Aug 5 '86

Center for Investigative Reporting, Inc.

54 Mint Street, Fourth Floor - San Francisco, California 94103 - (415) 543-1200

Harold Weisberg
7627 Old Reciever Road
Frederick, MD 21701

Dear Mr. Weisberg,

Thanks yfor your letter of July 29. It is difficult for me to respond because I am so overwhelmed by all the substantial reporting before me that plainly will never see the light of day if I don't publish the information. I am currently deep in Mackenzie v. CIA, my own case that seeks CIA iformation on its programs against and inside the U.S. dissident press.

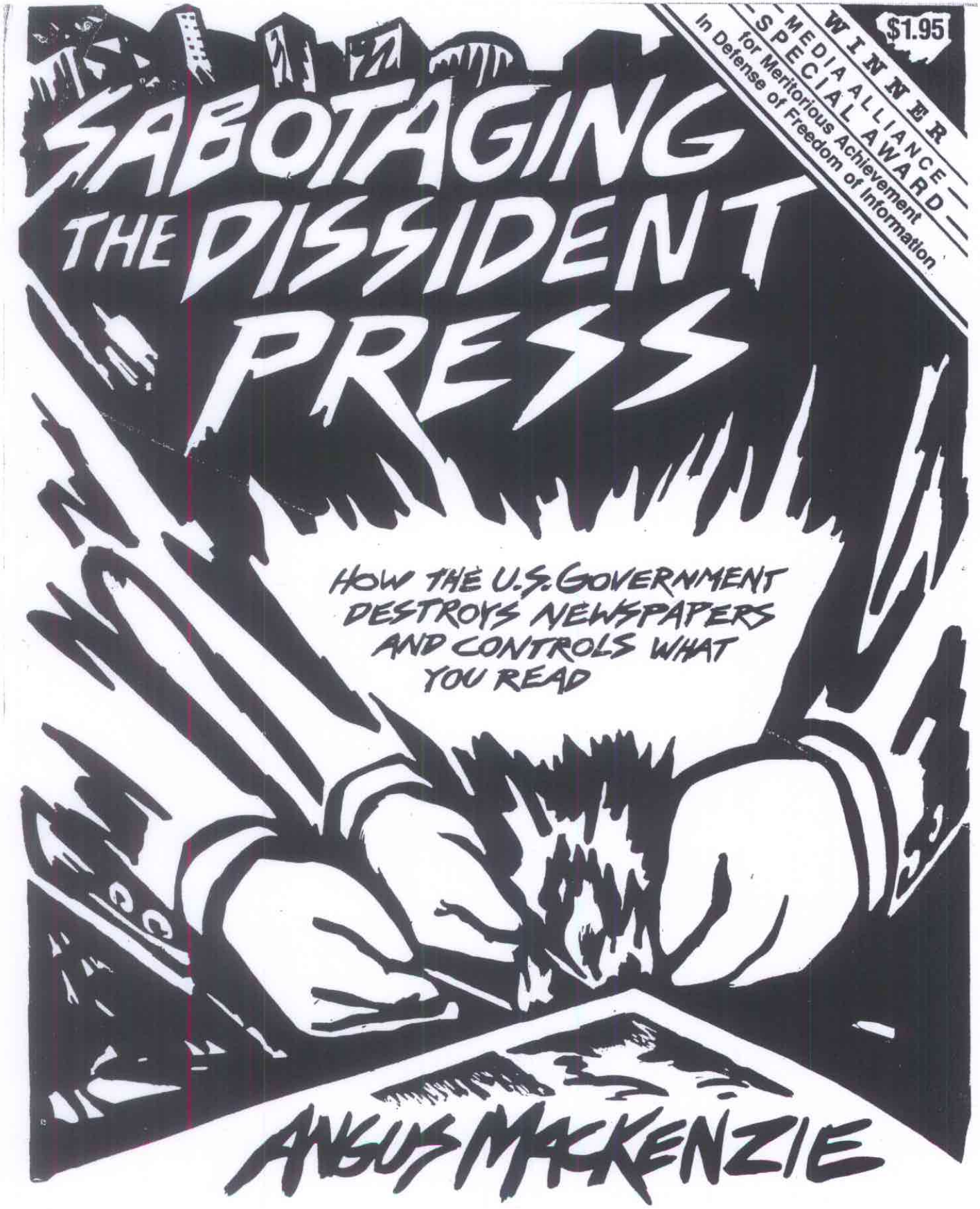
Nevertheless, I would very much like to come see you when I come to Washington late in October -- perhaps I could come out to your place, interview you on camera, and copy some key documents. Your assessment that discovery against an FOIA requester is a dangerous precendant is undoubtably correct; at this stage of the game, however, one can't even do very much about the current FOIA amendment that looks as if it is singing its way to enactment. It will overturn Chrysler, which means the FOIA will become a statute usable to prevent disclosure of information. That's a reversal of the fundemental principle of the ACt, and the ACLU and everyone else is going along with it.

So you see that I am only one person, as you are. And because I'm more mobile, and very interested in what you have done, and what's been done to you, I will try to visit next trip east.

Thanks, and do keep in touch.

Best,

Angus Mackenzie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MEDIA ALLIANCE
SPECIAL AWARD
for Meritorious Achievement
In Defense of Freedom of Information
SABOTAGING THE DISSIDENT PRESS
HOW THE U.S. GOVERNMENT DESTROYS NEWSPAPERS AND CONTROLS WHAT YOU READ
ANGUS MACKENZIE

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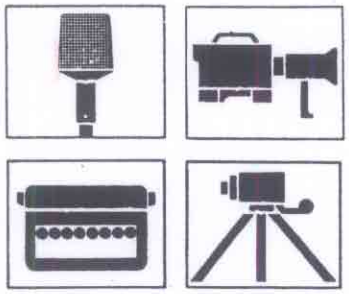

MEDIA ALLIANCE
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In Recognition Of
Meritorious Service To The Community
Media Alliance Hereby Awards

Angus Mackenzie

With The
Media Alliance Meritorious Achievement
Award In

In Defense of Freedom of Information

Presented This 2nd Day of October, 1982.

Ken McEldowney, President

Daniel Ben-Horin, Director

Award presented by Media Alliance, the 2,000-member journalists organization in San Francisco, to Angus Mackenzie, author of the articles in this booklet, for his Meritorious Achievement in Defense of Freedom of Information.

I would like to acknowledge the support of Fund for Investigative Journalism Director Howard Bray; Freedom of Information Service Center Director Tonda Rush; Reporters Committee for Freedom of the Press Executive Director Jack C. Landau; Kevin Brosch, esq., of Steptoe & Johnson; Jay Peterzell, Monica Andres and John Marks of the Center for National Security Studies; Chip Berlet, Scott Chricton, Rob Warden, Heartland, San Francisco Public Library Science and Government Documents Department, and more than 100 underground writers who gave their documents for study and their couches for rest. Thanks to Anna DeCormis, Cameron Mackenzie and my family who have shouldered the burden of this project.

Contents

Introduction

Here are five important articles by Angus Mackenzie that document how the U.S. Government controls the press. The introductory comment to "Sabotaging the Dissident Press" by *Columbia Journalism Review* editors notes the debt of gratitude the press owes Mackenzie for doing as a free-lance writer what news organizations might well have undertaken. When "Sabotaging" appeared in the *Review* March 3, 1981, few, if any, journalists knew that the U.S. Government had set out on a years-long campaign to destroy the smallest newspapers in the nation. The sidebar to that story, "Fiefdoms of Information," outlined the intelligence agencies' refusal to release under the Freedom of Information Act records of that campaign against the press.

"CIA Demands $30,000 to Start Search for Files" describes Mackenzie's efforts to sue the CIA for production of its documents on the underground press. It appeared in the Society of Professional Journalists annual report *FOI '82* and was distributed to 28,000 Society members in January, 1983. An update: the CIA is now releasing to Mackenzie some of its files on the underground press, but is withholding most records for "national security" reasons.

The Internal Revenue Service, which was used as a tool by the CIA in its efforts against publications like *Ramparts*, has regulations of its own that exert subtle but powerful control over the editorial content of thousands of periodicals from *National Geographic* to *Ms.* to *Mother Jones*. Mackenzie broke that story, "When Auditors Turn Editors," in the November/December, 1981, *Columbia Journalism Review*. A year later, on November 11, 1982, *Mother Jones* protested that its IRS audit was, after all, politically motivated. The IRS audit in 1983 still hangs over the heads of *Mother Jones* editors.

1982 brought more disturbing news. On June 23, President Reagan signed the Intelligence Identities Protection Act, a law which provides for the imprisonment of writers and publishers who expose certain secret agents of the FBI, Defense Department and CIA. "Darker Cloaks, Longer Daggers" in the June, 1982 *Progressive* examined the background and congressional debate on that law which at the very least has kept silent those intelligence operatives who had talked to journalists.

One intelligence official who did talk to Mackenzie after the Intelligence Identities Protection Act became law was the FBI's Assistant Director in Charge of Press and Congressional Affairs, Mr. Roger Young. Young summoned Mackenzie to FBI Headquarters February 8, 1983, and acknowledged the accuracy of "Sabotaging the Dissident Press." Young wanted to know how he could ameliorate journalists' fears that the FBI still infiltrates their newspapers. Mackenzie asked Young to tell the nation that the FBI doesn't penetrate the dissident press anymore. Young replied he could not say that.

William L. Rivers, Stanford University
Author of 27 journalism texts

August 1, 1983

On the Trail of a Secret War

COMMENTARY FROM THE EDITORS OF THE *COLUMBIA JOURNALISM REVIEW*

On June 19, 1970, police in Beloit, Wisconsin, kicked in the door of a house in which Angus Mackenzie and his brother James were living, and in which they were putting out an antiwar monthly called *People's Dreadnaught*. Claiming to be looking for an awol army private, the police searched the premises. Although they found no private, nor anything else that might incriminate the Mackenzies, they continued to harass the brothers by, for example, stationing plainclothesmen in the street outside their house. The Mackenzies believe that such tactics were largely responsible for a loss of revenue so severe that they were soon forced to fold their newspaper.

Reflecting angrily on what had occurred, and putting it together with stories he heard over the years about the harassment of other publications, Angus Mackenzie became obsessed with the idea that there had been a secret government campaign to stamp out the antiwar and countercultural press that sprang up during the Vietnam War. In 1978, with the help of a small grant from the Fund for Investigative Journalism, and with the encouragement of the *Review*'s then-editor, James Boylan, he set out on a long search for evidence. Crisscrossing the United States and at times so hard up that he had to hitchhike, he combed through tens of thousands of pages of government documents obtained by other journalists under the Freedom of Information Act. He also interviewed such former CIA, FBI, and Army counterintelligence people as he could persuade to talk to him. While he found no proof that the *People's Dreadnaught* had been the victim of anything more than local police animosity, he did find irrefutable evidence that agencies of the federal government had indeed done their best to put hundreds of other publications out of business. The story of that campaign is told, for the first time, in the article by Mr. Mackenzie.

We mention this not to blow our own horn, but to emphasize the debt of gratitude that the press owes Mr. Mackenzie for doing a job that news organizations, with their far greater resources, might well have undertaken on their own.

