THE PROBLEM OF DISCLOSURE

The Protection of Sources and Methods

The classification system applies to the executive branch as a whole, but the protection of "sources and methods" applies to CIA in a very special, almost unique way.[33] It overlaps with classification, but has an independent life; it is another means of protecting foreign intelligence information. Its statutory basis is Section 102(d)(3) of the National Security Act of 1947: "And provided further, that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure; ..." Referring back to this latter provision, Section 6 of the CIA Act of 1949 exempts the Agency from the provisions of any other law which requires "the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency..." Note that it is the Director personally who is charged with the responsibility of protecting sources and methods and that there is no explicit grant of powers to be exercised in carrying out this responsibility. Nor is there a definition of the scope of "sources and methods." E.O. 11652 refers twice to "sources and methods": E2 excludes information "disclosing intelligence sources and methods" and Section 9

authorizes supplementary protection for intelligence sources and methods. The criteria for Top Secret and Secret mention respectively "sensitive intelligence operations" and "intelligence operations."

The origin of the "sources and methods" concept is somewhat nebulous. The earliest known references occur in military planning papers dealing with the establishment of a "central intelligence service." General William J. Donovan had submitted to the President in November 1944 recommendations for a post-war intelligence service and the President had instructed the Joint Chiefs of Staff to study them and to prepare a draft Executive order for his signature. In a memorandum, dated 18 January 1945, the Joint Strategic Survey Committee, commenting on a proposed draft recommended: "With a view to emphasizing the importance of protecting certain methods and sources of obtaining information the following should be added to paragraph 6 of the draft directive: 'In the interpretation of this paragraph, the National Intelligence Authority and the Central Intelligence Agency will be responsible for fully protecting intelligence sources and methods which, due to their nature, have a direct and highly important bearing on military operations.'"[34]

This wording was incorporated into the draft Executive order that the Joint Chiefs of Staff sent to the President

circa 18 September 1945. The pertinent portion of paragraph 7 of the draft reads: "As approved by the National Intelligence Authority, the operations of the departmental intelligence agencies shall be open to inspection by the Central Intelligence Agency in connection with its planning function. In the interpretation of this paragraph, the National Intelligence Authority and the Central Intelligence Agency will be responsible for fully protecting intelligence sources and methods which, due to their nature, have a direct and highly important bearing on military operations."[35] There is circumstantial evidence that this sources-and-methods formulation may have originated, at least indirectly, with the Navy, in particular with the Director of Naval Communications who expressed concern that the availability of military communications intelligence to the Central Intelligence Agency would be detrimental to military operations and therefore recommended inclusion in the draft directive of language permitting each department or agency to withhold such information if it felt that disclosure "will be inimical to the functions of such department or agency."[36] The sources-and-methods obligation was apparently the result of a compromise with those in the military demanding discretionary authority to withhold sensitive information from CIA. In any event, it is fairly clear that the wording was designed to ensure that CIA adequately protected military secrets.

"Sources and methods" were not mentioned in the CIA sections of the draft bill sent to Congress by President Truman in 1947. The White House felt that the CIA section should be kept as short as possible to avoid controversy and not jeopardize the main thrust of the bill which involved the unification of the armed services. Congress felt otherwise. The Central Intelligence Group accordingly submitted to Congress its recommendations (originally sent to the White House) containing the sources-and-methods language. As incorporated in the 1947 Act, the latter is in the form of a proviso, one of three provisos restricting the powers of CIA. The other two provisos respectively deny to the Agency police powers and, by authorizing departmental intelligence, a monopoly in the intelligence field. Although the explicit reference to military secrets found in the old NSSC version is dropped, the contextual implication of the obligation to protect sources and methods is almost that of a condition of access to the intelligence of other departments.[37]

However this may be, CIA legal thinking on the sources-and-methods obligation has seen in it a significant grant of implicit authority to the Director that goes beyond the mere protection of classified information. "The Congress use of the term 'sources and methods,'" writes the Assistant General Counsel, "indicates its recognition of the existence

of a special kind of data encompassing a great deal more than what is usually termed 'classified intelligence information.'"[38] And the CIA General Counsel in a letter to Senator Muskie, dated 13 August 1974, in connection with the Senate hearings on classification, declared: "...it is conceivable that certain intelligence sources and methods information would require protection under 403(d)(3) of Title 50 [United States Code designation of Section 102(d)(3)] even though it would not also warrant classification under the Executive order. Information protected under that subsection, whether or not classified, is not subject to the mandatory disclosure provisions of the Freedom of Information Act since that Act does not apply to matters that are specifically exempt from disclosure by statute."[39]

