

The original documents are located in Box 6, folder “Intelligence - New York Times Articles by Seymour Hersh (1)” of the Richard B. Cheney Files at the Gerald R. Ford Presidential Library.

Copyright Notice

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Gerald Ford donated to the United States of America his copyrights in all of his unpublished writings in National Archives collections. Works prepared by U.S. Government employees as part of their official duties are in the public domain. The copyrights to materials written by other individuals or organizations are presumed to remain with them. If you think any of the information displayed in the PDF is subject to a valid copyright claim, please contact the Gerald R. Ford Presidential Library.

**NATIONAL ARCHIVES AND RECORDS SERVICE
WITHDRAWAL SHEET (PRESIDENTIAL LIBRARIES)**

FORM OF DOCUMENT	CORRESPONDENTS OR TITLE	DATE	RESTRICTION
	1. Cheney to Rumsfeld, 5/29/75		
a. Memo	Dick Cheney to Don Rumsfeld - Typed draft with handwritten editing (2 pp.) <i>opened (SYS) based on # 2 below KSH</i>	5/29/75	A 5/23/00
b. Memo	Handwritten draft of item 1a (3 pp.); <i>opened in part based on MR 91-28, # 6</i>	Undated	A
2. Memo	Dick Cheney to Don Rumsfeld - Retyped version of item 1a (2 pp.) <i>declassified NSC letter 1/6/93 let 2/9/93</i>	5/29/75	A
3. Memo	Copy of item 2 (2 pp.) " " " " "	5/29/75	A
4. Cable	Dick Cheney to Rumsfeld Donald Rumsfeld - Cable version of item 2 with unclassified attachments (10 pp.) Note - some unclassified attachments are included in the cable making it longer than item 2 EXEMPTED EXEMPTED 4/02	5/29/75	A
5. Memo	Copy of item 4 (10 pp.)	5/29/75	A

FILE LOCATION
 Cheney Files
 General Subject File
 Intelligence - New York Times Articles by Seymour Hersh (1) Box 7

RESTRICTION CODES
 (A) Closed by Executive Order 12356 governing access to national security information.
 (B) Closed by statute or by the agency which originated the document.
 (C) Closed in accordance with restrictions contained in the donor's deed of gift.

WHM, 5/30/85

§ 798. Disclosure of classified information¹

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any 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

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section—

The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national se-



curity, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

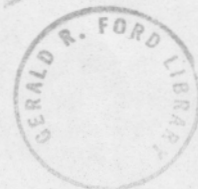
(c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof.

Added Oct. 31, 1951, c. 655, § 24(a), 65 Stat. 719.

¹ So enacted. See second section 798 enacted on June 30, 1953, set out below.

§ 798. Temporary extension of section 794¹

The provisions of section 794 of this title, as amended and extended by section 1(a) (29) of the Emergency Powers Continuation Act (66 Stat. 333), as further amended by Public Law 12, Eighty-third Congress, in addition to coming into full force and effect in time of war shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2912, 3 C.F.R., 1950 Supp., p. 71), or such earlier date as may be prescribed by concurrent resolution of the Congress, and acts which would give rise to legal consequences and penalties under section 794 when performed during a state of war shall give rise to the same legal consequences and



penalties when they are performed during the period above provided for.

Added June 30, 1953, c. 175, § 4, 67 Stat. 134.

¹So enacted. See first section 798 enacted on Oct. 31, 1951, set out above.



5/29/75

Problem: Unauthorized disclosure of classified national security information by Sy Hersh and the NYT.

News story - 5/25/75, Sunday NYT, U.S. sub operations off Soviet Coast.

Question: What, if any, action should we take as a result of publication?

Purpose - Goals

- 1.) To ~~discourage~~ enforce the law which prohibits such disclosure.
- 2.) To discourage the NYT and other publications from similar action.
- 3.) To ~~stop~~ find + prosecute the individual in govt. who provided the information.
- 4.) To discourage others from leaking such information in the future.
- 5.) To demonstrate the dangers to nat'l. security which develop ~~from~~ when investigations exceed the bounds of propriety.
- 6.) To create an environment in which the ongoing investigations of the intelligence community are conducted w/o harming our intelligence capabilities.



5/28/75 - Mr. - Bush, A.G. Levi, Cheney

Issues:

Confirm Sec Def's statement concerning Levi's view of NYT's article on US subs operating in Soviet waters.

A.G.'s position - any problem given family connection?

What does the law say - is there a violation?

Alternatives -

- 1.) FBI investigation of NYT, Herch +/or possible govt. sources.
- 2.) Grand Jury - seek immediate indictments of NYT + Herch
- 3.) Search Warrant - to go after Herch papers in his apt.
- 4.) Discuss informally w/ NYT.
- 5.) Do nothing

Timing - how does all this relate to Pres. schedule - when will we tip our hand to targets of investigation - when will our actions become public knowledge



Questions:

How strong is case given current information? Are there potential weak points?

- 1.) constitutionality of the law
- 2.) legitimacy of the classification
- 3.) degree of violation
- 4.) what would we have to prove to make the case stick.
- 5.) Do we need any additional information.



Political Considerations

How do we avoid the "pentagon papers syndrome?"

What will the public reaction be?

What will the Hill reaction be?

Will we get hit with violating the 1st amendment to the constitution?

How do we counter expected criticism
Does it present any opportunities -

Options

1) Do nothing - ignore the Herch story and hope it doesn't happen again.

2) Go quietly to the NYT - tell them we could prosecute, but would prefer a simple commitment from them that they would cease & desist.

3) Start FBI investigation - with or w/o public announcement. As targets include NYT, Sy Herch, potential govt sources, Marchetti, et al.

4) Seek search warrant to go after Herch and remaining materials.