Sabotaging the Dissident Press

The American public has learned in the last few years a great deal about the government's surveillance of the left during the Vietnam War era. The report of the Senate Select Committee on Intelligence (the Church committee) first suggested how widely the government had been involved in planting informants inside New Left groups, propagating false information about these groups, and using a variety of tactics to disrupt their activities. That such tactics were also used on a vast scale against dissenting magazines and the underground press, however, has not been reported in a comprehensive way. The story has lain scattered in a hundred places. Now,

documents obtained by editors and writers under the Freedom of Information Act, and interviews with former intelligence agents, make it possible, for the first time, to put together a coherent—though not necessarily complete—account of the federal government's systematic and sustained violation of the First Amendment during the late 1960s and early 1970s.

The government's offensive against the underground press primarily involved three agencies—the CIA, the FBI, and the Army. In many cases, their activities stemmed from what they could claim were legitimate concerns. The CIA's Operation CHAOS, for example, was set up to look into the foreign connections of domestic dissidents; however, it soon exceeded its mandate and became part of the broad attack on the left and on publications that were regarded as creating a climate disruptive of the war effort. At its height, the government's offensive may have affected more than 150 of the roughly 500 underground publications that became the nerve centers of the antiwar and countercultural movements.

A telling example of this offensive was the harassment of Liberation News Service, which, when opposition to the Vietnam War was building, played a key role in keeping the disparate parts of the antiwar movement informed. By 1968, the FBI had assigned three informants to penetrate the news service, while nine other informants regularly reported on it from the outside. Their reports were forwarded to the U.S. Army's Counterintelligence Branch, where an analyst kept tabs on LNS founders Ray Mungo and Marshall Bloom, and to the Secret Service, the Internal Revenue Service, the Navy, the Air Force, and the CIA. The FBI also attempted to discredit and break up the news service through various counterintelligence activities, such as trying to make LNS appear to be an FBI front, to create friction among staff members, and to burn down the LNS office in Washington while the staff slept upstairs. Before long, the CIA, too, joined the offensive; one of its recruits began filing reports on the movements of LNS staff members while reporting for the underground press to establish his cover as an underground journalist.

The CIA was apparently the first federal agency to plan actions against domestic publications. Its Operation CHAOS grew out of an investigation of *Ramparts* magazine, which during the late 1960s was perhaps the leading national publication of the left. In early 1967, *Ramparts* was preparing to publish an exposé on the CIA's funding of the U.S. National Student Association and on various foundations the agency used as conduits for that funding. The CIA got wind of the article in January 1967, two months before the planned March publication date. Viewing the article as "an attack on CIA in particular and the administration in general," the agency started to monitor the activities of *Ramparts* editors, ostensibly to ascertain whether they had contacts with hostile intelligence services. The CIA's Directorate of Plans (its "dirty tricks" department) assigned to counterintelligence agent

Richard Ober the task of "pulling together information on *Ramparts*, including any evidence of subversion [and] devising proposals for counteraction." While those proposals remain secret, several details relating to the *Ramparts* operation have become known.

On February 1, an associate of Ober's met with Thomas Terry, assistant to the commissioner of the Internal Revenue Service, to request that the IRS review *Ramparts'* corporate tax returns to determine who the magazine's backers were. Terry agreed to do so. Subsequently, Ober's office provided the IRS with "detailed informant information" about *Ramparts* backers, whom the IRS was requested to investigate for possible tax violations. Ober's investigation of the magazine uncovered no "evidence of subversion" or ties to foreign intelligence agencies. By August, however, it had produced a computerized listing of several hundred Americans, about fifty of whom were the subject of detailed files.

In August, too, Ober's mandate was expanded as the CIA, responding to pressure from President Johnson, initiated a massive and largely still-secret program of spying on and analyzing political protest—that is, Operation CHAOS. The underground press was one of its targets, the others being antiwar groups, radical youth organizations, black militants, and deserters and draft resisters. CHAOS, of course, raised special problems because it violated a clause in the agency's charter prohibiting the CIA from performing any "internal security function." To give a semblance of legality to the operation, the same justification was used as in the *Ramparts* investigation—namely, that the motive was to search out possible foreign funding or control.

In tracking the press, the CIA was able to count on help from the Army, with which, CHAOS files state, "Direct operational discussions on joint agent operations have been held." Ralph Stein directed the "New Left" desk for the Army's Counterintelligence Analysis Branch in Arlington, Virginia. The branch kept track of underground periodicals and maintained a microfilm crossfile on writers and editors affiliated with them. Stein got most of his information from public sources, but some of it came from classified intelligence reports which, he says, were provided by FBI and Army infiltrators. "Their information was too good, too inside," to have come from public source material, Stein recalled in a recent interview.

In late 1967, Stein was dispatched to CIA headquarters to brief liaison officer Jim Ludlum and others (presumably from Ober's office) on underground and student publications. He found, however, that the CIA men already knew a great deal about the subject. Two questions were foremost in their minds. They wanted to know all about "the ideas and beliefs of the individuals who produced these publications," Stein recalled, and about foreign financing of such prominent publications as *Ramparts* and a host of small underground papers. Stein's response to the latter question was, presumably, unsatisfac-

tory. "Far from being financed by any hostile power abroad," he commented recently, "the people who were putting out these papers were actually using their lunch money, and we were able to prove this." After his briefing session at the CIA, Stein returned to his Arlington office, where he remarked that he thought the CIA was not supposed to engage in domestic surveillance. Shortly thereafter, he was relieved of his liaison duties with the agency, which were taken over by a superior.

Like Stein, Ober found no evidence to support the suspicion that domestic dissidents were being financed or controlled by foreign powers. And, to Ober's credit, his office consistently reported that the antiwar and black nationalist movements were, in fact, responses to domestic political and economic frustrations. But the White House could not abandon what had by now become an *idée fixe* and—particularly after Richard Nixon's election in 1968—it pushed the CIA to probe further into domestic politics. The collection of names continued apace. (By 1973, when CHAOS was converted into the CIA's International Terrorism Group, the computerized list of Americans that Ober had begun to compile in 1967 had grown to include 300,000 names.)

In May 1969, as surveillance activities increased, then-CIA director Richard Helms stated in a memo to field offices that "Operational priority of CHAOS activities in the field is in the highest category, ranking with Soviet and Chicom [Chinese Communist]." While the agency had formerly relied on FBI personnel, it now began recruiting outsiders for CHAOS undercover work. One such recruit was Sal Ferrera, mentioned in a December 27, 1977, *New York Times* article as having worked as a CIA operative in Washington, D.C., and Paris. The details of Ferrara's association with Operation CHAOS are reported here for the first time. They provide a glimpse into just how the CIA spied on the American press.

Ferrera grew up in Chicago, studied revolutionary theory at Loyola University, and in 1969 moved to Washington, D.C., where he made contact with local journalists writing for underground publications. He attended early meetings of the newly founded *Quicksilver Times*, which quickly became the city's leading crusader against the Vietnam War. When the first issue came out on June 16, 1969, Ferrera's name was on the masthead. He participated in editorial decisions and represented the paper at various functions, and he continued to work in the underground press at home and abroad until 1974.

At some point not yet known he also went to work for CHAOS, his underground press connections providing him with impeccable "radical credentials." Wherever there was radical activity, Ferrera seemed to be there. Between January and April 1970, he interviewed Abbie Hoffman, Jerry Rubin, and other members of the Chicago Seven, as well as their lawyer, William Kunstler. In Washington, he became acquainted with Karl Hess, who worked for *The Libertarian* magazine, and soon took to dropping in to visit Hess's office in the base-

ment of the Institute for Policy Studies, a center for antiwar activities.

During the 1971 May Day antiwar demonstration in Washington, Ferrera took photographs and reported on the event for College Press Service, an antiwar syndication service; he may well have been the agent mentioned in the Rockefeller Commission's hearings on the CIA as having covered the demonstration for the agency. He also appears to have been the source of two reports to the CIA regarding staff members of Liberation News Service. In late April, when Ferrera was still working in the *Quicksilver* office, an LNS editor stopped in to ask if LNS staff members who planned to come down from New York for May Day could lodge there. A CHAOS informant's report, dated April 25 and released to LNS editor Andrew Marx under the FOIA, refers to this visit. A second report lists all LNS staff members who attended the May Day demonstration.

Ferrera subsequently went to live in Paris, where he wrote articles on radical student politics for LNS and College Press Service. In 1972, the CIA assigned Ferrera and another agent to monitor the activities of Philip Agee, who was then living in Paris and writing *Inside the Company*, his exposé of CIA operations in Latin America. Ferrera returned to the U.S. (and legally changed his name) in 1975, the year Agee's book appeared. When interviewed for this article, he denied his relationship with the CIA.

Ferrera's activities were not unique, as documents obtained by the Center for National Security Studies, a public-interest group based in Washington, D.C., make clear. In one memorandum a former CIA case officer for domestic CHAOS agents is quoted as saying that several such agents were active in this county "anywhere from months to years." Their activities belie the contention of the Church committee report, based on the claims of the CIA itself, that CHAOS agents operated in the U.S. primarily for training and cover purposes.

Four months after CHAOS was set up, the CIA initiated another domestic spying program. Run by the agency's Office of Security, it was dubbed Project Resistance—and it soon came up with a novel and quite effective means of shutting down dissident publications. Created in the wake of a program begun in February 1967 and designed narrowly to protect CIA recruiters on college campuses, Resistance soon became a nationwide probe of campus and non-campus dissident groups, paying special attention to the underground press. The Church committee report stated that Project Resistance was "a broad effort to obtain general background for predicting violence, which might have created threats to CIA installations, recruiters or contractors. . . ." Files obtained by the Center for National Security Studies, however, make it clear that Project Resistance's main purpose was to infiltrate the underground press, and that it did so routinely, sometimes through local police informers.

had suddenly evaporated. Columbia Records has declined to comment.

Throughout the country, other FBI offices employed similar tactics to silence the dissident press. When headquarters ordered the Detroit office to "neutralize" the *South End* and the *State News*, the student papers at Wayne State and Michigan State universities respectively, the office sent anonymous letters of protest to local businesses that advertised in them. A more limited campaign was waged against *The Tech*, the student paper at Massachusetts Institute of Technology.

Another bureau ploy used against college papers consisted of anonymously mailing their most controversial articles to funding sources and other influential persons, including state legislators, college trustees, and "friendly news media." "Items submitted should be extremely radical on their face, use profanity or be repulsive in nature," J. Edgar Hoover stated in a directive to fourteen field offices in May 1968.

The FBI also enlisted the assistance of local banks. In Cincinnati, the branch office obtained transaction records for two underground papers, the *Independent Eye* and the *Queen City Express*, helping it to identify advertisers and contributors. "As information is gathered," a memo dated July 8, 1970 stated, "it is believed there will be opportunities to suggest counterintelligence action against individuals and groups who are giving financial support to these publications."

Showing initiative, in 1970 the El Paso office proposed a "possible counterintelligent [sic] action" designed to silence the editor of the underground *The Sea Turtle and the Shark;* the idea was to publicize his alleged past criminal activities and "dependence upon various welfare programs." Eventually the editor was arrested for selling an "obscene newspaper" to a minor after the FBI had supplied information to local authorities.

