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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE **Law and National Security**
INTELLIGENCE REPORT

Volume 3, Number 12 | Morris I. Leibman, Chairman | December 1981

State Department Documents Soviet Disinformation and Forgeries

Continued from previous issue

Case Studies

The Soviet Anti-TNF Modernization Campaign in Europe. The Soviet campaign in Europe against NATO TNF modernization is a good illustration of Soviet use of "active measures." After a long and unprecedented buildup of Soviet military strength in Europe, including the deployment of new SS-20 nuclear missiles targeted on Western Europe, the NATO ministers in December 1979 decided to modernize NATO's TNF capabilities. The Soviets immediately began an ongoing, intensive campaign to develop an environment of public opinion opposed to the NATO decision. (Of course, not all opposition to the TNF modernization decision is inspired by the Soviet Union or its "active measures" activities.)

In this campaign, Soviet diplomats in European countries pressured their host governments in many ways. In one European country, the Soviet ambassador met privately with the Minister of Commerce to discuss the supply and price of oil sold by the Soviet Union to that country. During the discussion, the ambassador gave the minister a copy of Leonid Brezhnev's Berlin speech dealing with TNF. He suggested that if the host government would oppose TNF modernization, the Soviet Ministry of Foreign Affairs might persuade the Soviet Ministry of Foreign Trade to grant more favorable oil prices.

Moscow has spurred many front groups to oppose the TNF decision through well-publicized conferences and public demonstrations. To broaden the base of the anti-TNF campaign, front groups have lobbied non-Communist participants, including antinuclear groups, pacifists, environmentalists, and others. In some cases, the activities of these broad front groups have been directed by local Communist parties. Soviets have predictably devoted the greatest resources to these activities in NATO countries where opposition to the TNF modernization decision is strongest.

In the Netherlands, for example, the Communist Party of the Netherlands (CPN) has set up its own front group—Dutch Christians for Socialism. In November 1980, the Dutch "Joint Committee—Stop the Neutron Bomb—Stop the Nuclear Armament Race," which has ties to the CPN, sponsored an international forum against nuclear arms in Amsterdam. The forum succeeded in attracting support from a variety of quarters, which the CPN is exploiting in its campaign to prevent final parliamentary approval of the TNF decision.

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Conference on First Amendment, National Security Planned

The ABA Committee on Law and National Security and the Center for Law and National Security of the University of Virginia Law School are presenting a conference on the First Amendment and national security. The conference will review recent court decisions, pending legislation, and current problems faced by those responsible for safeguarding both civil liberties and national security.

The conference will be held on January 8 (keynote dinner), 9 and 10, 1982, at the Sugarbird Hotel, Water Island, St. Thomas, Virgin Islands. Efforts are being made to charter an Eastern Airlines jet to fly to St. Thomas from Washington, D. C. (BWI) at $400 round trip per person. Lawyers interested in attending should contact Mari Normyle, Administrator of the Center, at the School of Law, University of Virginia, Charlottesville, Virginia 22901, Tel.: 804—924-5066. Spouses are welcome.

Editor: **William C. Mott.** Associate Editor: **David Martin.** Standing Committee on Law and National Security, ABA, 1155 East 60th Street, Chicago, Ill. 60637.

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Soviet Disinformation and Forgeries

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The Soviet Campaign Against Enhanced Radiation Weapons (ERW). The Soviets, throughout 1977 and early 1978, carried out one of their largest, most expensive, and best orchestrated "active measures" campaigns against enhanced radiation (neutron) weapons. (Again, not all opposition to the U. S. decision to produce the enhanced radiation weapon is Soviet inspired.)

This Soviet campaign has had two objectives: first, to halt deployment of ERW by NATO; second, to divide NATO, encourage criticism of the United States, and divert Western attention from the growing Soviet military buildup and its threat to Western Europe and the world.

- Phase one occurred throughout the summer of 1977. The Soviets staged an intense propaganda blitz against ERW and the United States, involving numerous demonstrations and protests by various "peace councils" and other groups. This phase culminated in a Soviet-proclaimed international "Week of Action."
- Phase two began in January 1978 with Soviet propaganda exploitation of a letter from Leonid Brezhnev to Western heads of government warning that production and deployment of ERW constituted a serious threat to detente. A barrage of similar letters from members of the Supreme Soviet went to Western parliamentarians. Soviet trade union officials forwarded parallel messages to Western labor counterparts.
- Phase three came in early 1978 with a series of Soviet-planned conferences, under different names and covers, designed to build up the momentum of anti-ERW pressure for the U.N. Special Session on Disarmament of May-June 1978. These meetings and conferences, held throughout February and March, were organized either by the World Peace Council or jointly sponsored with established and recognized independent international groups.

The Soviet campaign succeeded in complicating allied defense planning and focusing criticism on the United States. A top Hungarian Communist Party official wrote that "the political campaign against the neutron bomb was one of the most significant and successful since World War Two." The propaganda campaign did not end in 1978; it was incorporated into the anti-TNF effort. With the recent U.S. decision to proceed with ERW production, the Soviets have begun a new barrage of propaganda and related "active measures."

