Central Intelligence Agency

Washington, D.C. 20505

OLL 85-1224/1

19 APR 1985

Mr. Bernard McMahon
Staff Director
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Bernie:

I am very pleased to enclose a copy of the Supreme Court's April 16 decision in the Sims case. We view the Supreme Court decision to be one of great importance for the ongoing mission of this Agency and for the national security of this country. This decision, which clarifies the Agency's ability to protect intelligence sources from the risk of forced disclosure, will send an important message to our sources that we can protect their confidentiality.

The contribution of this decision to the ability of the Agency to perform its statutory missions will be incalculable. This decision, along with Executive Order 12333, the CIA Information Act and Intelligence Identities Protection Act, represent important steps in the revitalization of the Agency.

We hope that you will share this important decision with the Members of the Committee and other members of your staff and convey to them our appreciation for their continued support of the Agency.

Sincerely,

/s/ Charles A. Briggs

Charles A. Briggs
Director, Office of Legislative Liaison

Enclosure

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CENTRAL INTELLIGENCE AGENCY ET AL. *v.* SIMS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA DISTRICT

No. 83–1075. Argued December 4, 1984—Decided April 16, 1985*

Between 1963 and 1966, the Central Intelligence Agency (CIA) financed a research project, code-named MKULTRA, that was established to counter Soviet and Chinese advances in brainwashing and interrogation techniques. Subprojects were contracted out to various universities, research foundations, and similar institutions. In 1977, respondents in No. 83–1075 (hereafter respondents) filed a request with the CIA under the Freedom of Information Act (FOIA), seeking, *inter alia*, the names of the institutions and individuals who had performed the research under MKULTRA. Citing Exemption 3 of the FOIA—which provides that an agency need not disclose "matters that are . . . specifically exempted from disclosure by statute . . . provided that such statute . . . refers to particular types of matters to be withheld"—the CIA declined to disclose the requested information. The CIA invoked, as the exempting statute referred to in Exemption 3, § 102(d)(3) of the National Security Act of 1947, which states that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Respondents then filed suit under the FOIA in Federal District Court. Applying, as directed by the Court of Appeals on an earlier appeal, a definition of "intelligence sources" as meaning only those sources to which the CIA had to guarantee confidentiality in order to obtain the information, the District Court held that the identities of researchers who had received express guarantees of confidentiality need not be disclosed, and also exempted from disclosure other researchers on the ground that their work for the CIA, apart from

*Together with No. 83–1249, *Sims et al.* v. *Central Intelligence Agency et al.*, also on certiorari to the same court.

Syllabus

MKULTRA, could, upon learning that the research was performed at a certain institution, deduce the identities of the protected individual researchers. Pp. 18–21.

—— U. S. App. D. C. ——, 709 F. 2d 95, affirmed in part and reversed in part.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed an opinion concurring in the result, in which BRENNAN, J., joined.

SUPREME COURT OF THE UNITED STATES

Nos. 83–1075 AND 83–1249

CENTRAL INTELLIGENCE AGENCY, ET AL., PETITIONERS

83–1075 v.

JOHN CARY SIMS AND SIDNEY M. WOLFE

JOHN CARY SIMS AND SIDNEY M. WOLFE, PETITIONERS

83–1249 v.

CENTRAL INTELLIGENCE AGENCY AND WILLIAM J. CASEY, DIRECTOR, CENTRAL INTELLIGENCE AGENCY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April 16, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

In No. 83–1075, we granted certiorari to decide whether § 102(d)(3) of the National Security Act of 1947, as incorporated in Exemption 3 of the Freedom of Information Act, exempts from disclosure only those sources of intelligence information to which the Central Intelligence Agency had to guarantee confidentiality in order to obtain the information. In No. 83–1249, the cross-petition, we granted certiorari to decide whether the Freedom of Information Act requires the Agency to disclose the institutional affiliations of persons whose identities are exempt from disclosure as "intelligence sources."