In addition to these comparatively restrained strategies, the FBI also instigated violent acts. In San Diego, for instance, the paramilitary Secret Army Organization, led by FBI informant Howard Godfrey, assaulted the offices and staff of the *Street Journal* on December 25, 1969. By January of 1971, the commune that published the *Journal* had broken up. FBI documents released under the FOIA show for the first time that the Secret Army Organization's operations extended as far east as Wisconsin, where the organization threatened to kidnap Mike Fellner, editor of the radical Madison paper *Takeover.*

In some cities, when direct attacks proved unsuccessful, the government set up its own phony news service which, so long as it was unexposed, provided a means of penetrating the left; once exposed, it cast suspicion on legitimate underground reporters and helped to create a feeling of paranoia. The Army started *Midwest News* in Chicago, according to former intelligence officer Ralph Stein; in San Francisco, the FBI set up Pacific International News Service. The head of the FBI's San

Francisco office at the time, Charles Bates—he is now a reporter for KGO-TV in San Francisco—said recently that he did not specifically recall Pacific International, but added that front operations of that kind "would have been fine if it weren't put down in writing." A spokesman for the San Francisco field office refused to confirm or deny the bureau's use of the news service. Meanwhile, on the East Coast, the FBI operated New York Press Service under the direction of Louis Salzberg. NYPS offered its services to left-wing publications at attractive rates, soliciting business with a letter that read, in part: "The next time your organization schedules a demonstration, march, picket or office party, let us know in advance. We'll cover it like a blanket and deliver a cost-free sample of our work to your office." NYPS's cover was blown when Salzberg surfaced as a government witness in the Chicago Seven trial, during which it was disclosed that he had been an FBI informant.

The New York field office shrewdly turned this setback into a means of casting suspicion on Liberation News Service. The office prepared an anonymous letter, copies of which were sent to newspapers and antiwar groups, accusing LNS of being an FBI front. "Lns [sic] is in an ideal position to infiltrate the movement at every level," the letter stated. "It has carefully concealed its books from all but a select few. Former employees have openly questioned its sources of operating funds. I shall write to you further on Lns for I (and several others) are taking steps to expose this fraud for what it really is—a government financed front."

Such, then, were the techniques used by the U.S. government to stifle freedom of expression in the late 1960s and early 1970s. These and other violations of American civil liberties, as publicized in the Church committee report, together with the public revulsion that attended its publication, resulting in restrictions on domestic surveillance by the CIA and FBI. Now the removal of those safeguards seems a distinct possibility, at least to judge by the recent report on intelligence issued by the Heritage Foundation and embraced by the Reagan transition team. That report claims that "The threat to the internal security of the Republic is greater today than at any time since World War II" and recommends resurrecting the standing internal security committees in Congress and, once again, permitting the FBI and CIA to spy on dissidents, including journalists.

If Reagan officials do go ahead and propose such measures, they will undoubtedly argue that guarantees can be established to prevent surveillance from getting out of hand. But if the experience of the Johnson and Nixon years is any guide, even programs which begin quite modestly can expand far beyond their original mandate.

Fiefdoms of Information

In my two-year-long effort to obtain federal agency files on underground publications, I learned almost as much about how the Freedom of Information Act works—or doesn't work—as I did about the means by which the government sought to suppress dissent in the 1960s and 1970s. I found, above all, that while some agencies were quite cooperative, the CIA and FBI proved adept at keeping their information to themselves.

In requesting FBI counterintelligence files and the entire "New Left Publications" file under the FOIA, I was able to supply the bureau wi th seventy-eight file numbers relating to forty-seven periodicals (obtained from heavily censored files previously released to editors of publications that no longer exist). Since the most difficult element in any request is identifying documents specifically enough so that the agency can locate them, this should have facilitated a quick response. Instead, the FBI demanded an advance deposit of $1,100 for more than 1,100 hours of search time. My appeal of that payment is still pending.

In the case of the CIA, I was able to supply the agency with four file numbers. After twenty-six days a letter came stating that I would have to agree to unspecified search fees. Nothing then happened until fourteen months later, when a second letter said I would have to deposit $30,000 on a search they estimated would cost a total of $61,501.

The Secret Service, by contrast, waived search-and-copy fees and complied with my request within seventeen days, sending forty censored pages dealing with nineteen newspapers—even though I had been unable to supply any file numbers to the service. Likewise, the Department of Defense attempted to comply with the intent of the act, although, again, I was unable to supply file numbers. Within thirty-two days of my request, the department waived $445.50 in search-and-copy fees. After a search, its Defense Investigative Service determined that it might have records on seventeen of the 500 newspapers on my list.

Supposedly, new teeth were put in the FOIA in 1974. At the time, a House-Senate conference report said that agencies must comply with requests within thirty days, that "fees should not be used for the purpose of discouraging requests," and that withheld files must concern activity within the agency's legal authority. My experience shows that the CIA and the FBI refuse to comply with both the intent and letter of the amended act.

When Enough Is Enough

COMMENTARY FROM THE EDITORS OF THE *COLUMBIA JOURNALISM REVIEW*

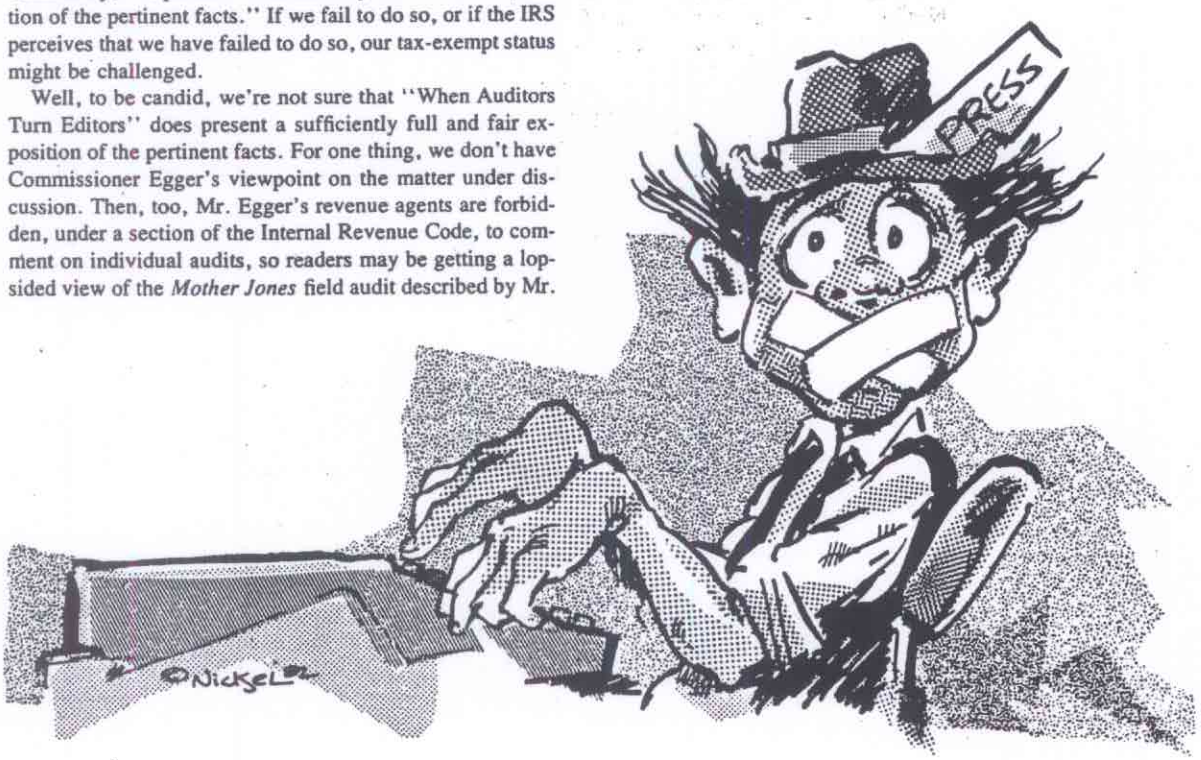
In the course of researching this issue's cover article on the IRS and the nonprofit, tax-exempt press ("When Auditors Turn Editors," page 29), reporter Angus Mackenzie attempted to interview the new commissioner of the Internal Revenue Service, Roscoe L. Egger, Jr. Mr. Egger declined to be interviewed because, a spokesman explained, "this area of IRS regulation is highly technical and extremely complex." If we rush in where commissioners fear to comment, it is only because Mr. Mackenzie and we believe that the problems that have arisen in "this area" — the legal jungle that, in the course of more than half a century of luxuriant growth, has grown out of Section 501 (c) (3) of the Internal Revenue Code — require attention and debate.

Under the provisions of that code, nonprofit periodicals that qualify for tax-exempt status enjoy what is, in effect, a federal subsidy. In return, certain things are required of such periodicals — of which the *Review*, published under the auspices of an educational institution, is one. Among other things, it is required of us when publishing articles on "subjects useful to the individual and beneficial to the community," to present "a sufficiently full and fair exposition of the pertinent facts." If we fail to do so, or if the IRS perceives that we have failed to do so, our tax-exempt status might be challenged.

Well, to be candid, we're not sure that "When Auditors Turn Editors" does present a sufficiently full and fair exposition of the pertinent facts. For one thing, we don't have Commissioner Egger's viewpoint on the matter under discussion. Then, too, Mr. Egger's revenue agents are forbidden, under a section of the Internal Revenue Code, to comment on individual audits, so readers may be getting a lopsided view of the *Mother Jones* field audit described by Mr. Mackenzie. And then there's that hair-raising adverb "sufficiently." Mr. Mackenzie's exposition of the facts strikes *us* as being sufficiently full and fair, but we are merely editors, not auditors.

There are other aspects of our cover article that may cause the IRS to raise its eyebrows: many problems and facts that may be regarded as pertinent are not touched upon, much less explored. The article does not, for example, deal with the serious question of whether some tax-exempt publications unfairly compete with commercial publications of a similar nature. Nor does it deal with the question of what commercial publishers often call "phony foundations" — those set up expressly to enable publications to qualify for reduced postal rates, among other benefits.

What it does deal with is the controversy over whether the conditions under which the IRS grants tax-exempt status to nonprofit publications conflict with constitutional guarantees of press freedom and equal protection. That, to us, is currently the heart of the matter. And, for us, that suffices.



When Auditors Turn Editors THE I.R.S.

AND THE NON-PROFIT PRESS

November 1981

For many publications, qualifying as tax exempt under Internal Revenue Code 501 (c) (3) is a matter of life or death. Those that qualify are eligible to receive contributions which donors can write off as deductions. Another boon for those who pass the IRS test is lower postage rates. Mark Dowie, who served as publisher of *Mother Jones* until August 1980, estimates that in recent years its exempt status saved the muckraking magazine roughly $200,000 annually on postal solicitations alone.

Now *Mother Jones* is one of a group of nonprofit publications, of varying political persuasions, that have reason to fear that the IRS will put them out of business, or at least make it very hard for them to survive, by withdrawing their tax-exempt status. Meanwhile, both the language of the tax laws and the close scrutiny accorded some of these publications by revenue agents have, in effect, already abridged freedom of the press in this country: there are limits to what a nonprofit periodical can say; there are proscribed ways of dealing with subject matter. Auditors have become editors.

Mother Jones's troubles with the IRS started last year — five years after its parent, the Foundation for National Progress, was granted tax-exempt status as a nonprofit charitable and educational entity. On March 27, 1980, then-publisher Dowie received a phone call from IRS agent Lee Junio. Junio said she was starting a "routine" audit of the foundation, including its magazine, and would like to visit its offices on Third Street in San Francisco to take a closer look at how it operated.

Junio turned up on April 17 and for a week settled into the magazine's editorial conference room. Her field audit examined the year 1978. She wanted everything: editorial and financial records; contracts between the magazine and its writers; information about the qualifications of its writers; and every 1978 issue of *Mother Jones*, as well as all the publications put out that year by the foundation's six other projects. (The six are: The New School for Democratic Management, The Energy Project, The Solar Energy Project, The Rent Control Project, The Mental Health Project, and The TV Project.) After she had selected and photocopied key documents, Junio returned to her office in the San Francisco Federal Building, where she continued her analysis.

