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Another privilege claim upheld

CIA, THE COURTS AND EXECUTIVE PRIVILEGE

Lawrence R. Houston

Over the years, CIA has had many occasions to negotiate in the various courts on the problem of security of its records and particularly of its intelligence sources and methods. Normally, some sort of accommodation has been reached to cover the needs of the court and the requirements of security. Only twice has the Agency been forced to the final step of claiming executive privilege. Both of these occasions were in civil actions wherein the claim of privilege is given weight by the court but does not bring about dismissal of the action as would be the case in a criminal trial.

The most recent case resulted in an interesting opinion by Judge Marvin E. Frankel, the Federal District Judge in question. The case arose out of an insurance dispute in which action was brought by Pan American Airways. On September 6, 1970, Pan American was operating a Boeing 747 airplane on its scheduled route from Brussels, Belgium, to New York City, with a stop in Amsterdam, Holland. On the flight from Amsterdam to London, two of the passengers produced hand guns and grenades, forcibly took command of the crew and the passengers, and ordered the pilot to proceed to Beirut, Lebanon. The hijackers, though not themselves Arabs, were working with and for the Palestinian operation called the Popular Front for the Liberation of Palestine (PFLP). In collaboration with other PFLP people who met them in Beirut, they laced the aircraft with explosives during and after a stop in the Lebanese capital. Then they caused the airplane to be flown to Cairo, Egypt, lighting fuses just before landing to ignite the explosives. The large complement of passengers and crew thus had scant minutes to disembark and flee as the plane landed at Cairo, before the craft exploded, burned, and was totally destroyed.

Pan American, of course, carried insurance coverage. This was in two packages. The so-called "all risk" insurance was carried by a group of American insurance companies to the full value of the plane, $24 million, and the policy contained a "war risk" exclusion. In other words, the American companies would not pay for loss caused by an act of war as defined in the policy. Pan American then obtained war risk coverage in two lots, $14 million from a Lloyd's group in London and $10 million from the United States Federal Aviation Authority. The "all risk" defendants were adamant that the loss was due to an act of war, and the other two defendants were just as firm that this hijacking did not come under the war risk exclusion. Pan American, therefore, brought suit against all the groups, and left it to the Federal District Court in New York to interpret the various policies.

Several large and expensive teams of lawyers started research into all aspects of the episode and the background of those involved. Early in the course of this preparation, Mr. Lawrence E. Walsh, representing the American defendants, came to see me and Mr. John S. Warner, then Deputy General Counsel. He claimed that the British defendants had had the help of documenta-

tion from official British intelligence components to assist in building their case and, therefore, he claimed that the American defendants had the right to inspect any and all American intelligence records in any way pertinent to the subject. We explained the security problems involved, particularly in the source and method area, and that these would present real obstacles to making available intelligence documentation. As a former Attorney General, Mr. Walsh actually had some familiarity with this subject.

We did not commit the Agency to any production of records. Mr. Walsh subsequently obtained an order for discovery directed, among others, to the Department of Defense, Department of State, and CIA, directing the production of all records having to do with the episode in which the plane was destroyed, with the complete background and history of the PFLP and a large number of named individuals connected therewith, and with a number of other specifically identified subjects. The only body of unclassified material that was responsive in any way was a compilation of [redacted] reports on the subject, which was offered but not accepted by the "all risk" insurers. We asked the United States Attorney to try to negotiate some middle position, as did State, but State finally gave defense counsel access to its records including classified material. STAT

A rough appraisal of what a full response to the discovery order would mean for CIA indicated that there would be a minimum of over 5,000 items, the majority of them raw reports, many from highly sensitive sources, all involving security problems to one degree or another. We also came to the conclusion that while there was much valuable intelligence material in this, the salient facts pertaining to the destruction of the plane and to the PFLP were readily available from open sources. We, therefore, felt the American defendants would not be prejudiced in their case by failing to have CIA records. Accordingly, we entered a formal claim of sovereign immunity in answer to the discovery order, an action that must be taken personally by the Director. The claim was supported by an affidavit which set forth the security problems, including the danger, particularly in this case, to lives and well-being of sources who might be exposed through the court process. The case was argued at great length by eminent counsel for some of the outstanding firms in the country, as well as by the United States Attorney.

