

## Openness and the Future of the Clandestine Service

N. Richard Kinsman

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*Editor's Note: The subject of openness in dealing with intelligence information, sources, and methods has long been controversial. This article and the one that follows provide a point-counterpoint discussion of some of the prominent issues involved.*

*“The core of my job as Director of Central Intelligence (DCI) is to mobilize the collection and analytical capabilities of the Central Intelligence Agency and the other US intelligence agencies to ensure that our national leaders have the information necessary for informed policy decision making. Although much of our work must be done in secrecy, we have a responsibility to the American people, and to history, to account for our actions and the quality of our work. Accordingly, I have made a serious commitment to the public release of information that with the passage of time no longer needs to be protected under our security classification system.”*

—DCI George J. Tenet, 15 July 1998

With the collapse of the Soviet Union and abortive efforts to dismember the CIA in the aftermath of the Cold War, the concept of “openness” gained widespread, uncritical acceptance, and this attitude probably will endure well into the future. In the context of intelli-

gence operations, the concept signifies a compromise between the need of a people in a democratic society to be informed of government operations, and the responsibilities of a secret intelligence organization to defend the security of that society. It would be counterproductive to argue against openness, particularly in the aftermath of the Cold War and recognition that public awareness is one of the strongest pillars of a free society. Nonetheless, as there are legitimate abridgments to the First Amendment, so there have to be abridgments to openness in order to avoid heedless and inappropriate applications of the concept, which threaten the viability of the CIA mission.

If the Clandestine Service (CS) is rendered ineffective due to the Agency's inability or unwillingness to insist on rational and reasonable applications of openness to the business of intelligence, we will be found guilty of a self-inflicted intelligence failure that could prove fatal. It is imperative that the senior managers of the Directorate of Operations (DO), home of the CS, become intimately involved in declassification issues. They need to drive the “openness train,” not ride in the caboose, if a major wreck is to be avoided.

The DCI's statement, and the responsibilities implicit within it, summarizes the conundrum

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of trying to reconcile the dictates of history and historians to provide as much detail as possible about historical events, with the objective of clandestine intelligence professionals to protect the details of their craft.

Today, the CIA is confronted with increasingly frequent and deadly serious assaults on DCI authorities and responsibilities. No less than the long-term viability of the CS is at issue.

The principal CIA programs for declassification are the Freedom of Information Act (FOIA); records requested by the State Department for its *Foreign Relations of the United States* (FRUS) series; special searches mandated by legislation or executive fiat, such as the Kennedy assassination, Chilean human rights, Nazi war crimes, Guatemala/Honduras human rights, Nazi gold, POW/MIA, covert action releases such as the CIA-backed coup in Guatemala in 1954, the Bay of Pigs; mandatory 25-year release programs; and others yet to come. This is a growth industry, spawning ever increasing bureaucracies in CIA, with ever greater human and financial resource needs. This article, however, confines itself to the implications of openness, especially as prescribed by FRUS and Executive Order 12958, for the future of CIA clandestine operations.

## FRUS

The FRUS series presents the official unclassified documentary historical record of *major foreign*

*policy decisions and significant diplomatic activity of the United States Government* (emphasis added).

Under the principles for State-CIA cooperation on FRUS, the Department of State and the CIA are to be guided by the general presumption that volumes of the FRUS series will disclose for the historical record major covert actions undertaken as a matter of US foreign policy.

Foreign relations of the United States are the responsibility of, and within the purview of, the Department of State, not the CIA, which is prohibited by law from making policy. FRUS, in describing “major foreign policy decisions and significant diplomatic activity,” should not be inferring responsibility for such activity to CIA, which in every case is acting in its capacity as executive agent for policy levels of the US Government. While inferring CIA as the authority for actions described in FRUS may not be the intention of FRUS authors, it is commonly misunderstood by readers to be the case. To correct this misperception, CIA should seldom, if ever, appear by name in the FRUS. Reference should be, for this and other reasons, to intelligence activities of the US Government.

