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INTELLIGENCE AND THE LAW: CONFLICT OR COMPATIBILITY?

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INTELLIGENCE AND THE LAW: CONFLICT OR COMPATIBILITY?

Tonight I will discuss with you the developing relationship between the law and one vital activity of the U.S. Government -- the collection and utilization of foreign intelligence as an essential ingredient of foreign policy and national security. More particularly, my discussion will focus on the complex and evolving interaction between "the rule of law" and the needs that drive the foreign intelligence activities of our government. The dramatic increase in international tensions reemphasizes the crucial need of our country for timely and accurate foreign intelligence.

These are troubled times for the world legal order. Soviet armed forces have invaded a sovereign nation and installed a puppet government. Following a Soviet veto of a Security Council resolution, the United Nations General Assembly has condemned overwhelmingly the Soviet Union and declared that the invasion and occupation is unlawful.

A band of terrorists continues to hold 50 United States diplomats hostage in the American Embassy in Tehran, an international outrage openly supported by the leaders of Iran. The International Court of Justice has ruled unanimously

that the hostages must be freed, declaring that "[t]here is no more fundamental prerequisite for the conduct of relations between states than the inviolability of diplomatic envoys and embassies," a principle of international law so well established that "throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose."

Iran's continuing defiance of the very concept of international law demonstrates the fragility of the law as a means of ordering human behavior. The action of the Soviet Union is even more damaging to the rule of law since this action cannot be rationalized as an aberrational act by revolutionary terrorists, and the Soviets claim shamelessly that their invasion was supported by a mutual defense treaty with Afghanistan. Both events illustrate again that the law is not self-executing.

Domestically, there are mechanisms for enforcing the law. Internationally, however, the ability to enforce the law through peaceful means is more limited. Frustration when the law is broken with apparent impunity may result in a willingness to reject the very concept of the law itself and a temptation to engage in acts which we would otherwise

condemn. There are indications that such feelings are astir within the United States today. Our frustration should not propel us to quickly abandon the application of the role of law to the intelligence activities of the United States Government. In our recent history the sobering instances of excess in the conduct of intelligence activities remind us that the troubles of the present do not negate the relevance of the past. They may, however, help us achieve a balanced understanding of the role of legal guideposts in the gathering of essential foreign intelligence.

I. The Role and Nature of Foreign Intelligence

The very word "intelligence" evokes a variety of emotional responses, ranging from a sense of mystery and intrigue, associated with James Bond or Benedict Arnold, to the concern or fear associated with disclosures of "intelligence abuses." In either case, a fascination with secret matters, especially when related to foreign affairs, is natural. As lawyers, however, we must isolate these emotional factors and utilize relevant evidence in a detached and analytical manner.

Sherman Kent, former chairman of CIA's Board of National Estimates, in his book Strategic Intelligence for American World Policy, described intelligence as comprising three

definitional subjects, namely knowledge, organization, and activity: "Knowledge" that our nation must have regarding other nations to assure itself that planning and decision making will not be conducted in ignorance; an "organization" structured to obtain, centralize, and evaluate that knowledge; and the "activity" of gathering such knowledge. The term today has a more specific definition in the law. "Intelligence" is defined in the President's Executive Order on United States Intelligence Activities to mean foreign intelligence and counterintelligence, and I shall be using it in that sense as well. Foreign intelligence is in turn defined as:

> ". . . information relating to the capabilities, intentions and activities of foreign powers, organizations or persons,"

while counterintelligence is defined as:

> ". . . information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons,"

Both of these definitions stress information regarding <u>foreign</u> powers, organizations or persons. In the past, the line between foreign and domestic intelligence often was not clearly drawn. For example, the 1976 report of the Senate

Select Committee to Study Governmental Operations with respect to Intelligence Activites -- commonly known as the Church Committee -- was concerned with both foreign and domestic intelligence gathering. In the Executive Branch, however, we are now careful to distinguish these two concerns, and the words in the Executive Order were deliberately chosen to divide sharply foreign from domestic intelligence-gathering. Recent bureaucratic reorganizations and the promulgation of rules, regulations, and guidelines, have reflected this sharp distinction. In the Federal Bureau of Investigation, criminal investigations are handled in a division separate from the division that conducts intelligence investigations. Similarly, the President's executive order intelligence activities specifically provides that it does not apply to any authorized "criminal law enforcement activities."

