UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 78-1743
	:	
CENTRAL INTELLIGENCE AGENCY, ET AL.,	:	
	:	
Defendants	:	

PLAINTIFF'S MEMORANDUM TO THE COURT
CONCERNING IN CAMERA INSPECTION

Preliminary Statement

In this Freedom of Information Act ("FOIA") lawsuit plaintiff Mark A. Allen ("Allen") seeks complete disclosure of a 15-page CIA document concerning the alleged activities of Lee Harvey Oswald in Mexico City less than two months prior to the assassination of President John F. Kennedy. Initially the Central Intelligency Agency ("CIA") withheld the document in its entirety and this Court dismissed the case. However, when Allen appealed to the Court of Appeals, acting on the CIA's motion, remanded, the CIA then released approximately half of the document. After this Court affirmed the CIA's action in withholding the remainder, Allen again appealed and the Court of Appeals again remanded, this time expressing its views in a lengthy opinion.

In its remand opinion the Court of Appeals instructed that: ". . . the District Court will make an in camera inspection of the document to determine whether the withheld portions are clearly exempt." Mark A. Allen v. Central Intelligence Agency, et al. (D.C. Cir. No. 90-1380, decided November 12, 1980), slip op. at 4, fn. 13. (Emphasis added) In order to assist the District Court in making its in camera inspection to the degree possible,

plaintiff submits this legal memorandum on the guidelines the Court must follow and the criteria it should apply in examining the document and reaching a determination as to whether portions of it that remain withheld are "clearly exempt."

In addition, because the exempt status of the information that the CIA still wishes to keep secret may turn on the extent to which such information may be discerned from readily available public sources, both official and nonofficial, plaintiff is also submitting a factual memorandum he has prepared which details the considerable--if not total--extent to which the information in the withheld portions has been placed in the public domain. A copy of the Allen memorandum is attached hereto.

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I. EXEMPTION 1

With regard to Exemption 1, the Court of Appeals held that:

> Trial courts, in reviewing de novo classification of documents, should refer to the Executive Order in effect at the time of the latest classification.

Allen, supra, slip op. at 9, fn. 25. The Court also stated that:

> Exemption 1 requires that the most recent classification of a requested document be in conformity with both the procedural and substantive criteria of the then-applicable Executive Order.

Allen, supra, slip op. at 8. (Emphasis added) Because the Executive Order in effect at the time of the last classification determination with respect to the document at issue here was E.O. 12065, this Court must determine whether its alleged classification is in conformity with "both the procedural and substantive criteria" of that Executive Order. Therefore, it is the duty of this Court on remand to examine the document in the light of each of these requirements, and to make express findings with respect to

each.

A. Procedural Requirements

In its discussion of the procedural requirements of Executive Order 12065, the Court of Appeals noted that Section 1-501 of that Order requires that

> [a]t the time of original classification, the following shall be shown on the face of the paper copies of all classified documents:
>
> (a) the identity of the original classification authority;
>
> (b) the office of origin;
>
> (c) the date or event for declassification or review; and
>
> (d) one of the three classification designations defined in Section 1-1.

Allen, supra, slip op. at 9, citing 3 C.F.R. 190 (1978 Compilation)(1979). The Court further noted that "the two affidavits [submitted by the CIA] in the present case . . . indicate neither the 'identity of the original classifi[er]' nor 'the date for declassification review.'" Allen, supra, slip op. at 10.

On remand the CIA has provided plaintiff with a copy of the document with previously excised classification markings restored to the document but crossed out, as ordered by the Court of Appeals. Examination of the document's cover sheet makes clear why the CIA's affidavits were defective and why the CIA so strongly resisted any of the discovery plaintiff sought to take regarding classification procedures: the document was not classified in accordance with the procedures prescribed by E.O. 12065; for example, it does not indicate on its face either the identity of the original classifier or the date or event for declassification or review.

Failure to comply with proper procedures can make Exemption 1 inapplicable. Halperin v. Department of State, 184 U.S.App.D.C. 124, 565 F.2d 699 (1977); Schaffer v. Kissinger, 164 U.S.App.D.C. 282, 505 F.2d 389 (1974). Where materials fail to qualify for Exemption 1 because of an agency's failure to follow proper procedures and the government alleges that disclosure would constitute grave danger to national security, the district court "should examine materials in camera to determine whether they may be withheld according to the exacting standard employed in First Amendment cases involving prior restraints." Ray v. Turner, 190 U.S. App.D.C. 290, 318, 587 F.2d 1187, 1215, note 62 (1979)(concurring opinion of Chief Judge Wright), summarizing holding in Halperin v. Department of State, supra, 184 U.S.App.D.C. at 131-132, 565 F. 2d 706-707.

However, as the Court of Appeals observed in its remand opinion, "actual procedural defects do not necessarily require the document to be disclosed." Allen, supra, slip op. at 10, fn. 27. In making this observation, the Court of Appeals cited Lesar v. U.S. Dep't of Justice, ___ F.2d ___, (D.C. Cir. No. 78-2305, decided July 15, 1980), in which the Court stated that the consequences of particular procedural violations may vary and held that a procedural defect in the time of original classification did not bar later classification under Executive Order 12065. In Halperin the Court of Appeals found that the agency had failed to classify the document at the time or origination in compliance with the directive implementing Executive Order 11652 and had failed to follow the proper substantive standards as well. As a result, the Court "required the district court on remand to ascertain whether the release of the materials would cause grave damage to the national security, a standard somewhat akin to the substantive criteria for classifying documents as 'Top Secret' under Executive

Order 11,652." Lesar, supra, ___ F.2d ___, slip op. at 23-24. Lesar, however, dealt with the question of "whether the failure to classify a document at the time of origination, standing alone, forever bars classification of the document under Executive Order 11,652." Lesar, supra, ___ F.2d ___, slip op. at 22. The Court of Appeals held that it did not.

Unlike Lesar, the procedural violations in this case do not involve "a mere mishap in the time of classification," Lesar, supra, ___ F. 2d ___, slip op. at 23, but are of a more serious nature. The failure of the CIA to indicate the identity of the original classification authority and the date or event for declassification or review on the face of the document strongly suggests that the CIA is withholding it for considerations other than those involving national security. And like the Halperin case, the publicly filed affidavits in this case have failed to demonstrate that the proper substantive standards have been applied to this document. Accordingly, this Court should review the document in camera in accordance with the same strict standard governing First Amendment cases involving prior restraint that was employed in Halperin.

B. Substantive Requirements

Section 1-302 of Executive Order 12065 provides that information "may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security." In focusing on this requirement, the Court of Appeals stated:

> Unfortunately, the [CIA's] description fails to indicate whether disclosure of this document will hasten the 'eventual identification of *** intelligence methods' that would likely

> occur even without disclosure of the document.

Allen, supra, slip op. at 11.

On remand, therefore, this Court should begin its inquiry into the CIA's compliance with the substantive requirements of Executive Order 12065 by determining whether the CIA even claims that disclosure of the withheld portions of the document will hasten identification of the "intelligence sources and methods" which it alleges must be kept secret in the interests of national security. If the CIA does not make this claim, then it has not met its burden of demonstrating compliance with the substantive provisions of Executive Order 12065 and disclosure of the withheld portions and disclosure of the withhold portions is required.