Soviet "Active Measures" Toward El Salvador. Complementing their overt public support for the leftist insurgency in El Salvador, the Soviets have also engaged in a global "active measures" campaign to sway public opinion. These activities include a broad range of standard techniques, including forgeries, disinformation, attempted manipulation of the press, and use of front groups. The obvious dual purpose has been to increase support for the insurgency while trying to discredit U. S. efforts to assist the Government of El Salvador.

In 1980, Salvadoran leftists met in Havana and formed the United Revolutionary Directorate (DRU), the central political and military planning organization for the insurgents. During the same period, the Salvadoran Revolutionary Democratic Front (FDR) was established, with Soviet and Cuban support, to represent the leftist insurgency abroad. The FDR and DRU work closely with Cubans and Soviets, but their collaboration is often covert.

The FDR also supported the establishment of Salvadoran solidarity committees in Western Europe, Latin America, Canada, Australia, and New Zealand. These solidarity committees have disseminated propaganda and organized meetings and demonstrations in support of the insurgents. Such committees, in cooperation with local Communist parties and leftist groups, organized some 70 demonstrations and protests between mid-January and mid-March 1981 in Western Europe, Latin America, Australia and New Zealand.

The FDR and DRU are careful to conceal the Soviet and Cuban hand in planning and supporting their activities and seek to pass themselves off as a fully independent, indigenous Salvadoran movement. These organizations have had some success in influencing public opinion throughout Latin America and in Western Europe. The effort of the insurgents to gain legitimacy has been buttressed by intense diplomatic activity on their behalf. For example, at the February 1981 nonaligned movement meeting in New Delhi, a 30-man Cuban contingent, cooperating closely with six Soviet diplomats, pressed the conference to condemn U. S. policy in El Salvador.

At another level, the Soviet media have published numerous distortions to erode support for U. S. policy. For example, an article in the December 30, 1980 *Pravda* falsely stated that U.S. military advisers in El Salvador were involved in punitive actions against noncombatants, including use of napalm and herbicides. In another particularly outrageous distortion, a January 1, 1981 article in the Soviet weekly *Literaturnaya Gazeta* falsely stated that the United States was preparing to implement the so-called centaur plan for "elimination" of thousands of Salvadorans.

Campaign Against the U. S.-Egyptian Relationship and the Camp David Process. In the Middle East, Moscow has waged an "active measures" campaign to weaken the U. S.-Egyptian relationship, undermine

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The First (and Last?) Published Opinion of the Intelligence Court

The United States Foreign Intelligence Surveillance Court (FISC) issued its first, and perhaps its last, published opinion on June 11, 1981. Since it is not to be found in any official reporter, as a service to the profession it is published in full below. Its genesis, however, is more interesting than its content—and more revealing of the secret operations of the court.

The FISC was established by the Foreign Intelligence Surveillance Act of 1978 (FISA), 92 Stat. 1783, 50 U.S.C. § 1801, with the sole function "to hear applications for and grant orders approving electronic surveillance . . . under . . . this Act." It is not a full-time court nor even, we understand, a court that ever assembles *en banc* except for an annual conference. All its judicial business can be conducted by its judges acting individually—and perhaps must be conducted in that fashion since the Act provides for applications to "a judge," 18 U.S.C. § 1804(a), issuance of orders by "the judge," 18 U.S.C. § 1805(a), contains no provision for rehearing *en banc*, and routes all appeals from denials of applications to a separately constituted appellate panel, 18 U.S.C. § 1803(b). But *cf. Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326 (1941). The full court consists of seven district court judges designated by the chief justice of the United States.

The problem which led to creation of the court is simple enough to understand: Ordinary warrants for electronic surveillance, issuable under Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, are unsatisfactory with respect to foreign intelligence and counterintelligence investigations for a number of reasons: (1) Sometimes the requirement of "probable cause" to believe that criminal activity is involved cannot be met—especially when intelligence (as opposed to counterintelligence) information is sought. (2) The requirement for service of the warrant—even if it is only complied with (as Title III permits) after the surveillance is completed—will often destroy the usefulness of the operation. (3) District courts in general do not have secure facilities adequate for the protection of the top-secret information which the applications contain (highly desired, needless to say, by the intelligence services of other countries).

Before passage of the FISA, foreign intelligence and counterintelligence surveillance was simply extrajudicial. The authorizing official was the attorney general, who was charged by executive order with assuring the existence of conditions that would prevent the electronic "search" from being "unreasonable" and hence unconstitutional. (The text of the Fourth Amendment, of course, does not categorically require warrants for all searches, but merely prohibits searches that are "unreasonable." Other examples of warrantless searches exist, such as searches in the course of arrest.) The Watergate era shattered public confidence in the adequacy of this arrangement, and the FISC was the result.