## Foreign Sensitivity

There are serious, cumulative, and long-term deleterious effects on the Agency as a result of specific citations by name to CIA in the FRUS. This is in addition to the historical inaccuracies abetted by referring to “CIA” activity instead of the historically precise terminology, that is, US Government activity. The foreign readership of the FRUS is of critical concern to the CS. The reaction of foreign readers to the exploits of the CIA, on their territory or that of neighboring countries, as recorded in the FRUS, increases sensitivity and awareness of the dangers inherent in a CIA presence. This normally translates into increased counterintelligence and/or terrorist activity directed against the real or imagined CIA presence, making the CS’s job more difficult and risky, and occasionally life-threatening.

Equally damaging to Agency interests is the reluctance of host country liaison entities to cooperate with CIA, given the fear that their cooperation, the fact of which is normally sensitive and protected within their own country, is likely to appear some day in the official written record of the US Government. This same fear is an even greater obstacle to be overcome in the case of agent recruitment targets, the lifeblood of Agency clandestine HUMINT collection programs.

State Department historians aggravate such problems through their efforts to provide “historically accurate” documents, citing CIA by name in FRUS volumes. CIA has

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already agreed to so-called boilerplate language entitled “Note on U.S. Covert Actions and Counter-Insurgency Programs,” for use in the FRUS. The unclassified language of this note, developed for insertion in future FRUS volumes “where appropriate,” makes explicit the wide range of possible US Government officially authorized clandestine activity in sovereign countries other than the United States, and acknowledges that the CIA is the executive agent of the US Government for covert action. Such activity is defined in the note explicitly as “propaganda; economic warfare; preventive direct action, including sabotage, demolition and evacuation measures; subversion against hostile states, including assistance to underground resistance movements, guerrillas, and refugee liberation’s [sic] groups; and support of indigenous anti-Communist elements in threatened countries of the Free World.”

Explicit FRUS citations of CIA activities in specific countries constitute de facto admission of a CIA presence, a direct contradiction of current policy to deny an official CIA presence abroad. This policy emanates from a dual vital need to protect our unilateral presence in foreign countries and to provide internal cover for our bilateral liaison activities, where authorized.

Official acknowledgment of a CIA presence in specific countries would present most foreign governments with an untenable internal political problem, as they are placed in the position of appearing to have condoned a CIA presence

(unilateral and/or liaison) in their countries, and thereby accepting the type of activities conducted by CIA, already made explicit in the above-described covert action boilerplate text. The issue of official CIA nonpresence abroad is crucially important to CIA's ability to conduct its clandestine missions of collection, liaison, and covert action.

Official, unclassified acknowledgment of a clandestine CIA presence abroad further risks serious contamination of the cover issue, wherein neither the US Government nor foreign government officials want to admit to allowing clandestine personnel under cover as among legitimate US Government employees, or as officially recognized intelligence liaison personnel in foreign countries. Foreign leaders and officials who want to maintain confidential relations with CIA or other US Government intelligence entities cannot be expected to tolerate unclassified official publication of clandestine CIA activities involving their respective countries.

The rationale for denial of a CIA presence in any specific foreign country is under legal challenge by State Department, National Security Council, and Department of Justice elements. There are several anoma-

lies present here, in what amounts to a direct and inappropriate challenge to DCI authorities. The forums for these challenges are the Interagency Covert Action Panel (ICAP), established to “determine whether to acknowledge historical covert actions not previously acknowledged by the US Government,” and the Interagency Security Classification Appeals Panel (ISCAP). The basic issues for the CS are de facto acknowledgment of a CIA presence abroad, and DCI authorities regarding classification.

Further, it may seem strange that challenges to DCI authorities come from within the same executive branch of government wherein CIA resides, and from two of the most prominent foreign relations entities of the executive branch. In fact, it is the National Security Council that writes “Presidential Findings,” the highly classified documents that authorize covert actions to be implemented by CIA.