5) Seek criminal indictments of one or more parties based on information now in hand.

6) Seek contempt citation against ex-CIA employees for violating court orders on release of classified info.



Channels for handling - Council of
will be the big play in pt. for W.H. -
for the Justice Dept.; NSC for the
DD, NSA, CIA, etc.

Crime message - recodification
of criminal statutes - should this
issue be addressed?

Broader ramifications - can we take
advantage of it to bolster our position
on the Church committee investigation?
To point out the need for limits on
the scope of the investigations?

Should we take special steps to
posture ourselves ~~publicly~~
publicly?

Did anyone on the Hill have access
to this information?



TOP SECRET/SENSITIVE/EYES ONLY

DECLASSIFIED
E.O. 12958, Sec. 3.5
NSC Memo, 11/24/98, State Dept. Guidelines
By KOH, NARA, Date 5/23/00
See MK 91-28, #4

May 29, 1975

MEMORANDUM FOR: DON RUMSFELD

FROM: DICK CHENEY

SUBJECT: Status Report - New York Times
Story of Sunday, May 25, 1975

Pursuant to your instructions, I have discussed above subject with Buchen, Hills, Attorney General Levi and DOD Counsel Hoffman. ~~There are considerable differences of opinion regarding what, if any, action should be taken in response to the story by Sy Hersh.~~

At the end of this message is the complete text of the Attorney General's opinion. It raises a number of questions about the wisdom and/or feasibility of any legal action. ~~Levi believes quiet informal approaches should be made to publishers of key newspapers to dissuade them from further publication of classified information.~~ *Other actions are under consideration.*

According to Hoffman, the Navy believes operations can continue, repeat can continue. SecDef is now personally reviewing the entire matter, and will be prepared to make a recommendation shortly as to the feasibility of continued operations. If the operation can, in fact, continue, then we may want to avoid taking any legal action.

McFarlane of NSC staff indicates that Scowcroft left with the impression that an investigation by the FBI would begin immediately. This has not been done. Such an investigation should probably not begin until a conscious decision has been made as to which course of action should be pursued.

Status - Summary

- (1) SecDef reviewing feasibility of continued operations.
- (2) No investigations have been started.

TOP SECRET/SENSITIVE/EYES ONLY



TOP SECRET/SENSITIVE/EYES ONLY

- 2 -

(3) White House Counsel and staff refining legal opinions and options.

The texts of Attorney General's opinion and of Washington Post article of January 4, 1974, are attached, as well as article from *Christian Science Monitor* of May 29.

Regards --

2 Attachments

TOP SECRET/SENSITIVE/EYES ONLY



N.Y. Times
5/25/75

Times

Sunny
cool
Temp
Sat

\$1.00 beyond 50-mile zone from New York City, except Long Island. Higher in air delivery cities.

Submarines of U.S. Stage Spy Missions Inside Soviet Waters

By SEYMOUR M. HERSH

Special to The New York Times

WASHINGTON, May 24—For nearly 15 years, the Navy has been using specially equipped electronic submarines to spy at times inside the three-mile limit of the Soviet Union and other nations.

The highly classified missions, code-named Holystone, have been credited by supporters with supplying vital information on the configuration, capabilities, noise patterns and missile-firing abilities of the Soviet submarine fleet.

It is not known how many men and submarines have been involved in the underseas spying, but at one point in the early seventies, at least four such ships were known to be in operation.

Concern About Detente

Critics of the program, who include past and present members of the National Security Council, the State Department, the Navy and the Central Intelligence Agency, contend that much of the intelligence gathered by the submarines can be obtained through other means, such as satellites, which are far less provocative and less vulnerable to Soviet interception.

The critics also question whether such intelligence operations have any place in the current atmosphere of detente between the United States and the Soviet Union.

Many of the critics acknowledged that they had agreed to discuss the operation in the hope of forcing changes in how intelligence was collected and utilized by the Government.

All the sources agreed that

the Soviet Union was aware of the Holystone program, although perhaps not specifically of when and where the boats were on patrol.

Adding to the objections to the missions raised by the critics, according to many former high-level Government officials interviewed, has been the number of accidents and near-misses involving the submarines, such as the following:

¶Two known collisions with Soviet submarines.

¶The grounding—and eventual escape—of a Holystone submarine within the three-mile limit off the east coast of the Soviet Union.

¶The accidental sinking of a North Vietnamese minesweeper by a submarine on patrol in the Gulf of Tonkin during the Vietnam war.