This distinction between foreign intelligence and domestic law enforcement reflects the attitude of the courts as revealed in cases like Keith and Zweibon, but it reflects more than that. There is now a basic assumption that the goals and purposes of intelligence and counterintelligence are fundamentally different from those of domestic law enforcement, and thus that these activities must be regulated differently. Law enforcement is intended to prevent, deter,

discover and punish acts which the society deems unacceptable. Intelligence and counterintelligence activities are intended to acquire information so that the President and his advisors can make informed decisions in the conduct of international diplomacy, foreign relations and national security affairs.

There is, of course, an area of investigation in which intelligence and law enforcement interests intersect. This is particularly true in the area of counterintelligence, where the United States government attempts to monitor clandestine information-gathering by agents of other countries within our own borders. Many forms of espionage by foreign countries within the United States are crimes under United States law. Nevertheless, only a small percentage of all counterintelligence cases can even be considered for successful criminal prosecutions, and investigations of foreign intelligence agents are seldom conducted from the outset as they would be were eventual prosecution expected. The need to observe the activities of the agents of foreign powers and to defend against their operations calls for considerable discretion. Many counterintelligence professionals believe that criminal prosecutions should never be brought against hostile agents, since doing so may only cause their replacement by other,

unknown agents of whose activities we may not be aware. Moreover, practical problems of "graymail" may inhibit prosecution. That is, criminal proceedings may not only confirm the accuracy of classified information that has been passed to a foreign power, but may also reveal at least some of the material to a far wider audience. The problems are not insurmountable, as the Kampiles trial demonstrates, but they are serious enough to warrant distinguishing espionage cases from other criminal prosecutions, although criminal prosecution should be considered and pursued in every possible case.

Having thus defined intelligence activities as pertaining to foreign affairs and national security issues, it should be obvious to all that they must be kept strong and effective. The national leadership simply requires the best information that can be obtained concerning the intentions and activities of foreign powers. Current events have underscored this basic fact. The ability of the United States to react to events in foreign lands is limited under any circumstances. Without timely and accurate information, the ability to react positively is eliminated. Compounding this problem is the fact that obtaining critical intelligence is exceedingly difficult. It may be virtually impossible, given today's

technology, for any country to conceal substantial troop movements, but the flow of funds and arms, as well as the strategy and plans of foreign governments are not as readily detectable. Unless we possess rapid and accurate knowledge about what a foreign power is likely to do, our information base is limited; and the more limited our information base, the more speculative are our analyses and the greater the danger to our security.

It is also evident that effective intelligence activities demand secrecy. Even if we are able to penetrate successfully the wall of secrecy surrounding a hostile foreign nation, our success will be as short-lived as the mayfly if we disclose the facts of our success. If we disclose the substance obtained we will not only lose our advantage and risk the secret changes in plans but we jeopardize or destroy our means of knowledge.

Finally, it should be apparent that obtaining secret information about an adversary's strengths and intentions will on occasion require our agents to persuade or beguile foreign agents to disclose secrets.

None of these observations would be at all controversial were it not that intelligence activities can come perilously close to intruding on our most basic statutory and constitutional

rights. This inherent danger is made even more intense by the highly sophisticated technological advances which are used commonly throughout the world today. High technology widens the range of possible activities, increases the volume of collection and disguises the traditional indicia of propriety. Essential secrecy simultaneously prohibits the review of doubtful actions in any public adversarial process. The near absence of judicial review of intelligence matters requires redoubled efforts within the executive branch to insure these activities are not exempted from all responsible checks and balances. This need to create new mechanisms to regulate and review intelligence activities brings me to the subject of the development of intelligence law.

II. History and Nature of U.S. Intelligence Law

Both the law and intelligence activities have existed in this country since before the creation of the American Republic. There were the early British laws that fomented the American Revolution, and there is clear evidence that

General George Washington authorized and relied upon substantial intelligence activities in the conduct of the American Revolution. Paul Revere, Nathan Hale, and Benedict Arnold are names as familiar to all American schoolchildren as are those of Thomas Jefferson, John Marshall and other early lawmakers. Law and intelligence activities developed largely along separate tracks in the United States, however, because of their conflicting natures and principal elements.