In considering additional aspects of the negative long-term effect on CIA as a result of the declassification/FRUS/ISCAP processes, one has to consider the inherent corollary damage. Despite the most careful and rigorous processing of individual documents in the declassification process, there is an inevitable deterioration in CIA's ability to protect those aspects most critical to the long-term viability of the business of intelligence—liaison relationships, sources and methods, recruitment, covert action, and so forth. This is due in part to the multiplicity and duplication of effort within CIA, with separate declassification programs using

uncoordinated and often conflicting declassification criteria. Release decisions considered nondamaging in one program are cited as precedent, then applied elsewhere causing unanticipated and damaging releases. True names of Agency personnel may be released in one program, while protected in another. Individual agent 201 information and Performance Appraisal Reports of Agency staff employees are also sometimes released to the general public. Even the most sensitive documents, such as Restricted Handling message traffic, have been inadvertently declassified, appearing on the Internet to the great surprise and consternation of senior Agency officials.

### **Feeding Misperceptions**

From a worldwide perspective, referring to the limited number of national intelligence organizations with global scope, there is little or no precedent for an unclassified national history like the FRUS to be written that includes specific detailed reference to clandestine activities or operations of a country's national intelligence service or services. Among the country histories one might examine in this respect are Great Britain, Russia and the former USSR, France, Israel, Germany, and Japan. As the official history of the United States writ large, in broad historical perspective, it appears to the foreign readership of the FRUS as little better than official boasting of CIA intelligence exploits, at the expense of foreign countries' sovereignty.

Unfortunately, the phenomena of suspicion and distrust of clandestine operations is reinforced by specific citations of CIA activity in the FRUS, and results in unintended inferences that the Agency is the originating and/or approving authority for its intelligence and covert action operations. Many readers mistakenly conclude that activity carried out by CIA is somehow uncoordinated, or worse, independent, and, in some cases, contrary to official policy. While there is some recognized usefulness in CIA being seen on occasion as providing a short-term means of allowing the presidency or Congress to distance itself from a failed or unpopular US Government initiative, the fiction of CIA being perceived as other than carrying out approved US policy should not be allowed to be enshrined in the official history of American foreign policy.

To add relevance to the unfortunate popular perception of CIA as a sometime rogue element, one need only consider who the general public refers to or blames for such well-known covert operations as the Bay of Pigs, Guatemala 1954, the Iran coup, the U-2 incident in 1960, and so forth. The reader of official US history should not be left with the impression that the results of such activities were other than the result of an official US Government initiative or policy decision. For example, the Bay of Pigs is commonly perceived as a CIA debacle. In fact, it is frequently argued that the failure was due to influence by then-Secretary of State Rusk, UN Ambassador Stevenson, and, ultimately, President Kennedy

in denying air operations and other support. FRUS would not be likely to include this level of controversy in its broad treatment of the history of US foreign policy.

### **Relevance**

Another issue which arises in the FRUS process is that of the "relevance" of Agency documents and activity to the stated objectives of FRUS. According to Public Law 102-138 of 28 October 1991, the series presents the "official documentary historical record of *major foreign policy decisions and significant diplomatic activity of the United States Government*" (emphasis added). In practice, State Department historians advise that "We (State) will decide what is relevant." There needs to be further discussion and agreement on criteria as to what constitutes covert action of sufficient impact or significance as to warrant inclusion in the official, unclassified "History of United States Foreign Policy."

Then there is the question as to what level of detail is relevant regarding any given covert action. Discussion of policy considerations is one thing; providing details of operational implementation is quite another. It can be argued that approved covert actions in and of themselves constitute foreign policy decisions, when on the scale of the Bay of Pigs, Afghanistan, Iran, and so forth. Many covert actions of lesser scope, however, do not merit classification as significant policy determinants and often, when described, threaten to reveal CIA protected sources and meth-

ods. In such instances, historical accuracy can be satisfied by describing the “fact of” a given covert action, including its intended objectives, without specifics that threaten clandestine operational relationships and methodology. There have to be clear distinctions between the official acknowledgment of covert action policy decisions as opposed to the details of the implementation of such foreign policy decisions.