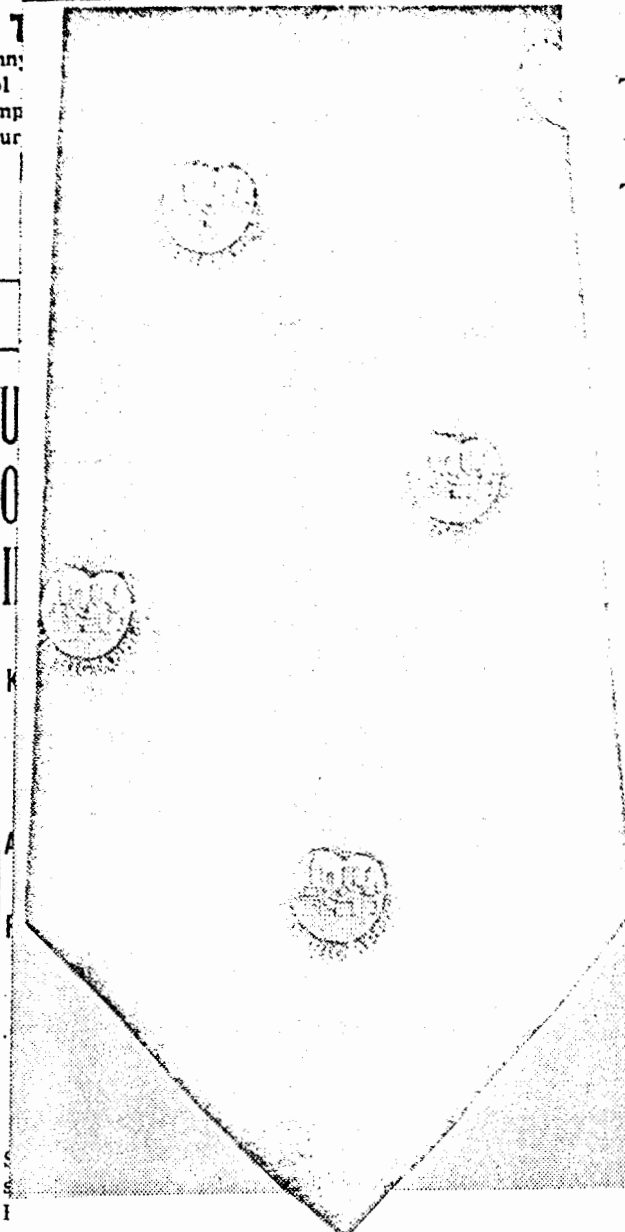
¶The damaging of a Holystone submarine that surfaced underneath a Soviet ship in the midst of a Soviet fleet naval exercise. Despite a search by the Soviet vessels, the submarine, which suffered damage to its conning tower, escaped.

Question of Control

Furthermore, many former officials say that the Holystone program raises questions about the Government's over-all intelligence reconnaissance programs and their control, which thus far do not seem to be a major factor in the Congressional select committees' investigation of intelligence operations.

It could not be learned how often penetration inside the three-mile limit was made, nor

Continued on Page 42, Column 1



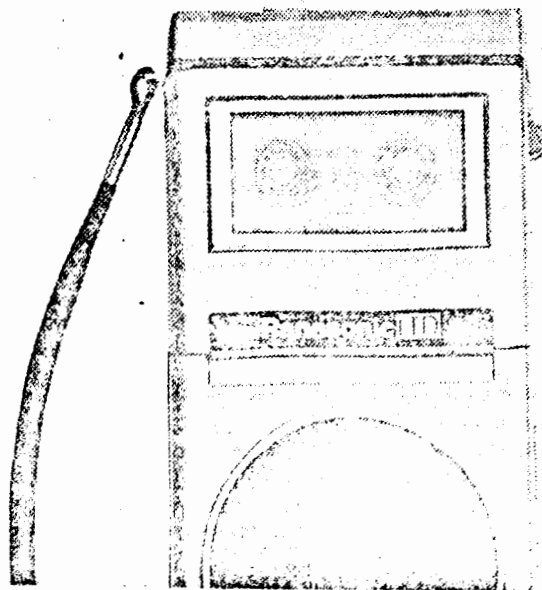
The Big Apple touch of Tie...a taste New York C

A slice of the Big Apple landscape, enclosed in a tiny apple motif, spreads across our tie by Ben Cravats. It's all woven in free polyester in a color of navy, rust, brocade burgundy. Makes a full statement for someone special. Give us a call or come in yours, 7.50

Macy's

Macy's Men's Store (Dept. 031) Street Floor, Herald Square and the Macy's near you. Mail and orders accepted. Deliveries outside Macy area add 1.25. Add sales tax as required. Phone Macy's 24 hours a day. LA 4-6000 in New York City, in New Jersey 800-221-6600, in New Haven 203-624-9211. Elsewhere in Conn. toll free 1-800-922-1350.

the hand-held recording studio



Give it a hand. That's all it takes to hold the Panasonic RQ 160 cassette recorder. With a built-in condenser microphone, cue/review features, battery-life indicator and pause control. Battery, carrying

Submarines of U.S. Stage Spying Missions Inside Soviet Waters

Continued From Page 1, Col. 7

could it be learned whether such penetration needed special clearance. All the sources agreed, however, that Holystone missions had repeatedly violated the territorial waters of the Soviet Union and other nations.

One source said that the submarines were able to plug into Soviet land communication cables strewn across the ocean bottom and thus were able to intercept high-level military messages and other communications considered too important to be sent by radio or other less secure means.

As outlined by the sources, Holystone was authorized in the early nineteen-sixties, and its reconnaissance operations were placed by Secretary of Defense Robert S. McNamara under the direct control of the Chief of Naval Operations, the four-star admiral who heads the Navy.

At various times during the Vietnam war, officials in Washington reportedly delegated responsibility for missions to the Navy admiral in charge of Pacific operations.

Pueblo Seizure
Control over the program was apparently tightened after North Korea seized the United States spy ship Pueblo in 1968, sources said, and the schedule of Holystone missions now have to be approved every month by the 40 Committee, the high-level intelligence review panel headed by Secretary of State Kissinger.

Navy sources familiar with the program said that Holystone involved a minimum of cost because the Navy utilized nuclear-powered basic attack submarines of the Sturgeon, or G37 Class, and simply added more electronic gear and a special unit from the National Security Agency to turn the attack submarine into a reconnaissance vessel.

The National Security Agency, with headquarters at Fort Meade, Md., near Washington, serves as the major source for intelligence and interception communications. It also is in charge of developing unbreakable codes for electronic transmission and breaking the codes of other nations. A highly secret N.S.A. unit was aboard the Pueblo when it was captured.

Inside the Navy, the Holystone patrols are considered a source of pride. Pentagon officials recalled that the Navy guarded clearances for the operation and that official knowledge of it outside the service was limited to a few high-ranking civilians.