I

Between 1953 and 1966, the Central Intelligence Agency financed a wide-ranging project, code-named MKULTRA,

On August 22, 1977, John C. Sims, an attorney, and Sidney M. Wolfe, M. D., the director of the Public Citizen Health Research Group,[4] filed a request with the Central Intelligence Agency seeking certain information about MKULTRA. Respondents invoked the Freedom of Information Act (FOIA), 5 U. S. C. § 552. Specifically, respondents sought the grant proposals and contracts awarded under the MKULTRA program and the names of the institutions and individuals that had performed research.[5]

Pursuant to respondents' request, the Agency made available to respondents all of the MKULTRA grant proposals and contracts. Citing Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3)(B),[6] however, the Agency declined to disclose the

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Subcommittee on Health and Scientific Research of the Senate Committee on Human Resources, 95th Cong., 1st Sess. (1977).

An internal Agency report by its Inspector General had documented the controversial aspects of the MKULTRA project in 1963. See Report of Inspection of MKULTRA (July 26, 1963).

[4]Sims and Wolfe are the respondents in No. 83-1075 and the cross-petitioners in No. 83-1249. In order to avoid confusion, we refer to Sims and Wolfe as respondents throughout this opinion.

[5]Twenty years after the conception of the MKULTRA project, all known files pertaining to MKULTRA were ordered destroyed. Final Report, at 389–390, 403–405. In 1977, the Agency located some 8,000 pages of previously undisclosed MKULTRA documents. These consisted mostly of financial records that had inadvertently survived the 1973 records destruction. Upon this discovery, Agency Director Stansfield Turner notified the Senate Select Committee on Intelligence and later testified at a joint hearing before the Select Committee and the Subcommittee on Health and Scientific Resources of the Senate Committee on Human Resources. Although the Joint Committee was given a complete list of the MKULTRA researchers and institutions, the Committee honored the Agency's request to treat the names as confidential. Respondents sought the surviving MKULTRA records that would provide this information.

[6]The Agency also cited Exemption 6, 5 U. S. C. § 552(b)(6), which insulates from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This claim, rejected by the District Court and the Court of Appeals, is no longer at issue.

On remand, the District Court applied this definition and ordered the Agency to disclose the names of 47 researchers and the institutions with which they had been affiliated. The court rejected respondents' contention that the MKULTRA research was not needed to perform the Agency's intelligence function, explaining that

> "[i]n view of the agency's concern that potential foreign enemies could be engaged in similar research and the desire to take effective counter-measures, . . . [the Agency] could reasonably determine that this research was needed for its intelligence function." App. to Pet. for Cert. in No. 83-1075, pp. 22a-23a.

The court then turned to the question whether the Agency could show, as the Court of Appeals' definition requires, that it could not reasonably have expected to obtain the information supplied by the MKULTRA sources without guaranteeing confidentiality to them. The court concluded that the Agency's policy of considering its relationships with MKULTRA researchers as confidential was not sufficient to satisfy the Court of Appeals' definition because "the chief desire for confidentiality was on the part of the CIA." *Id.*, at 24a. The court recognized that some of the researchers had sought, and received, express guarantees of confidentiality from the Agency, and as to those held that their identities need not be disclosed. The court also exempted other researchers from disclosure on the ground that their work for the Agency, apart from MKULTRA, required that their identities remain secret in order not to compromise the Agency's intelligence networks in foreign countries. *Id.*, at 26a-27a, 30a-31a. Finally, the court held that there was no need to disclose the institutional affiliations of the individual researchers whose identities were exempt from disclosure; this withholding was justified by the need to eliminate the unnecessary risk that such intelligence sources would be identified indirectly. *Id.*, at 27a, 34a.

We granted certiorari, 465 U. S. ——, —— (1984). We now reverse in part and affirm in part.