If the CIA does claim that disclosure will hasten identification of its "intelligence sources and methods," then this Court must evaluate that claim in light of the evidence that: (1) the document was written in a special way so as to protect the CIA's sources and methods (see Allen Memorandum, Exhibit 4); (2) the House Select Committee on Assassinations stated in a staff report that the document does not contain a single reference to a sensitive intelligence source or method (see Allen Memorandum, Exhibit 3); (3) many, if not all, of the intelligence sources and methods sought to be protected have already been publicly disclosed, either as a result of official disclosures or through news accounts based on information obviously supplied by government sources (see Allen Memorandum and attached exhibits); (4) the "intelligence sources and methods" which the CIA seeks to protect may be discerned by analysis of the official and nonofficial materials that are already in the public domain; and (5) in view of the fact that most information contained in the withheld portions of the document has already been officially released in other documents, and in

view of the widespread publicity concerning Lee Harvey Oswald's pre-assassination activities in Mexico City and the subject of the CIA's surveillance activities carried out by its Mexico City station, it cannot reasonably be expected that disclosure of the withheld portions would cause identifiable damage to the national security. (See Allen Memorandum and Exhibits generally; see in particular Allen Exhibit 8, the chapter of Anthony Summers' book Conspiracy that is entitled "Exits and Entrances in Mexico City," and Allen Exhibit 7, which contains a selection of materials from Philip Agee's book Inside the Company that concern CIA surveilance activities at its Mexico City station.)

C. Balancing Test

The Court of Appeals took note of Allen's argument that the CIA's affidavits failed to demonstrate compliance with Section 3-303 of Executive Order 12065, which requires declassification when "the need to protect [the classified] information [is] outweighed by the public interest in disclosure of the information," but decided that because they had already found the CIA's affidavits to be insufficient to support summary judgment, "we need not address these additional concerns." Allen, supra, slip op. at 12, fn. 34. However, the Court went on to instruct that:

> These additional concerns will, of course, be resolved when the trial court conducts an in camera inspection of the document, as is required by our decision today.

Ibid.

The CIA regulation implementing Section 3-303 of Executive Order 12065 provides that balancing will take place in circumstances where nondisclosure could reasonably be expected to:

> (6) Deprive the public of information indispensable to public decisions on issues of critical importance.

CIA Regulation HHB 70-2, chapter V, part 13(c)(revised January 22, 1980).[1/]

In Kanter v. Department of State, 479 F. Supp. 921 (D.D.C. 1979), the District Court recognized that Section 3-303 only requires declassification officials to conduct a balancing test "in some cases" and asserted that "[t]he identification of the cases that qualify for balancing is a matter largely within the informed discretion of an agency." It held, nonetheless, that "this Court has a special duty under the Freedom of Information Act to scrutinize an agency's procedural compliance with its declassification guidelines" and required the agency to make the balancing determination called for by Section 3-303. Ibid. at 923, fn. 3.

This case is plainly one which qualifies for balancing under the CIA's revised regulation. The document at issue is crucial to an informed decision as to whether the CIA failed to disclose to the Warren Commission, in timely fashion, the full story of its reaction to Oswald's pre-assassination trip to Mexico City. See Affidavit of Dr. Paul L. Hoch, ¶21, filed in this case on January 30, 1980. The manner in which Government agencies functioned in the investigation of President Kennedy's assassination is a matter

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1/ The two publicly filed CIA affidavits in this case, both executed by Mr. Robert E. Owen, relied on an earlier version of this regulation which did not contain this provision to argue that the CIA need not engage in balancing in this case. The CIA did not tell this Court that several months prior to the filing of its motion for summary judgment and the Supplemental Owen Affidavit, the Information Security Oversight Office ("ISOO") had found that the CIA's balancing test was too narrow in scope and directed that it be changed. And although the regulations was materially changed by the addition of the provision quoted here just 10 days after the CIA made its motion for summary judgment and well before the District Court decided the case, the CIA did not inform the Court of this change. Neither has the regulation been published in the Federal Register as required by Section 5-402 of the executive order, 3 C.F.R. at 202 (1979), despite the fact that prior to May 7, 1980, Government counsel assured Judge John J. Sirica that it would be published shortly. See Attachment 2, Memorandum and Opinion in John D. Marks v. Stansfield Turner, Civil Action No. 77-1108, filed May 7, 1980.

of paramount public interest. The profound and abiding national concern on this subject is reflected in the fact that a number of official committees and commissions have conducted extensive investigations into matters pertaining to the President's assassination, including whether the CIA withheld pertinent information from the Warren Commission. Indeed, the House Select Committee on Assassinations specifically investigated this question and found that the CIA was deficient in its collection and sharing of information both prior to and subsequent to the President's assassination. Report of the Select Committee on Assassinations of the United States House of Representatives, p. 246, et seq. (See Attachment 1) The House Select Committee also found that President Kennedy was probably killed as the result of a conspiracy. Report, p. 95 et seq. Such circumstances give rise to an overriding public interest in the fullest possible disclosure of information regarding the assassination of President Kennedy. The public interest in such disclosure is so profound that little except starting a war or endangering the life of a human source would justify withholding such inmation under the balancing test required by Section 3-303. And in performing the balancing consideration must also be give to the fact that more than 17 years have passed since the events in question and the publicity concerning them, including revelations about the nature of the CIA surveillance activities at its Mexico City station, has been unprecedented.

Because plaintiff does not know the contents of the in camera affidavit which the CIA has now filed with the Court, he cannot say whether the CIA has performed the balancing test required by Section 3-303. Whether or not the CIA has done so, this Court is required to review the document in camera and reach its own determination as to whether a balancing of the public interest against the harm to national security requires that the withheld portions of the document be released.

D. Segregable Portions

The Court of Appeals found that the affidavits submitted by the CIA "afford no basis for a conclusion that all 'reasonably segregable' nonexempt portions of the document have been released." Allen, supra, slip op. at 11. On remand the CIA has released but a single additional word of the document's contents, the word "City" in Mexico City.[2/] Thus this Court has the obligation of ensuring that that no segregable nonexempt materials have been withheld from plaintiff. This applies to Exemption 3 materials just as it does do Exemption 1 materials. Allen, supra, slip op. at 14.

II. EXEMPTION 3

The Court of Appeals found that the CIA's affidavits failed to demonstrate that portions of the document withheld under Exemption 3 were clearly exempt. Allen, supra, slip op. at 14. As the Court noted, the CIA failed to describe with sufficient specificity the nature of the "intelligence sources and methods."

In addition to establishing the specific nature of the sources and methods sought to be protected, this Court should also determine the extent to which these sources and methods are already publicly known. Many, if not all, of the methods employed by the CIA in connection with its Mexico City operations are already well known, and some have been officially released by government agencies. For example, the November 22, 1963 FBI memorandum which is Attachment 1 to Allen Exhibit 14 states that "CIA photographed OSWALD coming out of the RUSSIAN EMBASSY, Mexico City, 10/2/63."

2/ It has long been known that the CIA had a station in Mexico City. Indeed, this information was printed in Victor Marchetti's book The CIA and the Cult of Intelligence with CIA and court approval. See Attachment 3)

If this is one of the "intelligence methods" the CIA is trying to keep "secret," it can not now justifiably be suppressed.

This principle applies equally to materials withheld under the auspices of 50 U.S.C. § 403g as to those allegedly protected as "intelligence sources and methods" under 50 U.S.C. § 403(d)(3). The names and identities of many CIA employees and CIA components are now a matter of public knowledge. Whether they were once entitled to protection under the ambit of § 403g is not the issue; they no longer are.

The CIA continues to withhold the names of its personnel even where they are not only publicly known, but dead as well. As the Warren Commission critic Harold Weisberg noted in an affidavit previously filed in this case:

> One of the names for which Owen makes (b)(3) claim is that of "the late Winston M. Scott." Others are also in the public domain.