On 17 September 1973, Judge Frankel handed down his opinion, which was long and dealt with the issues in great detail. In short, he came to the conclusion that the PFLP was not an organized military operation, and the hijacking was an isolated act not related to any military operations so that it did not come within the exclusion of the war risk policy and the American companies defending were ordered to pay the judgment in full. He then dealt specifically with the CIA claim of privilege, and his treatment is best set forth in the Judge's own words as follows:

> The all risk defendants have unleashed manpower, suited to the sums at stake, in massive works of factual and legal research. Lavish discovery has been had of State Department, FAA, and FBI documents to learn about the PFLP, the Middle East struggles generally, and the disputed hijacking. Several inches of secret and otherwise classified State Department papers have been made a peculiar sort of secret annex to the record, with counsel and the court (*dubitante*) submitting to "clearance" procedures for access. All risk counsel also demanded,

however, secret Central Intelligence Agency (CIA) documents, and this agency, after some procedural rituals, interposed the "secrets of state" privilege. Ultimate determination of the issue thus posed was postponed until after trial. The all risk defendants at this point make the heady claim that if all else fails, they should have judgment for this reason against the "United States."

There is a threshold question of some magnitude whether the problem should be considered as one of discovery against the Government as a party. The all risk defendants have, strictly speaking, no claim against the United States, which has sold insurance to the plaintiff. The Government's "proprietary" role as insurer does not comfortably or conveniently lead to the conclusion that all its agencies, however separate, must be treated as fractions of this single "party" for discovery purposes. It might well be held that the applicable standards for disclosure are those of the Freedom of Information Act and that the all risk argument is ended by the duly imposed "secret" classification under the ruling in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973).

But even viewing The Government as a monolith, and applying *inter partes* rules of discovery, the risk argument fails because:

(1) the claim of privilege appears to have been justified in the circumstances, at least when measured against
(2) the trivial showing of alleged need for disclosure.

The CIA Director explained the refusal to disclose, even for *in camera* inspection, on the ground that:

> "The revelation of the identity of these sources to the Court or to the parties to this litigation could result not only in their loss to the Central Intelligence Agency for the future but also in serious physical danger to a number of them who are risking their lives and careers to assist us."

The circumstances apparent to the court from the entirety of this case render this a realistic and convincing concern. The setting reeks of violence and danger. The loss of American and other lives through terror is a vivid part of our evidence. But there should be no need to linger over this. With characteristic responsibility, all risk counsel reported during the trial that one of their witnesses had probably lied in cross-examination, and that the explanation appeared to be potential physical dangers to him had he done otherwise. The matter was left at that. It seems appropriate to pay similar heed to the representation of the CIA without yielding an iota of the court's responsibility and power to judge for itself the grounds of a claim of privilege.

This conclusion is reached easily in this case because the asserted needs for disclosure are shadowy and speculative at best. It is said that CIA documents might indicate (by hearsay, of course) payments by Arab governments to the PFLP. But the all risk defendants had the PLA Commanding General on the stand for days and did not even ask about this. Moreover, other evidence adduced by the all risk defendants showed there were no such payments, or none of consequence. It is argued that CIA hearsay might disclose PFLP intent and "aims and

operations during 1970." But surely our record, including reams of State Department hearsay, to say nothing of PFLP's non-reticent functioning, is ample on that. It is argued that the all risk defendants tried unsuccessfully to procure a witness from the PFLP, and that the CIA files would be or show "other sources of alternative evidence." But this persists in overlooking the hearsay rule and is otherwise a matter of unlikely conjecture.

In short, we have here, with the perspective of a huge record, a "formal claim of privilege set against a dubious showing of necessity." *United States* v. *Reynolds*, 345 U.S. 1, 11 (1953). The "formal claim" was made in a setting of substantial assurance that legitimate concerns for security and human life were at stake. Against that were extensive alternative sources, including broad disclosures by government agencies. The court is led upon the record as a whole to the firm judgment that the "intelligence" sought would not have enhanced significantly the factual knowledge needed for this lawsuit.