From these citations two thoughts emerge: that sources-and-methods information is not synonymous with classified intelligence information, and that it may even embrace information not classifiable in terms of the Executive order. It follows that sources-and-methods information has a specific character distinguishable from substantive intelligence information. One might define it as embracing:

a) information or material revealing or tending to reveal the identity and association with CIA of any person, group, organization, or governmental entity, whether witting or unwitting, that provides foreign intelligence information or intelligence-related services, as well as the identification and connection with CIA of any intelligence-producing device; and

b) information or material revealing or tending to reveal the means, techniques, and procedures by which foreign intelligence is collected, processed, and analyzed, including those used to support and protect foreign intelligence activities, to the extent that these means, techniques, and procedures are subject to countermeasures, or revelatory of intelligence intentions and capabilities. It must be broad enough to include all forms of clandestine activity, as well as scientific and technical intelligence. And, of course, it must include sources-and-methods information furnished by foreign governments. Unlike much other sensitive information, it is difficult to prescribe in advance the life span of sources-and-methods information.[40]

The question naturally occurs, How have the sources-and-methods provisions fared in the courts? In the United States v. Jarvinen, a 1952 case, the United States District Court for the Western District, State of Washington, rejected the argument that two CIA employees, acting on instructions from the DCI under Section 102(d)(3), could refuse to testify in court concerning an informant of the CIA office in [redacted] STAT They were sentenced to two weeks in jail, but later received a Presidential pardon. Because of the defective fact situation and the danger of creating an unfavorable precedent, the Agency decided not to appeal the decision of the district court.[41]

On the other hand, in Heine v. Raus, an action filed in 1964, there was a clear vindication of the Director's role in the protection of sources and methods. Confirming the decision

of the Maryland District Court, the Fourth Circuit Court of Appeals said, "action here to protect the integrity of sources of foreign intelligence was explicitly directed by Congress."[42]

Sources and methods figured also in the Marchetti case. Although the Supreme Court had refused the government an injunction in the "Pentagon Papers" case, the U.S. District Court for the Eastern District of Virginia in Alexandria issued an injunction on 18 April 1972 enjoining Victor Marchetti from public disclosure of any intelligence information, particularly that relating to intelligence sources and methods, and requiring him to submit his manuscript to the CIA for review before releasing it "to any person or corporation." The Fourth Circuit Court of Appeals restricted the injunction to "classified information" acquired by Marchetti during his employment by CIA.

In its final position on the Marchetti manuscript the Agency insisted on 168 deletions. The district court upheld only 26 of them, but, on appeal, the Fourth Circuit Court sustained the remaining 142 deletions and remanded the case to the district court "for such further proceedings as might be necessary." In his opinion of 7 February 1975 the chief judge of the Fourth Circuit Court, Judge Haynsworth, took note of the DCI's statutory responsibility to protect sources and methods, but based his decision on the classified nature of the information.

What was particularly noteworthy about the Marchetti case, however, was the willingness of the courts, under certain narrowly defined circumstances, to accept "prior restraint"--in this instance, because of the contractual nature of the secrecy agreement signed by Marchetti as a CIA employee.[43]

Since December 1975 there have been at least seven cases in which U.S. district courts have recognized the sources-and-methods provisions of the 1947 and 1949 Acts as a statutory basis, under exemption (b)(3) of the FOIA, for withholding information. Moreover, in most cases the courts have accepted testimony and affidavits rather than insisting on in camera examination of documents. Reaffirming the legal force of the sources-and-methods provisions, Judge William P. Gray of the U.S. District Court for the Central District of California declared in Stanley D. Backrack v. CIA, William Colby, a case decided on 13 May 1976: "While there is a strong public interest in the public disclosure of the functions of government agencies, there is also a strong public interest in the effective functioning of an intelligence service, which could be greatly impaired by irresponsible disclosure." Through the decisions of these district courts a series of precedents is emerging which have already greatly enhanced the legal stature of sources and methods as an independent means of protecting intelligence information--at least in the context of FOIA requests for information.[44]