In this regard, plaintiff notes that several excisions have been made on the document's cover sheet to conceal the distribution of copies. The names and identities of many CIA staff employees and components have become known over the years. For example, the involvement of CIA employees James J. Angleton, Raymond Rocca, and Arthur Dooley with Warren Commission records is well known and has been officially acknowledged in many ways. Names such as these cannot be justifiably withheld. For this reason, plaintiff requests that the Court query the CIA as to whether any of the names of CIA employees or the identities of CIA components withheld under this rubric has in fact become known to the public, either as the result of official disclosures or otherwise.

III. BAD FAITH

In its opinion the Court of Appeals stated that:

> Where there is evidence of bad faith on the part of the agency, the representations of the agency lose all trustworthiness.

Allen, supra, slip op. at 23. Elsewhere in its opinion, the Court took note of a specific charge of bad faith conduct made against the CIA by Allen, saying:

> In his reply brief appellant charges the CIA with bad faith in not informing the trial court that a certain regulation pertaining to classification under Executive Order 12065 had been amended. See reply brief for appellant at 18-19. We do not address the issue of bad faith, however, inasmuch as the other considerations by themselves demonstrate that in camera inspection is "plainly necessary."

Allen, supra, slip op. at 26, fn. 70.

The allegation of bad faith referred to by the Court of Appeals has been summarized in footnote 1, supra. The release of the so-called "classification markings" on the document pursuant to the remand opinion establishes the basis for a further charge of bad faith on the part of the CIA. It is now undeniable that the document was not properly classified procedurally. Not only was it not properly classified procedurally under Executive Order 12065, neither was it properly classified procedurally under Executive Orders 11652 or 10501. Yet in two different lawsuits, Fensterwald v. CIA, Civil Action No. 75-0897, and Allen v. CIA, the CIA procured favorable judgments by swearing under oath that the document was properly classified. The CIA officials so swearing were knowledgeable as to the requirements of Exemption 1 and the respective Executive Orders at the times they so swore. This can only be viewed as part of a deliberate attempt on the part of the CIA to obfuscate the facts and mislead the Court. Because of these examples of bad faith, this Court can no longer place its trust in the sworn word of the CIA, whether it is given in a public or in an in camera affidavit.

CONCLUSION

Plaintiff has set forth at some length his views as to what the Court of Appeals' remand requires of this Court on in camera review of the document. Plaintiff hopes, of course, that the Court will order release of the portions of the document that remain withheld. There is, however, the distinct possibility that whichever way the Court decides this case, it will once again wind up in the Court of Appeals. Because of the inherent difficulties which confront a litigant who must appeal a decision based on in camera from which he has been excluded, plaintiff respectfully requests the Court to be mindfull of his disadvantaged position, to make as complete a written record as it can of the bases for its decision, and to specifically address the issues raised by plaintiff in this memorandum.

Respectfully submitted,

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of February, 1981, served a copy of the foregoing Memorandum on Mr. Dennis Dutterer, AUSA, by leaving it with the Guard at the United States Courthouse, Washington, D.C. 20001.

James H. Lesar

JAMES H. LESAR

Attachment 1 Civil Action No. 78-1743

Union Calendar No. 962

95th Congress, 2d Session - - - - - - - House Report No. 95-1828, Part 2

REPORT

OF THE

SELECT COMMITTEE ON ASSASSINATIONS
U.S. HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

FINDINGS AND RECOMMENDATIONS

MARCH 29, 1979.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

C. The Committee Believes, on the Basis of the Evidence Available to It, That President John F. Kennedy Was Probably Assassinated as a Result of a Conspiracy. The Committee is Unable To Identify the Other Gunman or the Extent of the Conspiracy

Supreme Court Justice Oliver Wendell Holmes once simply defined conspiracy as "a partnership in criminal purposes."(*1*) That definition is adequate. Nevertheless, it may be helpful to set out a more precise definition. If two or more individuals agreed to take action to kill President Kennedy, and at least one of them took action in furtherance of the plan, and it resulted in President Kennedy's death, the President would have been assassinated as a result of a conspiracy.

The committee recognizes, of course, that while the word "conspiracy" technically denotes only a "partnership in criminal purposes," it also, in fact, connotes widely varying meanings to many people, and its use has vastly differing societal implications depending upon the sophistication, extent and ultimate purpose of the partnership. For example, a conspiracy to assassinate a President might be a complex plot orchestrated by foreign political powers; it might be the scheme of a group of American citizens dissatisfied with particular governmental policies; it also might be the plan of two largely isolated individuals with no readily discernible motive.

Conspiracies may easily range, therefore, from those with important implications for social or governmental institutions to those with no major societal significance. As the evidence concerning the probability that President Kennedy was assassinated as a result of a "conspiracy" is analyzed, these various connotations of the word "conspiracy" and distinctions between them ought to be constantly borne in mind. Here, as elsewhere, words must be used carefully, lest people be misled.[1]

A conspiracy cannot be said to have existed in Dealey Plaza unless evidence exists from which, in Justice Holmes' words, a "partnership in criminal purposes" may be inferred. The Warren Commission's conclusion that Lee Harvey Oswald was not involved in a conspiracy to assassinate the President was, for example, largely based on its findings of the absence of evidence of significant association (*2*) between Oswald and other possible conspirators and no physical evidence of conspiracy.(*3*) The Commission reasoned, quite rightly, that in the absence of association or physical evidence, there was no conspiracy.

Even without physical evidence of conspiracy at the scene of the assassination, there would, of course, be a conspiracy if others assisted Oswald in his efforts. Accordingly, an examination of Oswald's associates is necessary. The Warren Commission recognized that a first premise in a finding of conspiracy may be a finding of association. Because the Commission did not find any significant Oswald associ-

[1] It might be suggested that because of the widely varying meanings attached to the word "conspiracy," it ought to be avoided. Such a suggestion, however, raises another objection—the search for euphemistic variations can lead to a lack of candor. There is virtue in seeing something for what it is, even if the plain truth causes discomfort.

In the first instance, the Bureau received information from Chief Justice Warren regarding organized crime figure John Roselli's claim of personal knowledge relating to Cuban or underworld complicity. The Bureau declined to investigate the information and did not take any action until President Johnson personally intervened.(*50*) In the second instance, the Bureau received information from a source in 1967 regarding a reported meeting at which New Orleans Mafia leader Carlos Marcello had allegedly made a threat against the life of President Kennedy.(*51*) Rather than investigating the information, Bureau personnel took repeated action to discredit the source.(*52*)

To summarize, the committee found that the Bureau performed with varying degrees of competency in the investigation of the President's death. Its investigation into the complicity of Lee Harvey Oswald prior to and after the assassination was thorough and professional. Nevertheless, it failed to conduct an adequate investigation into the possibility of a conspiracy in key areas, and it was deficient in its sharing of information with the Warren Commission.

4. THE CENTRAL INTELLIGENCE AGENCY WAS DEFICIENT IN ITS COLLECTION AND SHARING OF INFORMATION BOTH PRIOR TO AND SUBSEQUENT TO THE ASSASSINATION

Created by the National Security Act of 1947,(*1*) the CIA was, in fact, a postwar outgrowth of the Office of Strategic Services (OSS). The head of OSS, though never a CIA official, was William J. Donovan, who in World War II adopted the British approach of combining the intelligence activities of various agencies into one office.

Toward the end of World War II, President Roosevelt sought Donovan's advice on a permanent intelligence apparatus. Donovan's classified reply, leaked to the press 3 months later, described an "all-powerful intelligence service . . . [which] would supersede all existing Federal police and intelligence units."(*2*) The reaction among the heads of existing intelligence and investigative agencies was predictably negative. Few wanted to see the OSS become more powerful.