It is concluded, under the principles of *United States* v. *Reynolds*, that there was no occasion for insisting upon *in camera* inspection of the documents and that there is no basis either for the extraordinary judgment the all risk insurers seek or for any other "sanctions."

It was, of course, gratifying to have the Agency claim of privilege upheld. However, there was still one point of concern left open by this opinion. There have been several degrees of privilege running back through legal history. Recent discussion has tended to differ between a claim of *government privilege*, which has to do with confidential communications within the government, and a claim of *sovereign immunity* which is based on security considerations pertaining to the national interest. The difference is that in the government privilege the courts take it upon themselves to review the information to see if it is relevant and necessary to the case, but there is a body of law which indicates that the claim of sovereign immunity is not reviewable by the courts. It is this latter interpretation which we had placed on our claim. However, it will be noted Judge Frankel took a differing view as he says:

> It seems appropriate to pay similar heed to the representation of the CIA without yielding an iota of the court's responsibility and power to judge for itself the grounds of a claim of privilege.

Whether he meant actually court review of the material involved or whether he had in mind some further demonstration of the need to protect the information is not quite clear. In this case, of course, the outcome was completely satisfactory.

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A review of legal precedents for protecting sensitive information from disclosure in the courts and Congress, with particular reference to Central Intelligence privileges.

EXECUTIVE PRIVILEGE IN THE FIELD OF INTELLIGENCE

Lawrence R. Houston

Recent agitation in congressional and newspaper circles against "secrecy in government" has focused attention on information security measures in the Executive Branch. The courts, too, have declared in recent months that information used by the government in preparing criminal prosecutions and even some administrative proceedings must be divulged, at least in part, as "one of the fundamentals of fair play." [1] In this atmosphere, the intelligence officer may reflect on the risk he runs of being caught between the upper and nether millstones of congressional or court demands on the one hand and the intelligence organization's requirement for secrecy on the other.

Actually, the problem of demands for the disclosure of information which the government considers confidential is not a new one, as can be seen from the history of the Executive Branch's struggles to withhold information from the courts and Congress. The Executive has based itself in these struggles on the doctrine of the separation of powers among the three branches of government, which holds that no one of the branches shall encroach upon the others.

The Separation of Powers

Demands for the disclosure of information held by the Executive have been made by the courts and by the Congress since the early days of the republic. On the other hand, the very First Congress recognized, more than a year prior to the ratifi-

[1] *Communist Party v Subversive Activities Control Board;* U.S. Court of Appeals, District of Columbia Circuit, decided 9 January 1958.

cation of the Bill of Rights, that some of the information held by the Executive ought not to be divulged. An act passed on 1 July 1790 concerning "the means of intercourse between the United States and foreign nations" provided for the settlement of certain expenditures which in the judgment of the President should not be made public.[2] During his first term of office President Washington, anxious to maintain close relations with Congress, on several occasions passed information to the Congress with the warning that it not be publicized. In a special message dated 12 January 1790, for example, he wrote:

> I conceive that an unreserved but a confidential communication of all the papers relative to the recent negotiations with some of the Southern Tribes of Indians is indispensibly requisite for the information of Congress. I am persuaded that they will effectually prevent either transcripts or publications of all such circumstances as might be injurious to the public interests.[3]

Two years later, in March 1792, a House resolution empowered a committee "to call for such persons, papers, and records as may be necessary to assist their inquiries" into Executive Branch actions with respect to a military expedition under Major General St. Clair. The president did not question the authority of the House, but wished to be careful in the matter because of the precedent it might set. He discussed the problem with his cabinet, and they came to the conclusion:

> First, that the House was an inquest and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public: Consequently were to exercise a discretion. Fourth, that neither the committee nor the House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.[4]

By 1794 President Washington, then in his second term, began to show less liberality in divulging information to Congress, for on 26 February of that year he sent a message to the Senate stating that "after an examination of [certain corre-

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[2] Richardson, *Messages and Papers of the Presidents*, 2283.