It is noteworthy, and central to the present story, that the FISA covers only *electronic* surveillance. If it seems strange that foreign intelligence and counterintelligence wiretaps should require a warrant while physical searches for the same purposes (so-called "black-bag jobs," to use the pejorative term) should not, the explanation depends upon whom you ask. The president and his lawyers would maintain that, *in extremis*, even wiretapping does not require a judicial warrant, despite the FISA—that if, in a particular case, the procedures of that legislation should impair the president's ability to protect the national security he would be authorized by his powers under the Constitution to proceed without them. Civil libertarians, on the other hand, would maintain that there is no presidential authority to proceed without a judicial warrant for *either* electronic *or* physical searches. But a nonargumentative and entirely accurate (if less substantive) explanation is simply that, when the FISA was passed, the civil libertarians would not accede to the issuance of warrants for physical searches without "probable cause" to believe the existence of criminal activity; and since the president believed he had the power to conduct such searches even without statutory authorization, the point was simply finessed. As the House Intelligence Committee report disingenuously explained:

> Although it may be desirable to develop legislative controls over physical search techniques, the committee has concluded that these practices are sufficiently different from electronic surveillance so [sic] as to require separate consideration by the Congress. The fact that the bill does not cover physical searches for intelligence purposes should not be viewed as congressional authorization for such activities. H. Rep. 95-1283, 95th Cong., 1st Sess. at 53 (1978).

Then, after passage of the FISA and during the term of a Carter administration imbued with civil libertarian concerns (and perhaps concerned also with self-protection against civil and criminal liability), the plot thickens. Attorney General Civiletti took the position that the FISC had authority to approve physical searches, and the Justice Department sought *and was granted* three such warrants. It is not clear how thoroughly the issue of jurisdiction was briefed for the issuing judges, nor whether they consulted with their

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Intelligence Court Opinion

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colleagues. Since it is difficult (no, to be frank, utterly impossible) to find any jurisdiction to issue warrants for physical searches in the FISA, the department presumably relied, if it addressed the issue, upon a theory of "inherent or implied authority"—a sort of doctrine of "necessity" because Fourth Amendment considerations were involved. (This was the position set forth in a department memorandum to FBI Director Webster. Memorandum from Kenneth C. Bass III to William H. Webster, Oct. 14, 1980, reprinted in H. Rep. 96-1466, 96th Cong., 2d Sess. at 8 (1980).) Even that theory is difficult to sustain, since to the extent there is a Fourth Amendment "necessity," it is a puzzlement why the necessity should be met by the FISC—which the legislative history clearly demonstrates was not intended to have the power—rather than by the regular district courts.

The Civiletti applications sought to meet this problem, apparently, by seeking the warrants from the FISC judges "in their dual capacities as U. S. district court judges and as judges designated to serve on the Foreign Intelligence Surveillance Court." Bass memorandum, *supra*, H. Rep. 96-1466 at 9. But this is an attempt to make one strong link by joining two weak ones; the district judges assuredly have explicit authority to approve physical searches (which the FISC does not possess), but they lack explicit authority (which the FISC does possess) to proceed without probable cause, to accept as adequate the manner of proof specified in the FISA, and to dispense with service of the warrant. It is most difficult to find all the latter details constitutionally "inherent" or "implied."

In all of this, the Civiletti Justice Department (judging, again, from the Bass memorandum) sought to maintain the position that though the warrants were obtainable they were "neither constitutionally nor statutorily required." "The Judiciary," it asserted, "has concurrent jurisdiction with the Executive Branch to authorize physical searches for intelligence purposes." *Id.*, H. Rep. 96-1466 at 9. The problem with this is that one of the few apparent certainties of Fourth Amendment law is that when a judicial warrant *can* be obtained (without imparing the government function for which it is sought), it *must* be obtained, and the search is *ipso facto* "unreasonable," and hence unconstitutional, without it.

Enter the Reagan administration, which probably was troubled by the last point, and certainly did not believe that the judges of the FISC (even while wearing their district court robes beneath their FISC cloaks) had the authority to issue physical-search warrants. Consider, however, the position of the department officials: The FISC had issued warrants three times; and since it is true that a warrant which can be obtained must be obtained, the attorney general would be acting with reckless disregard of the Fourth Amendment rights of the surveillance targets (not to mention his own financial security and physical freedom) to gamble on the most recent department interpretation of the law. The resourceful solution sought by the department was to apply to the FISC for a warrant and to argue that the court had no authority to grant the application.

There was, apparently, reason to believe that the court would agree with the new department position. Even before the change of administrations—and perhaps prompted by concerns expressed by the Senate and House Intelligence Committees (reflected in their subsequently issued reports cited herein)—the FISC judges had apparently had second thoughts about the physical-search subpoenas they had issued, and requested a memorandum on the subject from their law clerk. This was produced on Oct. 30, 1980, and concluded that no authority existed. H. Rep. 96-1466 at 17.