President Roosevelt's death turned out to be a serious blow to OSS—nearly crippling, for President Truman abolished the wartime agency without consulting Donovan or the Joint Chiefs of Staff. As a result, the United States was handicapped by a serious intelligence gap in immediate postwar international struggles.

(*a*) *Establishment of the CIA*

Unification of the Armed Forces was the main objective of the 1947 act. It also created the National Security Council, of which the CIA was to be the intelligence coordinating unit. Under the act, the CIA was charged with four responsibilities:

> To advise the NSC on intelligence matters relating to national security;
>
> To make recommendations on the coordination of intelligence activities;
>
> To correlate, evaluate and disseminate intelligence; and

To engage in additional intelligence activities and national security functions at the direction of the NSC.

The Agency was given no law enforcement functions.

In its early years, the CIA was hampered by internal organizational difficulties and bad relationships with other agencies. The turnover of directors was rather rapid—Lt. Gen. Hoyt S. Vandenberg in 1946, Adm. Roscoe H. Hillenkoetter in 1947, Lt. Gen. Walter Bedell Smith in 1950, Allen W. Dulles in 1952.

Dulles, who had been a wartime master spy, had strong opinions as to the type of men who should be named to top posts in the Agency. At Senate Armed Services Committee hearings on the National Security Act, he testified that the CIA:

> * * * should be directed by a relatively small but elite corps of men with a passion for anonymity and a willingness to stick at that particular job. They must find their reward in the work itself, and in the service they render their Government, rather than in public acclaim. (*3*)

In addition, in its formative period the CIA was subjected to the harangues of Senator Joseph R. McCarthy, who demanded a purge of Agency personnel. The upshot was a severe tightening of employment standards, as well as a restriction within the Agency on the expression of political viewpoints.

Although the CIA is not required to make public its organizational structure, it is known to consist of five main entities—the Office of the Director and four Directorates. The Director and Deputy Director, only one of whom may be a military officer, are appointed by the President. The four Directorates are as follows:

The Directorate of Operations—the clandestine services unit, which is comprised of a number of geographical operating divisions supplemented by functional staffs.

The Directorate of Intelligence—its responsibility is to analyze and then synthesize raw intelligence information into finished intelligence products.

The Directorate of Science and Technology—it is responsible for basic research and development; it operates technical systems and analyzes highly technical information.

The Directorate of Administration—the Agency's housekeeping department.

At one time there were also a number of proprietary organizations, front groups and social or political institutions that were run by the CIA or on its behalf. The best known proprietaries were Radio Free Europe and Radio Liberty, both established in the early 1950's. Among the front organizations were airlines and holding companies to support clandestine operations. In early 1967, it was learned that the CIA had for years been subsidizing the country's largest student organization, the National Student Association. Eventually, it became known that the Agency had channeled money to a number of business, labor, religious, charitable, and educational organizations.

(*b*) *Rockefeller Commission investigation of CIA activities*

In 1974 and 1975, in response to charges that the CIA had engaged in large-scale spying on American citizens and had compiled dossiers on many citizens, a commission headed by Vice President Rockefeller investigated whether domestic CIA activities exceeded the Agency's statutory authority. Mail intercepts, infiltration of dissident groups, illegal wiretaps and break-ins were among the subjects of the investigation.

The Rockefeller Commission concluded that the "great majority of the CIA's domestic activities comply with its statutory authority * * * Nevertheless, over the 28 years of its history, the CIA has engaged in some activities that should be criticized and not permitted to happen again—both in light of the limits imposed on the Agency by law and as a matter of public policy."(*4*)

(*c*) *The committee investigation*

As the committee examined the Agency's role in the investigation of the death of the President, it focused its investigation in these areas:

The Agency's handling of the Oswald case prior to the assassination;

CIA support of the Warren Commission investigation; and

Developments relevant to the Kennedy assassination after publication of the Warren report.

The committee's investigation proceeded on the basis of interviews, depositions and hearings. Evidence was received from present and former CIA officials and employees, as well as members and staff attorneys of the Warren Commission. The CIA personnel who testified or were interviewed were assured in writing by the Acting Director of Central Intelligence that their secrecy obligation to the CIA was not in effect with respect to questions relevant to the committee's inquiry.(*5*) To the extent possible, the committee pursued investigative leads by interviewing Cuban and Mexican citizens. Further, an extensive review of CIA and FBI files on Oswald's activities outside of the United States was undertaken. The CIA materials made available to the committee were examined in unabridged form.(*6*)

Much of the information obtained by the committee came from present and former officials and employees of the CIA and dealt with sensitive sources and methods of the Agency. Since these sources and methods are protected by law from unauthorized disclosure, this report of the CIA investigation was written with the intention of not disclosing them. Much of what is presented is, therefore, necessarily conclusionary, since detailed analysis would have required revealing sensitive and classified sources and methods.[1]

(1) *CIA preassassination performance—Oswald in Mexico City.*—An individual identified as Lee Harvey Oswald came to the attention of the CIA in the fall of 1963 when he made a trip to Mexico City. The committee examined the efforts of the CIA to determine the true identity of the individual, the nature of his visit to Mexico and with whom, if anyone, he might have associated while there.

CIA headquarters in Washington, D.C., was informed on October 9, 1963, that a person who identified himself as Oswald had contacted

[1] Staff studies reflecting a comprehensive examination of the issues and containing pertinent information and analysis were classified and stored at the National Archives.

the Soviet Embassy in Mexico City on October 1, 1963. Headquarters was also advised that Oswald had spoken with an individual possibly identified as Soviet Consul Kostikov on September 28, 1963, and that a photograph, apparently of an American, had been obtained. This photograph, which was thought by some Agency personnel to be of Oswald, did not purport to be a positive identification of him. The subject of the photograph was described as approximately 35 years old, 6 feet tall, with an athletic build, a balding top, and receding hairline. (*7*)

During October 1963,[2] CIA intelligence sources abroad determined that Oswald had visited the Soviet Embassy or the Cuban consulate in Mexico City at least 5 times for the purpose of obtaining an in-transit visa to Russia via Cuba. (*8*) Once CIA headquarters determined that Oswald was a former defector to the Soviet Union, his activity in Mexico City was considered to be potentially significant by both headquarters personnel and CIA intelligence sources abroad. (*9*) Headquarters, however, was not informed about Oswald's visa request nor of his visits to the Cuban consulate. As a result, while other interested Federal agencies were apprised of Oswald's contact with the Soviet Embassy, they were not informed about his visa request or of his visit to the Cuban consulate. (*10*)

The committee considered the possibility that an imposter visited the Soviet Embassy or Cuban consulate during one or more of the contacts in which Oswald was identified by the CIA. This suspicion arose, at least in part, because the photograph obtained by the CIA in October 1963 was shown after the assassination by the FBI to Oswald's mother as possibly showing her son. (Mrs. Oswald maintained the person in the picture was her son's killer, Jack Ruby.) (*11*) In addition, the description, based on the photograph, that the CIA had received in its first report of Oswald's contact with the Soviet Embassy in Mexico City, in fact bore no resemblance to Oswald. (*12*) The man in the photograph was clearly neither Oswald nor Ruby, and the CIA and FBI were unable (as was the committee) to establish the identity of the individual in the photograph. The overwhelming weight of the evidence indicated to the committee that the initial conclusion of Agency employees that the individual in the photograph was Oswald was the result of a careless mistake. It was not, the committee believed, because the individual was posing as Oswald. In fact, the committee established that the photograph was not even obtained at a time when Oswald was reported to have visited the Soviet Embassy in Mexico City. (*13*)

The question of an Oswald imposter was also raised in an FBI letterhead memorandum to the Secret Service dated November 23, 1963. It was based in part upon information received by CIA headquarters on October 9, 1963, that on October 1, 1963, Oswald had contacted the Soviet Embassy in Mexico City:

> The Central Intelligence Agency advised that on October 1, 1963, an extremely sensitive source had reported that an individual identified himself as Lee Oswald, who contacted the

[2] The Agency maintained that prior to the assassination, its field sources had not actually linked Oswald to the person who visited the Cuban consulate in October 1963. Testimony obtained directly from these sources, however, established that this connection had in fact been made in early October 1963.