[3] 1 *id.* 63.

[4] Writings of Thomas Jefferson, 303–305.

spondence] I directed copies and translations to be made *except* in those particulars which, in my judgment, for public consideration, ought not be communicated." [5] Two years later, on 30 March 1796, he transmitted to the House his famous refusal to divulge certain information requested by the House in connection with the Jay Treaty. In this treaty, many people believed, the young republic did not get enough concessions from the British, and the Federalists who supported it had become the target of popular resentment. Washington replied as follows to a House resolution:

> I trust that no part of my conduct has ever indicated a disposition to withhold any information which the Constitution has enjoined upon the President as a duty to give, or which could be required of him by either House of Congress as a right . . . The matter of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic.

Pointing out that he had been a member of the general convention and therefore "knew the principles on which the Constitution was formed," Washington concluded that since "it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different Departments should be preserved, a just regard to the Constitution and to the duty of my office under all circumstances of this case forbids the compliance with your request." [6]

Thus during Washington's administration the doctrine of the separation of powers came to provide the basis for executive privilege in withholding information. This doctrine, not specifically enunciated in the Constitution, emerged from decisions taken on specific political situations which arose during the first years of the republic, as the same men who wrote the Constitution interpreted it in such ways as they thought promoted its intended ends. In this way it was established that the Executive Branch of the Government has within its control certain types of executive documents which the Legislature cannot dislodge no matter how great the demand. The Executive Branch can be asked for documents, but should exercise

[5] 1 Richardson, *op. cit. supra,* note 2, 144. Italics supplied.

[6] 1 *id.* 186.

discretion as to whether their release would serve a public good or be contrary to the public interest.

The Judiciary also recognized, as early as 1803, the independence of the Executive Branch and its ability to control its own affairs. Chief Justice Marshall wrote: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the Executive, or executive officers, perform duties in which they have a discretion. Questions in this nature political, or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court." [7]

It is notable that this executive privilege was applied in the congressional cases cited above to the President's responsibility for foreign affairs. Under the Continental Congress, the Department of Foreign Affairs had been almost completely subject to congressional direction. Every member of the Congress was entitled to see all records of the Department, including secret matters. But after the Constitution was written, and pursuant to its grand design based on the separation of powers, Congress in 1789 subordinated the Department of Foreign Affairs to the Executive Branch and provided that its Secretary should have custody and charge of all records and papers in the Department. In 1816 the Senate Foreign Relations Committee declared that the "President is the Constitutional representative of the United States with regard to foreign matters" and that the nature of transactions with foreign nations "requires caution and success frequently depends on secrecy and dispatch."

Precedent in Intelligence Cases

Intelligence activities, intimately linked with foreign policy, played their part in the evolution of the Executive Branch's position on disclosure of information. In 1801 Congress interested itself in the expenditures of various Executive Departments and instituted an inquiry "as to the unauthorized disbursement of public funds." In reply to charges that the War Department expended funds for secret service not authorized by law, Oliver Wolcott (Comptroller of the United States 1791–1795; Secretary of the Treasury 1795–1800) gave a clear exposition of the accounting requirements of intelligence which is applicable today:

[7] *Marbury v Madison*, 1 Cranch 137 (1803).

> I never doubted for one instant that such expenditures were lawful, and that the principle should now be questioned has excited a degree of astonishment in my mind at least equal to the "surprise" of the Committee.
>
> Is it then seriously asserted that in the War and Navy Departments — establishments which from their nature presuppose an actual or probable state of *war*, which are designed to protect our country against *enemies* — that the precise *object* of every expenditure must be *published*? Upon what principle are our Generals and Commanders to be deprived of powers which are sanctioned by universal usage and expressly recognized as lawful by all writers of the Law of Nations? If one of our Naval Commanders now in the Mediterranean should expend a few hundred dollars for intelligence respecting the force of his enemy or the measures meditated by him, ought the present Administration to disallow the charge, or publish the source from which the intelligence was derived? Is it not equivalent to a publication to leave in a public office of accounts a document explaining all circumstances relating to a payment? Ought the truth be concealed by allowing fictitious accounts? Could a more effectual mode of preventing abuses be devised than to establish it as a rule that all confidential expenditures should be ascertained to the satisfaction of the Chief Magistrate of our country, that his express sanction should be obtained, and that the amount of all such expenditures should be referred to a *distinct account* in the Public Records? [8]