In the summer of 1980, Dowie stepped down as publisher and was replaced by Jacques Marchand. Marchand asked the foundation's tax attorney, Thomas Silk, to handle the legal response to any questions Junio's audit might raise. Silk, who had formerly worked with the Tax Division of the Department of Justice, subsequently met with Junio who did, indeed, raise several questions. The prickliest was: How is *Mother Jones* distinguishable from a commercial publication? Since, according to IRS Revenue Ruling 67-4, a nonprofit publishing venture must be distinguishable in a variety of ways from a commercial one, the question posed the threat that *Mother Jones* would be taxable. "It was the first indication," Silk recalls, "that there might be some doubt as to the favorable resolution of the audit."

In a detailed memorandum — Junio had asked for a reply in writing — Silk spelled out the differences between *Mother Jones* and commercial publications: the magazine did not want to make a profit, and it had never made a profit; its economic survival, he wrote, "is possible *only* because of charitable contributions and low-interest loans made by its supporters." Moreover, the foundation's charitable and educational principles brought *Mother Jones* into "frequent conflict with big business," thus drying up a potential source of ad revenue: corporate advertising. Automobile manufacturers also shunned the magazine, Silk pointed out, as a result of its articles on the Ford Pinto.

During the audit, *Mother Jones* happened to be preparing for publication — in its February/March issue — just the sort of piece that revenue agents might be expected to study with special care. Publishing articles that attempt to influence legislation may be grounds for challenging an organization's tax-exempt status. "The Trenchcoats Retrench," by Jeff Stein, dealt with the Intelligence Identities Protection Act, which would jail reporters and publishers for exposing the identities of intelligence agents. "If Stein had submitted a piece opposing that legislation," comments Marchand, "we couldn't have run it. We cannot say it ought to be opposed. We've got to be very cautious."

Silk and Marchand had arranged to meet with Junio, at the foundation's headquarters, on March 18 of this year. When she arrived they were surprised to see that she was accompanied by her supervisor, Lester Stepner, group manager of the exempt organizations audit section of the San Francisco district. They braced themselves for bad news. The news was worse than they had expected. Stepner announced, according to Silk, that the IRS had tentatively decided to revoke the tax-exempt status of the Foundation for National Progress. "We were shocked," says Silk. "We never had an indication that the entire exemption of the foundation might be revoked." (Stepner and Junio cannot comment on the case or on the accuracy of these recollections because, under Section 6103 of the revenue code, they are forbidden to discuss individual cases.)

Silk asked Stepner if the tentative decision to deny tax exemption to the foundation was based on *Mother Jones*'s content. No, said Stepner, according to Silk; he had no quarrel with the description of its contents as educational. Rather, like Junio before him, he could not see how *Mother Jones* was distinguishable from a commercial publication. Silk protested that many nonprofit magazines — such as *Smithsonian, Ms., Audubon,* and *Natural History* — were produced and distributed in the same fashion as *Mother Jones*: all, for example, are sent to member/subscribers obtained primarily through direct-mail solicitations. Stepner's reply, says Silk, was that those publications weren't in his district; if they were, he would raise the same question with them — a reply that points up the discretion allowed district administrators. (As it happens, *Smithsonian*'s tax-exempt status is being reviewed, too. According to Christian Hohenlohe, treasurer of the Smithsonian Institution, "the question of unrelated business income from advertising is the main question the IRS has about our magazine." Asked whether the IRS had raised questions about *Smithsonian*'s distribution methods and contents or about the qualifications of its contributors, Hohenlohe said it had not — further evidence of the discretion allowed revenue agents.)

Seven months have elapsed since Stepner and Junio met with Marchand and Silk. Silk has provided additional information to the IRS regarding the noncommercial, educational nature of *Mother Jones*. Nevertheless, its editors are apprehensive that any day now they may receive a thirty-day notice confirming Stepner's preliminary decision. (Such decisions are sometimes overturned at administrative levels.) Marchand, who retired as publisher on September 1, likens the loss of the foundation's exempt status to an earthquake: "Totally destructive." Certainly, *Mother Jones* would be badly shaken. From its inception, the magazine has operated at a loss — $235,654 in 1978, for example — which has been made up by charitable contributions and low-interest loans. A drop in donations, coupled with a steep rise in postal rates, could be fatal.

A second IRS field audit that began shortly after the Reagan administration took over involves the North American Congress on Latin America (NACLA), an exempt organization, based in New York City, which publishes the bimonthly, left-wing *Report on the Americas*, as well as books, research guides, and comic books. The audit started last March. On August 10, says NACLA president Steven Volk, IRS field auditor David Levine told NACLA's accountant that, while the organization's finances were consistent with 501 (c) (3) status, he would perhaps challenge its exemption because of the contents of NACLA publications, which he had reviewed during the audit. Then, on September 14, according to Volk, Levine called to say he was recommending that the IRS revoke NACLA's exempt status on the ground that the government should not be subsidizing organizations that indulge in "name calling" against families like the Rockefellers — a reference to *The Incredible Rocky*, a scathing comic-book history of "Those Fabulous Rockefeller Brothers." Says NACLA attorney Victor Rabinowitz, "If 501 (c) (3) is going to be based on political content, then, by God, the number of publications that is going to be affected, both right- and left-wing, is very, very great."

A third magazine whose future will be decided by the IRS is *Harper's*. In the spring of 1980, the magazine, which had been losing more than $1 million annually for several years, nearly went under. At the last minute, it was rescued by the John D. and Catherine T. MacArthur Foundation, which subsequently set up the Harper's Magazine Foundation, so that *Harper's* would be eligible to receive tax-deductible contributions. The IRS is reviewing the fledgling foundation's application for tax-exempt, nonprofit status. If the exemption is granted, the MacArthur Foundation, which now holds title to the magazine, will transfer the magazine's assets and liabilities to the Harper's Magazine Foundation and give to it what remains of a total gift of $1.5 million, some of which has been paid out to keep the magazine alive. If the IRS denies the application, this transfer cannot take place. "Under the federal tax laws," explains Joseph A. Diana, secretary treasurer of the Harper's Magazine Foundation, "it is not possible for a foundation to make a gift of money to an organization which does not have tax-exempt status."

Historically, it was the removal of taxes imposed on newspapers as a means of controlling them, together with the freedom to report on and criticize Congress, that distinguished the U.S. press from the press of many other nations. The passage of successive revenue laws from 1913 through 1954, incorporating reformulations of section 501 (c) (3), which exempts a wide range of organizations, marked the start of a new era. The Internal Revenue Code drawn up by Congress is defined by IRS regulations, which are, in turn, defined and clarified by revenue rulings. The code, the regulations, and the rulings constitute the huge body of law that gives the IRS the power to scrutinize the editorial content, the advertising policies, and the business practices of the nonprofit press, and to render its crucial judgments. Having derived its powers from Congress, the IRS now controls how nonprofit publications, if they wish to remain tax exempt, may report the votes of members of Congress, how they may report on legislation, and how they may report on candidates for public office.

To qualify for tax-exempt status, an organization's purpose must be primarily educational, charitable, literary, or religious. The editorial content of its publications must be limited to "subjects useful to the individual and beneficial to the community." Articles must present a "sufficiently full and fair exposition of the pertinent facts." Thus, auditors have become arbiters of what is useful, beneficial, and fair. The IRS has other criteria on the basis of which it hands down its verdicts. Not only must the distribution of tax-exempt periodicals be distinguishable from that of their commercial counterparts — a point raised in the *Mother Jones* case — but the skills and abilities of the people who work for such periodicals must be "other than those that are generally found on the staff" of commercial publications, to cite the language of a 1977 revenue ruling that denied exemption to a nameless newspaper. (Under Section 6103, the IRS is forbidden to divulge the names of organizations to which it has denied exemption.)

How many nonprofit periodicals there are today is not known. About 177,000 tax-exempt organizations list their purpose as educational; many of them publish periodicals, but the IRS does not have a figure for this specific category. There must be several thousand — right-wing, left-wing, middle-of-the-road, religious, anti-religious, ranging in size from *National Geographic* (circulation: 10,768,125) to *Mother Jones* (circulation: 218,000) and on down to papers like *Big Mama Rag* (circulation: 2,000), all educating their readers according to their own lights.

Now, singly or in clusters, like the papers belonging to the Catholic Press Association, the nonprofit press is learning how hard it is to live with a federal agency whose powers are vast and whose authorizing legislation is couched in broad terms. The Internal Revenue Code states, for example, that "no substantial" part of the activities of an exempt organization can be devoted to "carrying on propaganda, or otherwise attempting to influence legislation." Thus, publishers and editors, second-guessing the auditors, must take pains to determine when articles go beyond educating and become influential — a determination that might seem best left to philosophers. To resolve the question of what "no substantial" part may mean, Congress and the courts have come up with a sliding scale that, in the case of most publications described here, sets 5 percent of an organization's budget as the maximum that may be used to directly influence legislation. Wary nonprofit editors keep this figure in mind. At *Ms.* magazine, which has been tax exempt since 1979, throughout the year editors keep a rough count of the number of pages that might be construed as attempting to influence, rather than merely inform, readers regarding various pieces of legislation; at the end of the fiscal year, they calculate what percent of the total cost of production these pages constitute. (If, about halfway through the year, the page count seems to be mounting too fast, everyone is put on alert — one of the many forms of self-censorship that have become standard operating procedure as a result of existing regulations.)

The revenue code contains another prohibition that, particularly as defined by a recent ruling, has created more serious problems. Exempt organizations, the law states, can "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." This appears to be an absolute ban; it isn't. Voter-education material is permitted; only material that "intervenes" in elections is banned. Three years ago, in Revenue Ruling 78-160, the IRS clarified the concept of intervention in these words: "A nonprofit educational organization that sends to candidates for public office in an upcoming election a questionnaire on topics of concern to it and publishes the responses received, without editorial comment . . . is engaged in . . . intervention in a political campaign and . . . does not qualify for exemption under 501 (c) (3)."

The ruling came under such sharp attack, notably from the League of Women Voters, that within a month the IRS rescinded and replaced it with Revenue Ruling 78-248, presumably designed to mollify critics. The new ruling, the IRS explained in a press release, "emphasizes that whether an activity constitutes such prohibited participation or intervention [in an election] depends on the facts and circumstances in each case." In short, the IRS would henceforth determine on a case-by-case basis whether publication of candidates' replies to a set of neutral questions on a variety of issues or on only one issue was evidence of "bias."

One group of publications that was infuriated by the IRS's intervention rulings was the religious press, which is largely dependent on tax-exempt, nonprofit status and which, believing that politics and morality cannot be separated, had regularly published surveys of candidates' stands on selected issues. The reaction of the Catholic press is an instructive case in point.

As the 1980 presidential campaign geared up, several of the 140 member papers of the Catholic Press Association denounced the revised ruling. For example, *South Texas*

Catholic, published in Corpus Christi, ran an editorial on March 21, 1980, which said, in part:

> No "bias" is permitted. And how does the ruling define bias? If a Catholic newspaper conducted a poll, for example, on candidates views regarding abortion only, [Revenue Ruling] 78-248 says that "its emphasis on one area of concern indicates that its purpose is not nonpartisan voter education." . . . But how wide a variety of issues will be acceptable to the IRS? And what will the IRS determine to be strictly "Catholic" issues?
>
> A deeper question is how, in this land of freedom, has the IRS been able to gather the power necessary to restrict the content of a newspaper . . .?