> Soviet Embassy in Mexico City inquiring as to any messages. Special Agents of this Bureau, who have conversed with Oswald in Dallas, Tex., have observed photographs of the individual referred to above and have listened to a recording of his voice. These Special Agents are of the opinion that the above-referred-to individual was not Lee Harvey Oswald. (*14*)

In response to a committee inquiry, the FBI reported that no tape recording of Oswald's voice was in fact ever received. The Bureau explained that its Dallas office only received the report of a conversation to which Oswald had been a party. This explanation was independently confirmed by the committee. A review of relevant FBI cable traffic established that at 7:23 p.m. (CST) on November 23, 1963, Dallas Special Agent-in-Charge Shanklin advised Director Hoover that only a report of this conversation was available, not an actual tape recording. On November 25, the Dallas office again apprised the Director that "[t]here appears to be some confusion in that no tapes were taken to Dallas * * * [O]nly typewritten [reports were] supplied * * *."(*15*)

Shanklin stated in a committee interview that no recording was ever received by FBI officials in Dallas.(*16*) Moreover, former FBI Special Agents James Hosty, John W. Fain, Burnett Tom Carter, and Arnold J. Brown, each of whom had conversed with Oswald at one time, informed the committee they had never listened to a recording of Oswald's voice.[3](*17*)

Finally, on the basis of an extensive file review and detailed testimony by present and former CIA officials and employees, the committee determined that CIA headquarters never received a recording of Oswald's voice.(*18*) The committee concluded, therefore, that the information in the November 23, 1963, letterhead memorandum was mistaken and did not provide a basis for concluding that there had been an Oswald imposter.

The committee did, however, obtain independent evidence that someone might have posed as Oswald in Mexico in late September and early October 1963. The former Cuban consul in Mexico City, Eusebio Azcue, testified that the man who applied for an in-transit visa to the Soviet Union was not the one who was identified as Lee Harvey Oswald, the assassin of President Kennedy on November 22, 1963. Azcue, who maintained that he had dealt on three occasions in Mexico with someone who identified himself as Oswald, described the man he claimed was an imposter as a 30-year-old white male, about 5 feet 6 inches in height, with a long face and a straight and pointed nose.(*19*)

In addition, the committee interviewed Silvia Duran, a secretary in the Cuban consulate in 1963. Although she said that it was in fact Oswald who had visited the consulate on three occasions, she described him as 5 feet 6, 125 pounds, with sparse blond hair, features that did not match those of Lee Harvey Oswald.(*20*) The descriptions given by both Azcue and Duran do bear a resemblance—height aside—to an

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[3] The committee did not contact the three other FBI special agents who had also conversed with Oswald at one time.

alleged Oswald associate referred to in an unconfirmed report provided by another witness, Elena Garro de Paz, former wife of the noted Mexican poet, Octavio Paz. Elena Garro described the associate, whom she claimed to have seen with Oswald at a party, as "very tall and slender [with] * * * long blond hair * * * a gaunt face [and] a rather long protruding chin."[4] (*21*)

Two other points warranted further investigation of the imposter issue. The Oswald who contacted the Russian and Cuban diplomatic compounds reportedly spoke broken, hardly recognizable Russian, yet there is considerable evidence that Lee Harvey Oswald was relatively fluent in this language. (*22*) In addition, Silvia Duran told the committee that Oswald was not at the Cuban consulate on September 28, 1963, a day the consulate was closed to the public. (*23*) The committee obtained reliable evidence of a sensitive nature from another source, however, that a person who identified himself as Oswald met with Duran at the consulate that day. (*24*)

The imposter issue could, of course, have been easily resolved had photographs of the person or persons in question been taken at the entrance to the Cuban consulate and Soviet Embassy. The Cuban Government maintained to the committee that the Cuban consulate was under photographic surveillance. In fact, the Cuban Government provided the committee with photographs of the alleged surveillance camera location. (*25*) The committee had other reports that the CIA had obtained a picture of Oswald that was taken during at least one of his visits to the Soviet Embassy and Cuban consulates. (*26*) The CIA, however, denied that such a photograph had been obtained, and no such pictures of Oswald were discovered by the committee during its review of the Agency's files. (*27*)

Despite the unanswered questions, the weight of the evidence supported the conclusion that Oswald was the individual who visited the Soviet Embassy and Cuban consulate. Silvia Duran, who dealt with Oswald at three different times, told the committee she was certain that the individual who applied for an in-transit visa to Russia via Cuba was Oswald. (*28*) She specifically identified the individual in the photograph on Oswald's visa application form as the Lee Harvey Oswald who had visited the Cuban consulate. (*29*) Moreover, Duran stated that Oswald's visa application was signed in her presence. (*30*)

Duran's statements were corroborated by Alfredo Mirabal who succeeded Azcue as Cuban consul in Mexico City in 1963. Mirabal testified that on two occasions, from a distance of 4 meters, he had observed Oswald at the Cuban consulate and that this was the same person who was later photographed being shot by Jack Ruby. (*31*) Further, the committee was given access by the Cuban Government to Oswald's original visa application, a carbon copy of which had been supplied to the Warren Commission. Testimony before the committee established that each of these forms had been signed separately. (*32*) The application papers were photographed, and the signature on them was then studied by the committee's panel of handwriting experts. The panel's analysis indicated that the signature on both forms was that of Lee Harvey Oswald.[5] (*33*) Finally, reliable evidence of a sensitive nature provided to the committee by the CIA tended to indicate that

[4] Elena Garro's allegation is discussed in more detail in section I C 2. supra.

[5] Cuban Consul Azcue indicated to the committee that consulate practice in 1963 prohibited applications from being removed from the consulate premises to be filled out elsewhere. Silvia Duran stated, however, that applications could be filled out elsewhere.

the person who contacted the Soviet Embassy was the same Lee Harvey Oswald who had visited the Cuban consulate. (*34*)

It can be said that the fact that the Agency's field sources noted Oswald's movements outside the United States was an indication of effective intelligence work. Nevertheless, the CIA's handling of the Oswald case prior to the assassination was deficient because CIA headquarters was not apprised of all information that its field sources had gathered with respect to Oswald, and headquarters, in turn, was thereby prevented from relaying a more complete résumé of Oswald's actions in Mexico City to the FBI, which was charged with responsibility for the Oswald security case.

The committee was unable to determine whether the CIA did in fact come into possession of a photograph of Oswald taken during his visits to the Soviet Embassy and Cuban consulate in Mexico City, or whether Oswald had any associates in Mexico City. Nevertheless, other information provided by the CIA, as well as evidence obtained from Cuban and Mexican sources, enabled the committee to conclude that the individual who represented himself as Lee Harvey Oswald at the Cuban consulate in Mexico was not an imposter.