The Agency's experience with the Marchetti case revealed certain weaknesses from a judicial review aspect in generalized appeals to Section 102(d)(3) as a means of preventing the disclosure of sources-and-methods information. To give greater legal solidity to future use of this Section, the Office of the General Counsel has drawn up a catalogue of sources and methods, hopefully broad enough and specific enough to prove convincingly in case of litigation that a disputed piece of information falls clearly in a category previously designated by the Director pursuant to his statutory authority.[45] Complementary to this is the draft DCID (1/19) entitled "Non-disclosure Agreements for Intelligence Sources or Methods Information." Paragraph 1 sets forth the policy: "All members of the Executive Branch and its contractors given access to information containing sources or methods of intelligence shall, as a condition of obtaining access, sign an agreement that they will not disclose that information to persons not authorized to receive it." The agreement is to make specific reference to Section 102(d)(3), and each protected document is to bear the marking: "Warning Notice: Sensitive Intelligence Sources and Methods Involved." When finally implemented, these two steps should go a long way toward filling loopholes that judicial challenges might otherwise have found. The shortcoming of both these steps,

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however, is the absence of a definition of sources and methods. A catalogue excludes what it fails to include. Undefined, sources-and-methods information runs the risk of becoming as jargonized and abused a concept as that of "national security."

Statutory and Constitutional Barriers to Disclosure

> "American culture is a populistic culture. As such, it seeks publicity as a good in itself. Extremely suspicious of anything which smacks of holding back, it appreciates publicity, not merely as a curb on the arrogance of rulers, but as a condition in which the members of society are brought into a maximum of contact with each other. Favoring the exposure of practically every aspect of life, it is uneasy in the presence of those who appear to be withholding something."[46]

It is against this ethos that the torrent of unauthorized disclosures in the seventies must be viewed. These included the "Pentagon Papers" in 1971; the Marchetti and Marks expose in 1974; Agee's damaging book in 1975; and the Village Voice publication of the Secret report of the House Select Committee on Intelligence in 1976.

Besides the American penchant for publicity, disclosure at any particular time may be triggered by such factors as a disgruntled or disaffected member of the executive branch, sharp cleavages in the body politic, a confrontation between the Congress and the President, and secrets that have lost their credibility.[47] The "Pentagon Papers," which has been referred to perversely as "citizen disclosure," belongs to

the species designed to change government policy. As such, it has a number of precedents in our early history, although certainly not in scale or impact. In 1795 Senator Mason of Virginia, feeling that the people had a right to know the terms of a treaty that Washington had laid before the Senate in secret session, sent a copy to the Philadelphia Aurora; Senator Tappan of Ohio did the same thing in 1844 with a treaty calling for the annexation of Texas which President Tyler had presented to the Senate in secret session, sending the text to the New York Evening Post; and in 1848 the New York Herald Tribune published the Treaty of Guadaloupe Hidalgo ending the Mexican war, while the Senate was debating it in executive session.[48] The other three cases of recent disclosure illustrate the tension between publicity and secrecy at its tautest point, that is, as it relates to covert intelligence activities. In three of the four cases an essential ingredient was a disgruntled or disaffected employee or former employee of the executive branch.

It is striking that the compromises of classified information in the seventies have been overwhelmingly due to public disclosure rather than espionage. The legal defenses of secrecy, like the Maginot Line, have been so singlemindedly directed against espionage that they have been repeatedly outflanked by public disclosure. The First Amendment to the Constitution, in severely restricting the use of "prior restraint" against

the press, has also been, it is true, conducive to disclosure. In view of this situation, how much protection then do statutory and other judicially enforceable principles provide for foreign intelligence information?

Before there was a classification system or espionage laws, the executive branch protected secrets by virtue of the principle of "executive privilege." The authority for issuing Executive orders on classification derived from the exercise of this privilege.[49] E.O. 11652 refers only indirectly to the Espionage Statutes. The doctrine of executive privilege is an unwritten, implicit power that is usually derived from Article 1, Section 2 of the Constitution--the separation-of-powers provision--and, as it relates to national security, from the powers of the President as Commander in Chief and as the principal representative of the State in the conduct of foreign affairs. In the New York Times Company v. the United States, in 1971, even while refusing to support the government's position on the "Pentagon Papers," Justice Potter Stewart gave a ringing affirmation of executive privilege: "It is clear to me that it is the constitutional duty of the executive--as a matter of sovereign prerogative and not as a matter of law as the courts know law--through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense."[50]

But the extravagant claims of executive privilege in connection with the Watergate experience and their rejection by the Congress and the courts have made incontrovertibly clear that the executive has no absolute power to withhold information for national security, or any other reasons, being subject in the exercise of executive privilege to legislative and judicial checks and balances. Executive privilege still remains a valid doctrine, but the courts are more likely to support the Executive in withholding valid state secrets than in preventing their publication once they have escaped from executive control.[51] This is certainly borne out by recent disclosure history.

