Federation of American Scientists
307 Massachusetts Avenue, NE
Washington, D.C. 20002

for more information:
Steven Aftergood
(202)675-1012

SECRECY & GOVERNMENT BULLETIN

To Challenge Excessive Government Secrecy and
To Promote Public Oversight and Free Exchange
In Science, Technology, Defense, and Intelligence

Issue No. 16
November 1992
ISSN 1061-0340

Teller: Publish Secret Documents After One Year

Observing that long-term secrecy "conflicts with the spirit of democracy," the redoubtable Dr. Edward Teller has proposed that all classified documents be released after one year.

"Let us pass a law requiring all secret documents to be published one year after their issuance. This would of course eliminate long-term secrecy and might also deter unnecessary classification of documents, because the original invocation of secrecy might be subject to criticism and even ridicule when the documents are published."

Teller's proposal appears in a letter to the Editor of *Issues in Science and Technology* (National Academy of Sciences, Fall 1992, p. 6). Other letters from Senator Daniel P. Moynihan and Rep. Henry B. Gonzalez, responding to our article in the Summer 1992 *Issues*, also call for "dramatic" revisions to the secrecy system.

"A short time ago, the Soviet Union was the most secretive organization in the world; it no longer exists," writes Teller, who has long been a critic of government secrecy. "This puts the United States in the uncomfortable position of holding the record in secrecy. It is urgent that we do something about this situation."

Intelligence Oversight: Less Than Meets the Eye

Over the last couple of years, the Congressional intelligence committees have made some important gestures towards improving oversight, such as the establishment of a statutory CIA inspector general and the development of an in-house budget auditing authority. But a strong case can be made that the system is not working adequately.

Some of the limitations of intelligence budget oversight are illuminated in a remarkable article by Senate Intelligence Committee staffer Mary K. Sturtevant in *American Intelligence Journal* (Summer 1992, pp. 17-20). Among the article's more revealing and disturbing passages are these:

- "Because of the classified nature of the programs we review, we are especially reliant on information provided by the very Community we hope to oversee. We lack alternative sources of information and points of view on intelligence budget requests, as there are few constituents with legitimate access to intelligence programs who wish to bring information forward to the Committees."
- "We normally can review a program only once a year, so we make up our minds quickly on the basis of limited information."
- "...the great majority of continuing, or 'base,' programs go unscrutinized."
- "*In toto*, we are perhaps one dozen or so full-time budget staff supporting the Intelligence Authorization and Appropriations Committees of both the House and the Senate reviewing activities conducted by tens of thousands of civilian and military personnel and programs valued in the multiple billions of dollars."

There is nothing unusually sinister here; problems of limited staff resources and uneven Administration responsiveness are commonplace in other, relatively non-controversial areas of Congressional oversight.

But these commonplace obstacles are profoundly aggravated by the unyielding secrecy that continues to surround intelligence. And when the oversight committees fail, there is usually no one else to pick up the slack.

While every other major policy activity is under perpetual investigation by some branch of the media, the intelligence community is largely immune to press scrutiny until scandal breaks. The burden of the oversight committees is therefore immense. But since Congressional oversight is fueled to an important extent by media attention, it is hardly surprising that they sometimes fail to meet that burden. Witness the belated entry of the Senate intelligence committee into the two year old BNL controversy, an action which followed rather than preceded intense scrutiny by others.

Obviously, a substantially declassified intelligence program (probably with a much smaller budget) would lend itself far better to an oversight process that is worthy of the name. In any case, the present system is severely limited, and to a considerable degree the intelligence community remains unchecked and unbalanced.

The Secret Court That Can't Say No

The impact of Cold War secrecy on the judicial branch of government is perhaps most radically exemplified by the Foreign Intelligence Surveillance (FIS) Court, which is distinguished by its record of approving every application for surveillance placed before it. This unusual court also meets in secret, does not hold adversarial hearings (i.e. in which two sides argue conflicting views), and does not publish its rulings.

The FIS court was established by the Foreign Intelligence Surveillance Act (FISA) of 1978. It is composed of seven district court judges who are empowered to hear applications from the FBI or the NSA to conduct electronic surveillance within the United States of foreign powers or their agents, and to rule on those applications.

The peculiar thing is, these federal judges don't seem to do any judging. The record shows that they approve anything that is submitted to them.

According to Justice Department documents obtained by *S&GB*, the number of applications for electronic surveillance under the FISA totals 6,546 since the Act came into effect in May 1979 through the end of calendar year 1991. The court has denied exactly zero.

(In 1981, the Court turned away an application for

physical search because that is not within its jurisdiction. Some applications requested authorization to conduct surveillance at more than one location, or using more than one surveillance technique, and therefore the number of authorizations exceeds the number of applications for a grand total of 6,561.)