Perhaps the most trenchant attack on the ruling to appear in the Catholic press was written by syndicated columnist Reverend Virgil C. Blum, S.J., president of the Catholic League for Religious and Civil Rights. In a May 8, 1980, column, headlined IRS SUPPRESSES FREE PRESS, Father Blum wrote that the IRS had, in effect, told Catholic newspaper editors: "As a condition for continuing to enjoy a tax-exempt status, you must surrender your First Amendment right to free speech and press." The IRS's imposition of such a choice, he went on, conflicted with a 1958 Supreme Court decision, *Speiser* v. *Randall*, which ruled unconstitutional a California law that required individuals claiming a property-tax exemption to take a loyalty oath. The Court declared:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.

But the IRS was not the only target of the Catholic press's wrath. The Catholic Press Association, whose headquarters are in Rockville Centre, New York, also caught holy hell. Trying to be helpful, in February 1980 the CPA had drawn up guidelines for coping with the IRS ruling. The watchword was caution. A specific guideline, underlined for emphasis, stated categorically: *Endorsements and evaluations of any sort are not to be carried on.*" The CPA's "Guidelines for Member Publishers" further stated:

> If an organization publishes a vote within a reasonable time after such a vote is recorded, and *periodically* publishes the vote of public officials, then the publication of the vote during the election campaign will probably not expose the organization to a challenge on the basis of the ruling. . . .

Such counsel seemed gutless to *The Catholic Standard and Times* of Philadelphia, among other member papers. A March 20 *Standard and Times* editorial, RELIGIOUS PRESS, RELIGIOUS FREEDOM, described both the IRS's ruling and the CPA's compliant attitude toward it as "crippling to Catholic newspapers, which should be free to publish the records or positions of public officials or candidates when people are most interested in such records or positions — near the election." To cease doing so, the paper said, "would amount at best to journalistic mediocrity and at worst to journalistic cowardice." The editorial concluded on a militant note: "The CPA would appear to be counseling such cowardice; the IRS would appear to be directing it — a clear violation by a government agency of freedom of the press and freedom of religion."

Responding to such criticisms, the CPA's board of directors in mid-May advised publishers that the guidelines did not constitute approval of the IRS's ruling, which was now perceived as endangering freedom of speech and religion.

By June 1980 Catholic militancy on press freedom had become news in *The New York Times*. PRIEST IN TEXAS DEFIES RULING BY I.R.S. THAT BARS STAND ON POLITICAL ISSUES read the four-column headline of a June 22 story by William K. Stevens. The defiant priest was the Reverend Brian Wallace, editor of *Today's Catholic*, the official weekly newspaper of the archdiocese of San Antonio. On May 2 — the day before the Texas presidential primaries — Father Wallace had published an editorial entitled TO THE IRS — NUTS!!!" It read, in part:

> Somehow after 50 years of the current federal tax code, the IRS has recently reached the conclusion that churches must make a choice: keep quiet and be tax exempt or enter into political debates and pay for it dearly. Says the IRS: "Choose one, please."
>
> To that, *Today's Catholic* says emphatically and in the biggest letters we can find: "NUTS!!!"

Father Wallace then plunged into politics — or morality, two aspects of life between which, he wrote, "there can be no divorce." The editor-priest assessed John Anderson's, Edward Kennedy's, and Ronald Reagan's stands on a single issue — abortion; described Reagan as "the only presidential candidate who is clearly opposed to abortion and is willing to use the political power of the presidency to support his position"; cited the voting records of congressional candidates on the single issue of abortion; and, finally, urged readers to "work for the passage of a resolution on pro-life issues" at their precinct conventions and to vote their conscience at the primary election.

The IRS has yet to take up Father Wallace's well-publicized challenge to its authority.

The mood that summer was, perhaps, not propitious for IRS action. On August 20, the House of Representatives passed an amendment to the Treasury Appropriations Bill that would have prevented the IRS from disqualifying any organization for tax-exempt status "by reason that such organization publishes or distributes voters' guides relating to any political campaign." (The bill failed to pass the Senate during that legislative session; the amendment, introduced by Congressman Philip M. Crane, of Illinois, was not included in the House bill passed in late July of this year.) In September, the American Civil Liberties Union brought suit against the IRS on behalf of the Office for Church in Society, the social-action agency of the United Church of Christ, which as a church is tax exempt. The OCS had, for years, periodically published the voting records of members of the House and Senate on various issues, together with statements of the church's position on these issues. Following the issuance of Revenue Ruling 78-248, the OCS had discontinued this service, fearing that the IRS might challenge

the church's exemption. The lawsuit asserted that the ruling "interferes with, impairs, and hinders the free exercise of plaintiff's rights under the First Amendment. . . ." The issue was resolved in a "private letter ruling" that October; the IRS said, in effect, that the church could safely resume its voter-education project so long as publication was not tied to a particular election.

Such reinterpretations, of course, made on a case-by-case basis, do nothing to reduce the sense of vulnerability felt by editors and publishers of other nonprofit publications. For, in the eye of the IRS, each organization and each publication, is unique — and, given the discretionary power enjoyed by district administrators, a practice that is overlooked or condoned in one district may be challenged in another.

Big Mama Rag is about as far removed from a diocesan publication as one can imagine. Founded in 1972, the heyday of the women's movement, *Big Mama* is one of the few feminist papers to survive — if only by the skin of its teeth and the determination of its volunteer staff. Published in Denver, the monthly gets along on an annual budget of less than $10,000, more than half of which comes from contributions. Ads account for less than 10 percent of its content; more than half of its press run of 2,000 is given away. Two years after its founding, the struggling paper applied for tax-exempt status as an educational organization whose purpose was "to create a channel of communication for women that would educate and inform them on general issues of concern to them." The application was denied. *Big Mama*, the IRS ruled, was sold "in accordance with ordinary commercial publishing practices" — thus violating the same rule that may be invoked against *Mother Jones*. This, at least, was the initial, official version of the reason for denial. When, in September 1976, *Big Mama* representatives met with IRS officials to explain just how uncommercial their paper was, they were presented with another objection: the paper promoted lesbianism. According to an internal IRS document subsequently produced in court, IRS agents advised them that tax-exempt status would be granted on condition that the editors would agree "to abstain from advocating that homosexuality is a mere preference, orientation, or propensity on par with heterosexuality. . . ."

Lawyers in Denver and Washington, D.C., fought the case, *pro bono*, all the way up to the Federal Circuit Court of Appeals in Washington. There they argued that the IRS's regulatory scheme violated the First Amendment and the equal protection guarantee of the Fifth Amendment, and was unconstitutionally vague. Sidestepping this broad challenge, on September 15, 1980, Circuit Judge Abner Mikva ruled against the IRS on the ground that the Internal Revenue Code's definition of "educational" was unconstitutionally vague. The IRS's concern over *Big Mama*'s views on homosexuality, Judge Mikva said, simply highlighted the inherent susceptibility of vague statutory language to discriminatory enforcement.

"I was taken aback," recalls an attorney in the office of the revenue service's chief counsel. "This was the first time something had been declared unconstitutional in this 501 (c) (3) area."

Judge Mikva's decision was upheld and expanded in another landmark case decided on May 27 of this year. The case involved *Attack!*, a racist monthly newsletter put out by the nonprofit National Alliance. *Attack!* had applied for tax-exempt status in July 1977; eight months later its application was denied on the ground that the newsletter's "tone and subject matter potentially serve to influence the prejudices and passions of its readers." Further, said the IRS denial, *Attack!* did not present a sufficiently "full and fair exposition of the pertinent facts."

National Alliance v. *U.S.* reached the federal district court in Washington, D.C., eight months after the Appeals Court had handed down its decision on *Big Mama Rag*. Applying the principles enunciated in that decision, the district court ruled against the IRS, saying that the phrase "full and fair exposition" of the facts was even more open to interpretation and selective application than "educational." But this decision, too, left unanswered the central question of whether the IRS's whole regulatory scheme is unconstitutional in that it requires publications to trade their constitutional rights for a tax status upon which their survival may depend.

Another piece of that IRS regulatory scheme is being challenged in a case now being weighed by the Court of Appeals in Washington. This case, brought by Thomas F. Field, publisher of *Tax Notes*, challenges the 501 (c) (3) restriction on lobbying. Field says it violates the First Amendment and also the equal-protection guarantee of the Fifth Amendment because, while tax-exempt charities and educational organizations are restricted from lobbying, veterans groups and fraternal societies enjoy tax exemption with no lobbying restriction. Field further argues that the lobbying restriction serves no governmental purpose, as proved by Congress in 1962 when it allowed business firms to deduct most lobbying expenses from their taxes, reasoning that lobbying served society by keeping Congress informed. Field's case started after the IRS, in February 1978, denied his application for tax exemption for a lobbying and litigative group. In April of this year the IRS denial was upheld by the Court of Appeals. But on June 11 the court decided to hear his case *en banc*, meaning that all ten judges will hear it. Thus, the decision is likely to be authoritative.

The resolution of Field's case is crucial to the future of IRS control over the contents of exempt publications because, as an IRS attorney says, "To determine if they are lobbying, we have to look at content. We're looking for guidance [from the courts]."

In the past, the IRS's interest in content was often politically motivated. In 1967, for instance, the CIA asked the IRS to help draw up countermeasures against *Ramparts*, which was exposing the National Student Association as a CIA front, and the IRS agreed (see "Sabotaging the Dissident Press," CJR, March/April 1981). Into the 1970s the IRS continued to cooperate with the CIA, and with the FBI and Army Intelligence, as these agencies sought to put the underground press out of business. But if publications on the left were a frequent target, those on the right were not safe either. During the Kennedy administration, according to a report issued in June 1975 by the Joint Congressional Committee on Taxation, the IRS was used to "get" the radical right.

The proliferation of nonprofit publications in the last decade has been accompanied by a proliferation of IRS rules governing their activities. This leaves the door wide open for the resumption of IRS harassment of editors for political purposes. Fine points of law aside, in the case of the press the discretionary application of tax laws has meant, and always will mean, government control of content. The IRS got into editing through an act of Congress. Perhaps it is time for Congress to usher it out. ■

On March 26, the U.S. Appeals Court in Washington, D.C., reversed an earlier decision, handed down by a panel of three judges, that had upheld an IRS denial of tax-exempt status for Taxation With Representation of Washington. This time around, with ten judges hearing the case, the court ruled that Section 501 (c) (3) of the Internal Revenue Code constitutes a double standard, in violation of the Constitution's equal protection guarantees, inasmuch as it permits veterans' organizations to lobby without restriction while restraining other tax-exempt charities and educational organizations from doing so. Circuit Judge Abner Mikva, writing for the majority, concluded that Congress should either take away the right of organized veterans to lobby with tax-deductible money or extend that right to all tax-exempt groups. The IRS has appealed to the Supreme Court. Field expects the Court to hear the case in late 1982.

The *Mother Jones* case, meanwhile, has taken a couple of strange turns. In his article, Mackenzie reported that the IRS had tentatively decided to revoke the tax-exempt status of the Foundation for National Progress, primarily because field auditors "could not see how *Mother Jones* was distinguishable from a commercial publication."

Thomas Silk, the foundation's tax lawyer, recently told Mackenzie that, shortly after the *Review* article appeared last fall, IRS agent Lee Junio called to say that the IRS would *not* revoke the foundation's exemption. This welcome news was followed, on April 15 of this year, by the receipt of an IRS bill for three quarters of a million dollars — a sum roughly equivalent to the amount of money the magazine lost in the audited years 1978, 1979, and 1980. What had happened?

