Chapter 6
Legal Analysis

Introduction

The CIA, like every other agency of the federal government, possesses only that authority which the Constitution or duly enacted statutes confer on it. And, like every other agency, it is subject to any prohibitions or restraints which the Constitution and applicable statutes impose on it.

Congress vested broad powers in the CIA. Its purpose was to create an effective centralized foreign intelligence agency with sufficient authority and flexibility to meet new conditions as they arose.

But the Agency's authority under the Act is not unlimited. All its functions must relate in some way to foreign intelligence. The Agency is further restricted by the Act's prohibition on law enforcement powers and internal security functions, as well as by other Constitutional and statutory provisions.

Determining the lawfulness of particular Agency conduct requires analysis of its authority as well as any applicable restrictions. The process does not always produce clear and precise answers. Difficult questions of statutory and Constitutional interpretation are involved. There are few, if any, authoritative judicial decisions. The legislative history and the experience under the Act are an uncertain guide.

In many instances, the only appropriate test is one of reasonableness. Different persons are likely to hold different opinions as to what the statutes and Constitution authorize or prohibit in particular circumstances.

Legal questions are only the beginning of a complete analysis of the issues. A distinction must be drawn between what the law authorizes or prohibits and what may be desirable or undesirable as a matter of public policy. Activities which the law authorizes may, nonetheless, be undesirable as a matter of policy. Conversely, policy may create a compelling need for activities which have not been authorized; to the extent that no Constitutional restrictions pose an abso-

lute barrier, authority for such activities may be sought if it does not now exist.

In the Commission's recommendations, both law and policy are considered. This chapter, however, is intended to deal only with the applicable law.

A. The Extent of the CIA's Authority

1. The Authority of the CIA as to Foreign Intelligence

Although the National Security Act does not expressly limit the CIA's intelligence activities to foreign intelligence, it appears from the legislative history as a whole and the consistent practice under the statute that the Agency's responsibility is so limited.

In deciding what constitutes "foreign intelligence," the subject matter of the information and not the location of its source is the principal factor that determines whether it is within the purview of the CIA.[1] This conclusion is supported by that portion of the legislative history which indicates the CIA may collect foreign intelligence in this country by overt means.

"Foreign intelligence" is a term with no settled meaning. It is used but not defined in National Security Council Intelligence Directives. Its scope is unclear where information has both foreign and domestic aspects.

The legislative history indicates general congressional concern that the Agency should not direct activities against United States citizens or accumulate information on them. However, Congress did not expressly prohibit any activities by the CIA except the exercise of law enforcement and internal security functions.

We believe the congressional concern is properly accommodated by construing "foreign intelligence" as information concerning the capabilities, intentions, and activities of foreign nations, individuals or entities, wherever that information can be found. It does not include information on domestic activities of United States citizens unless there is reason to suspect they are engaged in espionage or similar illegal activities on behalf of foreign powers.

The authority of the CIA to collect foreign intelligence in this country by clandestine means is also unclear. The Act neither expressly authorizes such collection nor expressly prohibits it. The National Security Council has never formally assigned this responsibility to the CIA. The Commission concludes that the CIA's authority in this area needs clarification.

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[1] See also *Heine* v. *Raus*, 261 F. Supp. 570 (D. Md. 1966), *vacated and remanded*, 399 F. 2d 785 (4th Cir. 1968).

2. Support Activities

In order to carry on its authorized intelligence functions within and without the United States, the CIA must necessarily engage in a variety of support activities. Such activities include the operation of its headquarters, the recruitment and training of employees, the procurement of supplies, communication with overseas stations, and the like.

The Commission finds that the authority to conduct foreign intelligence operations includes the authority to conduct such otherwise lawful domestic activities as are reasonably necessary and appropriate by way of support. This includes the authority to use those unusual cover and support devices required by the clandestine nature of the CIA.

3. Protection of Sources and Methods

The National Security Act requires the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure. The Commission believes that this provision and the inherent authority of the Director authorize the Agency to take reasonable measures not otherwise prohibited to protect the facilities and personnel of the Agency from outside threats and to ensure good security practices by persons affiliated with the Agency.