II

No. 83-1075

A

The mandate of the FOIA calls for broad disclosure of Government records.[9] Congress recognized, however, that public disclosure is not always in the public interest and thus provided that agency records may be withheld from disclosure under any of the nine exemptions defined in 5 U. S. C. § 552(b). Under Exemption 3 disclosure need not be made as to information "specifically exempted from disclosure by statute" if the statute affords the agency no discretion on disclosure, 5 U. S. C. § 552(b)(3)(A), establishes particular criteria for withholding the information, or refers to the particular types of material to be withheld, § 552(b)(3)(B).

The question in No. 83-1075 is twofold: first, does § 102(d)(3) of the National Security Act of 1947 constitute a statutory exemption to disclosure within the meaning of Exemption 3; and second, are the MKULTRA researchers included within § 102(d)(3)'s protection of "intelligence sources."

B

Congress has made the Director of Central Intelligence "responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U. S. C. § 403(d)(3). As part of its postwar reorganization of the national defense system, Congress chartered the Agency with the responsibility of coordinating intelligence activities relating to national se-

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[9]The Court has consistently recognized this principle. See, *e. g.*, *Baldrige* v. *Shapiro*, 455 U. S. 345, 352 (1982); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 220 (1978); *EPA* v. *Mink*, 410 U. S. 73, 80 (1973).

methods" or if disclosure would reveal otherwise protected information.

C

Respondents contend that the Court of Appeals' definition of "intelligence sources," focusing on the need to guarantee confidentiality in order to obtain the type of information desired, draws the proper line with respect to intelligence sources deserving exemption from the FOIA. The plain meaning of the statutory language, as well as the legislative history of the National Security Act, however, indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure. The Court of Appeals' narrowing of this authority not only contravenes the express intention of Congress, but also overlooks the practical necessities of modern intelligence gathering—the very reason Congress entrusted this Agency with sweeping power to protect its "intelligence sources and methods."

We begin with the language of § 102(d)(3). *Baldrige* v. *Shapiro*, 455 U. S. 345, 356 (1982); *Steadman* v. *SEC*, 450 U. S. 91, 97 (1981). Section 102(d)(3) specifically authorizes the Director of Central Intelligence to protect "intelligence sources and methods" from disclosure. Plainly the broad sweep of this statutory language comports with the nature of the Agency's unique responsibilities. To keep informed of other nations' activities bearing on our national security the Agency must rely on a host of sources. At the same time, the Director must have the authority to shield those Agency activities and sources from any disclosures that would unnecessarily compromise the Agency's efforts.

The "plain meaning" of § 102(d)(3) may not be squared with any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence. Section 102(d)(3) does not state, as the Court of Appeals' view suggests, that the Director of Central Intelligence is authorized to protect intelligence sources only

Agency was Congress' recognition that our Government would have to shepherd and analyze a "mass of information" in order to safeguard national security in the postwar world. See *Ibid.* Witnesses with broad experience in the intelligence field testified before Congress concerning the practical realities of intelligence work. Fleet Admiral Nimitz, for example, explained that "intelligence is a composite of authenticated and evaluated information covering not only the armed forces establishment of a possible enemy, but also his industrial capacity, racial traits, religious beliefs, and other related aspects." National Defense Establishment: Hearings on S. 758 before the Senate Committee on Armed Services, 80th Cong., 1st Sess., 132 (1947) (Senate Hearings). General Vandenberg, then the Director of the Central Intelligence Group, the Agency's immediate predecessor, emphasized that "foreign intelligence [gathering] consists of securing all possible data pertaining to foreign governments or the national defense and security of the United States." *Id.*, at 497.[14]

Witnesses spoke of the extraordinary diversity of intelligence sources. Allen Dulles, for example, the Agency's first Director, shattered the myth of the classic "secret agent" as the typical intelligence source, and explained that "American businessmen and American professors and Americans of all types and descriptions who travel around the world are one of the greatest repositories of intelligence that we have." National Security Act of 1947: Hearings on H. R. 2319 before