(2) *The CIA and the Warren Commission.*—The CIA took the position that it was not to conduct a police-type investigation of the assassination of President Kennedy. According to the testimony of former Director Richard M. Helms, its role was to provide support for the Warren Commission's effort by responding to specific inquiries. (*35*) Nevertheless, because the CIA was the Commission's primary source of information beyond U.S. territorial limits with respect to the question of foreign complicity in the assassination, the committee sought to evaluate both the quality of the CIA's handling of the foreign conspiracy question and the Agency's working relationship with the Commission.[6]

The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities also studied the performance of the intelligence agencies in conducting their investigation of the assassination and their relationship with the Warren Commission. The Senate committee's report emphasized the Agency's failure to pursue certain leads to a possible Cuban conspiracy or to apprise the Warren Commission of CIA assassination plots against Fidel Castro. (*36*) In response, the CIA prepared a Task Force Report (1977 TFR) on the accuracy of the Senate committee's analysis. In its investigation, the committee reviewed the 1977 TFR [7] and used it as a starting point in assessing the timeliness and effectiveness of the CIA's responses to the Warren Commission's periodic requests for information. (*37*)

The CIA investigation of the Kennedy assassination was focused at the outset on Oswald's trip to Mexico. It was managed at Washington headquarters by the desk officer responsible for intelligence activity related to Mexico. Immediately following the assassination, the desk officer was instructed by Richard Helms, then Deputy Director for

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[6] Results of the committee's investigation of how effectively the CIA pursued the question of foreign complicity can be found in sections II C 1 and 2.

[7] For the committee's analysis of the significance of information that the CIA failed to provide the Warren Commission, see section I C 2.

Plans, to coordinate efforts to compile and evaluate incoming information pertaining to the assassination. The desk officer was assigned this responsibility due to his past experience conducting internal CIA security investigations and because Oswald had visited Mexico 2 months prior to the assassination.(*38*) The cable traffic this officer coordinated was voluminous.

By late December 1963, it had become apparent that the CIA's interest in information related to the assassination had extended beyond Oswald's trip to Mexico. It encompassed Oswald's defection to the Soviet Union as well as the possible involvement of foreign powers in an assassination conspiracy. Consequently, responsibility for coordinating CIA investigative efforts was shifted to the counterintelligence staff, which had worldwide resources and expertise in investigating sabotage, guerrilla activities and counterespionage.(*39*)

The second phase of the Agency information collection effort, designed principally to respond to the work of the Warren Commission, was coordinated by Raymond Rocca, Chief of Research and Analysis (CI/R & A) for the counterintelligence staff. CI/R & A was the counterintelligence staff component particularly concerned with research and analysis related to counterintelligence and the formulation of policy based on the analysis. Rocca was the CIA's working-level contact point with the Warren Commission; consequently he was in a position to review most CIA information pertaining to the assassination, which comprised a heavy volume of incoming cable traffic.(*40*) Due to compartmentalization, however, Rocca did not have access to all materials potentially relevant to the Warren Commission investigation. For example, Rocca had no knowledge of efforts by the CIA to assassinate Fidel Castro in the early 1960's.(*41*)

An examination of the functioning of the Warren Commission indicated to the committee that its staff assumed the CIA would expeditiously provide it with all relevant information rather than merely furnish data in response to specific requests.(*42*) An analysis by the committee showed that the Warren Commission's view was not shared by certain high-ranking officials of the Agency, including Deputy Director Helms. In fact, the CIA did not always respond to the Commission's broad request for all relevant material. In testimony to the committee, Helms said the CIA's general position was that it should forward information to the Commission only in response to specific requests.(*43*) Helms indicated that he did not inform the Warren Commission of the anti-Castro plots because he was never "asked to testify before the Warren Commission about * * * [CIA] operations."(*44*) This attitude caused, in the view of the Senate committee, an interpretation of the Warren Commission investigation that was too narrow in scope.(*45*)[8]

[8] The committee agreed that this was an unacceptable explanation for the CIA's failure to inform the Warren Commission of the anti-Castro plots. It was apparent that the Commission was unable to make a specific request for information about the plots since it was unaware of their existence. In this regard, the observations of the Senate committee are worth quoting:

"Why senior officials of the FBI and the CIA permitted the investigation to go forward, in light of these deficiencies, and why they permitted the Warren Commission to reach its conclusion without all relevant information is still unclear. Certainly, concern with public reputation, problems of coordination between agencies, possible bureaucratic failure and embarrassment, and the extreme compartmentation of knowledge of sensitive operations may have contributed to these shortcomings. But the possibility exists that senior officials in both agencies made conscious decisions not to disclose potentially important information."(*46*)

The CIA also failed to provide the Warren Commission with all information in its possession pertaining to Luisa Calderon, a Cuban consulate employee in Mexico City suspected of having ties to the Cuban intelligence service. Calderon, who was alleged in 1964 by a Cuban defector to have been in contact with an American who might have been Oswald during the period of time of Oswald's visit to Mexico City, engaged in a conversation approximately 5 hours after the assassination in which she indicated possible foreknowledge of the assassination.[9] The Warren Commission, however, was not apprised by the CIA of this conversation. (The CIA was unable to explain the omission, but the committee uncovered no evidence to suggest that it was due to anything but careless oversight.) (*47*)

With the exception of that which was obtained from sensitive sources and methods, CIA information, in general, was accurately and expeditiously provided to the Warren Commission. In cases of sensitive sources and methods, rather than provide the Commission with raw data that would have meant revealing the sources and methods, the substance of the information was submitted in accurate summary form. (*48*)

As a case in point, the committee determined that within two days of the President's assassination, CIA headquarters received detailed reports of Oswald's contacts with the Soviet Embassy and Cuban consulate in Mexico City in late September and early October 1963. (*49*) Accurate summaries of this material were given to the Warren Commission on January 31, 1964, but direct access to the original material (which would have revealed sources and methods that were sensitive) was not provided until April 1964, when Warren Commission investigators traveling abroad met with a CIA representative who provided it to them. (*50*) One Warren Commission staff member who reviewed the original material wrote an April 22, 1964, memorandum, which indicated the impact of this material:

> [The CIA representative's] narrative plus the material we were shown disclosed immediately how incorrect our previous information had been on Oswald's contacts with the Soviet and Cuban Embassies [in Mexico City.] Apparently, the distortions and omissions to which our information had been subjected had entered some place in Washington, because the CIA information that we were shown by [the CIA representative] was unambiguous on almost all the crucial points. We had previously planned to show the [CIA representative] [Commission Assistant Counsel W. David] Slawson's reconstruction of Oswald's probable activities at the Embassies to get [his] opinion, but once we saw how badly distorted our information was we realized that this would be useless. Therefore, instead, we decided to take as close notes as possible from the original source materials at some later time during our visit. (*51*)

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[9] The substance of that conversation is covered in section I C 2 on a possible Cuban conspiracy. The CIA maintained that the original Agency report summarizing this conversation was inaccurately translated and that, when accurately translated, it was apparent that there was no basis for sending the original conversation to the Warren Commission. The committee, however, considered the CIA's revised translation of the report and did not regard it as definitive. Moreover, even if the Agency's revised translation were accepted, the substance of the report remained essentially unchanged. Accordingly, using either translation as the basis for analysis, the Warren Commission should have been apprised of this conversation.

The committee did note that these distortions may have merely been the product of the staff member's inaccurate analysis of the available material, since the record reflected that he had reviewed a CIA memorandum dated January 31, 1964, that accurately summarized these records. (*52*) Nevertheless, as a result of his direct review of the original source materials, he was able to clarify considerably his analysis of Oswald's activities in Mexico City.