No Sign of Office
The program still is under the direct control of the naval intelligence command and is known as OPPO 099U inside the Navy. There is no sign of that office in the published Pentagon telephone directory, nor is its chief operational officer, Capt. Jack B. Richard, listed.

The sensitivity of the program is dramatized by the fact that the Navy has set up a separate channel for recruiting the seamen for the Holystone missions, according to men involved in the recruiting.

The recruiting, much of which reportedly carried out at overseas Navy bases, is consid-



An important aspect of the missions was the gathering of information about missiles fired from Soviet submarines. The missiles aboard this Soviet sub are concealed by the launching tubes. Photo is from a Moscow press agency.

ered so sensitive that the candidates are not permitted to know exactly what they are being asked to do. Special tests are administered, including extensive psychiatric testing, before a seaman is judged qualified, sources said.

As of a few years ago, an intelligence summary of the program was made available every Thursday in the Chief of Naval Operations' briefing theater on the fourth floor of the Pentagon. One participant recalled that the Holystone missions were discussed after the regular intelligence briefing for high-ranking admirals and the top Navy civilian officials.

The lights were dimmed and slides were utilized to show where the missions were on station, the source said.

Photographs Shown
The participant recalled seeing close-up photographs of Soviet submarines that had been taken by a Holystone vessel. At that meeting, which took place in the early seventies, the Navy officially briefed the program as if the Soviet Union had not detected any of its Holystone missions, the source said.

In numerous interviews, however, many Government officials described that belief as inconceivable, particularly in view of the known accidents involving Holystone vessels and Soviet submarines.

One former Government official recalled that the Navy once turned down an internal recommendation that the Holystone operation be publicly disclosed. The argument was that the Navy had nothing to lose because the program was well-known to high officials in the United States and Soviet Union and because some Government lawyers said that it was at least arguable that the operation was in accord with international law and thus was legal.

The Navy declined the suggestion, the official said, in what was interpreted to be an admission that not all the Holystone operations could stand up to public scrutiny.

Briefing Recalled
One former Government intelligence official recalled a Holystone briefing in the mid-sixties in which he and others were shown photographs of the underside of an E-Class Soviet submarine that appeared to be taken inside Vladivostok harbor, a main Soviet submarine port.

"On that same mission," the official recalled, "the Holystone submarine scraped the

bottom of one of the E-Class submarines and knocked off some of its equipment."

He recalled that someone asked during the briefing whether that had been the only such incident, and was told "No. It's happened at least two other times."

On March 31, 1971, according to a copy of a C.I.A. memorandum made available to The New York Times, another Holystone collision involving a Soviet submarine took place.

The memo, sent on April 1 to Richard C. Helms, then the Director of Central Intelligence, said that "the collision is reported to have occurred about 17 nautical miles offshore—beyond the 12-mile territorial limit claimed by the U.S.S.R. No Soviet reaction has been noted."

Eighteen months earlier, a Holystone submarine was beached for about two hours off the Soviet coast, a former Government aide recalled. The incident created concern inside the National Security Council, the aide said, because of the possibility that a major international incident would develop if the ship was discovered.

Another former Government official recalled being briefed in the late sixties about the collision of a Holystone vessel with a North Vietnamese minesweeper in the Gulf of Tonkin. The North Vietnamese vessel, which apparently had been provided to the Vietnamese by the Soviet Union, sank within minutes.

In January, 1974, Laurence Stern reported in The Washington Post the existence of the underwater intelligence operation and its code name, but details about the missions, including their extent and the difficulties they encountered, have never been previously disclosed. The dispatch drew no official reaction either from the Soviet Union or the United States.

No Modification Noted
One source said that there was no significant modification of the Holystone operations after the Post article, which angered the Pentagon, although the Russians now seem to be increasing their counter-detection efforts against the reconnaissance missions.

Much of the Soviet effort and similar detection efforts by the Chinese utilize radar in an attempt to track the periscopes of the Holystone submarines, the source said. On occasion, Holystone submarines have been subjected to intensive hunts by Soviet de-

stroyers and aircraft, the source added.

The combination of the various misfortunes, the increased Soviet and Chinese detection efforts, and the apparent unwillingness of the Navy or the 40 Committee to monitor the operations closely have convinced many former Government officials that Holystone's risks now outweigh the acknowledged value of the intelligence collected.

"It provided useful stuff all right," one former high-level intelligence analyst said, "but it was a risky kind of business."

A former high-level C.I.A. official suggested that Holystone was symptomatic of many of the current Pentagon intelligence collection and reconnaissance programs. He specifically referred to a high-level briefing during which Navy intelligence officials showed close-up photographs of an abandoned Soviet nuclear-powered vessel, the apparent victim of an on-board accident.

Kissinger Role Seen
Similarly, a former White House official recalled that Mr. Kissinger was known to be a strong supporter and close observer of the Holystone operations. Mr. Kissinger attended briefings on the project, the former aide said, in the early days of the Nixon Administration.

Despite the emphasis on photographs, most of those interviewed agreed that photography was the least significant aspect of the Holystone missions.

Far more important, they said, was the information obtained through the N.S.A.'s electronic means about Soviet long and short range submarine-launched ballistic missiles.

Since the Russians normally off and whose risks seem to be minimal. But another official, who told close United States observation, the Holystone missions information that was obtained often penetrated close to the

Soviet shores to observe the missile launchings.

The missions were able to get what one official termed a "voice autograph" of various Soviet submarines. These were described as detailed tape recordings of the noises made by submarine engines and other equipment.

Such recordings were carefully maintained, the official said, and Navy technicians have been able to perfect a method for identifying specific Soviet submarines, even those tracked at long range under the ocean.