[14] Congressmen certainly appreciated the special nature of the Agency's intelligence function. For example, Rep. Wadsworth remarked that the "function of [the Agency] is to constitute itself as a gathering point for information coming from all over the world through all kinds of channels." 93 Cong. Rec. 9397 (1947). Rep. Boggs, during the course of the House hearings, commented that the Director of Central Intelligence "is dealing with all the information and the evaluation of that information, from wherever we can get it." National Security Act of 1947: Hearings on H. R. 2319 before the House Committee on Expenditures in the Executive Departments, 80th Cong., 1st Sess., 112 (Apr. 2–July 1, 1947).

the Director of Central Intelligence responsible for "protecting intelligence sources and methods from unauthorized disclosure." This language stemmed from President Truman's Directive of January 22, 1946, 11 Fed. Reg. 1337, in which he established the National Intelligence Agency and the Central Intelligence Group, the Agency's predecessors. These institutions were charged with "assur[ing] the most effective accomplishment of the intelligence mission related to the national security," *ibid.*, and accordingly made "responsible for fully protecting intelligence sources and methods," *id.*, at 1339. The fact that the mandate of § 102(d)(3) derives from this Presidential Directive reinforces our reading of the legislative history that Congress gave the Agency broad power to control the disclosure of intelligence sources.

III

A

Applying the definition of "intelligence sources" fashioned by the Congress in § 102(d)(3), we hold that the Director of Central Intelligence was well within his statutory authority to withhold the names of the MKULTRA researchers from disclosure under the FOIA. The District Court specifically ruled that the Agency "could reasonably determine that this research was needed for its intelligence function,"[17] and the Court of Appeals did not question this ruling. Indeed, the record shows that the MKULTRA research was related to the Agency's intelligence-gathering function in part because it revealed information about the ability of foreign governments to use drugs and other biological, chemical, or physical agents in warfare or intelligence operations against adversaries. During the height of the cold war period, the Agency was concerned, not without reason, that other countries were charting new advances in brainwashing and interrogation techniques.[18]

[17] App. to Pet. for Cert. in No. 83-1075, pp. 22a-23a.

[18] For example, Director of Intelligence Stansfield Turner explained

who supplied the Agency with information unattainable without guaranteeing confidentiality. That crabbed reading of the statute contravenes the express language of § 102(d)(3), the statute's legislative history, and the harsh realities of the present day. The dangerous consequences of that narrowing of the statute suggest why Congress chose to vest the Director of Central Intelligence with the broad discretion to safeguard the Agency's sources and methods of operation.

The Court of Appeals underestimated the importance of providing intelligence sources with an assurance of confidentiality that is as absolute as possible. Under the court's approach, the Agency would be forced to disclose a source whenever a court determines, after the fact, that the Agency could have obtained the kind of information supplied without promising confidentiality.[29] This forced disclosure of the identities of its intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission. "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U. S. 507, 509, n. 3 (1980) *(per curiam)*. See *Haig* v. *Agee*, 453 U. S. 280, 307 (1981). If potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place.

Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering

[29] Indeed, the Court of Appeals suggested that the Agency would be required to betray an explicit promise of confidentiality if a court determines that the promise was not necessary, or if a court concludes that the intelligence source to whom the promise was given was "unreasonably and atypically leery" of cooperating with the Agency. 228 U. S. App. D. C., at 273, 709 F. 2d, at 99. However, "[g]reat nations, like great men, should keep their word." *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 142 (1960) (Black, J., dissenting).

volves seemingly innocuous sources as well as unsuspecting individuals who provide valuable intelligence information.

