift executive action conflict with well-established legal principles of individual rights: an accused's right to a fair criminal trial; freedom from unreasonable searches and seizures; rights of privacy; and freedom of speech and the press.

Judges thus get involved where an informed citizenry would instinctively want judicial review of secret intelligence activities. The involvement of the Federal judiciary is limited but salutary in its effect on executive branch actions. Nothing concentrates the mind and dampens excess so wonderfully as the imminent prospect of explaining one's actions to a Federal judge.

The Constitution's great genius in this area is a system of government that reconciles the nation's needs for order and defense from foreign aggression with fundamental individual rights that are directly affected by intelligence activities. Those nations currently devising statutory charters and legislative oversight of their foreign intelligence services might do well to include an independent judiciary in their blueprints. Federal judges are the essential third part of the oversight system in the United States, matching requirements of the laws to intelligence activities and watching the watchers.