Another instance in which the CIA's concern for protecting its sensitive sources and methods resulted in delayed access by the Warren Commission had to do with a photograph that was referred to when CIA headquarters was informed on October 9, 1963, that Oswald had contacted the Soviet Embassy in Mexico City. The photograph was described as apparently depicting an American initially believed by some CIA personnel to be Oswald. (*53*) It was also the photograph that was apparently shown to Marguerite Oswald after the assassination. (*54*)

The circumstances of the photograph's origin as well as the fact that the individual in the photograph bore no resemblance to Oswald were known to the CIA shortly after the assassination. (*55*) Nevertheless, the Warren Commission was not told those details by the CIA until late March 1964. (*56*)[10] The Commission had requested an explanation of the photograph on February 12, 1964, having inadvertently learned of its existence from the testimony of Marguerite Oswald. (*60*)

The committee did not conclude that the CIA's handling of information derived from sensitive methods and sources, in fact, substantially impeded the progress of the Warren Commission, but it did find that the Agency's policy with respect to this information was inconsistent with the spirit of Executive Order 11130 that "[a]ll executive departments and agencies are directed to furnish the Commission with such facilities, services and cooperation as it may request from time to time."

(3) *Post-Warren report CIA investigation.*—The committee found that the CIA, as had the FBI, showed little or no inclination to develop information with respect to the President's assassination once the Warren Commission had issued its report. Three cases in point that emerged in the aftermath of the investigation and seemed relevant enough to warrant more careful consideration than they received have been described previously in this report.

In the case of Yuri Nosenko, the Soviet defector who claimed that, as an officer of the KGB, he handled the Oswald file[11], the CIA failed to capitalize on a potential source of critical evidence. By employing inexperienced interrogators who lacked interest in or knowledge of Oswald or the assassination, and by subjecting Nosenko to hostile interrogation, the CIA lost an opportunity to elicit information that might have shed light on Oswald, his wife Marina,

[10] One CIA officer indicated that since the photograph was not of Oswald, there was no need to inform the Warren Commission about it, thereby jeopardizing a sensitive CIA source and method. (*57*) Further, CIA documents show that even when the Commission sought an explanation of the photograph, the Agency's concern for the protection of its sources and methods inhibited immediate compliance with the request. (*58*) The committee believed, nonetheless, that as the photograph was referred to in the first report that CIA headquarters received on Oswald's contact with the Soviet Embassy, (*59*) it was directly relevant to the Warren Commission investigation and should have been made available promptly.

[11] See section I C 1.

and a possible KGB connection to them. In the cases of two Mexican citizens who claimed to have had contacts with Oswald in Mexico City in the fall of 1963, Elena Garro de Paz and Oscar Contreras,[12] the CIA took only perfunctory action, consequently failing to gain insight into actions by Oswald that might have had a bearing on the assassination.

5. THE WARREN COMMISSION PERFORMED WITH VARYING DEGREES OF COMPETENCY IN THE FULFILLMENT OF ITS DUTIES

(*a*) *The Warren Commission conducted a thorough and professional investigation into the responsibility of Lee Harvey Oswald for the assassination*

(*b*) *The Warren Commission failed to investigate adequately the possibility of a conspiracy to assassinate the President. This deficiency was attributable in part to the failure of the Commission to receive all the relevant information that was in the possession of other agencies and departments of the Government*

(*c*) *The Warren Commission arrived at its conclusions, based on the evidence available to it, in good faith*

(*d*) *The Warren Commission presented the conclusions in its report in a fashion that was too definitive*

President John F. Kennedy was the fourth American President to be assassinated, but his death was the first that led to the formation of a special commission for the purpose of making a full investigation. In earlier assassinations, the investigations had been left to existing judicial bodies:

> In the case of Abraham Lincoln in 1865, a military commission determined that John Wilkes Booth was part of a conspiracy, and the Office of the Judge Advocate General of the U.S. Army saw to the prosecution of six defendants, four of whom were hanged.
>
> The assassins of James A. Garfield in 1881 and William McKinley in 1901 were promptly tried in courts of law and executed.

In the aftermath of the Kennedy assassination, it was decided by President Lyndon B. Johnson and his advisers that a panel of distinguished citizens should be given the responsibility for finding the full facts of the case and reporting them, along with appropriate recommendations, to the American people.

The Commission was authorized by Executive Order 11130 to set its own procedures and to employ whatever assistance it deemed necessary from Federal agencies, all of which were ordered to cooperate to the maximum with the Commission, which had, under an act of Congress, subpena power and the authority to grant immunity to witnesses who claimed their privilege against self-incrimination under the fifth amendment. (*1*)

Chief Justice Earl Warren was selected by President Johnson to head the Commission. Two senior Members of the Senate, Richard B. Russell, Democrat of Georgia, and John Sherman Cooper, Republican of Kentucky, were chosen to serve on the Commission, as were two from the House of Representatives, Hale Boggs, Democrat of Louisiana, and Gerald Ford, Republican of Michigan. Two attorneys who

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[12] See section I C 2.

Attachment 2

Civil Action No. 78-1743

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN D. MARKS, et al.,]
Plaintiffs,]
v.] Civil Action No. 77-1108
STANSFIELD TURNER, et al.,]
Defendants.]

MEMORANDUM AND ORDER

In this Freedom of Information Act (FOIA) case, plaintiffs seek access to sixteen documents withheld by the Central Intelligence Agency (CIA) pursuant to exemptions (b)(1) and (b)(3).[1/] Plaintiffs are interested in obtaining only those documents which "relate to covert recruitment by the CIA of United States and foreign students in the United States and the operational use of faculty and staff at academic institutions in the United States in such covert recruitment." Report to the Court and Stipulation at 1 (filed June 11, 1979). Defendants have stipulated that these 16 documents are responsive to plaintiffs' request. Id.

Plaintiffs first became aware of the CIA's covert recruitment practices on American college campuses upon publication of the Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94-755, 94th Cong., 2d Sess., Book I, at 179-191 (1976). Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Opposition) at 8. Stating that it was

1/ 5 U.S.C. 552(b)(1) & 552(b)(3) (1976).

disturbed "by the present practice of operationally using American academics" the Committee issued its report "to alert these institutions that there is a problem." Id. at 191.

Plaintiffs aver that over thirty colleges and universities "are either developing or have proposed, adopted, or rejected guidelines in an attempt to solve the problems identified by the Select Committee Report." Affidavit of Morton Halperin, ¶¶ 19-24 (filed July 2, 1979). Plaintiffs seek the documents in question in this case, which were made available to Congress by the CIA in the course of the above-mentioned investigation, to aid academic institutions in developing these guidelines. They note that:

> many members of the academic community do not believe that they have sufficient information to reach a clear judgment about whether the CIA's program of covert recruitment is, in fact, a serious threat to academic freedom and should be prohibited on their campuses.

Halperin Affidavit, ¶ 32. 2/

While many of the documents plaintiffs originally sought have been released to them, 16 remain in dispute, as noted above. This matter is now before the Court on defendants' motion for summary judgment, which contends that all 16 of the remaining documents have been properly withheld. Defendants aver that all the classified documents are properly classified and hence exempt from disclosure under the FOIA by exemptions

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2/ While ordinarily the interests and needs of the requesting party are irrelevant in an FOIA action, Baker v. CIA, 580 F.2d 664, 666 n.4 (D.C. Cir. 1978); Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971), they are relevant in this case. As will be seen infra, the executive order authorizing classification specifies the public interest as a factor to be considered in declassification decisions. This is germane to the consideration of the (b)(1) exemption, as will be discussed.

(b)(1) and (b)(3).[3] Second Supplemental Affidavit of Robert E. Owen at 4-7 (filed Aug. 31, 1979).