The law emphasizes openness, stability, and a balancing of interests; its concerns are domestic and its scope is comprehensive. Intelligence activities require secrecy, flexibility, and a single-mindedness of purpose; they focus on foreign developments and rapid adaptability to specific circumstances. It is no surprise that, given these disparities, the law and foreign intelligence did not meet in the U.S. until recently.

The first permanent peacetime intelligence organizations in the U.S. were created in the 1880's, but these efforts were meager, and in World War I we relied to a great extent on the intelligence capabilities of our allies. Between the wars these few organizations in the U.S. atrophied only to be strengthened following Pearl Harbor and to flourish as the Office of Strategic Services during World War II. Aside from the various presidential and other high-level directives

dealing essentially with organizational matters, there was almost no accompanying development of law relating to intelligence activities.

Following the end of World War II, President Truman recommended the creation of a permanent central intelligence agency and this was accomplished with the enactment of the National Security Act of 1947. This statute was perhaps the first public declaration in law by any nation of the existence and functions of its intelligence service and it is remarkably concise. In five short subparagraphs it instructs the CIA to collect intelligence and perform other functions related to intelligence at the direction of the National Security Council. The sole restriction in the only "intelligence law" then available was the proviso that the CIA should not have any police, subpoena or law enforcement powers or internal security functions. Even that limitation was as much a concession to established law enforcement agencies as it was an effort to prevent the creation of an American secret police.

Aside from the espionage statutes enacted originally in 1917 and subsequently amended, and administrative housekeeping laws enacted to facilitate the operation of the Central Intelligence Agency and the National Security Agency, there

were no other laws relating to U.S. intelligence activities until the seventies. In fact, laws that had been enacted for wholly different purposes without thought to their effect on intelligence activities would have, if taken literally, obstructed or prevented authorized programs that would be clearly recognized as legitimate and necessary efforts on the part of the Government. Faced with an absence of particularized law and precedent and an array of general purpose laws not appropriate to their endeavors, it was a simple and rational matter for the government or its intelligence agencies to ignore the broad range of legal strictures that apply in other areas of governmental activity. The assumption was strengthened that intelligence efforts were so "different" or so "special" that national security considerations required that modified standards be applied to intelligence. The deference shown to intelligence matters for almost thirty years by the public, press, judiciary, Congress, executive officials, various Presidents and Attorneys General contributed significantly to the validity of the assumption.

Over the past few years this has changed, and there has been a rapid development of intelligence law. It has been marked by occasional pain, by serious claims of damage

to the intelligence capabilities of the United States, and by frequent and extensive internal debate. Although there may continue to be some confusion about how the law applies to a particular matter, the result of this complex process has been that there is no longer any doubt in the minds of individuals associated with the intelligence and national security apparatus that intelligence activities are subject to definable legal standards.

One of the earliest developments was in February 1976, when President Ford issued the first official public statement of a set of coherent standards, authorizations and prohibitions, developed by Attorney General Levi and others, to govern the practices of our intelligence apparatus. Executive Order 1905, unfortunately, proved in practice to contain some shortcomings and omissions. Nevertheless, it was the first comprehensive statement of a body of "intelligence law."

After two years of government experience under that order, President Carter, in January 1978, issued Executive Order 12036 which, unlike its predecessor, required that multiple sets of procedures be developed and approved by the Attorney General to govern the complete range of collection and dissemination practices by all the intelligence entities where the information collected or disseminated pertained to

persons entitled to the protection of the United States Constitution. The United States stands alone as the only country which has issued such a comprehensive statement.

The extensive and continuing exchange between the Attorney General and the intelligence agencies which has resulted from this order has not only been instructive to all parties, it has also increased the duties of the General Counsels in the intelligence community and given them an important role in the difficult business of their own organizations. Intelligence officers are now called on to be alert to legal requirements in their work, paying close attention to the means as well as the ends. The confrontation of law and intelligence has produced, in other words, a dialectic which leads to the development of new law, the reassurance of intelligence agents that their orders are free of legal doubt, and the deterrence of improper intelligence projects.