The statute referred to in the debates was an Act of Congress passed on 9 February 1793 which gave the President authority, if the public interest required, to account for money drawn from the Treasury for the purpose of "intercourse with foreign nations" simply by his own certification or that of the Secretary of State. Actually, this statute reaffirmed the similar legislation of 1790 providing for the settlement of certain expenditures which, in the judgment of the President, ought not be made public.[9] The substance of these Acts was revived and continued in later legislation, and President Polk utilized it in 1846 in refusing to accede to a House resolution requesting an accounting of Daniel Webster's expenses as Secretary of State in the previous administration.

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[8] *Control of Federal Expenditures,* A Documentary History 1775–1894, Institute for Government Record of the Brookings Institution, pp. 329–330. Punctuation modernized.

[9] Richardson, *supra,* note 2.

In 1842 Webster had negotiated an agreement with the British representative, Lord Ashburton, on the long-disputed boundary of Maine. To make the treaty more palatable to the public and enhance its chances of ratification in the Senate, Webster had spent money out of "secret service funds" to carry on favorable propaganda in the religious press of Maine. Senator Benton termed this practice a "shame and an injury . . . a solemn bamboozlement." A Congressional investigation followed, during the course of which the request was levied upon President Polk.

President Polk based his refusal to comply on the statutes which gave the President discretionary authority to withhold details on how money was spent. He supported his predecessor's determination that the expenditure should not be made public, asserting that if not "a matter of strict duty, it would certainly be a safe general rule that this should not be done." In his message to Congress he acknowledged the "strong and correct public feeling throughout the country against secrecy of any kind in the administration of the Government" but argued that "emergencies may arise in which it becomes absolutely necessary for the public safety or public good to make expenditures the very object of which would be defeated by publicity." He pointed out as an example that in time of war or impending danger it may be necessary to "employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they had the least apprehension that their names or their agency would in any contingency be divulged." [10]

The non-disclosure of information relating to intelligence was tested rather vigorously in several instances during the Civil War, and these tests established a strong precedent in favor of the inviolability of intelligence activities. Brigadier General G. M. Dodge, who conducted a number of intelligence activities in the West with considerable results, became the object of relentless criticism for his financing methods. He refused obdurately to break the confidence of his agents by revealing names and amounts paid, and when he was denied the funds necessary for these activities, he had to raise the money for his agents by confiscating cotton crops in the South

[10] 5 Richardson, *op. cit. supra,* note 2, 2281.

and selling them at public auction. Three years after the end of the War, when War Department auditors discovered that General Dodge had paid spies for Grant's and Sherman's armies, they peremptorily ordered him to make an accounting of the exact sums. Receipts and vouchers signed by spies who lived in the South were obviously difficult to obtain, and furthermore the names of the agents, for their own security, could not be disclosed. As a result, when the War Department closed Dodge's secret service accounts 21 years after the war, they were apparently still without a receipt for every dollar spent.[11]

A leading legal decision governing the privilege of the Executive Branch to withhold intelligence also had its genesis in the Civil War. In July 1861 William A. Loyd entered into a contract with President Lincoln under which he proceeded "within the rebel lines and remained during the entire war." He collected intelligence information all during the war and transmitted it directly to the President. At the end of the war he was reimbursed his expenses, but did not get any of the $200-per-month salary for which the contract called. After Loyd's death a suit was brought by his administrator against the Government to collect the salary Lincoln had contracted to pay him.