"We can follow boats through their life cycle," the expert said, meaning that technicians are able to keep track of a Soviet submarine from her launching until she is decommissioned.

The Russians are believed to be far behind in this kind of underwater intelligence, the source said.

A number of sources described the Holystone information as being important to the United States-Soviet Strategic Arms Limitations Talks that led in 1972 to an interim five-year accord. The accord, among other things, placed certain limits on the number of land-based and submarine-launched offensive ballistic missiles both sides could maintain.

"One of the reasons we can have a SALT agreement is because we know what the Soviets are doing," one official said, "and Holystone is an important part of what we know about the Soviet submarine force."

This official, who was involved in some aspects of the arms talks described the submarine reconnaissance program as "the kind of intelligence operation that has a high pay-off and whose risks seem to be minimal."

But another official, who told close United States observation, the Holystone missions information that was obtained often penetrated close to the

project seemed to "very provocative" and was inadequately supervised.

In this official's view, the most significant information provided by Holystone was a readout of the various computer calculations and signals that the Russians put into effect before firing their long and short range submarine missiles.

The reconnaissance boats were also invaluable, he said, in following the flight and eventual crash of the Soviet missiles, providing constant information on guidance and electronic systems.

"What bothers me," the official said, "is the fact that the Soviets know we're there. This isn't like overhead [satellite] intelligence. This is provocative."

None of the issues raised by the Holystone program is known to have been seriously considered by any Congressional committee.

A member of the Senate Select Committee on Intelligence acknowledged this week that the committee had yet to focus on such reconnaissance operations.

"I suppose we'll hit it at some point," the official said. "This committee will look into all allegations."

S

SPECIAL SAL

IT ALL Buy Direct

ONE OF THE BEST & QUARRY

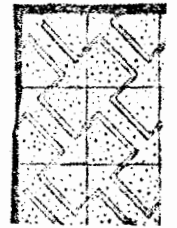
\$1.75

INCLUDING ALL SHAPES, COME

PROFES

- How many times have you
- Come to our store
- We make sure

MEMORIAL DAY WEEKEND MARATHON SALE ON HONEYWELL PENTAX CAMERAS!
TRADE-INS ACCEPTED
HONEYWELL PENTAX SPOTMATIC F
with f.2 SMC Takumar lens
• Meters Wide open for



Top Secret, etc.

DECLASSIFIED in part
E.O. 12958, Sec. 3.5
NSC Memo, 11/24/98, State Dept. Guidelines
By KBH, NARA, Date 5/23/00 / 10/31/02
See MR 91-28, # 8

TO: Rumsfeld
From: Cherry

McFarlane of the NSC reports the following from Defense:

The Navy has expressed its tentative view that "planning" for the continuation of the operation should go forward.

..... a decision to discontinue, based primarily upon Soviet reaction in the meantime, may be taken. To the extent that an investigation could generate publicity leading to a Soviet reaction, an investigation is considered a bad ~~at~~ idea.

In sum, the Navy believes that, in the absence of any Soviet reaction, the operation can



and should be continued, and that to minimize the likelihood of a Soviet reaction, no investigation should be launched. SecDef ~~concurs~~ has concurred in the Navy's position.

-- End McFarlane Report --

1.) Based on the above, I recommend that no investigation be launched for the time-being. ~~Plan action~~

2.) ~~Upon your~~ Walsh is proceeding to refine various options ~~to~~ to take action to ~~to~~ enforce laws against unauthorized disclosure of classified information.

3.) I recommend that we prepare for review, ~~at the highest level~~ upon your return, ~~of~~ three broad options;

a.) Continuation of the operation. Take no action against those responsible for N.Y. Times story.

b.) Continuation of the operation. Take limited action to discourage further disclosures; i.e. private discussion with publishers, etc.



c) Discontinue the operation.
Initiate action ~~against~~ to enforce
the laws against unauthorized
disclosures.

~~Please advise~~
~~Regards.~~

Question - Should we consider
a private approach to the N.Y.
Times before your return, to prevent
publication of any additional stories?
We have no indication that
any ~~of~~ additional stories are
about to be published.

Please advise.

Regards,



INSTRUCTIONS TO COMM CENTERS:

RETAIN NO FILE COPIES; DELIVER IN SEALED ENVELOPE.

DECLASSIFIED

E.O. 12958, Sec. 3.4.

NR 91-28, #4, NSC letter 1/6/93

By KSH, NARA, Date 1/28/93

TOP SECRET/SENSITIVE/EYES ONLY

May 29, 1975

MEMORANDUM FOR: DON RUMSFELD

FROM: DICK CHENEY

SUBJECT: Status Report - New York Times
Story of Sunday, May 25, 1975

Pursuant to your instructions, I have discussed above subject with Buchen, Hills, Attorney General Levi and DOD Counsel Hoffman.

At the end of this message is the complete text of the Attorney General's opinion. It raises a number of questions about the wisdom and/or feasibility of any legal action.

According to Hoffman, the Navy believes operations can continue, repeat can continue. SecDef is now personally reviewing the entire matter, and will be prepared to make a recommendation shortly as to the feasibility of continued operations. If the operation can, in fact, continue, then we may want to avoid taking any legal action.

McFarlane of NSC staff indicates that Scowcroft left with the impression that an investigation by the FBI would begin immediately. This has not been done. Such an investigation should probably not begin until a conscious decision has been made as to which course of action should be pursued.

Status - Summary

- (1) SecDef reviewing feasibility of continued operations.
- (2) No investigations have been started.
- (3) White House Counsel and staff refining legal opinions and options.

TOP SECRET/SENSITIVE/EYES ONLY



TOP SECRET/SENSITIVE/EYES ONLY

- 2 -

The texts of Attorney General's opinion and of Washington Post article of January 4, 1974, are attached, as well as article from Christian Science Monitor of May 29.