Exemption (b)(1) provides that disclosure is not required for documents that are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

Exemption (b)(3) provides that disclosure is not required for documents that are:

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

The exemption statutes in question here are 50 U.S.C. § 403(d)(3) (1976) and 50 U.S.C. § 403g (1976), which provide that the Director of Central Intelligence shall be responsible for protecting intelligence sources from unauthorized disclosure. To aid the Director in this function, the CIA is exempted from the provisions of any other law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency. The courts have accepted these statutes as exemption statutes for (b)(3) purposes. See, e.g., Baker v. CIA, 580 F.2d 664, 667 (D.C. Cir. 1978); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976).

The parties' arguments to the Court have focused upon the question of whether or not exemption (b)(1) has been

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3/ Only exemption (b)(3) is claimed for document number 15, which is described as a report from a very sensitive intelligence source, but is not classified. Supplemental Document Index (filed Nov. 28, 1978). Both exemptions (b)(1) and (b)(3) are claimed for all other documents in question. Id.

properly claimed. Central to this dispute is the interpretation to be given Executive Order 12065, 3 C.F.R. 190-205 (1979), which is the authority upon which defendants' (b)(1) claim of exemption rests.

E.O. 12065 sets out a comprehensive scheme for the classification and declassification of national security information. Section 3-303 of that order, the section in dispute, provides:

> It is presumed that information which continues to meet the classification requirements in Section 1-3 requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head, [or another specified official]. That official will determine whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure.

3 C.F.R. at 197 (1979).

Defendants concede that they have not applied this balancing test to the documents at issue, but argue that the balancing test need only be applied in a few extraordinary circumstances, of which this is not one. Motion for Summary Judgment at 7, Reply Brief at 3. Reading the executive order narrowly, the CIA revised its regulation on declassification and downgrading on January 2, 1979, to accord with its interpretation of the new executive order. Noting that "[t]he drafters of the Order recognized that such cases [requiring balancing]would be rare . . .," the regulation provided that balancing would not take place except in circumstances where nondisclosure could reasonably be expected to:

> (1) Place a person's life in jeopardy;
> (2) Adversely affect the public health and safety;
> (3) Impede legitimate law enforcement functions;

(4) Impede the investigative or oversight functions of the Congress; or
(5) Obstruct the fair administration of justice.

CIA Regulation HHB 70-2, chapter V, part 13(c) (unpublished) (attached, in its revised form, as Appendix A).

If this interpretation of the executive order were correct, the Court would be compelled to agree with defendants that exemption (b)(1) applies. The Second Supplemental Affidavit of Robert E. Owen convinces the Court that the regulation, as written, was properly applied.

As plaintiffs were quick to observe, however, Opposition at 5, this restrictive interpretation appears to violate the spirit of the executive order with its expansive purpose "to balance the public's interest in access to Government information with the need to protect certain national security information from disclosure." Introduction to E.O. 12065, 3 C.F.R. at 190 (1979). This opinion was shared by the Information Security Oversight Office (ISOO), which was created by the executive order to review agency implementing regulations and perform related functions, E.O. 12065, § 5-202(f), 3 C.F.R. at 202 (1979). In its comments on the regulation after its promulgation by the CIA, the ISOO found the section on the balancing test too narrow in scope and directed that it be changed. Plaintiffs' Supplemental Memorandum, Exhibit H (filed Sept. 26, 1979).

The CIA has now made that change. The new regulation provides in pertinent part that balancing will take place where nondisclosure could reasonably be expected to:

(6) Deprive the public of information indispensable to public decisions on issues of critical national importance.

CIA Regulation HHB 70-2, chapter V, part 13(c) (revised Jan. 22, 1980). This regulation, effective February 1, 1980, has not yet been published in the Federal Register as required by section 5-402 of the executive order, 3 C.F.R. at 202 (1979),

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CIA Regulation HHB 70-2, chapter V, part 13(c) (revised Jan. 22, 1980). This regulation, effective February 1, 1980, has not yet been published in the Federal Register as required by section 5-402 of the executive order, 3 C.F.R. at 202 (1979),

but Government counsel has assured the Court that it will be published shortly.

Plaintiffs have made it clear that they believe the information they seek is indispensable to thorough and reasoned public consideration of the issue of covert recruitment and operational use of faculty and staff on American colleges and universities, Opposition at 8-13, Affidavit of Morton H. Halperin, ¶¶ 12-35, and the extensive hearings conducted by three governmental bodies[4] on this issue indicate that Congress and the Executive branch consider it an issue of critical national importance. Thus, in light of plaintiffs' allegations and this recent change in the CIA regulation, it is necessary to remand this matter to the agency for reconsideration under the balancing provisions of section 3-303 of Executive order 12065.

Accordingly, defendants' motion for summary judgment is denied and this matter is remanded to the Central Intelligence Agency for reconsideration in accordance with this opinion.[5] This Court will retain jurisdiction over this case for any further action required.

IT IS SO ORDERED.

John L. Sirica
UNITED STATES DISTRICT JUDGE

DATED: 5/7/80

4/ The Rockefeller Commission, the Pike Committee, and the Church Committee. Second Supplemental Affidavit of Robert E. Owen, at 5.

5/ Defendants, in their reply brief to plaintiffs' opposition to the motion for summary judgment, raised for the first time the contention that six documents in question are not reachable under the FOIA because they were prepared by the CIA in direct response to specific inquiries from a congressional committee. Citing Goland v CIA, 607 F.2d 339 (D.C. Cir. 1978) and Holy Spirit Ass'n for the Unification of World Christianity v. CIA, No. 79-0151 (D.D.C. July 31, 1979), they contend that these documents are Congress' and therefore are not "agency records" under 5 U.S.C. § 551(1)(A).

Although the Court is not inclined to agree, it need not decide the issue at this time since defendants have not made a showing of the requisite "indicia of congress' continuing control" required by Goland, 607 F.2d at 348 n.48. Thus, even if the Court were to agree with defendants' view of the law on this question, a genuine issue of material fact would remain in dispute, preventing entry of summary judgment. Fed. R. Civ. P. 56(c).

The Court will consider document 15, for which only exemption b(3) is claimed, at such time as it considers any documents remaining in dispute after remand.

The CIA and the Cult of Intelligence

Victor Marchetti
and John D. Marks

INTRODUCTION BY MELVIN L. WULF

Alfred A. Knopf New York 1974

United States without citizenship, thus presenting the CIA with a difficult dilemma. As long as the former agent remained unhappy and frustrated in Mexico City, he represented a threat that his relationship with the agency and those of the many other CIA penetrations of his government which he knew about might be exposed. As a result, CIA headquarters in Langley sent word to the station in Mexico City that the ex-agent could enter the country without the usual preconditions. The agency's top officials hoped that he could be kept under reasonable control and prevented from getting too deeply involved in political activities which would be particularly embarrassing to the U.S. government.

It is only logical to believe that there are instances when termination requires drastic action on the part of the operators. Such cases are, of course, highly sensitive and quite uncommon in the CIA. But when it does become necessary to consider the permanent elimination of a particularly threatful agent, the final decision must be made at the highest level of authority, by the Director of Central Intelligence. With the exception of special or paramilitary operations, physical violence and homicide are not viewed as acceptable clandestine methods—unless they are acceptable to the Director himself.

Two aspects of clandestine tradecraft which have particular applicability to classical espionage, and to agent operations in general, are secret communications and contacts. The case officer must set up safe means of communicating with his agent; otherwise, there will be no way of receiving the information that the agent is stealing, or of providing him with instructions and guidance. In addition to a primary communication system, there will usually be an alternate method for use if the primary system fails. From time to time, different systems will be employed to reduce the chances of compromising the operation. As with most activities in the intelligence game, there are no hard and fast rules governing communication with secret agents. As long as the methods used are secure and workable, the case officer is free to devise any means of contact with his agent that is suitable to the operational situation.