Although the need for secrecy unfortunately excludes the general public from detailed discussions of the application of this body of law, the legislative process has played an extraordinarily important role in the development of the law of intelligence. In 1978, Congress passed the Foreign Intelligence Surveillance Act, an enormous achievement in

this sensitive field due in large part to the leadership of President Carter, Attorney General Griffin Bell and the key members of Congress. The design and specificity of proposals from intelligence agencies to conduct intelligence-related electronic surveillance in the United States have benefitted from the judicial scrutiny and approval made mandatory under this statute. Moreover, the Attorney General retains sole authority to approve agency-certified surveillance applications before filing with the court. This triple review helps assure that only the necessary and carefully considered proposals will result in the initiation of an electronic surveillance in the name of intelligence. I can assure you that our intelligence agencies are functioning well under that statute, which serves as refutation of the argument that mere public consideration by the Congress of such statutes would undermine the entire U.S. intelligence apparatus.

There are other bits and pieces of intelligence law that join together to create governing standards. The Case - Zablocki Act of 1972 requires that Congress be advised of any international agreement to which the U.S. is a party, and this includes such agreements between intelligence services. Both the Senate and the House of Representatives have adopted resolutions creating independent intelligence committees with primary oversight of the intelligence agencies. The Freedom of Information Act and the Privacy

Act have both had a significant effect on the information collection, dissemination and storage practices of the intelligence agencies (not always beneficial). And an Executive Order, signed by President Carter in October 1978, has overhauled the classification and declassification practices of the federal government.

Extensive discussions and careful reviews have been taking place between Administration and Congressional representatives regarding the development of comprehensive charter legislation for the intelligence agencies. One of the purposes of the Church Committee's activities was to create a record as a foundation for the drafting of legislation which would delineate carefully the line between proper and improper intelligence activities. This process has proved far more difficult than many had anticipated. Intelligence agencies are called upon to operate in societies with vastly different cultures, most of which we understand imperfectly at best. Moreover, these agencies must often provide their services in an atmosphere of international political tension and volatility. The effort to make these judgments and to reach consensus on a charter which gives the agencies sufficient flexibility to meet changing situations to protect our

security, without delegating to them virtually unlimited discretion, has proved herculean. We are continuing to design such a statute. But regardless of whether it becomes law, its consideration has already had the positive effect of continuous concentration by all of us on the policy choices inherent in our intelligence activities and the structural tools we have established for accomplishing them. If our concerns about the current international situation lead us to continue to examine our rules for conducting intelligence activities objectively, rather than to envy and to imitate the seeming efficiency of the tactics of totalitarian nations, we will not, I am confident, abandon our progress nor retreat from what we have gained.

III. Illustrative Issues in Intelligence Law

The basic tension in intelligence activities is between the government's legitimate need for information and the individual's right to privacy. All intelligence activities aimed at collecting information which is not publicly available involve some intrusions into the privacy of individuals or organizations. Fortunately for all Americans, the vast preponderance of the information our government seeks comes from foreign persons and organizations, most of them located

Outside the United States. Current limitations in United States domestic law on the collection of intelligence from foreign sources are essentially nonexistent. The Federal Government, in all cases, collects the information this country needs without intentionally violating United States Law.

Federal law, as it applies here, protects United States persons from excessive or improper intrusions into their personal, private affairs in the name of national security. The concept of a "United States person" is perhaps unique to intelligence law and lies at the heart of many current restrictions. A "United States person" is defined in Executive Order 12036 as "a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association organized in the United States or composed substantially of United States citizens or aliens admitted for permanent residence, or a corporation incorporated in the United States." The Foreign Intelligence Surveillance Act of 1978 uses a similar definition. Around this core concept we have erected an extensive structure of regulations, guidelines and a few statutes. One's status as a United States person is, in general, not determined by one's

location. Thus, a United States citizen abroad remains a United States person for intelligence law purposes, while a foreign visitor to this country does not become automatically a United States person upon entry into this country. There are a number of restrictions in the law which protect foreign visitors from unwarranted intelligence activities in this country, but those limitations are significantly different from the ones applicable to United States persons.

The basic personal rights which may be affected by intelligence activities directed against non-consenting United States persons arise from the Constitution itself, particularly the First and Fourth Amendments. United States persons may have acquired their knowledge of foreign governments the course of political activities protected by the First Amendment. Because our government does not exist as an end unto itself, but as a means of preserving certain precious freedoms for each of us, we do not allow a need to protect the nation to become an excuse for violating the very rights the Government was instituted to protect. But neither can we ignore the Government's legitimate need for information which at times may affect the freedoms guaranteed under the First Amendment.

Simple example will demonstrate the tension. It is perfectly lawful in the United States for a foreign government to organize private United States citizens to promote that government's policy in the United States. We require such foreign agents to register with our government in certain cases and to provide limited information about these activities.