In any case, the Reagan Justice Department proceeded with the physical-search application it hoped to have denied, and it won—which is to say it lost—by which I mean the application was denied. Judge Hart, to whom the application was made, found lack of jurisdiction. The last paragraph of his opinion summarizes his reasoning:

> In view of the clearly expressed intent of Congress to withhold authority to issue orders approving physical searches, it would be idle to consider whether a judge of the FISC nevertheless has some implied or inherent authority to do so. Obviously, where a given authority is denied it cannot be supplied by resort to principles of inherent, implied or ancillary jurisdiction.

The opinion is careful to negate authority on the part of judges under either FISC cloak or district court robe—which is important, because uncertainty as to whether a regular district judge could issue the warrant would perpetuate the department's dilemma. Judge Hart noted, moreover (gratuitously, perhaps, but most helpfully), that "the other designated judges of the FISC concur in this judgment."

The episode is surely bizarre; indeed, it must be super-bizarre, for otherwise it would not stand out from the rest of the landscape in the foreign intelligence field. It may contain, however, some useful lessons. One of the criticisms levelled against the concept of a foreign intelligence surveillance court when it was first proposed was the incompatibility of secret action with courts of law. Public and professional scrutiny of actions and of the stated reasons for

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Seminar on Intelligence For Teaching Faculty Planned

The Consortium for the Study of Intelligence (CSI), a project of the National Strategy Information Center, will sponsor a second annual faculty seminar on the teaching of intelligence from July 16-25, 1982, at Bowdoin College in Maine. The objectives of the seminar are to deepen substantive knowledge of the intelligence process and product, expand and improve teaching of intelligence-related concerns, and to promote professional contacts among scholars in the field.

The seminar format will include: lectures by specialists with diverse experience and perspectives; intensive discussions following each lecture; workshops on teaching methods, review of various teaching and research resources; and display of materials collected or developed by the CSI staff.

Applications are invited from law professors, especially those interested in constitutional, international, national security and intelligence-related law. CSI will pay transportation and room and board costs. Approximately 25 teaching faculty from a variety of disciplines will be selected, and final notifications will be mailed by the middle of March.

For further information and application forms contact:

Dr. Roy Godson, Coordinator
Consortium for the Study of Intelligence
1730 Rhode Island Avenue, N.W., Suite 601
Washington, D. C. 20036
Tel.: 202 – 296-6406

The deadline for applications will be February 17, 1982.

Dezinformatsiya or Misleading the Adversary

Editor's Note: The Chairman of the ABA Standing Committee on Law and National Security has passed on to us a request from a reader of the Intelligence Report *that we publish a selected bibliography of books and mini-books on the subject of intelligence and national security law. Fortuitously, the National Strategy Information Center, which has close ties with the committee in that its President, Frank Barnett, is the committee's educational consultant, has just published the fourth in a series of books on the subject* Intelligence Requirements for the 1980's. *The latest book in the series,* Covert Action, *is reviewed below.*

Covert intelligence is an arcane art which is part and parcel of the whole Soviet effort to defeat the West. Readers of this Report *will recall Ily Dzhirkvelov, the KGB defector, in his interview published in our July 1981 issue described the KGB disinformation service and some of its covert operations around the world. Similarly, Galina Orionova, the defector from Georgy Arbatov's American Institute, stated in our September 1981 issue: "Disinformation of foreigners, particularly of the Americans, is the* first *duty of every ISKAN employee."*

Yet General Vernon Walters in Covert Action *accurately describes the Soviet impression of America in these words:*

> *Their attitude toward intelligence is typical of their guilt-ridden state. They have always been ambivalent toward it. When they do not feel threatened, they regard it as immoral or else disband it entirely.*

It's almost as though we were back in the days when Secretary of War Henry Stimson said of code-breaking operations in 1940, "Gentlemen do not read each other's mail."

The Soviets have no such compunctions. Their attitude toward intelligence was perhaps best described by Winston Churchill when he told Secretary Forrestal the Soviets

> *had no understanding of such words as "honesty," "honor," "trust," and "truth" – in fact, they regard these as negative virtues. They will, he said, try every door in the house, enter all rooms which are not locked, and when they come to one that is barred, if they are unsuccessful in breaking through it, they will withdraw and invite you to dine genially that same evening.*

The term "covert action" is essentially an American one that came into use during the post-World War II period. Few other nations make such a distinction between overt and covert activities. This particular instrument of influencing people and events is viewed by most as a routine means for carrying out policy. And indeed, the ability to penetrate and influence foreign nations is an important instrument in the hands of any ruler. The Soviets have developed an impressive array of covert action instruments, while the U. S. has been engaged in unilateral disarmament in this area. Soviet disinformation, clandestine broadcasting, media penetration, agents of influence, blackmail and forgery sew dissension and confusion in the West, but have elicited almost no counter action. Many U. S. leaders have taken the view that these measures are immoral, or could get us into trouble, making even discussion of them unseemly. The result has been a failure to make use of covert action to support U. S. objectives, as well as to defend the United States against the covert measures of foreign governments.