Regards --

3 Attachments

TOP SECRET/SENSITIVE/EYES ONLY



THE WHITE HOUSE
WASHINGTON

DECLASSIFIED
E.O. 12958, Sec. 3.4.

MR 91-28, #4, NSC letter 1/6/93
By KSH, NARA, Date 1/28/93

TOP SECRET/SENSITIVE/EYES ONLY

May 29, 1975

MEMORANDUM FOR: DON RUMSFELD
FROM: DICK CHENEY
SUBJECT: Status Report - New York Times
Story of Sunday, May 25, 1975

Pursuant to your instructions, I have discussed above subject with Buchen, Hills, Attorney General Levi and DOD Counsel Hoffman.

At the end of this message is the complete text of the Attorney General's opinion. It raises a number of questions about the wisdom and/or feasibility of any legal action.

According to Hoffman, the Navy believes operations can continue, repeat can continue. SecDef is now personally reviewing the entire matter, and will be prepared to make a recommendation shortly as to the feasibility of continued operations. If the operation can, in fact, continue, then we may want to avoid taking any legal action.

McFarlane of NSC staff indicates that Scowcroft left with the impression that an investigation by the FBI would begin immediately. This has not been done. Such an investigation should probably not begin until a conscious decision has been made as to which course of action should be pursued.

Status - Summary

- (1) SecDef reviewing feasibility of continued operations.
- (2) No investigations have been started.
- (3) White House Counsel and staff refining legal opinions and options.

TOP SECRET/SENSITIVE/EYES ONLY



TOP SECRET/SENSITIVE/EYES ONLY


- 2 -

The texts of Attorney General's opinion and of Washington Post article of January 4, 1974, are attached, as well as article from Christian Science Monitor of May 29.

Regards --

3 Attachments

TOP SECRET/SENSITIVE/EYES ONLY



Office of the Attorney General
Washington, D. C. 20530

Mah 29, 1975

MEMORANDUM FOR THE PRESIDENT

You have asked for the Department of Justice's views about what steps may be taken with respect to disclosures in the New York Times about submarine operations. The New York Times article, while it purports to consist of new disclosures, in fact draws heavily upon an article published January 4, 1974, in the Washington Post. The existence of the operation, the fact that submarines monitored Soviet communications, the code name of the operation and most anecdotes about the operation (e.g. the collision of a U.S. submarine with a Soviet vessel) were all included in the Washington Post article. However, the New York Times article does include a statement, not in the Washington Post article, elaborating on communications interceptions by disclosing that submarines had managed to "plug into" Soviet communications cables. The New York Times article also included a direct quote from materials under a protective order in the Marchetti case.

This memorandum sets forth several alternative legal actions that might be taken against the New York Times, reporter Seymour Hersh, or their source.



Each of these alternatives involves two serious problems: First, the previous publication of much of the material in the Washington Post makes legal action less attractive since the government could not take the position that the entire article constituted a new disclosure of classified material but would rather have to attack only a few isolated paragraphs which went beyond previous disclosures. Second, in any legal action the government would have to admit -- and, indeed prove -- that the undersea communications intelligence operation both existed and was classified. This would put an official stamp of truth on the article and could have diplomatic consequences which would otherwise not follow from an unofficial account.

The legal options are:

I. Prosecutions Under the Espionage Act

A. Prosecution of the New York Times or Hersch under 18 U.S.C. 798 (a) (3) for knowing disclosure of classified information concerning the communications intelligence activities of the United States. The sole aspect of the story to which Sec. 798 might be applicable is the paragraph concerning U.S. submarines plugging in to Soviet undersea cables.

Sec. 798 has never been used and there is no judicial interpretation of its proof requirements. Prosecution under 798 could rest upon the fact of publication and would not then require subpoenaing newspapermen and newspaper files to identify sources for further prosecution. This has the

advantage of minimizing First Amendment litigation and adverse public reaction. It has the disadvantage that the persons who leaked the classified information will not be prosecuted.

The alternative is to run a grand jury investigation in order to identify and prosecute the sources of the leaks under 798. It is predictable, however, that Hersh would refuse to name his sources, even if he were granted immunity to avoid the issue of self-incrimination, and would accept imprisonment for contempt. This would turn the case into a journalist^(-ic) cause celebre without securing any conviction on the merits.

The least controversial use of 798 would be prosecution of the Times alone. Since only a fine and not imprisonment would be at stake, the prosecution would be viewed as in the nature of a test case to establish the scope of the government's power to protect sensitive information. This course, however, might be less likely to deter Hersh from publication of additional classified information.

Sec. 798 appears to offer the most promising basis for prosecution but there are unresolved legal issues, e.g., whether the defendant's knowledge that the information was classified may be inferred by a jury from the nature of the information without more.

B. Prosecution could also be brought under Section 793, the Espionage Act. Unlike Section 798, this section is not limited in scope to communications intelligence information.

Subsection (d) prohibits a person who has lawful possession of information relating to the national defense from communicating or delivering such information to a person not entitled to receive it. This means that the reporter and the newspaper could not be prosecuted under this subsection, but their sources presumably could.

Prosecution under this subsection would require proof of the following elements:

(1) Proof of the source of the newspaper's information. As pointed out earlier, in all probability, evidence on this point could be obtained only if the reporter divulged his sources, which is unlikely. This course would also turn the case into a cause celebre without securing any conviction on the merits.

(2) Proof that the information disclosed was accurate and related to national security.

(3) Proof that the government has made an affirmative effort to prevent dissemination and that the information is not in the public domain. This element would require the government to focus its case on two paragraphs, one referring to the interception of communications on Soviet undersea cables, and the other quoting a CIA memorandum involved in the Marchetti case. The remaining portion of the story has, by and large, been in the public domain for more than one year, having been published in the Washington Post.