Year	Applications	Approvals	Denials
1979	199	207	0
1980	319	322	0
1981	431	433	0
1982	473	475	0
1983	549	549	0
1984	635	635	0
1985	587	587	0
1986	573	573	0
1987	512	512	0
1988	534	534	0
1989	546	546	0
1990	595	595	0
1991	593	593	0
Total	6,546	6,561	0

The Justice Department professes to be proud of this record. And according to the former FIS Court presiding judge, George L. Hart, Jr., "We do not 'rubber stamp' the applications submitted. The staff simply does a fine job of preparing the applications."

In its day, the FISA was widely viewed as "revolutionary," because for the first time it required judicial authorization for domestic government surveillance in non-criminal, foreign intelligence operations. Further, the applications had to include certain specifications and commitments against improper use or disclosure. If nothing else, the process provided an important (though secret) paper trail. But "judicial authorization" at best means only that the forms are properly filled out.

(While domestic surveillance for non-intelligence purposes also has a very high judicial approval rate, it requires a finding of "probable cause" that a criminal offense is underway, and requires notice to the target after termination of the surveillance, among other differences.)

The Congressional oversight committees initially published reports on FISA implementation for a few years, as required by the Act, but now mostly just monitor the Justice Department's semi-annual reports, "occasionally leading to further inquiry," according to a staffer.

As former Rep. Robert Kastenmeier said in 1983, "Either the FISA is working perfectly or it really isn't working very well at all." That remains an accurate, if unhelpful, assessment.

"Assisting" Former Intelligence Employees

If you're an intelligence agency, what do you do with a former employee who is disgruntled, demented, or down on his luck, but still has lots of secret information in his head that he may be tempted to sell? You can ignore the problem and hope it will go away, but you can't arrest the person until he commits a crime. Until recently, most agencies' legal options for intervention in such a case have been limited to surveillance.

Defector Edward Lee Howard, after he was fired from the CIA but before he defected, told the CIA, "you guys should take better care of your officers." (D. Wise, *The Spy Who Got Away*, p. 144). The Agency, in response, offered to pay for Howard's psychiatric treatment.

Now a provision in the 1993 Intelligence Authorization Bill (section 401) authorizes the Pentagon to "assist" certain former Defense Intelligence Agency employees when it is necessary "to maintain their judgment and emotional stability" in order to prevent them from disclosing secret data. Congress authorized similar assistance for former NSA employees last year. The CIA has had such authority for at least several years.

According to the report on the intelligence bill, the Secretary of Defense may "utilize appropriated funds to provide assistance to certain former DIA employees for up to five years after leaving such employment. The assistance may be provided if the Secretary determines it is essential to avoid circumstances that might lead to the unlawful disclosure of classified information to which the employee to be assisted had access."

Several awkward questions are raised by this provision. What is the propriety of paying former officials to comply with the law? What about the potential for extortion? And why is the "assistance" limited to five years after employment?

The answer to the last question is partly that Congress did not want the assistance to be open-ended, but also because of the recognition that classified information becomes substantially less sensitive with the passage of time, according to a committee staffer. After five years, it is no longer considered necessary, worthwhile or cost-effective to actively intervene to protect the information in question, regardless of any "circumstances" that might lead to its disclosure.

NRO: One Step Forward, One Step Back

Almost immediately after the name of the thirty-two year old National Reconnaissance Office (NRO) was declassified in September, the Pentagon dashed off a letter to Congress seeking to block any further disclosures. Specifically, the Pentagon wanted a legal defense against insurgents armed with FOIA requests who might want to know a little bit more about the multi-billion dollar secret agency. Of course, virtually everything about the NRO is classified and therefore already exempt from FOIA requests. But the Pentagon wanted legal authority to withhold information that is otherwise unclassified.

Congress, ever vigilant in matters of national security, raced to pass a new law that exempts from disclosure the number of NRO employees, their names, titles and salaries. (*Congressional Quarterly*, 10/10/92, p. 3183). Similar, even more restrictive, prohibitions on disclosure are already in force with respect to the CIA, DIA, and NSA.

The theory is that any information on NRO organizational structure is of little public interest, but would benefit unspecified hostile intelligence agencies, enabling them to target their espionage efforts. This theory might be more persuasive if more information that clearly is of public interest-- such as the NRO's budget-- were officially released.

DOD Counter-Intelligence

In October, the Pentagon released a declassified version of the recent Counterintelligence and Security Countermeasures Strategic Plan (see last issue), which is intended "to rationalize and strengthen counterintelligence and security countermeasures." Among other things, it calls for a new approach to secrecy and information security issues within DOD.

"Fiscal responsibility dictates that we must carefully define what must be protected and concentrate our finite resources upon safeguarding our most important assets and information. This requires a fundamentally new way of thinking about the 'security envelope' to be applied to our information and information systems in the post-Cold War period."

A copy of the DOD plan is available from our office.

* * *

The Secrecy & Government Bulletin is prepared and edited by Steven Aftergood. Subscriptions are available from the Federation of American Scientists at a cost of $20 per year (about 10 issues). The FAS Project on Secrecy & Government is supported by grants from the Rockefeller Family Fund and the J. Roderick MacArthur Foundation.