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Misleading the Adversary

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A new study on *Covert Action* by the Consortium for the Study of Intelligence in its series *Intelligence Requirements for the 1980's* examines how this has happened, and includes many prescriptions to revive Western covert capabilities. The study is edited by Dr. Roy Godson of Georgetown University, the Coordinator of the Consortium.

Contributors to the study made the following observations

– Soviet covert action will continue on a global scale. KGB penetration has proceeded with remarkable ease in the open societies of the West.

– There are political, economic and social weaknesses in the Soviet Union which, should we choose to do so, can be targeted and exploited. In the face of adversaries for whom "active measures" are basic tools of influence and power, Western lack of response may prove extremely damaging.

– Our past record in covert action reveals a crippling failure to integrate covert action into foreign policy.

– Insurgencies will threaten pro-Western nations in the 1980's. U. S. paramilitary operations alone may ensure survival of some friendly nations. The U. S., however, must be willing to initiate such actions, including support for coups and countercoups, rather than merely reacting to them.

– Specific measures should be undertaken to raise morale "in the trenches," to revive covert action planning staffs, and to encourage recruitment and training of Americans and foreigners.

An exceptional group of contributors addressed these themes combining the insights of former intelligence professionals, academics, and active congressional and executive branch experts. Dr. Adda Bozeman, Professor of International Relations at Sarah Lawrence College, dissects the cultural blinders which have disarmed the West, and General Vernon Walters (former deputy director of Central Intelligence and now an ambassador-at-large and an advisor to Secretary of State Haig) suggests how the U. S. might identify and exploit the vulnerabilities in the Soviet empire. Dr. Angelo Codevilla (of the staff of the Senate Select Committee on Intelligence) surveys the particular vulnerabilities in democratic, authoritarian and totalitarian societies: Theodore Shackley assesses paramilitary threats and possible responses based on 30 years as a CIA station chief; and Donald Jameson, a former CIA covert action specialist, lays bare the persistence of Soviet aggression by covert means. Each chapter of *Covert Action* includes both an original paper contributed by the author with informed and lively commentary by discussants, including Dr. Paul Seabury, now a member of the President's Foreign Intelligence Advisory Board; John Barron, author of the book *The KGB;* Ray Cline, former deputy director for intelligence, CIA; Sen. Malcolm Wallop and Reps. C. W. "Bill" Young and Les Aspin, members of the Senate and House Intelligence Committees.

They all agree that our ability to sustain the Western alliance and to reverse the influence of pro-Soviet and anti-Western elements in the Third World demands a re-thinking of the role of covert measures as an integral part of foreign policy.

Covert Action is the fourth volume in the series *Intelligence Requirements for the 1980's* produced by the Consortium for the Study of Intelligence, a project of the National Strategy Information Center. This series is unique in its attempt to explain the four major components of intelligence – analysis and estimates, counterintelligence, clandestine collection, and covert action – and their symbiotic relationships.

Since 1979, the Consortium has sponsored five research colloquia for which papers have been commissioned from high-ranking former intelligence professionals, congressional intelligence experts, and academics with special knowledge of this subject.

Other volumes in the series are: *Elements of Intelligence* (1979); *Analysis and Estimates* (1980); *Counterintelligence* (1980), and *Clandestine Collection,* due out in spring 1982.

Intelligence Requirements for the 1980's: Covert Action is $7.50 (paperback), and is distributed by Transaction Books. It and the volumes listed above may be obtained from the National Strategy Information Center, Inc., 111 East 58th Street, New York, N.Y. 10022.

Intelligence Court Opinion

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actions was, it was said, the traditional check against judicial arbitrariness and the sole assurance of judicial responsibility. And publication of opinions was the only means of achieving consistency through a body of rational precedent. Ordinary warrants, even though issued *ex parte,* were not insulated from this process, since they would often be challenged and reviewed in the course of subsequent public criminal proceedings. Intelligence warrants, by contrast, were meant never to see the light of day.

The outcome of the present case does not vindicate that concern, and may well indicate that it is exaggerated. Even before the change in administrations, the FISC appeared en route to correcting its error, perhaps because the oversight activities of the House and Senate Intelligence Committees performed the function that public and professional scrutiny normally discharges. It may be that there was something distinctive about the makeup of the committees or about

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the nature of the issue which precludes the generalization that oversight will always perform this role. Even so, it must at least be acknowledged that the system worked in the present case.

It was also said, at the time the FISC was created, that the expectation of greater protection from a judicial panel was a grand illusion; that, especially in such matters involving national security, the courts would rarely second-guess the determinations of the Executive. The warrant procedure, these voices warned, would in fact reduce protection of civil liberties, by trading this meaningless judicial involvement for the greater exposure to civil liability (and hence the greater attentiveness) that executive action without the protection of a warrant entails. And questions of civil liability aside, it would diminish the sense of responsibility of the attorney general—making what is, as a practical matter, his final decision appear to be only an application on his part to a higher tribunal. These concerns do seem to be vindicated by the present case. If the FISC could have been misled by the Justice Department so easily on a pure point of law, how much of an obstacle can it possibly present with respect to the more problematic and debatable *factual* issues bearing upon the propriety of a warrant?