One statutory barrier to disclosure--the sources-and-methods provisions of the 1947 and 1949 Acts--has been discussed in the preceding section. Exemption (b)(1) of the Freedom of Information Act gives statutory sanction to the protection of information properly classified in accordance with an Executive order.

A particularly operative statute is the Atomic Energy Act of 1954, which offers this definition of Restricted Data: "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data

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other countries if the Commission and the Director of Central Intelligence jointly determine that the information is necessary for the intelligence process and can be adequately protected as national security information. This flexibility, coupled with ERDA's strict compliance with the declassification provisions of the Act, has contributed greatly to its success as a security program.

Next to Restricted Data, cryptographic information has probably been the category of classified information most successfully protected by statute. It is protected under the Espionage Statutes, which are codified in Sections 792-799 of Title 18 of the United States Code. Section 798 deals with cryptographic information. It criminalizes the publication or transmission to an unauthorized person of classified information "(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or ...(4) obtained by the processes of communications intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes..." It goes on to define "communications intelligence" as "all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients." Section 798 specifically bans

publication of cryptologic information in unequivocal terms and omits the "intent" criteria of culpability which weaken the other sections. As it relates to the "procedures and methods" of communications intelligence, this statute overlaps to some extent with the sources-and-methods provision of the 1947 Act.

Section 793 of the Espionage Statutes penalizes a series of specified actions undertaken "for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." The underlining, which we have added, is the guilt criterion common to this section and Section 794. Subsection (a) of Section 794 punishes with death or imprisonment anyone who delivers, or attempts to deliver, to a foreign person or government, information relating to the national defense with the intent formulation underlined above. Subsection (b) imposes the same penalties on anyone who, in time of war, "with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates..." information on troop movements, defense dispositions, etc. This is the only place in the Espionage Statutes where the "publishing" of defense information is specifically mentioned. It is limited in its application to time of war and to communications intended for the enemy. "If this intent requirement

is read to mean conscious purpose--a construction suggested by the absence of the "reason to believe" standard used in the culpability formulation of 794(a)--then prosecution of normal publication under Section 794(b) is a virtual impossibility."[54]

Returning to Section 793 of the Espionage Statutes, there is no definition of "intent," "reason to believe," "damage" or "advantage" in the guilt criterion. Although 793 is adequate to convict a person guilty of espionage, its applicability to a person who publishes defense information is less clear.[55] Professor Benno C. Schmidt, Jr., an authority on the Espionage Statutes, sums up his study of them as follows:

> In my reading of the Espionage Statutes, publication of defense information not animated by a purpose to communicate to a foreign country is not prohibited, except for the narrow range of cryptographic information covered by Sections 952 and 798. This reading admittedly makes heavy use of legislative history in construing the culpability provisions of subsections 794(b), 793(a) and 793(b). My conclusion rests also on the belief--perhaps speculation would be a better word--that courts will refuse to apply Sections 793(d) and (e) to acts preparatory to publication, either by finding some very narrow reading that conforms the provision to the pattern of the other Espionage Statutes, or--preferably as it seems to me--by striking the provisions from Title 18 on grounds of vagueness and overbreadth.[55a]

It is noteworthy that the United States did not invoke the Espionage Statutes against the New York Times in connection with the publication of the "Pentagon Papers."

In addition to the defects described above, the Espionage Statutes have two other major weaknesses when viewed in terms

of the protection of intelligence information, and in particular, the sources-and-methods information of CIA. First, the meaning of "defense information" contained therein is probably not broad enough to embrace the whole of sources-and-methods information or much of foreign relations information. In Gorin v. the United States, the Court declared: "In short, the phrase 'information connected with National Defense' as used in the context of the Espionage Act, means broadly, secret or confidential information which has its primary significance in relation to the possible armed conflicts in which the nation might be engaged."[56] Second, proving in a court of law "intent or reason to believe" that the information in question was to be used to the "injury of the United States, or advantage of a foreign nation" will often be more costly in terms of security than the violation to be punished. Referring to court decisions that the government must present proof of these points to a jury, the CIA Assistant General Counsel wrote: "These rulings have left the government in the position of having to reveal in court the very information it is trying to keep secret, or else not prosecute those who steal information and use it to the injury of the nation. To invoke the law's protection of the secret, the secret must be told."[57]

is generally recognized, and we endorse it; the physical safety of persons may be at stake, or political repercussions of some operations, if exposed, would be unacceptable. Because this is an area in which human judgment cannot foresee all contingencies, there has been a strongly conservative attitude in matters of operational security. A distinguishing feature is the compartmentation of operations to reduce the number of knowledgeable persons who can commit some compromising error. Critics of the system feel it is overdone, with the operators defending it on grounds of professional caution." p. 11.