The case was finally decided by the Supreme Court in 1876, and the claim was denied. Mr Justice Field set forth in his opinion a position on secrecy in intelligence matters which is still being followed today. He wrote that Loyd was engaged in secret service, "the information sought was to be obtained clandestinely," and "the employment and the service were to be equally concealed." The Government and the employee "must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter." Were the conditions of such secret contracts to be divulged, embarrassment and compromise of the Government in its public duties and consequent injury to the public would result, or furthermore the person or the character of the agent might be injured or endangered. The secrecy which such contracts impose "is implied in all secret employments of the Government in time of war, or upon matters affecting foreign relations," and precludes any action for their enforcement. "The pub-

[11] Perkins, J. R., *Trails, Rails and War*, Bobbs-Merrill (1929).

licity produced by an action would itself be a breach of a contract of that kind and thus defeat a recovery." [12]

The pattern of executive privilege as applied to withholding information on intelligence activities was determined by the resolution of these situations which occurred from the first years of the Republic through the Civil War. Decisions in later cases utilized the precedents which had here been established. In 1948 the Supreme Court, deciding a case concerning an application for an overseas air route, reaffirmed that "the President, both as Commander-in-Chief and as the nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world," and defined its own position on cases involving secret information:

> It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences . . . The very nature of executive decisions as to foreign policy is political, not judicial.[13]

Intelligence information is recognized by the three branches of Government as of special importance because of its connection with foreign affairs and military security.

Authorities for CIA Information Controls

As an Executive agency CIA partakes of the privileges accorded generally to the Executive Branch with respect to withholding information, privileges ultimately dependent on the separation of powers doctrine. In addition, Congress has specifically recognized the secrecy essential in the operation of Central Intelligence by providing in the National Security Act of 1947 that the Director "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." In the Central Intelligence Act of 1949, noting again this responsibility of the Director, Congress exempted the Agency from any law which requires the disclosure of the organization, functions, names, official titles, salaries, or num-

[12] *Totten Adm'r v United States;* 92 US 105 (1876).

[13] *Chicago and Southern Airlines, Inc. v Waterman Steamship Corporation;* 33 US 103 (1948).

bers of personnel employed. Other statutes exempt the Agency from requirements to file certain information reports.

Pursuant to the Director's task of safeguarding intelligence information, Agency regulations governing the release of information serve notice upon employees that unauthorized disclosure is a criminal and an administrative offense. A criminal prosecution for unauthorized disclosure can be instituted against an employee under several statutes, including the Espionage Laws, or administrative sanctions including discharge can be applied against him.

Central Intelligence is also subject to the provision of Executive Order 10501 that "classified defense information shall not be disseminated outside the Executive Branch except under conditions and through channels authorized by the head of the disseminating department or agency." This provision, although it has never been tested in the courts, gives the Director added support in controlling the release of information to the courts and Congress as well as to the public. He can and will upon request release information of no security significance to the courts or Congress; he can exercise discretion in the release of information produced by and concerning the CIA; but there are limitations on his authority over information originating in other departments, joint interagency documents, and personnel security information. If the decision whether to comply with a demand for information cannot be made at the Director's level, it is referred to the National Security Council.

CIA's position vis-a-vis the courts and Congress is unique beside that of other agencies, because of the recognized secrecy and sensitivity and the connection with foreign affairs possessed by the information with which the Agency deals. This position has been tested on several occasions.

Intelligence and the Courts

The secrecy of intelligence employment which the Supreme Court recognized in the Totten case on the Loyd-Lincoln contract over eighty years ago is basically unchanged today. The difficulties encountered in the courts by a person claiming pay for secret work allegedly performed for the Government were illustrated in the Gratton Booth Tucker case in 1954. Tucker alleged that he had performed services "under conditions of utmost secrecy, in line of duty, under the supervision of agents

of the United States Secret Service and of the C.I.D. of the Armed Services and Department of Justice, FBI and of the Central Intelligence Agency." He claimed that from 1942 to 1947 he contributed his services voluntarily and "without thought of compensation in anticriminal and counterespionage activities in Mexico and behind the lines in Germany," and that in 1950 he was assigned to Korea. For all this he brought suit against the United States in the Court of Claims, seeking payment of $50,000 annually for the years he worked and of $10,000 as expenses. On the very basis of these allegations, and without going into the matter any further, the court refused recovery, citing the Totten case as authority.[14]