The statistics suggest (though they can certainly not be said to demonstrate) that the FISA has made electronic surveillance easier. According to testimony given by Attorney General Levi to the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities in 1975, the number of foreign intelligence and counterintelligence electronic surveillances in 1974 was 232. In 1980, according to the annual report which § 107 of the FISA requires the attorney general to file with the Administrative Office of the U. S. Courts and the Congress, it was 319. Assuming (what may well not be the case) that the need for surveillance has been relatively stable during this period, either of two conclusions may be drawn: (1) with reduced accountability for their actions assured by the shield of a judicial warrant, attorneys general have been conducting surveillance that should not be conducted and would not have been conducted before; or (2) relieved from the unreasonable pressure of possible civil liability for today's activities to be imposed on the basis of tomorrow's notions of security needs and libertarian rights, attorneys general have been conducting surveillance that should be conducted but was not conducted before.

One thing, at least, is clear: the Executive likes the Act. As FBI Director Webster said at the June 1980 workshop sponsored by the ABA Standing Committee on Law and National Security and the University of Chicago (quoted in the Senate Intelligence Committee's 1980 report, S. Rep. No. 96-1017, 96th Cong., 2d Sess. at 6): "[O]n the basis of our experience, . . . it works well and has not had a deleterious effect on our counterintelligence effort." Indeed, the statistics on warrant approvals being what they are, one suspects that the Executive must be considering the desirability of extending the FISA to cover physical searches as well. The impediment, of course, is that the same opposition from libertarians which prevented that extension in 1978 still exists—and has probably been stiffened by the same statistics. I would guess that the illogical compromise reached in 1978 is likely to endure, and that the half-warrantless regime of foreign intelligence surveillance will be with us for some time.

One last moral, or perhaps merely a wry observation, suggests itself: How nice it is to be a judge! The FISC now acknowledges, in effect (though it does not refer to the fact in its opinion), that it wrongfully approved three physical searches. Had the attorney general given such wrongful approval, he would have serious worries about civil liability, see *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971). Which means, of course, that even when the attorney general's approval is rightful it lets him in for years of annoyance and expense in defending civil litigation. (Suits are still pending against Attorneys General Levi, Bell, and, I presume, Civiletti.) But as far as a confessedly wrongful approval by the FISC is concerned, not to worry. The Supreme Court has perceived that there is something special about courts that requires absolute civil immunity, even when the action taken "was in error, was done maliciously, or was in excess of . . . authority." *Stump* v. *Sparkman*, 435 U. S. 349, 356 (1978). This absolute immunity even rubs off on those "participating in the judicial process," *Butz* v. *Economou*, 438 U. S. 478, 509 (1978), such as prosecutors, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), and extends to adjudicating officers and prosecuting employees in agency proceedings, *Butz* v. *Economou*, *supra*, 438 U. S. at 511-17. It "stems from the characteristics of the judicial process," and is necessary to assure that its beneficiaries can perform their functions "without harassment or intimidation," *id.* at 512, and without risk that their "discretion . . . be distorted," *id.* at 515. Other officers of the executive branch, on the other hand—including most specifically those who must decide whether a search is lawful and necessary to protect society, see *id.* at 505-06—do not require or merit such protection, and may be sued on the ground that they knew *or should have known* they were acting outside the law, *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974). How nice to be a judge—at least in a society where the rules reflect the distinctive priorities of (because they are made by) judges!

Antonin Scalia

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Intelligence Court Opinion

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IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE PHYSICAL SEARCH OF NONRESIDENTIAL PREMISES AND PERSONAL PROPERTY

The United States has applied for an order authorizing the physical search of certain real and personal property. I have decided that as a designated judge of the United States Foreign Intelligence Surveillance Court (FISC) I have no authority to issue such an order. I am authorized to state that the other designated judges of the FISC concur in this judgment.

The FISC was established by the Foreign Intelligence Surveillance Act (FISA), 92 Stat. 1783, 50 U.S.C. 1801. It consists (sec. 103(a)) of seven United States district court judges designated by the Chief Justice "who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act." As an inferior court established by Congress pursuant to Article III of the Constitution, the FISC has only such jurisdiction as the FISA confers upon it and such ancillary authority as may fairly be implied from the powers expressly granted to it.

Obviously, the instant application implicates a question of the jurisdiction of the FISC under the terms of the FISA. Here, as in any case involving statutory interpretation, ". . . the meaning of the stature [sic] must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917). In my opinion, the language of the FISA clearly limits the authority of the judges designated to sit as judges of the FISC to the issuance of orders approving "electronic surveillance" as that term is defined in the act.