What measures are reasonable in a particular case depends on all the facts and circumstances. No general rule can be laid down, but some relevant factors can be suggested. Among them are:

—The degree of danger to the security of the Agency;

—The sensitivity of the activities involved;

—The extent and nature of the Agency's intrusions on individual privacy; and,

—The alternative means of protection available.

Because of the uncertainty inherent in a test of reasonableness, the Commission in the chapters which follow has recommended both statutory changes and a number of restrictions on the means which the Agency may employ to protect its sources and methods.

On rare occasions, the Agency has asserted that the Director's authority permits him to investigate any unauthorized disclosure that jeopardizes intelligence sources and methods. This claim has been made in cases where there was no reason to believe the disclosure came from a person in any way related to the Agency. Although the statutory language and legislative history are not precise, the Commission finds that such an interpretation is unwarranted, especially in light of the applicable NSCID that makes the CIA responsible only for unauthorized disclosures from the Agency.

In our judgment:

(a) The investigative authority of the Director is limited to persons affiliated with the Agency—that is, employees (including former employees and applicants for employment), contractors and their employees, knowing sources of intelligence, agents and similar persons used by the Agency in operations, and others who require clearance by the CIA for access to classified information. Such investigations must be conducted in a lawful manner consistent with the requirements of the Constitution and applicable statutes.

(b) Investigation of breaches of security by employees of other government agencies is the responsibility of the heads of those agencies or of the FBI.

(c) The CIA has no authority to investigate newsmen.

The Commission proposes statutory changes as well as an Executive Order to clarify these matters.

4. Other Authority

The CIA derives some authority from federal statutes of general application. The Economy Act of 1932 [2] authorizes government agencies to provide services and equipment to each other where that course would be in the best interest of the government. Public Law 90–331 requires all federal agencies to assist the Secret Service in the performance of its protective duties. The authority granted in these acts is often exercised by the CIA, but our investigation has disclosed no improprieties arising from that exercise.

The CIA may from time to time be delegated some of the President's inherent authority under the Constitution in matters affecting foreign relations. The scope of the President's inherent authority and the power of the Congress to control the manner of its exercise are difficult Constitutional issues not raised by the facts found by the Commission in carrying out its assignment.

B. The Restrictions on CIA's Authority

1. The Prohibition on Law Enforcement Powers or Internal Security Functions

The statutory proviso that "the Agency shall have no police, subpena, law-enforcement powers, or internal security functions" was initially designed to prevent the CIA from becoming a national secret police force. It was also intended to protect the domestic jurisdiction of the FBI. The statute does not define the terms used.

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[2] 31 U.S.C. sec. 686.

Many matters related to foreign intelligence or the security of the Agency also relate to law enforcement or internal security. For example, an unauthorized disclosure of classified information by an Agency employee may also violate the espionage acts or other criminal statutes. Additionally, the Agency in the ordinary course of its business has relationships of various types with law enforcement agencies. Some of these relationships may raise questions of compliance with the proviso.

The Commission finds that whether Agency activity is prohibited depends principally on the purpose for which it is conducted. If the principal purpose of the activity is the prosecution of crimes or protection against civil disorders or domestic insurrection, then the activity is prohibited. On the other hand, if the principal purpose relates to foreign intelligence or to protection of the security of the Agency, the activity is permissible, within limits, even though it might also be performed by a law enforcement agency.

For instance, the mere fact that the Agency has files on or containing the names of American citizens is not in itself a violation of the statutory prohibition on law enforcement or internal security functions. The test is always the purpose for which the files were accumulated and the use made of them thereafter.

The Commission does not construe the proviso to prohibit the CIA from evaluating and disseminating foreign intelligence which may be relevant and useful to law enforcement. Such a function is simply an exercise of the Agency's statutory responsibility "to correlate and evaluate intelligence relating to the national security." Nor do we believe that the CIA is barred from passing domestic information to interested agencies, including law enforcement agencies, where that information was incidentally acquired in the course of authorized foreign intelligence activities. Indeed, where the Agency has information directly relevant to an ongoing criminal investigation, as it did in connection with the Watergate investigation, the Agency is under a duty to bring its evidence to the attention of the appropriate authorities.

So long as the Agency does not actively participate in the activities of law enforcement agencies, we find that it is proper for it to furnish such agencies with the benefits of technical developments and expertise which may improve their effectiveness.