Another aspect of the Government's privilege not to disclose state secrets in open court was decided several years ago by the Supreme Court in the Reynolds case. This was a suit for damages brought against the Government by the widows of three civilian observers who were killed in the crash of a military plane on which they were testing secret electronic equipment. The Air Force refused to divulge certain information which the widows thought necessary to their case, stating that the matter was privileged against disclosure pursuant to Air Force regulations prohibiting that reports be made available to persons "outside the authorized chain of command." The Air Force then made a formal claim of privilege, affirming that "the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." An affidavit by the Air Force Judge Advocate General asserted further that the material could not be furnished "without seriously hampering national security." The Supreme Court accepted the Air Force argument, saying that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." And these Air Force statements had been sufficient to satisfy the court of the military secret involved.[15]

The privilege of withholding national security information from the courts has been subject to some limitation. One case, *U.S. v Jarvinen*,[16] illustrates that this executive privilege is not

[14] *Gratton Booth Tucker v United States;* 127 Ct. Cl. 477 (1954).

[15] *United States v Reynolds;* 345 US 1 (1952).

[16] *United States v Jarvinen;* Dist. Ct. Western District of Washington, Northern Div. (1952).

judicially inviolable. Jarvinen was a casual informant in the United States who gave information in 1952 to CIA and later to the FBI that Owen Lattimore had booked passage to the USSR. He later informed CIA that he had fabricated the whole story. Soon thereafter Jarvinen was indicted for making false statements to government agencies. At the trial a CIA employee called to testify by the Department of Justice prosecutor was directed by CIA not to answer. The witness' claim of privilege was not accepted, however, and when he refused the court's order to answer he was held in contempt and sentenced to fifteen days in jail. He was pardoned by the President.

The CIA argument had been based on the provision of the CIA Act of 1949 that the Director "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure" and on Executive Order 10290, then in effect, which limited dissemination of classified security information. The court had reservations about the substantive merits of the privilege, and the widespread publicity emanating from the case apparently vitiated the claim of need to protect sources and methods. It was the further opinion of the court that in a criminal prosecution the Government must choose either to present all the pertinent information, regardless of its sensitivity, or to risk dismissal of the case by not presenting any sensitive information at all.

There have been several instances of indirect Agency participation in court cases, usually when employees have been requested to furnish documents or testify on behalf of the Government or private parties. In recent cases in which other Government agencies have participated there has been a cooperation between them and Central Intelligence representatives which was lacking in the Jarvinen case, and little difficulty has been encountered with respect to the privilege of withholding classified information. A good example is the Justice Department's prosecution of the case against Petersen,[17] an employee of the National Security Agency who had passed NSA documents to the Dutch. The Justice Department needed to present classified information to the court in order to substantiate its case, but the Director of Central Intelligence advised, in

[17] *United States v Petersen* (E. D. Va. Criminal No. 3049, January 4, 1955).

the interest of security, that a particular document not be used. The Justice Department accepted this recommendation and succeeded in convicting Petersen on other evidence.

CIA and Congress

CIA's record of cooperation with congressional committees has on the whole been satisfactory. The Agency certainly recognizes that Congress has a legitimate interest in some intelligence information and obviously a better claim on it than say the private citizen who needs it for purposes of litigation. Although, under the separation of powers doctrine, intelligence gathering and production is an executive function and the responsibility of the Executive Branch, the Congress does have responsibilities in the foreign affairs field. It is, moreover, the appropriating authority for Agency funds, and indiscriminate withholding of information could not only result in a poorly informed Congress but also jeopardize the good will the Agency enjoys with it. Within the bounds of security, therefore, CIA has attempted conscientiously to fulfill requests from Congress proper to the legislative function. And Congress, for its part, has so far respected CIA's decision to withhold information or produce it only in closed session with the understanding that it is not to be released.