The IRS is prohibited by statute from commenting on individual tax cases; lawyer Silk, for his part, offers this explanation: "The briefs and exhibits we supplied to the IRS last year convinced them that a substantial part of the foundation's activities are charitable and educational, but they continued to regard the magazine itself as primarily a commercial operation — this despite the fact that *Mother Jones* lost money every year and would not have been published except as an effort to reach a broader section of the public with the foundation's message. Meanwhile, even if *Mother Jones were* taxable as a commercial activity, it would have no tax to pay because it lost money. What the IRS has done is to allocate as income all the funds received from subscriptions and advertising revenue, but they have not allowed us the deductions they would ordinarily allow a commercial publishing venture."

Silk adds that he is "reluctant to believe that the IRS action represents harassment" and that "it would seem to be the result of confusion." He expects that this confusion will be resolved at a higher administrative level of the IRS.

July 1982

Darker Cloaks, Longer Daggers

A NEW LAW PROTECTS SPIES' IDENTITIES AND COVERS UP THEIR DIRTY WORK

June 1982

Soon President Reagan will sign the Intelligence Identities Protection Act and visit more destruction on the nation's ever-embattled press freedoms than any recent predecessor. The new law will, among other things, subject anyone who reveals the names of covert CIA, FBI, or Pentagon personnel to a stretch in Federal prison. Advocates of the bill say it will protect the lives of those who serve the United States under cover in dangerous, far-flung places. But even proponents acknowledged in Senate debate that such well-behaved journals of record as *The New York Times* would risk prosecution for reporting intelligence abuses in the normal course of business.

Representative Don Edwards, California Democrat, told the House that the bill "strikes directly at the heart of the First Amendment," and is "unparalleled by any piece of legislation in our nation's history during peacetime."

The act passed the Senate by a vote of 90 to 6 in March; House approval came last September, 354 to 56.

The bill posts penalties for three groups. First, Government employes who have, or once had, access to secrets and intentionally disclose "any information identifying" a covert agent may be imprisoned for up to ten years. Second, Government workers who have had no access to secret identities but on the strength of classified data deduce identities and give them away may get up to five years.

The threat of such punishment for those on Government payrolls means that reporters talking to people attached to the intelligence community run a new gamble—jailing by grand juries without benefit of trial—for refusing to reveal their inside sources, who themselves will now be liable to long prison terms.

Third, the act comes down hard on anyone committing "a pattern of activities intended to identify and expose covert agents . . . with *reason to believe* that such activities would impair or impede the foreign intelligence activities of the United States" (emphasis added).

DAVID SUTER

This reason-to-believe qualifier loomed large in the Senate debate. Most of the Senate fight pivoted on a successful amendment to the bill by Rhode Island Republican John H. Chafee. He made prosecution easier by replacing the so-called *intent* clause with reason-to-believe, although S.I. Hayakawa, the Senate's only certified semanticist, said any distinction between the phrases was "hair splitting." Other Senators made it clear they believed the Chafee language meant the *good intent* of a writer to expose wrongdoing is not a defense against prosecution.

Bill Bradley, Democrat of New Jersey, said, "The reason-to-believe standard would cover virtually all disclosures by an investigative reporter involving intelligence agents."

Joseph Biden, Democrat of Delaware, questioned whether *New York Times* reporter Robert Pear might be imprisoned if he continued to disclose names of current CIA employes in a series on Korean influence-buying in the Congress. Washington Democrat Henry M. Jackson replied to Biden, "That is for a jury to decide." Pear, reached at his paper's Washington bureau, told *The Progressive* he was unaware that his prospects for prosecution had figured in the Senate debate.

So prosecution of *Times* reporters—or anyone else—can be expected. And so, Biden said, can "long debates in editorial rooms of the newspapers of America as to whether or not they go forward with exposing a [Edwin] Wilson or a [Frank] Terpil or anyone else." (Wilson and Terpil are former CIA officers under indictment for exporting explosives to Libya.)

In its report recommending the bill to the full Senate, the Senate Intelligence Committee made clear that the identification of even one intelligence agent may be illegal. Representative Edwards says the bill prohibits "republication of disclosures made by others." One need not even mention any names; "any information" that identifies is enough for prosecution, reads the bill.

The act is intended to protect U.S. spies stationed abroad, although 3,000 of them have been named already by one-time CIA agent Philip Agee, *CounterSpy* magazine, and *Covert Action Information Bulletin*, all hostile to the CIA. Supporters have repeatedly cited the case of CIA Station Chief Richard Skeffington Welsh, who was murdered by anti-American leftists in Athens in 1975. His name had been connected by *CounterSpy* to CIA operations in Peru. Even before Welsh's body reached home, the finger of blame pointed straight at *CounterSpy*. The Intelligence Identities Protection Act quickly became a top legislative priority for the CIA.

But will the act accomplish what its sponsors want? Some say no. *CounterSpy* editor John Kelly told *The Progressive* that Welsh was identified first not by his magazine in 1975, but in 1968 by Julius Mader, an East German who wrote *Who's Who in the*

Ironically, it was the CIA itself that pioneered the practice of naming agents' names. In 1969, an agent published 200 alleged CIA identities in an underground paper, to establish a cover as he threw himself into Operation CHAOS

CIA, naming Welsh and the foreign capitals to which he had been assigned since 1960. Even backers of the act said on the floor of Congress that it would not bring to an end such overseas identification of U.S. agents. Kelly argues that the law will not accomplish what its drafters set out to do, but will instead chill domestic debate on intelligence activities.

Oddly enough, Senator Daniel Patrick Moynihan, New York Democrat, agrees with editor Kelly that much of the information the bill would conceal under the cloak of the criminal code is already in the public domain. Yet it was Moynihan who, with Chafee, introduced the legislation in the Senate in January 1980.

However, by March of this year Moynihan was fighting Chafee's reason-to-believe standard. Moynihan, acting as chairman of the Senate Intelligence Committee, made a stunning about-face. He reminded the Senate that he is its only member with ambassadorial experience. His tour in New Delhi proved to him that "we have failed to provide but nominal cover . . . for American intelligence operatives. [They] might as well be all Texans with high-heeled boots, so conspicuous . . . and well known are they. We are on the edge of making a crime out of the publication of information which is commonly available, information which is not difficult to obtain." Then he voted against the legislation he himself had proposed.

In another midstream change, House Select Committee on Intelligence Chairman Edward P. Boland, Massachusetts Democrat, also an original sponsor, told his colleagues, "I cannot support this bill on final passage," and he too voted against it.

Early supporters now worry the act will hit even middle-of-the-road reformers—and that is exactly what the CIA has wanted since revelations of its adventures in domestic spying hit the front pages in 1975 and 1976. So important was passage of the act to the CIA that Vice President Bush, the agency's former director, helped smooth its way through the Senate. But Bush neglected to tell the Senate how the whole business of naming names got started. It got started by the CIA.

In 1969, six years before an angry and disenchanted Philip Agee went public, CIA agent Salvatore John Ferrera published 200 names and addresses of alleged CIA employes in the August 26 issue of *Quicksilver Times*, a Washington, D.C., underground newspaper he had helped start. He apparently exposed those 200 low-level agency employes to establish credible cover with U.S. dissident writers, whose ranks he was infiltrating for the CIA. So it turns out that the CIA pioneered the practice of naming its agents—something it now wants outlawed.

Ferrera had a hand in Operation CHAOS, an illegal CIA domestic program that harassed the dissident press from 1969 to at least 1974, in violation of the 1947 Congressional ban on any "internal-security functions" for the CIA. The workings of Operation CHAOS are still largely a secret. A little-noticed loophole in the Intelligence Identities Protection Act may help keep them so: The act defines "covert agent" as an officer or employe of an intelligence agency "who is serving outside the United States." The CIA is thus encouraged to fly its domestic operatives overseas every five years to assure them the protection of the Identities Act.

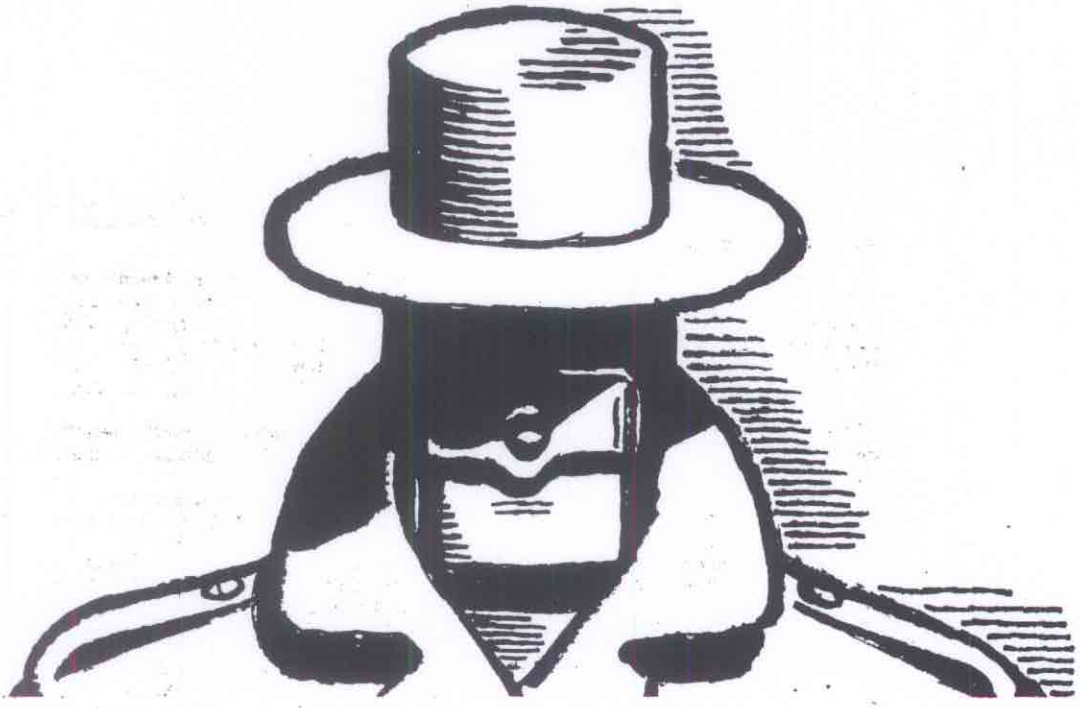
Indeed, CHAOS agent Ferrera flew overseas to spy on Philip Agee after keeping watch on *Quicksilver Times* in Washington, Liberation News Service in New York, and *Second City* in Chicago. The new act may help conceal the names of domestic operatives like Ferrera, thanks to its overseas-travel clause, even though most members of Congress thought they were voting for protection of our overseas spies only.

Such a potential loophole in any guidelines against CIA collection of information about Americans here in the United States was anticipated by the Church Committee in its 1976 Senate report on CHAOS. And now, just such a real loophole will allow the CIA to violate its 1947 charter—to spy domestically. From here on, domestic spies may be protected from exposure so long as they are flown abroad every five years, as was Ferrera.

Bernard Raimo, counsel to the House Intelligence Committee, confirmed that this safety hatch for domestic agents was written into the law at the behest of the CIA. "When we were drafting this two or three years ago, the CIA prevailed upon the committee to establish some time so as to include people in clandestine service who come back here to train. Their career pattern is overseas," he said.