Disclosure of the subject matter of the Agency's research efforts and inquiries may compromise the Agency's ability to gather intelligence as much as disclosure of the identities of intelligence sources. A foreign government can learn a great deal about the Agency's activities by knowing the public sources of information that interest the Agency. The inquiries pursued by the Agency can often tell our adversaries something that is of value to them. See 228 U. S. App. D. C., at 277, 709 F. 2d, at 103 (Bork, J., concurring in part and dissenting in part). For example, disclosure of the fact that the Agency subscribes to an obscure but publicly available Eastern European technical journal could thwart the Agency's efforts to exploit its value as a source of intelligence information. Similarly, had foreign governments learned the Agency was using certain public journals and ongoing open research projects in its MKULTRA research of "brainwashing" and possible countermeasures, they might have been able to infer both the general nature of the project and the general scope that the Agency's inquiry was taking.[a]

C

The "statutory mandate" of § 102(d)(3) is clear: Congress gave the Director wide-ranging authority to "protec[t] intelligence sources and methods from unauthorized disclosure." *Snepp* v. *United States*, 444 U. S., at 509, n. 3. An intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations. The record establishes that the MKULTRA researchers did in fact provide the Agency with information related

[a] In an affidavit, Director of Central Intelligence Turner stated that "[t]hroughout the course of the [MKULTRA] Project, CIA involvement or association with the research was concealed in order to avoid stimulating the interest of hostile countries in the same research areas." App. to Pet. for Cert. in No. 83-1075, pp. 89a-90a.

D. C. 82, 90, 598 F. 2d 1, 9 (1978), quoting *United States* v. *Marchetti*, 466 F. 2d 1309, 1318 (CA4), cert. denied. 409 U. S. 1063 (1972).

Accordingly, the Director, in exercising his authority under § 102(d)(3), has power to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source. See, *e. g.*, *Gardels* v. *CIA*, 223 U. S. App. D. C. 88, 91–92, 689 F. 2d 1100, 1103–1104 (1982); *Halperin* v. *CIA*, *supra*, at 113, 629 F. 2d, at 147.

Here the Director concluded that disclosure of the institutional affiliations of the MKULTRA researchers could lead to identifying the researchers themselves and thus the disclosure posed an unacceptable risk of revealing protected "intelligence sources."[*] The decisions of the Director, who must of course be familiar with "the whole picture," as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake. It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency.

The District Court, in a ruling affirmed by the Court of Appeals, permitted the Director to withhold the institutional affiliations of the researchers whose identities were exempt from disclosure on the ground that disclosure of "the identities of the institutions . . . might lead to the indirect dis-

[*] During the congressional inquiries into MKULTRA, then Director of Central Intelligence Turner notified the 80 institutions at which MKULTRA research had been conducted. Many of these institutions had not previously been advised of their involvement; Director Turner notified them as part of "a course of action [designed to] lead to the identification of unwitting experimental subjects." *Id.*, at 92a, n. 1. As a result of inquiries into the MKULTRA progam, many of these institutions disclosed their involvement to the public. Others advised the Agency that they had no objection to public disclosure. Director Turner disclosed the names of these institutions; he did not disclose the names of any institutions that objected to disclosure. See n. 7, *supra*.

identity of intelligence sources. And it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process. Here Admiral Turner, as Director, decided that the benefits of disclosing the identities of institutions that had no objection to disclosure outweighed the costs of doing so. But Congress, in § 102(d)(3), entrusted this discretionary authority to the Director, and the fact that Admiral Turner made that determination in 1978 does not bind his successors to make the same determination, in a different context, with respect to institutions requesting that their identities not be disclosed. See, *e. g.*, *Salisbury* v. *United States*, 223 U. S.App. D. C. 243, 248, 690 F. 2d 966, 971 (1982).

V

We hold that the Director of Central Intelligence properly invoked § 102(d)(3) of the National Security Act of 1947 to withhold disclosure of the identities of the individual MKULTRA researchers as protected "intelligence sources." We also hold that the FOIA does not require the Director to disclose the institutional affiliations of the exempt researchers in light of the record which supports the Agency's determination that such disclosure would lead to an unacceptable risk of disclosing the sources' identities.

Accordingly, we reverse that part of the judgment of the Court of Appeals regarding the disclosure of the individual researchers and affirm that part of the judgment pertaining to disclosure of the researchers' institutional affiliations.

It is so ordered.