33. The Rockefeller Commission Report notes: "In connection with the statutory responsibility of the Director of Central Intelligence for the protection of intelligence sources and methods from unauthorized disclosure, the National Security Council has directed that each agency or department be responsible for the protection of its own sources and methods, and that the Director call upon these other bodies as appropriate to investigate any unauthorized disclosures and report to him. The Director has, in turn, delegated these responsibilities to the Security Committee of the United States Intelligence Board [now the National Foreign Intelligence Board]..." Report to the Commission on CIA Activities within the United States. Washington: Govt. Print. Office, June 1975, p. 56. The precise extent to which the DCI's statutory responsibility extends to other members of the Intelligence Community is unclear.

34. JSSC memorandum, dated 18 September 1945, entitled "Proposed Establishment of a Central Intelligence Service. Report of the Joint Strategic Survey Committee." It references Joint Chiefs of Staff (JCS) memorandum 1181 (Donovan's recommendations). The National Intelligence Authority was the predecessor of the National Security Council.

35. JCS 1181/5 (amended). "Establishment of a Central Intelligence Service Upon Liquidation of O.S.S. Directive Regarding the Coordination of Intelligence Activities." For text see Appendix R, Donovan and the CIA: A History of the Establishment of the Central Intelligence Agency, by [redacted] CIA, 1975 (SECRET). STAT

36. Memorandum from Director of Naval Communications to Chief of Naval Operations, dated 8 January 1975. Subject: Establishment of a National Intelligence Service-Necessity for Safeguarding the Security of Military Intelligence in Connection Therewith.

37. This seems borne out by these words in the Central Intelligence Group (CIG) draft for the CIA section of the 1947 Act: "Be responsible for fully protecting sources and methods used in the collection of foreign intelligence information received by the Agency..." And also in the draft for a separate CIA Act of 10 March 1947: "Be responsible for taking measures to protect sources and methods used in the collection and dissemination of foreign intelligence information received by the Agency..." The Rockefeller Commission Report, op. cit., p. 53, expresses a similar view: "This language [sources and methods] was originally inserted in the early drafts of the Act in response to the expressed concern of some military officials that a civilian agency might not properly respect the need for secrecy. Congress was also aware of the concern that the United States espionage laws were ineffective in preventing unauthorized disclosure of classified information."

38. [redacted] "The Protection of Intelligence Data." Studies in Intelligence. Vol. 11, No. 2, p. 72.

39. Letter from John S. Warner to Senator Muskie, Senate Hearings on Government Secrecy, op. cit., p. 115.

40. This definition draws on some of the concepts contained in the OGC catalog of sources and methods and the Agency-sponsored bill dealing with sources and methods. See footnotes 42 and 66. "Foreign intelligence information" itself would, of course, also require definition. The Rockefeller Commission Report observes that "'foreign intelligence' is a term with no settled meaning. It is used but not defined in National Security Council Intelligence Directives. Its scope is unclear where information has both foreign and domestic aspects." Op. cit., p. 59. It adds its belief that "...congressional concern is properly accommodated by construing 'foreign intelligence' as information concerning the capabilities, intentions, and activities of foreign nations, individuals or entities, wherever the information can be found. It does not include information on domestic activities of United States citizens unless there is reason to suspect they are engaged in espionage or similar illegal activities on behalf of foreign powers." Ibid., p. 59.

41. For a short account of this case, see: Guide to CIA Statutes and Law, p. 16. Also Lawrence R. Houston. "U.S. v. Jarvinen." Studies in Intelligence. Vol. 15, No. 1.

42. Guide to CIA Statutes and Law, pp. 16-18.

43. On this point Judge Haynsworth reiterated his previous holding "that the First Amendment is no bar against an injunction forbidding the disclosure of classifiable information within the guidelines of the Executive Orders when (1) the classified information was acquired, during the course of his employment, by an employee of a United States agency or department in which such information is handled and (2) its disclosure would violate a solemn agreement made by the employee at the commencement of his employment. With respect to such information, by his execution of the secrecy agreement and his entry into the confidential employment relationship, he effectively relinquished his First Amendment rights." Opinion, p. 15. For a brief summary of the Marchetti case prior to the final appeal see Victor Marchetti and John D. Marks. The CIA and the Cult of Intelligence. New York: Alfred A. Knopf, 1974. Introduction by Melvin L. Wulf, legal director of ACLU and Marchetti's defense lawyer. The Supreme Court refused to review the Marchetti case.