When examined closely and from the point of view of its backers, the act makes sense, given recent developments in the intelligence community.

When the CIA reported that Libyan assassination squads were gunning for him, President Reagan ordered Director William Casey to embark upon "domestic counterintelligence" on December 4, 1981. With foreign assassins reportedly loose in the United States, an unleashing of the CIA seemed reasonable to most—until the Libyans "disappeared," leaving the FBI without a trace of evidence. What *was* left behind was the executive order to unleash the CIA at home—an order the Administration had been preparing long before the lurid hit-squad news bought the Reaganites a marketable excuse.



Reagan's Executive Order 12333 instructs the CIA to "conduct counterintelligence activities within the United States," and contains a legal aperture the size of a barn: The CIA may "conduct special activities approved by the President." In the name of counterintelligence, the CIA, FBI, and Army waged war from 1967 to 1974 on black, antiwar, and antinuclear dissidents and their publications. For example, in early 1967, *Ramparts* magazine, then perhaps the leading publication of the Left, was ready to expose the CIA's funding of the U.S. National Student Association. The CIA got wind of what *Ramparts* was up to two months before publication and, viewing the rumored article as an attack on the CIA, started to shadow the magazine's editors, ostensibly to find out whether they had ties to hostile intelligence services. The agency ordered counterintelligence agent Richard Ober to conceive a counterattack. Ober's proposals remain secret, but his was exactly the sort of operation the CIA has in the past called "foreign counterintelligence." It will apparently be permitted again, thanks to Reagan's December 4 order.

Congress was wary of such Presidential manipulation in 1947, when the CIA was established. Legislators fresh from a war with totalitarians in Europe and Asia warned that a powerful intelligence agency under the control of the President might turn into a security police apparatus. So Congress, with a respectful eye toward civil liberties at home, wrote into the 1947 National Security Act language barring the CIA from "internal-security functions" and police duties. On April 24, 1947, Representative Clarence J. Brown of Ohio said it all: "I am not interested in setting up here in the United States any particular central police agency under any President, and I do not care what his name may be, and just allow him to have a Gestapo of his own if he wants to have it."

Now Reagan has circumvented that internal-security ban. Once the Intelligence Identities Protection Act is on the books, the press may be prevented from reporting any CIA abuses—of the President's making or an energetic low-level functionary—domestic or foreign.

Illegal CIA political action is not all that may be shielded under this act. Representative Robert McClory, Illinois Republican, gleefully pointed out just before the House approved the act that "this legislation also covers FBI agents who operate under cover when they are engaged in counterintelligence activities." The publishers of underground and black-power newspapers, among others, see the euphemism of "counterintelligence activities" for what it too often is.

It remains to be seen how the courts will rule on this reckless new law. Certainly, until now, the press has been asleep. But editors and reporters had better wake up. Spy chief Casey wants authority to search newsrooms without warrants for evidence of disclosures of CIA agent identities. And Casey is proposing to Attorney General William French Smith that CIA agents be granted immunity from criminal prosecution while on missions. The bill awaiting Ronald Reagan's signature will, sadly, not be a hard act to follow for other hoofers in the President's anti–First Amendment variety show. ■

UPDATE: *The final House-Senate conference report on the Intelligence Identities Protection Act substantially limited the scope of this legislation. The conference report, issued after "Darker Cloaks" had gone to press, said the law "does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses." That report, taken as the final word on congressional intent, was quite different from the statements made by proponents on the floor of Congress. Of the law, as it applies to journalists, Society of Professional Journalists attorney Bruce Sanford says, "Ignore it." But the law has kept intelligence operatives from talking to reporters.*

CIA Demands

I am suing the Central Intelligence Agency for violating the Freedom of Information Act because the agency has refused to release files concerning its infiltration of the dissident U.S. press.

I first requested CIA documents on the underground press June 21, 1979, while on assignment from the Columbia Journalism Review to write "Sabotaging the Dissident Press." The article was was published, no thanks to the CIA, in the March/April 1981 issue. There I detailed how the Army, Federal Bureau of Investigation and the CIA beginning in 1967 infiltrated and harassed publications and tried to put them out of business. I had turned up CIA documents that prove the agency had routinely infiltrated a whole generation of antiwar and black power periodicals, sometimes using local police informants.

After discovering these initial documents, I decided that under the FOIA the American people have the right to see the secret files from this illegal CIA attack on the first amendment.

So I requested the documents and asked the CIA to waive search and copy fees it would normally charge to produce them. I could not afford to pay fees since, like many freelancers, I earn less than $5,000 a year from writing. The FOIA says the government shall waive fees if releasing files would primarily benefit the general public. Congress intended this section of the law to prevent bureaucrats from discouraging scholars and journalists by charging them large sums of money for government records.

The CIA refused to waive most fees for its underground press files. The agency's Charles E. Savige responded to my fee waiver request July 19, 1979, writing, "It is doubtful that we would have enough

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Lester A. Pines, Esq.
Langhammer & Pines
126 State Street
Madison, WI 53703

15 SEP 1980

Dear Mr. Pines:

This is to advise you of our estimate of the additional search fees associated with the FOIA request of your client, Angus MacKenzie, for information pertaining to the underground press.

The additional fees come to a total of $153. They consist of 22 1/4 hours of clerical search time @$4 per hour and 8 hours of professional search time @$8 per hour. The total search fee, including the amount we mentioned to you in our letter of 1 August 1980, now comes to $61,501.

[illegible] beginning the processing of the balance of [illegible] request, we would need to receive a deposit of [illegible] the balance of

The price Angus Mackenzie has to pay is clearly spelled out by the CIA in response to his FOI request.

$30,000 to Start Search of Files

releasable material in our files to benefit the general public to a degree sufficient to justify a fee waiver." However, the agency would waive fees "if authorized representatives of each paper requests records on their organizations."

The trouble with this fee waiver is that it has no basis in the law and most papers that were subject to infiltration by the CIA are now defunct, the staffs scattered, with little hope of getting releases from them.

More than a year later the CIA decided how much money it wanted just to search — not to copy — its files on the underground press. On August 1, 1980, CIA Information and Privacy Coordinator John E. Bacon estimated fees would total $61,348. He later boosted that sum to $61,501. Payment, he wrote, would not guarantee the CIA would find any documents releasable.

In addition, he demanded payment of $30,000 and my promise to pay the remainder of the $61,501 before the agency would begin its search for the documents.

Eight months later, on administrative appeal, the CIA dug in its heels. On March 3, 1981, the same day **Columbia Journalism Review** published my "Sabotaging the Dissident Press," Bacon wrote a letter repeating that release of the files would not benefit the general public. Coincidentally, excerpts from my article were running on the Associated Press wire, on NBC radio network news and on National Public Radio. My investigation seemed to be benefiting the general public.

What could I do against the CIA? I knew that when Congress put teeth into the FOIA in 1974, its House-Senate conference report said "fees should not be used for the purpose of discouraging requests." But I was powerless as a freelance writer to fight the CIA's tactics.

Here comes help. The Freedom of Information Service Center, which is a joint project ot the Reporters Committee for Freedom of the Press and the Society of Professional Journalists, ran to my rescue by arranging pro bono services from Steptoe & Johnson, one of the largest Washington, D.C., law firms.

Almost three years after my initial request, attorney Kevin Brosch phoned the CIA on my behalf April 13, 1982. A CIA representative told Brosch that due to the sensitive nature of the requested documents, the agency would not release for two more years files on seven newspapers from which I had earlier managed to get releases in order to obtain a fee waiver.

On June 16, 1982, we filed suit against the agency with Executive Director of the Reporters Committee Jack C. Landau as co-counsel in an attempt to clarify two major FOIA issues. One, what is a reasonable wait for documents? And two, do journalists with access to national media deserve fee waivers on the presumption that files released to them will primarily benefit the general public?

The Justice Department, which defends the CIA in such suits, had told attorney Brosch that the information I have requested about CIA surveillance of dissident papers will involve a large number of files.

Meanwhile, CIA director William J. Casey is campaigning to have his agency exempted from requests such as mine under the FOIA. My estimate is that Casey and company know how much the American people are going to be disenchanted with his agency when and if the full extent of CIA operations against domestic dissident newspapers becomes public. No wonder Casey wants the CIA exempted. Every journalist can help by calling their elected representatives to make sure the CIA receives no more FOIA exemptions.

FOI '82

Covering Up Domestic Spying

The American Civil Liberties Union, the Central Intelligence Agency, and Republican Senators Barry Goldwater and Strom Thurmond have become bedfellows in the latest effort to exempt the CIA from the Freedom of Information Act.

True, the ACLU, the Senators and the CIA are still nitpicking over the language of the bill — S.B. 1324 — which proposes to allow the Director of Central Intelligence to withhold "operational files" from public scrutiny. These former adversaries agree the bill will free the CIA from searching those files it never makes public anyway in response to Information Act requests. This, they say, will allow timely processing of other Information Act requests, speeding up the current two-to-three-year wait.

Critics, however, say the bill amounts to a total CIA exemption from the Information Act, under which the CIA is now required to release some files.

Both CIA Deputy General Counsel Ernest Mayerfeld and ACLU Attorney Mark H. Lynch, friendly enemies after their seven years of Information Act courtroom battles, say the bill was introduced to Congress after they reached an informal agreement. Their compromise centers on the CIA dropping its push for a total FOIA exemption and speeding up processing of requests.

ACLU lawyer Lynch commented on the talks with the CIA's attorney: "We're two guys who've spent a lot of time in court together shooting the shit and I've always told him if they get off the total exemption thing we might be able to work something out."

But some Information Act experts say the CIA is taking the ACLU for a ride.

An examination of the bill and CIA attorneys' interpretations of it reveal it will hide files from those CIA components which were responsible for illegal domestic spying. This provision is timely. President Reagan, December 4, 1981, ordered the CIA into domestic spying. CIA political espionage is rising like a ghost from the Debategate scandal, in which *Time* magazine revealed that CIA Director William J. Casey, when he was Reagan's 1980 campaign manager, set up an intelligence apparatus using former CIA agents to gather political information from their colleagues still active in the agency.

Will this legislation help keep secret any future domestic CIA political activities? Addressing that question, CIA Deputy Director John N. McMahon told the Senate Intelligence Committee not to worry. "There will not ever again be a repeat of the improprieties of the past. And let me assure you that Bill Casey and I consider it our paramount responsibility that the rules and regulations not be violated." More CIA assurances follow.

The conservatives and the ACLU support the bill because, they say, it will NOT expand the agency's power to keep files secret. They claim, instead, it will speed up agency releases. Said Sen. Goldwater, "By exempting from long and burdensome searches those operational files from which very little information has ever been released, the processing of all other requests can be completed much sooner."

The CIA Deputy Director told the Senate Intelligence Committee June 21, "It is hoped the CIA can substantially curtail the present two-to-three-year wait that requesters must now endure." This assurance is not in the proposed law.

The ACLU's FOIA expert, Allan Adler, put it another way. "If this bill lives up to CIA promises, it will be a good bill. The CIA says nothing in this bill will increase or expand withholding authority. It just foregoes search and review of material we agree is seldom released."

The guts of this legislation will permit the CIA to keep secret its "operational files," the definition of which is the key to this bill. The CIA and ACLU disagree about what that term means.

This reporter asked the ACLU and CIA for definitions of "operational files" and got two wildly different answers.

CIA Deputy Counsel Mayerfeld, formerly an operations officer, says "counterintelligence" files will be exempt from release. "Counterintelligence" is the word the CIA used to describe its illegal domestic spying from 1967 to 1974. The agency may still be using that term for any current domestic operations.