Compulsory provision of information about political activities certainly raises a First Amendment issue, one which the Courts have considered in several contexts. It has been ruled constitutional for the United States government to compel private citizens to disclose their contributions to presidential campaigns (see Buckley v. Valeo).

It is constitutional to require private lobbyists to register. It is also constitutional to require agents of a foreign power to disclose the details of their agency and their activities. But there are limits to the Government's entitlement to information. It is, for example, unconstitutional for a state to compel a private political organization to furnish a membership list to the state, where the effect of doing so would be to chill First Amendment activity.

Each of these cases turned on the facts and a careful balancing of governmental needs with First Amendment freedoms. Collectively, they stand for the general proposition that under certain circumstances the Government can compel a

private individual to disclose information about activities protected by the First Amendment.

But what about noncompulsory disclosure? May the government obtain information about an individual's activities without his consent, but also without compulsion? Here the law is less settled. Judicial opinions have indicated that it does not violate constitutional rights for an undercover agent to obtain information which a person is willing to disclose, even when that disclosure is induced by some form of deception. Other cases indicate clearly that when the information disclosed concerns political activities and is gathered by a law enforcement agency for purposes other than criminal prosecutions, the practice is unconstitutional. But those decisions do not specificially address the different considerations that exist when the information is sought by an intelligence agency for intelligence rather than law enforcement purposes. If the Government can compel agents of foreign powers to register and describe their political activities, is it unconstitutional to place covert agents in those same foreign agent groups to obtain information? Case law would indicate there is no absolute answer but rather each situation must be considered in light of the need of the Government and the effect on the individual.

Executive Order 12036 generally prohibits an intelligence agency from putting agents into any organization in the United States without disclosure of the intelligence affiliation unless the organization is primarily composed of individuals who are not United States persons and is acting on behalf of a foreign power, or the infiltration is undertaken on behalf of the FBI as part of a lawful bureau investigation. The Order also permits agencies to have employees participate in organizations without disclosure in certain narrow circumstances under publicly available guidelines approved by the Attorney General. The CIA, for example, is permitted to undertake undisclosed participation in domestic organizations in seven limited situations, including the development of individual assocations and credentials needed to substantiate a cover employment. Approval of such undisclosed participation must be given by an appropriate CIA senior official and all such approvals are subject to review by the Attorney General. These limitations go considerably beyond the requirements of any existing statute or judicial decision. They reflect an awareness of the effect that undisclosed government involvement may have on First Amendment freedoms and privacy. These procedures, which attempt to balance competing interests by creating categories of permissible participation and by

requiring appropriate review in each case, are new. They do not reflect the cumulative development and wisdom of years of actual regulation, and they will be tested in practice and subjected to scrutiny by the Congress and the public. Such evaluation is most welcome. It would be especially valuable to obtain the thoughts of the academic community, including the law schools, on the body of rules, regulations, and statutes that are emerging as intelligence law evolves and matures.

The second primary Constitutional provision permeating current intelligence law is the Fourth Amendment. Intelligence techniques involve both traditional searches and utilization of new technology which the courts have not yet considered. The Foreign Intelligence Surveillance Act of 1978 requires a court order for any traditional form of wiretapping or eavesdropping. It also contains a general requirement for a court order to employ any surveillance device in the United States to gather information in circumstances where there is "a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." Drawing on the Supreme Court's decision in Katz v. United States, the statute is intended to reflect evolving concepts of the

Fourth Amendment as interpreted by the courts. For instance, consider the treatment of so-called "beepers" --devices that can be attached to vehicles and which issue a radio signal periodically which describes the location of the vehicle to persons monitoring the device. The statute itself does not require a court order before a "beeper" can be used to determine the location of a foreign agent's car unless, under applicable decisions, a court order would be required if the FBI used such a device to locate a bank robber. The applicability of the Fourth Amendment to "beepers" is not yet completely clear, but these devices have been involved in numerous criminal cases and we at least have some judicial precedents to consider and apply.

The rapid development of technology, on the other hand, permits intelligence agencies to use surveillance devices that have never been the subject of judicial review. Use of such devices requires the Department of Justice to decide whether it is necessary to seek approval of the Foreign Intelligence Surveillance Court before using such a device. The Foreign Intelligence Surveillance Act in a sense poses a puzzle. The Foreign Intelligence Surveillance Court's jurisdiction under the Act is limited to issuing orders for

electronic surveillance as defined in the Act. Yet the definition of electronic surveillance itself requires consideration of judicial interpretations of the Fourth Amendment and there may not be any precedent covering a particular new technology.