Subsection (e) proscribes the same conduct as subsection (d) and applies to those in unlawful possession of national security information. Accordingly, this subsection could be the basis for a prosecution of the reporter and the New York Times company. This subsection would also require proof that there was knowledge that the information is classified and that it relates to the national security. Again, this course would require the government to verify the accuracy and sensitivity of the information disclosed.

As to Section 793, there is an argument that its provisions do not cover publication since its express terms apply only to "communications." In the Pentagon Papers case the justices expressed varying views on this issue. It is our view this section would cover publication.

II. Action in Connection With the Marchetti Litigation

The New York Times article quotes from a document covered by a protective order issued in the Marchetti litigation (which concerns disclosures in a book titled, The CIA and the Cult of Intelligence). The quotation leaves out information that was masked in the document as it appeared in records of the litigation, thus indicating the New York Times may have obtained the document in violation of the court order.

A. One alternative would be to commence a criminal contempt proceeding in connection with the Marchetti litigation, requesting that the Court issue an order requiring all those

persons who had access to the documents involved in the case to state whether they furnished the documents to the journalist. The difficulties with this option are:

(1) The Court may refuse to issue such an order on the grounds that the government has no evidence reflecting a violation of the protective order. A prior government effort to petition the Court to take action upon publication of a Washington Post article in 1974 failed. A new request would very probably fail and might cause the judge to issue a public rebuke of the government.

(2) Various judges, law clerks, and government counsel have had access to the documents so we have no factual basis to point a finger at the plaintiffs' camp.

(3) The New York Times article hints that the information was derived from interviews with past and present government officials who know of the program.

(4) Even if the Court were to issue an order, presumably all of the persons who had access would claim a Fifth Amendment privilege.

For these reasons, the government would no doubt be stymied and perhaps embarrassed by what might appear to be a feeble effort to get at the source of the violation of the protective order and the leakage of classified information.

B. Another alternative would be to use a grand jury to investigate a possible criminal contempt of the Court's protective order. The grand jury could subpoena anyone having access to the documents and the journalist. It could grant immunity to any witness which would negate a Fifth Amendment privilege. The difficulties with this course of action are:

(1) The journalist would presumably refuse to identify the source, thus provoking a Branzburg v. Hayes, 408 U.S. 665, confrontation.

(2) The leaks contain greater information than was in the Marchetti documents and the remedy of criminal contempt might, thus, fall short of the appropriate remedies needed.

C. It has been suggested that we might ask the Court to amend the protective order to cover the New York Times. This possibility does not seem feasible or appropriate. The Times is not a party to the litigation, and we cannot demonstrate that they acted in concert with parties in violation of the protective order. We have serious doubts that the Court would act favorably on such a request. In short, we have no basis to broaden the coverage of the protective order simply because the Times published classified information.

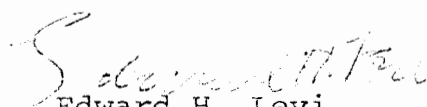
D. In order to restrain future publication by the Times, we would have to move for an injunction. This motion would clearly have to comply with the stringent burdens of

New York Times v. United States, 403 U.S. 714 (1971).

(Pentagon Papers Case) That would be impossible unless we could prove "direct, immediate, and irreparable damage" and not merely "substantial damage" to the national interest.

III. Recommendation

It is my view that the most promising course of action, for the moment, would be to discuss the problem of publication of material detrimental to the national security with leading publishers. Should you desire, I would be glad to undertake such discussions.


Edward H. Levi
Attorney General

U.S. Subs Spying In Soviet Waters

By Laurence Stern
Washington Post Staff Writer

1/4/74

The United States maintains a fleet of electronic eavesdropping submarines operating close to the Soviet coastline to monitor Russian submarine activity and secret military communications.

These submarines, described as "underwater U-2s," roam within Soviet territorial waters, according to intelligence sources with access to documents describing the spying operations.

The Pentagon declines to comment on the underwater intelligence gathering program on grounds that public discussion of the activity would be "detrimental to what we're doing." Other knowledgeable sources contend that the Russians have been aware of the U.S. submarine surveillance for years, as they were of the U-2 flights over the Soviet Union in the late 1950s.

The U-2 flights over Russia

were ended in an atmosphere of high international rancor with the shooting down of Central Intelligence Agency pilot Francis Gary Powers.

Sources familiar with the submarine eavesdropping operations say that the monitoring has been conducted within the Soviet Union's three-mile territorial limit since the late 1960s. Pentagon officials, while neither confirming nor denying the surveillance activities, assert—in the words of one spokesman—that "we don't go mucking around in other people's territorial waters. . . . All the things we do are mindful of other people's airspace and territorial waters."

Soviet vessels also conduct eavesdropping operations in U.S. continental waters although chiefly by means of surface trawlers. Russian subs

See SUBMARINES, A8, Col. 1

U.S. Subs Are Spying Off Russia

SUBMARINES, From A1

are not believed to have the immensely sophisticated electronic capability of the U.S. underwater snooping craft.

The highly secret U.S. submarine surveillance program, which has been alluded to in scattered public references, has assumed major strategic importance since the capture of the electronic spy ship *Pueblo* off the coast of North Korea six years ago this month. The *Pueblo* was captured 13 miles off the North Korean coast.

One of the principal lessons of the *Pueblo* incident was the vulnerability of surface intelligence ships to capture, especially in the vicinity of hostile coastlines. Questions were also raised in the ensuing debate, particularly in a Senate Foreign Relations Committee staff study on the *Pueblo* incident, whether military intelligence and diplomatic interests were being sufficiently coordinated in the spying operations.