"Electronic surveillance" is defined in precise terms in sec. 101(f). It includes (1) the "acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication" by or to a U. S. person in the U. S., (2) the acquisition by such a device of the "contents of any wire communication to or from a person in the" U. S., (3) the acquisition by such a device of the "contents of any radio communication . . . if both the sender and all intended recipients are located within the" U. S., and (4) "the installation or use of" such a device "in the United States for monitoring to acquire information, other than from a wire or radio communication." [1]

The reference throughout this subsection is to "electronic, mechanical or other surveillance device." The purpose is the *"acquisition"* of *"the contents"* of a wire or radio communication or monitoring (par. 4) to *"acquire information,* other than from a wire or radio communication." (Emphasis added.) Clearly, the thrust is a search, by the use of surveillance devices, for words or other sounds to acquire "foreign intelligence information" as that term is defined in sec. 101(e). There is not a word in the definitions of "electronic surveillance" even remotely indicating that the term encompasses a physical search of premises or other objects for tangible items.[2]

The limiting terms of sec. 101(f) apply, of course, throughout the FISA. As noted above, FISC "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act" (sec. 103(a)); an "application for an order approving electronic surveillance shall be made," etc. (sec. 104(a)); "the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds," etc. (sec. 105(a)).

The legislative history of the FISA confirms what the statutory language so plainly teaches: the FISC has no jurisdiction in the area of physical searches. The committee reports deal specifically with the subjects of physical searches and the opening of mail; they make the same distinction between such searches and searches by electronic surveillance as is so clearly drawn in the very terms of the FISA. H. Rep. 95-1283 of the House Intelligence Committee puts the distinction sharply (p. 53):

[1] It will be noted that these definitions limit the authority to conduct electronic surveillances to the U. S. in a geographic sense as defined in sec. 101(i). The drafters left to another day the matter of "broadening this legislation to apply overseas . . . [because] the problems and circumstances of overseas surveillance demand separate treatment." H. Rep. 95-1283, pp. 27-28. See also *id.,* p. 51; S. Rep. 95-701, pp. 7, 34-35.

[2] Paragraph (4) of sec. 101(f) provides for the "installation or use" of a surveillance device "for monitoring to acquire information." "This is intended to include the acquisition or oral communications." H. Rep. 95-1283, p. 52. By implication, it encompasses the means necessary to make an installation. This is made clear by the requirement that an application to a judge of the FISC state "whether physical entry is required to effect the surveillance" (sec. 104(a)(8)) and the provision that an order approving an electronic surveillance shall specify "whether physical entry will be used to effect the surveillance." Sec. 105(b)(1)(D). But all that is authorized is "physical entry." Such an authorization cannot be bootstrapped into authority to search entered premises for tangible items. The "search" in such a situation is limited to such observation of the premises as may be necessary to make an effective installation of the surveillance device.

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> The committee does not intend the term "surveillance device" as used in paragraph (4) [of sec. 101(f)] to include devices which are used incidentally as part of a physical search, or the opening of mail, but which do not constitute a device for monitoring. Lock picks, still cameras, and similar devices can be used to acquire information, or to assist in the acquisition of information, by means of physical search. So-called chamfering devices can be used to open mail. This bill does not bring these activities within its purview. Although it may be desirable to develop legislative controls over physical search techniques, the committee has concluded that these practices are sufficiently different from electronic surveillance so as to require separate consideration by the Congress. The fact that the bill does not cover physical searches for intelligence purposes should not be viewed as congressional authorization for such activities. In any case, any requirements of the fourth amendment would, of course, continue to apply to this type of activity.

At the end of the paragraph the committee dropped a footnote stating: "It should be noted that Executive Order 12036, Jan. 24, 1978, places limits on physical searches and the opening of mail." That order (43 Fed. Reg. 3674, 3685) governs the conduct of physical searches without judicial warrant for foreign intelligence purposes pursuant to the constitutional authority of the President.

Thus, the clearly expressed view of the House Intelligence Committee was (1) that the FISA does not authorize physical searches or the opening of mail for foreign intelligence purposes and (2) that until Congress legislates in those areas, the executive branch is relegated to the President's inherent authority in such matters or the procedures of F. R. Cr. P. 41.

The same view was articulated by the Senate Intelligence Committee in its earlier S. Rep. 95-701, p. 38. The language there is virtually the same as the language of the House Intelligence Committee quoted above. In addition, the Senate committee referred to the bill S. 2525, 95th Cong., the National Intelligence Reorganization and Reform Act of 1978, which, it said, "addresses the problem of physical searches within the United States or directed against U. S. persons abroad for intelligence purposes."[3] In the same vein, the Senate Judiciary Committee said (S. Rep. 95-604, p. 6): "the bill does not provide statutory authorization for the use of any technique other than electronic surveillance, and, combined with chapter 119 of title 18 [Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2510] it constitutes the exclusive means by which electronic surveillance, as defined, and the interception of domestic wire and oral communications may be conducted . . ."