44. Backrack was suing for all information on the relations of Nicholas de Rochefort (deceased) with CIA and its predecessor organizations. Paragraph 9 of Judge Gray's opinion is particularly noteworthy: "Since it is concluded that the exemptive provisions of 5 U.S.C. 552(b)(3) [that is, the sources-and-methods provisions under the FOIA statutory exemption] are applicable herein, the Court has no occasion to consider whether the sought information, if it exists, would also be exempt from disclosure by the provisions of U.S.C. 552(b)(1) [information properly classified pursuant to an Executive order]." The other cases referred to in the text are: Harriet A. Phillippi v. CIA, et. al., 1 December 1975, a case in which in camera examination of documents with the plaintiff's lawyer present was denied; William B. Richardson v. J.T. Spahr et. al., 30 January 1976, a consolidation of three suits demanding CIA financial records; Gary A. Weissman v. CIA et. al., 14 April 1976, in which the plaintiff requested the CIA security file on himself; Jonathan A. Bennett v. DOD, CIA, et.al., 13 September 1976, requesting information on all missions sent into Cuba by DOD; and Morton H. Halperin v. William E. Colby, et. al., 4 June 1976, a request for budgetary information (Although the sources-and-methods provisions were cited by the judge, the case was decided on the basis of exemption (b)(1)); and Anthony V. Vecchiarello v. Edward Levi, et. al. (CIA), 1 June 1976. The District Court decided that the disputed information was properly withheld under the FOIA exemptions.

45. The sources-and-methods catalogue, OGC 76-03333, dated 12 December 1975, is entitled "Aspects of Intelligence Sources and Methods of the Central Intelligence Agency That Require Protection from Unauthorized Disclosure." It is divided into twelve sections with a total of 126 "aspects." Approved by the DCI on 12 January 1976, it is to be issued as an Agency regulation. An OGC staff memorandum explaining the rationale of the sources-and-methods catagloue notes that in those instances where the district court decided against the Agency's deletions from Marchetti's book, it was generally because the Agency was unable to document prior determinations concerning the classification of the contested item. The nondisclosure agreement for sources-and-methods information will be in addition to the secrecy agreement that employees now sign for the protection of classified information.

46. Shils, op. cit., p. 41. He adds: "With its [America's] devotion to publicity on such a scale, it could scarcely be expected that in its normal state Americans would have much sympathy with secrecy, particularly government secrecy." Ibid., p. 42. And again: "No society has ever been so extensively exposed to public scrutiny as the United States in the twentieth century." Ibid., p. 39.

47. Writing of the disclosures of CIA cover and funding operations in 1967, Knott concludes: "Habits of thinking within the Agency and the Executive had become outmoded, and preserved from change by secrecy." Op. cit., p. 64. In other words, covert operations that had been appropriate and credible in the fifties had ceased to be so in 1967, but were not recognized as such until it was too late. Secrecy often tends to breed insensitivity to change and public opinion.

48. Cited by Professor Arthur Schlesinger, Jr., Senate Hearings, op. cit., pp. 40-41.

49. The preamble to E.O. 11652 takes note of the section of the Freedom of Information Act (552(b)(1) of Title 5, U.S.C.) exempting properly classified information from disclosure, but the Executive order does not expressly derive its authority from that Act.

50. Quoted by Stanley Futterman. "What is the Real Problem with the Classification System?" Ch. 3 in None of Your Business, op. cit., p. 102.

51. Speaking of the decision in the "Pentagon Papers" case, New York Times v. United States, Ralph E. Erickson, then Assistant Attorney General, expressed this view: "While the Justices applied a number of different standards, it seems clear that injunctive relief against publication of classified material already in the hands of the press will be granted only in the most extreme circumstances, at least in the absence of specific legislation." Hearings on the Proper Classification and Handling of Government Information Involving the National Security and H.R. 9853, a Related Bill. Special Subcommittee on Intelligence. House Armed Services Committee. 92d Congress. 2d Sess. March and May 1972. H.A.S.C. No. 92-79, p. 17472.

52. The then Atomic Energy Commission (AEC) Classification Handbook and excerpts from the Atomic Energy Act are reproduced in the Senate Hearings on Government Secrecy, op. cit., pp. 364-467.