Prior to the capture of the *Pueblo* an American submarine on an intelligence mission, the *Ronquil*, narrowly avoided capture by Soviet naval forces. The sub caught fire near the Soviet coast and was surrounded by Soviet destroyers which attempted to force it to the surface. The sub eluded the Russian destroyer gauntlet and escaped to safety.

In another case, according to intelligence sources, a U.S. surveillance submarine collided with a Soviet sub near the Russian coast but also avoided capture.

The underwater eavesdropping program, code named Holy Stone, is probably the most hush-hush of all U.S. electronic intelligence operations which are also conducted by spy satellite and aircraft. The subs are equipped to gather a wide variety of electronic, communications and radar intelligence.

One of their chief missions is to monitor Soviet nuclear submarine activities, a function which figures importantly in the strategic arms limitation negotiations between the United States and the Soviet Union.

The operations are coordinated by the 40 Committee of the National Security Council, which presides over all "black" — covert — intelligence activities of the United States.

One of the reasons cited by Pentagon officials in declining to discuss the submarine eavesdropping—in addition to the claim of sensitivity—was current litigation over a book manuscript by two former intelligence officials. The book, "The Cult of Intelligence," by Victor Marchetti and John Marks, reportedly describes U.S. electronic surveillance techniques which were censored by the CIA under court order.

"Lawyers on our side suspect that things in the book are beginning to pop up in the hands of other people," said a Pentagon spokesman. Marchetti, a former CIA analyst, and Marks, a former State Department intelligence officer, are challenging 225 deletions made in the manuscript on security grounds.

The Marchetti-Marks manuscript, to be published by Knopf, has been classified "top secret-sensitive" by the government, according to attorneys in the case.

"We do some things with submarines," said one Defense official. "Any speculation about what we do is something our people think would be detrimental to what we're doing. It is not an area we'd like to see opened up."



OPINION AND COMMENTARY

Joseph C. Harsch

The games navies play

"The New York Times has startled some of its readers by printing accounts of how United States submarines on intelligence gathering missions have not only approached the Soviet coastlines, but even entered Soviet waters inside the three-mile limit.¹

Three things, it seems to me, need to be said about this report to put the matter in perspective.

First, both Soviet and American navies have long been in the practice of playing tricky and dangerous games. What American submarines do around the Soviet-shore line, Soviet submarines and other ships (often parading as harmless fishermen) do around American and allied shore lines. There is nothing the American Navy has done which the Soviets haven't done also — within their respective capacities.

Second, much of the report is not news to people who keep up with such matters. The Times reporter has come up with one item which so far as I can learn had been kept strictly secret. He says that American submarines on intelligence patrol have learned how to sit on the ocean bottom and read the communications traffic moving over Soviet cables. Otherwise, the report is of material fairly widely known but not previously put together in a single published account."

Third, the report says that it is presumed in U.S. Navy circles (this is confirmed) that the Soviets know all about the American practices. Equally, the U.S. Navy knows about such operations by their Soviet competitors.

So we are talking about the propriety of an American newspaper publishing information which is known to the national competitor (the Soviet Union) but hitherto more or less kept

away from the American public. Should the American press play the government game in keeping only the American people — who pay the freight — in ignorance of what their submarines are doing?

Most people would probably agree that so long as an intelligence operation of this kind is in fact a secret from the competitor it should be kept as a secret. But let us consider only the case of an American naval operation which Moscow has detected and knows all about even if unable to prevent it. Why keep it out of the public domain?

There is one angle here which should be weighed. Yes, the Soviet and American navies play the intelligence game with each other. They are right now negotiating about a possible set of rules to keep the game from getting too dangerous. But there are certain proprieties to be observed for practical reasons.

For example, if an American submarine trails a Soviet squadron on maneuvers, is detected, and makes a successful escape — there is private humiliation for the Soviet skippers who failed to hang on to their prey. But if the Americans boast of having escaped then the humiliation becomes public and calls for some form of protest or reprisal.

The classic example of how the game has been played in the past was provided when a British naval reserve officer named Comdr. Lionel Crabbe failed to return from a scuba dive near the Soviet cruiser Ordzhonikidze at anchor in Portsmouth Harbor, April 15, 1956.

The British Government denied any official knowledge of what Commander Crabbe had been trying to do and also any knowledge of what had happened to him. Speculation has been lively. Most accounts assume that he was

either captured by Soviet frogmen operating through an underwater airlock in the ship's hull, or was killed by some device fired from the ship. But there has never been an official admission that he had been doing anything more serious than taking a dive. Nor have the Soviets ever said one word about what they did to Commander Crabbe.

Working against an American official secrets act is the well-known inclination of persons in the American Government to classify as secret anything and everything. A case in point was the menu at an Army base for a dinner given to the Queen of the Netherlands. The abuse of the classification process makes the American press extremely reluctant to accept a law with teeth in it to protect alleged "secrets."

No serious problem arose during World War II. American newspapers operated under a voluntary censorship system. When in doubt an editor would check with the OWI (Office of War Information) in Washington. There were no serious differences of opinion during this entire operation. The OWI was headed by distinguished and trusted former journalists. They acted as successful mediators between the government and the editors.

There are occasional legitimate secrets which should be kept secret because their disclosure would benefit, or embarrass, a competitor. The American press for excellent cause does not trust most of the American Government to use classification within reason. Since the OWI system worked so well during World War II, why not devise a peacetime equivalent? The American Society of Newspaper Editors could nominate a panel of professional newsmen. The government could select from the panel.

GERALD R. FORD LIBRARY

This form marks the file location of item number ⁴3-5 as listed
on the pink form (GSA form 7122, Withdrawal Sheet) at the front of the folder.