We have seen that Congress decided to consider separately the subject or [sic] physical searches, including the opening of mail. This subject was covered by S. 2284 in the last Congress. Since it would have amended and supplemented the FISA, it must be considered as part of the legislative materials bearing on our question.

Title VIII of S. 2284, entitled, "Physical Searches Within the United States" (Cong. Rec., daily ed., Feb. 8, 1980, pp. S 1325-S1327), was the vehicle for the promised separate consideration of that subject. The section-by-section analysis stated that the "court order procedures of the [FISA] are extended to 'physical search,' defined as any search of property located in the United States and any opening of mail in the United States or in the U. S. postal channels, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." *Id.*, p. S1333. In a statement joining in the introduction of S. 2284 (*id.*, p. S1334), then chairman Bayh of the Intelligence Committee said (*id.*, p. S1335):

> . . . But perhaps the best way to bring overseas surveillance and search powers under the rule of law and within the constitutional system of checks and balances is through this Act. We must carefully consider these issues in the weeks to come.
>
> The same is true for the provisions that bring physical search in the United States within the framework of the Foreign Intelligence Surveillance Act of 1978. Current restrictions on physical search under the Executive order procedures are very stringent. Thus, the charter could result in the lifting of certain limitations. However, without the requirement in law to obtain a court order under a criminal standard for searches of Americans in this country, a future administration could abandon the Executive order procedures and assert "inherent power" to search the homes and offices of citizens without effective checks.

Title VIII contained 57 amendments of the FISA, beginning with the insertion of the words, "physical searches and" in the statement of purpose, so as to read, "To authorize physical searches and electronic surveillance to obtain foreign intelligence information," and changing the title of the Act to "Foreign Intelligence Search and Surveillance Act." *Id.*, p.

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[3] S. 2525 was a precursor of S. 2284, 96th Cong., the National Intelligence Act of 1980, discussed below.

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S1325. The other amendments would have added similar appropriate language to nearly every section of the FISA.

The foregoing review of the language of the FISA and the reports of the three committees which gave the legislation exhaustive consideration demonstrates that the FISC has no jurisdiction to authorize physical searches or the opening of mail. This conclusion is buttressed by the fact that Congress subsequently gave active consideration to the deferred question whether the FISA should be amended to extend the procedures of the Act to cover physical searches. That question has not yet been resolved by amending or other legislation.

In view of the clearly expressed intent of Congress to withhold authority to issue orders approving physical searches, it would be idle to consider whether a judge of the FISC nevertheless has some implied or inherent authority to do so. Obviously, where a given authority is denied it cannot be supplied by resort to principles of inherent, implied or ancillary jurisdiction.

Soviet Disinformation and Forgeries

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the Camp David peace process, and generally exacerbate tensions. A special feature of Middle East "active measures" activities has been the use of forgeries, including:

- A purported speech by a member of the U. S. Administration which insulted Egyptians and called for "a total change of the government and the governmental system in Egypt." This forgery, which surfaced in 1976, was the first of a series of bogus documents produced by the Soviets to complicate U. S.-Egyptian relations.
- A forged document, allegedly prepared by the Secretary of State, or one of his close associates, for the President, which used language insulting and offensive to President Sadat and other Egyptians and also to other Arab leaders, including King Khalid of Saudi Arabia. This forgery was delivered anonymously to the Egyptian Embassy in Rome in April 1977.
- A series of forged letters and U. S. Government documents, which criticized Sadat's "lack of leadership" and called for a "change of government" in Egypt. These forgeries surfaced in various locations during 1977.
- A forged dispatch, allegedly prepared by the U. S. Embassy in Tehran, which suggested that the United States had acquiesced in plans by Iran and Saudi Arabia to overthrow Sadat. This forgery was sent by mail to the Egyptian Embassy in Belgrade in August 1977.
- A forged CIA report which criticized Islamic groups as a barrier to U. S. goals in the Middle East and suggested tactics to suppress, divide, and eliminate these groups. This forgery surfaced in the January 1979 issue of the Cairo-based magazine *Al-Dawa*.
- A forged letter from U. S. Ambassador to Egypt Herman F. Eilts, which declared that, because Sadat was not prepared to serve U. S. interests, "we must repudiate him and get rid of him without hesitation." This forgery surfaced in the October 1, 1979 issue of the Syrian newspaper *Al-Ba'th*.

Conclusion

The Soviet Union continues to make extensive use of "active measures" to achieve its foreign policy objectives, to frustrate those of other countries, and to undermine leadership in many nations. On the basis of the historical record, there is every reason to believe that the Soviet leadership will continue to make heavy investments of money and manpower in meddlesome and disruptive operations around the world.

While Soviet "active measures" can be exposed, as they have often been in the past, the Soviets are becoming more sophisticated, especially in forgeries and political influence operations. Unless the targets of Soviet "active measures" take effective action to counter them, these activities will continue to trouble both industrialized and developing countries.

For further information contact: William C. Mott, Suite 709,
1730 Rhode Island Avenue N.W., Washington, D. C. 20036.

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