53. The House Committee Report on Executive Classification, op. cit., p. 99, makes this interesting comment on the atomic energy program:

> Like other executive agencies the AEC also functions within the Executive order classification system, as well as its own statutory system. The committee notes, however, the sharp contrast between the apparent efficient operation of the AEC classification system and the administrative failures that have marked the operation of the Executive order system within the past 20 years.
>
> It is true that the highly technical type of information that is subject to classification within AEC's own statutory system and its limited scope of applicability makes it more manageable. Moreover, scientific development in the atomic energy field usually provides more precise benchmarks for measuring the necessity to continue classification of AEC information at a particular level than is generally true in the fields of foreign policy or defense information.

54. Benno C. Schmidt, Jr. "The American Espionage Statutes and Publication of Defense Information." Ch. 11 in Secrecy and Foreign Policy, op. cit., p. 188. By dropping the word "intent" and retaining "reason to believe" and by substituting for foreign person or power "any person not

entitled to receive it," subsections (d) and (e) of 793 come closest to embracing press disclosure of defense information. Subsection (d) prescribes penalties for one lawfully in possession of defense information who refuses to deliver it on demand to an officer or employee of the United States "entitled to receive it"; subsection (e) covers a person who, being in unauthorized possession of defense information retains it, communicates it to another unauthorized person, or refuses to surrender it to an officer or employee of the United States entitled to receive it. Prior to 1950 there was only a section (d) applying to government employees; the addition of (e) was done as a result of the Whittaker Chambers "pumpkin papers" case to criminalize retention by non-goverment personnel. Ibid., p. 188.

55. Ibid., p. 198. The present Espionage Statutes comprise in the main legislation enacted in 1911, 1917, and 1950. The most recent provision, Section 799, deals with the protection of NASA secrets.

55a. Ibid., p. 201. Section 952 (18 U.S.C. 952) imposes penalties on a government employee who publishes or makes unauthorized disclosure of information concerning or transmitted by a foreign diplomatic code.

56. Quoted in CIA publication entitled "Title 18, U.S. Code. Sections 792, 793, 794, 795, 796, 797, and 798 with an Interpretation of the Internal Security Act of 1950." p. 6.

57. Morrison, op. cit., p. 75. Mention should also be made of another statutory barrier to disclosure, subsection (b) of the Internal Security Act of 1950 (50 U.S.C. 783). This subsection makes it a crime "for any officer or employee of the United States" to communicate to a foreign agent "any information of a kind which shall have been classified by the President as affecting the security of the United States..." Quoted by Ralph E. Erickson in statement to the House Subcommittee on Intelligence, H.A.S.C. No. 92-79, op. cit., p. 17471. It apparently does not apply to former government employees.

58. Guiding Principles for the Intelligence Community, 13 May 1976. NFIB-D-1/49.

59. Knott, op. cit., p. 10.

60. See Senate bills S. 1726 and S. 2451. Texts and analysis of these and other bills dealing with classification

WHEN TV NEWS SHOULD—AND SHOULDN'T—REVEAL GOVERNMENT SECRETS

Newsweek
Time
U.S. News & World Report
TV GUIDE 4
Date 14-20 Nov 87

A member of the Senate Select Committee on Intelligence offers his views in this sensitive area of public concern

By Sen. William S. Cohen (R-Maine)

The phrases "freedom of the press" and "the public's right to know" are talismanic. We rub them daily to define our values, to lift us above dictatorships, even above the small throng of other democracies, pointing with pride at the immeasurable value we place upon our freedom of expression. But are there limits to our insatiable appetite for information? Do the American people have the right to know everything?

Many members of the press see their duty in absolute terms. Since Government action is based upon the consent of the governed, they reason, consent is meaningless unless it is *informed* consent. Therefore, it is argued, information available to elected officials should be disseminated to the public so it can determine whether the Government's action is one of wisdom or folly.

The problem with this reasoning is that it insists the First Amendment be painted in bold, primary colors. The Supreme Court, however, has consistently reminded us that there is a great deal of gray mixed in with the red, white and blue of the Bill of Rights.

The burden of weighing competing interests is also imposed when the public's right to know rubs up against the Government's occasional need to maintain secrecy. Surely, the general public should know how its elected officials staple together a budget or sift tax legislation through the mesh of competing interests. But what if the U.S. contemplates an air strike against a terrorist training camp or undertakes a daring rescue of American schoolchildren held captive on an island or a hijacked airplane? Are there larger interests involved in the exercise of the First Amendment? Can the need for national secrecy or security outweigh the need to be notified?