Some of the legal complexities can be openly discussed. Case law indicates that a prior judicial order is required before a microphonic surveillance device is used to intercept a private conversation if there is a reasonable expectation of privacy. But those cases do not clearly define the limits of such an expectation. Placing a "bug" in a home, office or other private location requires a warrant. Using a tape recorder to record a conversation that can be heard by an individual lawfully in an adjacent room does not require a prior warrant. Use of a "parabolic mike" -- such as those used by network crews to enhance the entertainment value of professional football --may well require a warrant. Where is the "bright line?" Suppose we are able to use a normal, readily available tape recorder to listen to sounds which are discernible, though not intelligible, to the human ear without any physical intrusion and then subject that recording to audio enhancement to render the sounds intelligible. Is that activity one which would require a warrant if undertaken

for law enforcement purposes? The answer is not certain. Consider a similar issue. No one would suggest that the FBI must obtain a warrant before reading the daily newspaper. The FBI may act on the basis of information contained in the paper without the slightest suggestion that they have undertaken a search. If members of a criminal conspiracy decide to use the classified ads to communicate their plans, the FBI may certainly read those same ads and, if they are clever enough, discover the conspiracy. Is the situation any different if the ads are published in a foreign language? Undoubtedly not. But what if the conspirators use a complicated mathematical code generated by a "beyond-the-state-of-the-art" computer which the conspirators subjectively believe produced a message in a newspaper that is in fact completely indecipherable to anyone except themselves. Suppose further that the FBI is able to break that code by use of an even more sophisticated computer. Has the FBI undertaken a search within the meaning of the Fourth Amendment? I submit there would be wide agreement that no search has occurred, but the path to that result in light of current decisions is uncertain. It is, of course, possible to argue that the conspirators in fact had a subjective and objective reasonable expectation that their communications were secret. But the fact that they

chose to put those communications in the public domain, even though in encrypted form, may justify the conclusion that their expectation is not one which the courts are prepared to protect from governmental surveillance and utilization. This conclusion rests, in part, on reported cases which indicate that one who puts a message out on a radio does not have an expectation of privacy under Katz and that the police may, without a warrant, take a person's trash outside his or her home and subject it to chemical analysis to determine whether any drugs have been discarded.

These issues are typical of those presented to the Department of Justice in an intelligence context. Many of them involve attempts to apply decisional law in novel contexts. This process is common enough in the law. But the process of ascertaining intelligence law does differ from the process of applying the law in other areas in one crucial respect. The precedents we develop and the rules we employ are, to a great degree, a body of esoteric law that is not subject frequently to judicial review, or public comment. The American principle of checks and balances can be mooted when it comes to intelligence activities.

Thus, it is extremely important that we maintain and, to the extent possible, institutionalize in the Executive

Branch a process for obtaining a multiplicity of views on the fundamental legal issues arising from intelligence activities. This brings me back to the theme of conflict and compatibility. In the Justice Department, I have seen to it that I receive advice on these matters from former CIA employees and from members of the American Civil Liberties Union, as well as from different units with diverse points of view. It is likewise important for the heads of the intelligence agencies to facilitate meaningful in-house criticism of their proposals. Arguing against the projects of his client is one of the most difficult, but most important skills that every lawyer must learn if his practice is to meet minimal standards of social responsibility. This is particularly true in the government. Through the debate and consideration of conflicting views from independent sources and a careful and multiple review process, intelligence decisions can be made which meet the vital needs of the nation and are compatible with law.

Of course, regardless of how sensitive we in the government may be, we cannot be certain that we will always make perfect legal decisions. What is perhaps more important to the concept of the "rule of law" is whether the legal issues are considered, the right questions asked, and reasonable conclusions reached.