There is also frequent discussion and disagreement with regard to the impact of information already in the public domain, as justification in FRUS for including similar information, but from official sources. CIA should not agree to official acknowledgment in FRUS of the details of covert actions beyond the fact of policy approval, objectives, and rationale, in order to protect methodology, CIA presence in foreign countries, liaison relationships, and so forth.

CIA is in danger of losing control of its own declassification process, especially regarding FRUS, to the nongovernmental academic community. It is increasingly apparent that the FRUS series is being written for, and according to, criteria and standards of the domestic US academic community. There is another whole body of law and executive authority, tested in the US courts, which defines CIA national security responsibilities regarding the protection of certain categories of information. “Generally accepted standards of scholarship” are nowhere mentioned in the relevant national security laws and executive orders.

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A more appropriate authority on questions of national security declassification would be the President’s Foreign Intelligence Advisory Board (PFIAB), whose members have the requisite background and experience to arrive at impartial and informed decisions.

#### Special Searches

Other than FOIA and FRUS, the general declassification category of “special searches” is especially troublesome. These searches have proliferated in recent years, often dictated by special interests or political agendas, and without established procedures as in the case of FOIA and FRUS.

Thus, in a sense, CIA becomes subject to the shifting winds of politics, and is usually placed in a no-win situation, in that expectations of what may reside in CIA files are seldom satisfied by what emerges. Meanwhile, internal resources are increasingly strained to meet ad hoc internal search requirements which do not contribute to CIA missions and devour resources that would otherwise be available for current requirements.

From a procedural standpoint, these special searches are highly destructive of internal CIA functionality in the declassification arena.

The search criteria or goal is generally described broadly, and, given the highly subjective nature of the inquiries, produces large volumes of documents. Each new special search requires reinvention of the wheel in terms of declassification criteria. In the JFK case, the search was mandated by legislation, then implemented by an external (to CIA) panel that had few discernible concerns with regard to CIA long-term equities.

In other searches, criteria for declassification, or protection, is a work in progress according to subject matter, political interests, and so forth. Chile is a recent example. The confluence of the publication of a FRUS volume on that country and the special human rights search prompted by the detention of former Chilean President Pinochet totally disrupted whatever limited prior coherence existed in terms of declassification criteria, process, and procedures. Indeed, as a result of this debacle, all covert action is at risk of being officially considered a human rights issue, described as “other acts of political violence.” Within CIA itself, the validity and applicability of declassification criteria become cause for debate among competing internal interests such as the DO, Congressional Affairs, Public Affairs, the General Counsel, the CIA History Staff, and the Office of Information Management. Each new search tends to establish new criteria and precedents, which are then available for the next search. The end result is increasing confusion as to what can or should be protected, while outside interests have an ever-expanding data bank of often

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inconsistently redacted documents from which to challenge declassification decisions.

#### **Executive Order 12958**

Under the terms of Executive Order 12958, Sec. 5.4, there is an appeal procedure which established the Interagency Security Classification Appeals Panel. The members of ISCAP are the State Department, the Department of Defense, the National Security Council, the Justice Department, the National Archives, and the DCI, whose representative comes from the Community Management Staff (CMS). CMS considers itself to be the Intelligence Community representative as opposed to the CIA representative, and thus free to oppose CIA positions. When this occurs, CIA per se is without representation. ISCAP is the appeal panel for persons who want to contest declassification decisions under E.O. 12958. When an appeal reaches ISCAP, CIA declassification decisions may be overturned by a simple majority vote. The only formal appeal to an ISCAP decision is to the President of the United States.