In such a dilemma, as with many delicately balanced constitutional issues, the answer has to be: it depends.

What if war has not been declared, but something less than peace prevails? What if we are about to launch that strike against the terrorist camp? Should the television networks provide live coverage of the flight path of our aircraft? As a general rule, when tactical surprise is imperative for the success of the mission and the safety of the men and women involved, then the eyes and ears of the public should remain shielded and sealed from knowledge. Once hostile forces have been engaged, the need to be informed would justifiably emerge.

But, the press might ask, "What if the targets of the mission are satellites of the Soviet Union? Indeed, what if Soviet personnel are killed in the process? Don't the American people have the right to know that their officials may be condemning them to an atomic ash heap?"

These are tough questions, but they presume Government officials are unable or unwilling to take such considerations into account before executing a plan of action. Moreover, they presume that elected officials cannot be trusted to make tough and wise decisions, only misguided or possibly mad ones.

The fact is that while Americans demand that their Government act honestly, we realize that it cannot do everything openly, particularly when it involves sensitive negotiations with other governments, the development of exotic new weapons systems or protecting the American people against hostile military and intelligence activities.

Whenever the freedom of the press bumps up against national security, we need to examine the nature of the public good that would be advanced by secrecy or by disclosure. I do not find the public interest being served by disclosing, for example:

- ☐ The names of our clandestine agents abroad;
- ☐ Our methods of detecting and deciphering the communications of hostile nations;
- ☐ Plans by other nations to assist in the overthrow of a terrorist leader;
- ☐ The movement of ships as a prelude to retaliatory action against a hostile nation;
- ☐ The most advanced technology developed by our military.

Last year the press revealed that the National Security Council had designed a disinformation campaign directed at Libyan strongman Muammar Kaddafi, using the media as its conduit. In my judgment, the press was absolutely justified in exposing such a disinformation campaign. First, the Soviet Union is known to traffic in lies. Emulating the Soviets will not help us prevail over them in the marketplace of world opinion.

Second, when—not if—the public discovers that we are spinning a web of lies (even for a desirable end), they will come to distrust us when we are telling the truth. Truth is the cement that holds the faith of the American people. When it cracks or loses its adhesive power, then we are left to float cynically among the debris of democracy.

What if a reporter has acquired access to information and is about to file a story revealing an extraordinarily sensitive covert operation that only a few members of Congress are aware of? Can the Government stop the presses? The answer is maybe. The Supreme Court in the Pentagon Papers case suggested that there may be times when the Government is legally justified in preventing the publication of certain types of information, such as troop movements in time of war. As a general rule, however, it is clear the Government will find more relief from Rolaids than it will from the Court.

In May 1983, CBS correspondent David Martin reported that U.S. intelligence had intercepted a series of cables implicating the Iranian government in the bombing of the U.S. Embassy in Beirut that killed 17 Americans. The CIA claimed the report "caused us to lose the manner in which the intercept was made." Martin later agreed that, if the CIA was right, he shouldn't have done the story.

Last year the late William Casey, then director of the CIA, publicly declared

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he might seek a criminal complaint against NBC News for its story involving certain signals-intelligence capability—the ability to intercept Soviet communications—possessed by the U.S. Legal action, however, was not instituted because NBC's story didn't spell out the nature of the interception.

Indeed, the press should be skeptical when called upon by the Government to exercise restraint. On too many occasions, we have seen the words "national security" invoked to avoid political embarrassment, partisan motivations and even illegal activities. But that skepticism should not be hardened into a rock wall of unreasonableness.

The press has a duty to the citizenry to act responsibly in reporting on national-security activities. But such responsibility cannot be legislated: it must come from the media themselves, and it must be insisted upon by the American people. In cases where there is doubt whether the national security will be harmed by the disclosure, the Government should be consulted and asked for its advice. In my judgment, in most cases news stories can be broadcast or written in a manner that avoids publication of particularly sensitive details.

Where such accommodations cannot be reached with the Government, and the press is not persuaded that the Government's national-security interest outweighs the public's interest in the information concerned, then I believe the Government ought to be so advised by the press. If the circumstances are so egregious that they would fall under the Supreme Court's test for enjoining publication, the Government would at least have the opportunity to restrain publication and have the matter decided by the courts. With prior consultation, this would be an extremely rare occurrence.

There are no easy solutions to these competing tensions in our constitutional system. Indeed, one thing is clear: other than death, taxes and rush-hour traffic, there are few absolutes to be found in our lives—or our Constitution.