In the past, the Agency has conducted some technical training of members of state and local police forces through the Law Enforcement Assistance Administration. A 1973 statute prohibited this practice. The Agency has interpreted the statute to evidence congressional intent that it terminate furnishing such training directly to local law enforcement agencies as well. The Commission approves the Agency's

decision to leave to the FBI such training of state and local police officers.

2. *Constitutional Prohibitions*

The Central Intelligence Agency, like all organs of government, is required to obey the Constitution. The protections of the Constitution extend generally to all persons within the borders of the United States, even aliens who have entered the country illegally.

a. *The First Amendment.*—The First Amendment to the Constitution protects among other things freedom of speech, of the press, and of political association from abridgement by the government. These freedoms are not absolute. The Amendment, as Mr. Justice Holmes noted, does not "protect a man in falsely shouting fire in a theatre and causing a panic." Nevertheless, government conduct which inhibits the exercise of these Constitutional rights raises a substantial Constitutional question.

The interception of private communications and the undue accumulation of information on political views or activities of American citizens could have some inhibiting effect. Because the Commission has found these activities were improper for other reasons, it is unnecessary to explore the First Amendment questions in detail.

b. *The Fourth Amendment.*—The Fourth Amendment prohibits unreasonable searches and seizures. In ordinary criminal cases, law enforcement officers must obtain a judicial warrant before searching a person's residence, hotel room, or office, except in "exigent circumstances." When the Supreme Court held in 1967 that private conversations were protected by the Fourth Amendment, it made it clear that all wiretaps and other forms of surreptitious electronic surveillance were within the field of investigative activities that ordinarily require prior judicial approval.

It is unclear whether the President can act without such approval in some cases where the national security is involved. The Supreme Court recently held that a warrant is required in national security cases having "no significant connection with a foreign power, its agents or agencies." [3] However, the Court expressly reserved decision on whether a significant foreign connection would justify a different result. Some lower courts have held that no warrant is required in such cases.

Neither the Fourth Amendment nor any other Constitutional or statutory provision prohibits physical surveillance—the observation of the public comings and goings of an individual—unless such sur-

[3] *United States v. United States District Court*, 407 U.S. 297 (1972).

veillance reaches the point of harassment. The use of undercover agents or informers is also largely uncontrolled by legal standards.[4]

c. *Waiver and Consent*—Constitutional rights may be waived in certain circumstances. The Supreme Court has held that a valid waiver must be knowing and voluntary, and the evidence of such a waiver must be clear and unequivocal. The government cannot make waiver of Constitutional rights a condition of public employment, unless the demand for such a waiver is reasonably related to a proper governmental objective and the waiver is the least restrictive means available to achieve that objective. Whether a particular waiver is valid depends on all the facts of the case.

3. Statutory Prohibitions

a. *The Omnibus Crime Control and Safe Streets Act.*—Title III of the Omnibus Crime Control and Safe Streets Act [5] prohibits the interception of private conversations through wiretaps or other forms of electronic eavesdropping unless one party to the conversation consents or a judicial warrant is obtained. The statute expressly does not affect whatever power the President has to order warrantless wiretaps or eavesdropping in national security cases. An Executive Order, dated June 30, 1965, permits warrantless wiretaps so long as the written approval of the President or the Attorney General is obtained.

The statute defines "interception" to mean "the acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." A number of judicial decisions have held that the Act does not prohibit the collection of long-distance telephone billing records. These records show the telephone number called, the date and time of the call, and, in some cases, the names of the parties. They do not indicate the content of the call.

A different question is posed by the acquisition of communications incidental to the testing of interception equipment to be used abroad. On the face of the statute, such activities appear to be prohibited.

b. *Statutes Protecting the United States Mails.*—Opening first-class mail to examine its contents without a lawfully issued warrant is illegal.[6] The statutes set forth no exception for national security matters.

The examination of the exterior of first-class mail without opening it presents a different problem. Lower federal courts have held that these so-called "mail covers" are valid if they are conducted within the framework of the postal regulations and there is no unreasonable delay of the mail. The Supreme Court has not passed on this issue.