IV. The Future of Intelligence Law

The development of intelligence activities and the law applicable to them is directly influenced by world conditions. The current emphasis on legal requirements in intelligence activities is a result of the excesses of the recent past. Those disclosures came during a period in our history when the Government was itself abused, a President was forced out of office and an unpopular war was prolonged despite vigorous public dissatisfaction. The reaction to these combined forces has produced more effort to achieve lasting reforms than would have been sustained had those events not followed upon each other. But current events tend to provoke further analysis. Some may argue that attempts to regulate intelligence activities are futile, or at least question seriously the weighing of costs and benefits in light of the enormity of hostile acts abroad. Such re-examination is necessary and constructive. But it must not cause us to lose sight of the past. Watergate did happen. CHAOS was an actual program, as was COINTELPRO. Those abuses had their beginnings in action which appeared "necessary" and "reasonable" to the officials who began them. But the programs grew, the justifications expanded, and responsibility disappeared.

I will not try to convince you that the proliferation of law in the conduct of intelligence activities has been entirely without cost. The rapid development of intelligence law that we have witnessed in recent years has in fact limited some of the flexibility and ease of action formerly enjoyed by intelligence officials. What have we gained? Those working in intelligence now operate under the most lucid statements of authority that have ever been available to them. Intelligence agencies have clear and unambiguous limitations on their authority. The protection of the individual rights and liberties of our citizens from infringement by intelligence activities is at a high point. Most of the reforms are fixed and others are gaining maturity. At the same time there are few, if any, cases where it has proved impossible under the law to collect truly vital intelligence information. Rather, we think more carefully and we answer more precisely before authorizing particular activities or even proposing them.

Nevertheless, this is an important time to be aware that the unfinished agenda of lawmaking in intelligence includes some important items for the legitimate protection of our intelligence activities. Existing law provides

inadequate protections to the men and women who serve our nation as intelligence officers. They need -- and deserve -- better protection against those who would intentionally disclose their secret mission and jeopardize their personal safety by disclosing their identities. Public comment and criticism of intelligence activities and specific operations is proper. Revealing the identities of particular intelligence personnel and placing them in danger, on the other hand, serves no legitimate purpose. Our proper concern for individual liberties must be balanced with a concern for the safety of those who serve the nation in difficult times and under dangerous conditions.

We also need to adopt legal procedures to deal with "graymail", where criminal defendants can escape punishment by threatened public disclosure of remote secret information during a criminal trial. It is not impossible to prosecute intelligence employees. We have been successful in most cases. But the ability of the courts to protect legally irrelevant secret information from unnecessary disclosure must be strengthened.

Further protection for the intelligence community could be effected by a change in the Hughes-Ryan Amendment of

1974, which requires the timely reporting of covert action projects to some eight congressional committees. That cumbersome procedure disseminates knowledge of these proposals to such a large number of persons that the secrecy which is essential to success becomes doubtful. A carefully crafted amendment to the statute should be made to require reporting to the Senate and House Intelligence Committees.

At the same time, we must continue to consider the enactment of a statute governing physical searches in the United States or searches and surveillances of United States citizens abroad; these matters are not treated in the Foreign Intelligence Surveillance Act, although logically, they are closely connected.

While we pursue legislative solutions to these problems, the process of self-regulation in the Executive Branch must and will continue. Many of the regulations are publicly available, and as they gain wider review we will all benefit from wise analysis and critical comment.

But equally important, the need for self-regulation by the government will redouble as modern technology grows ever more sophisticated. The state of the art is already so advanced as to bear little relation to traditional Fourth

Amendment analysis, and will continue to outstrip the development of decisional law for the foreseeable future. The increased efficiency of intelligence-gathering will clearly be a great benefit to the security of our nation but the same technology will increase the heavy burden of responsibility for fashioning proper safeguards in intelligence law.

Finally, we need to remain vigilant in the oversight and monitoring of the system for the classification and declassification of documents. Great strides have already been made, as I have mentioned. President Carter issued an order about eighteen months ago which substantially improved the system. It officially establishes, for the first time, the principle that even a document which is properly classified should sometimes be declassified where "the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure." The order also creates an administrative mechanism, complete with disciplinary sanctions, for rooting out abuses of the system, including the overclassification of documents.

In light of all I have said tonight, my firm conclusion that the rule of law and the conduct of intelligence activities are compatible is no surprise.

The constitutional provisions, statutes, executive orders, and procedures affecting intelligence gathering will evolve in response to changing perceptions and new experiences. While we must guard against the adoption of an overly pliant construction of our self-imposed rules, I am confident that we can devise new standards in the light of experience which do not compromise our essential liberties, and at the same time support a strong intelligence community equal to its critical mission.