There have recently been several highly significant challenges to CIA declassification decisions emanating from the ISCAP appeal process. The process itself can be considered to be flawed in that the ISCAP is for the most part composed of individuals without the requisite background and experience in clandestine intelligence operations to recognize and protect what needs protection. A spirit of practi-

cality and common sense is no more adequate for sophisticated and nuanced declassification decisions than for brain surgery. Nor do these panel members appear to understand that leaders of foreign countries, where US covert activities are attributed to CIA, cannot be expected to approve of such activities. One would not expect the military to allow tank drivers or pilots to run submarines, or lawyers to perform medical operations. In the same vein, valid decisions on clandestine operations declassification can only properly be made by those with the required current and background knowledge, and the experience of living with the anticipated and unanticipated consequences of information declassified, and then openly available to the entire world.

It is from the non-United States readership that the unintended consequences are likely to be derived. The loss of liaison cooperation, increased counterintelligence vigilance against staff and agents abroad, and the refusal of human assets to collaborate due to fear of exposure cut to the vital organs of the CS.

There is no workable appeal process for ISCAP decisions, short of going to the President. The unfortunate result of CS equities being judged by unqualified panelists is

that bedrock Agency policies and DCI authorities are under assault from ISCAP reviews. Perhaps the most stunning example of this is an ISCAP vote in 1999, by a margin of 5 to 1, regarding the protection of Foreign Government Information (FGI), liaison-derived intelligence. In most cases, the “fact of” an existing clandestine liaison relationship is classified; the clandestine collection of intelligence via such relationships constitutes a collection method as in sources and methods. The DCI legislative authority to protect sources and methods is under direct legal challenge via the very panel established under E.O. 12958 to adjudicate declassification issues.

As if this were not enough, ISCAP has ordered the DCI to query clandestine foreign liaison partners for permission to declassify their information. The mere request by CIA to a foreign intelligence organization to declassify information it has provided in the past is certain to be unsettling; it fosters an atmosphere of concern, not only over protecting sources and documents passed previously, but also whether it should continue to do so. Foreign officials may decide to stop passing on this sensitive information.

In a legal decision on this issue rendered by the Office of Legal Counsel, US Department of Justice on 5 October 1999, it was ruled that the ISCAP can legally override DCI classification authorities and responsibilities. This includes DCI abilities to protect sources and methods, the essence of the CS.

Quite apart from the challenge to overall DCI authority explicit in this attempted interference in his management of sources and methods, there can be no more certain way to destroy intelligence relationships than to demonstrate CIA's inability to honor prior agreements and protect sensitive/foreign sources. This is an issue of credibility and trustworthiness, which is crucial in the establishment of clandestine relationships. To those foreign individuals who commit to such relationships, failure to protect is often, quite literally, a matter of life and death. This issue seems destined for appeal to the President. Meanwhile, ISCAP has also recently challenged CIA protection of another clandestine collection method currently used to great benefit in a number of foreign countries. In both of these examples, ISCAP members have demonstrated their lack of understanding and concern with regard to fundamental clandestine intelli-

gence collection verities, as well as denying DCI authority and responsibilities.

### **Strong Leadership Needed**

To prevent immediate and long-term injurious impact on our clandestine capabilities, we should continue to deny in full documents which cannot otherwise be sanitized in such a manner as to protect our equities. In most cases, satisfactory sanitization will at a minimum, entail deletion of specific reference to CIA, as well as references and/or inferences which identify sources and methods, liaison relationships, and so forth.

More than theory or lip service will be required to make this work. Unfortunately, the DO, despite being the Directorate most affected, has not become fully engaged at the senior management level. This may be partially explained in terms

of what is commonly referred to as the "DO culture." Here, that phrase is used to refer to a cultural disdain for other than clandestine operations. Such an admirable focus may be too narrow to meet successfully the challenge of the era of openness. Only those who have had sufficient experience to understand and appreciate the nuances can truly judge the impact of lapses in the protection of the basic tenets of the craft. It is therefore incumbent on the DO leadership to recognize the seriousness of the current assault on its core values and to devote the same measure of dedication and imagination to protecting those values as it does to traditional operations. We can and should embrace openness. Senior Agency management must, however, set the parameters of intelligence information release to safeguard the future effectiveness of the CS.