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[4] *Hoffa* v. *United States*, 385 U.S. 293 (1966).
[5] 18 U.S.C. sec. 2510 *et seq.*
[6] 18 U.S.C. secs. 1701–1703.

c. *Disclosure of Income Tax Information.*—Federal statutes, Executive Orders, and Internal Revenue Service regulations prohibit disclosure of information from federal income tax returns except under carefully defined procedures. There is no exception to these requirements for the CIA. Indeed, CIA inspection of tax returns was one form of improper activity specifically mentioned in the 1947 Act's legislative history.

d. *Other Statutes.*—The Commission has not attempted to identify or analyze all statutes which might conceivably apply to activities by the CIA or on its behalf. Whether in any particular case a criminal or other prohibitory statute restricts the authority of the CIA within the United States is a question of interpretation of that statute in light of the National Security Act. The statute may contain an express or implied exception for activities required in the interest of national security; on the other hand, it may be an unqualified prohibition on certain conduct. Only an analysis of the language, any relevant legislative history, and the underlying policies can answer the question in a particular case.

Conclusions

The evidence within the scope of this inquiry does not indicate that fundamental rewriting of the National Security Act is either necessary or appropriate.

The evidence does demonstrate the need for some statutory and administrative clarification of the role and function of the Agency.

Ambiguities have been partially responsible for some, though not all, of the Agency's deviations within the United States from its assigned mission. In some cases, reasonable persons will differ as to the lawfulness of the activity; in others, the absence of clear guidelines as to its authority deprived the Agency of a means of resisting pressures to engage in activities which now appear to us improper.

Greater public awareness of the limits of the CIA's domestic authority would do much to reassure the American people.

The requisite clarification can best be accomplished (a) through a specific amendment clarifying the National Security Act provision which delineates the permissible scope of CIA activities, as set forth in Recommendation 1, and (b) through issuance of an Executive Order further limiting domestic activities of the CIA, as set forth in Recommendation 2.

Recommendation (1)

Section 403 of the National Security Act of 1947 should be amended in the form set forth in Appendix VI to this Report. These amendments, in summary, would:

a. Make explicit that the CIA's activities must be related to *foreign* intelligence.

b. Clarify the responsibility of the CIA to protect intelligence sources and methods from unauthorized disclosure. (The Agency would be responsible for protecting against unauthorized disclosures within the CIA, and it would be responsible for providing guidance and technical assistance to other agency and department heads in protecting against unauthorized disclosures within their own agencies and departments.)

c. Confirm publicly the CIA's existing authority to collect foreign intelligence from willing sources within the United States, and, except as specified by the President in a published Executive Order,[7] prohibit the CIA from collection efforts within the United States directed at securing foreign intelligence from unknowing American citizens.

Recommendation (2)

The President should by Executive Order prohibit the CIA from the collection of information about the domestic activities of U.S. citizens (whether by overt or covert means), the evaluation, correlation, and dissemination of analyses or reports about such activities, and the storage of such information, with exceptions for the following categories of persons or activities:

a. Persons presently or formerly affiliated, or being considered for affiliation, with the CIA, directly or indirectly, or others who require clearance by the CIA to receive classified information;

b. Persons or activities that pose a clear threat to CIA facilities or personnel, provided that proper coordination with the FBI is accomplished;

c. Persons suspected of espionage or other illegal activities relating to foreign intelligence, provided that proper coordination with the FBI is accomplished.

d. Information which is received incidental to appropriate CIA activities may be transmitted to an agency with appropriate jurisdiction, including law enforcement agencies.

Collection of information from normal library sources such as

[7] The Executive Order authorized by this statute should recognize that when the collection of foreign intelligence from persons who are not United States citizens results in the incidental acquisition of information from unknowing citizens, the Agency should be permitted to make appropriate use or disposition of such information. Such collection activities must be directed at foreign intelligence sources, and the involvement of American citizens must be incidental.

newspapers, books, magazines, and other such documents is not to be affected by this order.

Information currently being maintained which is inconsistent with the order should be destroyed at the conclusion of the current congressional investigations, or as soon thereafter as permitted by law.

The CIA should periodically screen its files and eliminate all material inconsistent with the order.

The order should be issued after consultation with the National Security Council, the Attorney General, and the Director of Central Intelligence. Any modification of the order would be permitted only through published amendments.