If summoned by a subpoena to testify before a Congressional Committee, all CIA employees, including the Director, are required to appear or be held in contempt of Congress. There are few instances, however, in which an employee has been subpoenaed to testify involuntarily, and no documents have ever been released to Congress without the Director's approval. In most cases it has been as a matter of form or at Agency request that an employee's testimony has been called for and a subpoena served. In only two instances situations have arisen which led to strained relations between the Agency and congressional committees. When Agency testimony was desired by the Senate Internal Security Committee concerning the security status of John Paton Davies, CIA successfully requested several delays in the hearings on security grounds. And in 1954, while the Senate Committee on Government Operations was considering inquiring as to certain facts relating to the security status of an Agency employee, counsel for the Committee and the General Counsel of CIA agreed on the

legitimate interests of the Agency and the Committee. The employee was never questioned by the Committee.

No court cases have defined an employee's rights to withhold from Congress information which has been classified and the divulgence of which could work harm to this country's intelligence program. Such a case could theoretically arise through testing a Congressional contempt citation in a habeas corpus proceeding, but it is unlikely that such a test will be made. The employee could use an order from the Director as a basis for not testifying, and the Director's judgment has always been respected by the Congress when he has decided he cannot reveal certain information. Because the information which CIA has is so clearly within the purview of the Executive Branch, this Agency has a much stronger legal basis for refusal than other departments have.

If Congress should persist, there would of course have to be eventual Presidential support for continued refusal to give information. Such support was tendered, outside the intelligence and foreign fields, in 1909 when Theodore Roosevelt withstood a Senate resolution calling for certain papers in the Bureau of Corporations concerned with the absorption by U.S. Steel of another corporation. Roosevelt informed the Senate that he had obtained personal possession of the papers it desired but that the Senate could get them only by impeachment. "Some of these facts which they [the Senate] want," he declared, "for what purpose I hardly know, were given to the Government under the Seal of Secrecy and cannot be divulged, and I will see to it that the word of this Government to the individual is kept sacred." [18]

Generally, there has been a spirit of cooperation between the Legislative and Executive Branches. In those cases where a conflict has occurred, and the Executive has refused to divulge information requested even in the strongest terms by the Legislature, the decision of the Executive has prevailed. The Constitution has been in existence for over 170 years and under it 34 Presidents and 85 Congresses have forged a strong interpretation of the separation of powers. In the field of foreign affairs intelligence, the Director of Central Intelligence, acting

[18] *The Letters of Archie Butt, Personal Aide to President Roosevelt;* by Abbott, pp. 305–06.

under the constitutional powers of the Executive Branch of Government together with powers granted by statute, can withhold such information as he believes is in the best interests of the United States. If a showdown were to occur, however, the issue is between the President and Congress as to whether classified information should be divulged against the wishes of the Director, who is responsible for the protection of sources and methods. Historical precedent in similar situations appears to favor the President.

HSC Mat furn

CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

Review Staff: 75/3709/1
5 January 1976

Mr. A. Searle Field
Staff Director
Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515 Attn: Ms. Sheketoff

Dear Mr. Field:

Attached hereto is information on digraphs requested in your letter of 30 December 1975.

Sincerely,

[redacted] 25X1A

Review Staff

Attachments:
As Stated

25X1

[redacted] [redacted] 25X1 25X1

1. The digraph is not the distinguishing factor used to denote particularly sensitive projects. Each digraph can be used for making cryptonyms or code words for both non-sensitive and sensitive activities.

25X1A

3. Attached is a list of digraphs with an explanation of how they have been used.

List of possible digraphs used from 1970 - 1974 for making cryptonyms or code words for non-sensitive and sensitive projects or for activities involving CIA only, or CIA and the Intelligence Community.

25X1

[redacted]

List of possible digraphs used from 1970 - 1974 for making cryptonyms or code words for non-sensitive and sensitive projects or activities. These digraphs are restricted and are used exclusively within the confines of CIA.

25X1A

[redacted]