MHCHAOS was the counterintelligence operation from 1967 to 1974 that targeted U.S. antiwar and civil rights movements — and the underground press. One CIA source says two roomfuls of these files have yet to be released under the FOIA. The ACLU's Lynch says those documents would be made public under this legislation because they have been the subject of a congressional investigation. But CIA Attorney Mayerfeld says that whether this bill would keep secret MHCHAOS documents "gets to be a complex question I can't answer."

Mayerfeld also says "security liaison arrangements" will be exempt under this bill. The CIA Office of Security conducted extensive liaison with U.S. police in the late 1960s and early 1970s. The CIA organized police political spying units which then fed information to MHCHAOS.

These domestic operations were run despite the congressional ban on them. Congress created the CIA in 1947 "*Provided*, That the agency shall not have police, subpoena, law-enforcement powers or internal-security functions." Nevertheless, should CIA contacts with local law enforcement continue, the files from those operations may be kept secret under this legislation.

Other domestic operations and files may become exempt from disclosure also. Mayerfeld says "counterterrorism operations" are to be exempt. In 1974 the CIA changed the name of MHCHAOS to the International Terrorism Group, under Richard Ober, the MHCHAOS commander. Ober kept MHCHAOS files on more than 300,000 Americans. Mayerfeld refused to comment on whether this bill would bar the public from seeing files from the International Terrorism Group.

The ACLU holds a different view of what "operational files" mean. Although the CIA's Mayerfeld was certain the definition was written into the legislation, ACLU Attorney Lynch told this reporter the bill contains "no definition." On the other hand, the ACLU's FOIA expert Adler attempted to define the term: "Operational files contain how the intelligence is gathered. You are not talking about intelligence itself."

The Organization of American Historians sent Dr. Anna K. Nelson before the Senate Intelligence Committee to testify that the term "operational files" includes all files. "Is there any file of a government agency that does not deal with 'operations'?" she asked the committee.

Adler says if the ACLU can win "pinned down meanings of operational files," the bill will then contain "no additional withholding authority" and the ACLU will support it. But when the Senate Intelligence Committee asked the ACLU to submit revised language for the bill, the ACLU declined, and instead backed the House version introduced by Democrat Romano L. Mazzoli of Kentucky, according to committee sources.

The House bill contains basically the same definition of "operational files" as the Senate version.

The House bill does contain differences from the Senate version that the ACLU says are important. Some experts, however, are not so sure the different language is better. The Senate version opposed by the ACLU would have let the CIA director designate which files are to be exempt. The House bill drops that provision. However, a spokesman for Sen. Walter D. Huddleston, Democrat of Kentucky on the Intelligence Committee, says that "makes no difference." With either version, the CIA will decide which files to keep secret.

The House bill also provides for the release of files of investigations into CIA wrongdoing. That change from the Senate version might be important except that it depends on the CIA to determine what constitutes "the subject of an investigation."

For instance, operation MHCHAOS was investigated by Senator Church's committee in 1975. But Senate investigators ignored MHCHAOS operations against the dissident U.S. press. MHCHAOS files on the underground publications were not forwarded to the committee for inspection. Those documents apparently remain in the CIA counterintelligence section. Will those files be released under the House bill because the overall operation was investigated by the Senate? Or will those documents be exempt from disclosure because they are part of counterintelligence files? The CIA shall decide.

The CIA told the Senate its method of deciding which of its files investigated for impropriety it will release. According to John N. McMahon, Deputy Director of Central Intelligence, if the agency finds that allegations of wrongdoing are merited, records relating to that impropriety will be released. In other words, the CIA says it will determine which charges against it are true and will then make public files that confirm those charges — an assurance reporters who have attempted to get CIA files find difficult to accept.

The House version, supported by the ACLU, contains another questionable improvement over the Senate bill. Some experts, like the historian, say "operational files" may include intelligence reports. The House bill calls for search and review — but not release — of reports derived from operational files. So the House bill, while an improvement over the Senate bill on this score, remains unclear about whether the CIA would have to release intelligence reports. If those intelligence reports could be kept secret under this measure, the legislation amounts to a total exemption for the CIA from the Information Act.

The bills are much more specific in their designation of CIA components that shall be exempt from the search and release requirements of the Information Act.

Specifically, the bills define as exempt "operational files located in the Directorate of Operations, Directorate of Science and Technology and Office of Security."

The Directorate of Operations, also known as the dirty tricks department, ran MHCHAOS against the antidraft, antiwar and civil rights movements. It also ran the agency's still-secret operations inside the United States Student Association into 1979.

The Office of Security studied the U.S. press and lent support to MHCHAOS. Those operations were so widespread that they, for example, checked into the Washington-Baltimore Newspaper Guild, which rep-

resents reporters, and on March 16, 1968 received information from an infiltrator of a tiny antiwar sheet in Lubbock, Texas, called the *Forum*, according to documents released under the Information Act.

The bills would exempt files from search and review in those CIA components unless you were requesting them on yourself. But it is unclear from the language of the legislation whether or not your personal files, once located, could be designated as exempt from disclosure.

Nevertheless, the CIA and ACLU say this legislation will not cover up files that might now otherwise be released.

The CIA says "by removing these sensitive operational files from the FOIA process, the public is deprived of no meaningful information whatsoever."

Lynch agrees. He told the Senate Intelligence Committee June 28 that those operational files "are now invariably exempt from disclosure."

Are those CIA-ACLU claims true? The categorical answer is NO. Operational files ARE occasionally released by the CIA. They have documented news stories that have embarrassed the agency.

Here is one of many examples. A document was released to John Foster Berlet, who edited the Denver-based College Press Service, and that document was used to corroborate a magazine article. Berlet's syndicate mailed antiwar news to more than 200 college newspapers, and still does under new ownership. On October 25, 1976, in response to a request by Berlet, the CIA declassified and approved for release a raw informant's report on him. Dated April 29, 1971, the agent's report told the CIA of an important news service move from its Washington, D.C. headquarters to Denver. The agent, Salvatore John Ferrera, reported Berlet "is an enthusiastic person but was closed-mouthed about his background." That report and others like it were used to document "Sabotaging the Dissident Press," a *Columbia Journalism Review* article by this author, which detailed the intelligence agencies' campaign to destroy domestic underground newspapers.

These bills would cover up the kind of news that appeared July 16 in the *Washington Post* revealing that the CIA as late as 1979 ran operations inside the United States Student Association, which represents three million students on 360 U.S. campuses. The CIA file index which documented that story would have been kept secret under this legislation because it indexed files out of the Directorate of Operations, says the students' attorney David Sobel.

Perhaps the most obvious cover-up contained in these bills is the section that will throw out court challenges to CIA withholding of documents under the Information Act.

CIA Attorney Mayerfeld testified before the Senate Intelligence Committee that of 77 suits against the agency under the Information Act, 46 would be affected by this legislation; of those, 22 would be dismissed outright and a majority of the requested files would be designated exempt in 24 cases.

A few days later, Mayerfeld changed his figures. To a Senate Intelligence Committee staffer, he said of 69 suits against the agency, he didn't know how many would be affected.

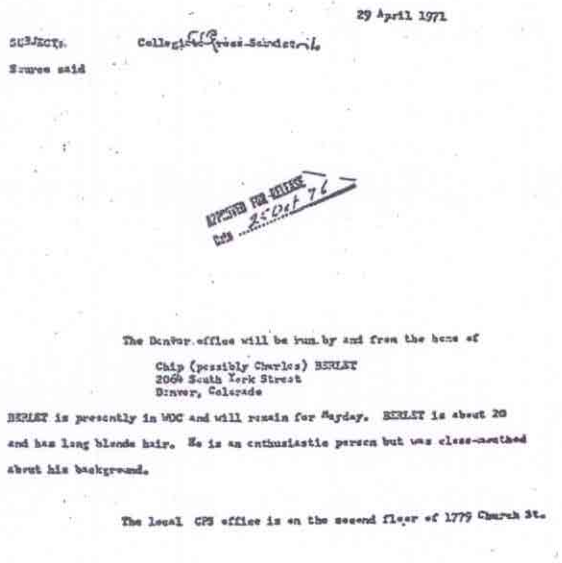
Why the change in his testimony? Said the committee staffer, in the polite manner of the national capital, "he was guessing."

As for the ACLU's position on the lawsuit dismissals, Adler says, "we haven't addressed that issue at this point."

Here is one example of these lawsuits, to give an indication of what may be dismissed. In 1979 when on assignment to write "Sabotaging the Dissident Press," this reporter requested the CIA's extensive files on the underground press. After the CIA requested $61,501 to search its files and persisted in refusing to release even one page, I filed suit against the agency June 16, 1982.

The CIA agreed September 9, 1982 to release some of those files without charge during the next year.

Would these files be released had this legislation passed, say, last year? I asked Lynch. They would be released because that operation was the subject of an investigation, he said.



29 April 1971

SUBJECT: College Press Service

Source said

APPROVED FOR RELEASE
DATE 25 Oct 76

The Denver office will be run by and from the home of

Chip (possibly Charles) BERLET
2069 South York Street
Denver, Colorado

BERLET is presently in WDC and will remain for Mayday. BERLET is about 20 and has long blonde hair. He is an enthusiastic person but was close-mouthed about his background.

The local CPS office is on the second floor of 1779 Church St.

This censored CIA informant's report to the Directorate of Operations was released to College Press Service October 25, 1976, under the Information Act, contrary to CIA-ACLU claims that this type of operational file is never made public. The CIA may keep this type of document secret if Congress passes another exemption for that agency.

But CIA attorney Mayerfeld would not give a straight answer about the release of MHCHAOS-related documents, I told Lynch.

"Well, that's one of the things we'll have to pin down," Lynch said.

The real question becomes: why didn't the ACLU oppose this legislation from the start? The ACLU delivers many answers to that question, including discussions about the role of opposition, fighting for better language and tactics and strategy thereof. Those debates might be worth airing had not this investigation turned up another reason. The ACLU and CIA reached an informal agreement on this legislation before it was introduced to Congress.

A source who works closely with Lynch says "the deal is on."

The CIA says the deal is on.

Lynch, who has fought long and hard for the Information Act, says, "I've always told him (Mayerfeld) if they get off the total exemption thing we might be able to work things out."

CIA Deputy General Counsel Mayerfeld says "there was kind of an understanding that we should wind up somewhere between total relief and the status quo. There was a mutual realization that some improvements could be achieved and this bill was it."

Mayerfeld said some of those discussions were with Mark Lynch. When asked when the understanding was reached, Mayerfeld said "before the bill was introduced."

What might have happened if the ACLU refused the deal? Would the CIA have gotten a total exemption from the FOIA? Is the ACLU just making the best of a bad situation?

Morton Halperin has one answer. He had served as Henry Kissinger's right-hand man in the National Security Counsel and he now heads the ACLU project called the Center for National Security Studies and works closely with Lynch. He justified the deal this way to rebelling ACLU troops: "The CIA would not have given up their public and vigorous effort to secure a total exemption unless we were willing to state that this new approach was one we could consider." In other words, the CIA may have gotten a total FOIA exemption but for the deal.

The CIA doesn't think it could get a total exemption. CIA General Counsel Stanley Sporkin told this reporter, "We would have liked a full exemption but we realized that wasn't in the cards."

One of the nation's top FOIA experts, Tonda Rush, who directs the Freedom of Information Service Center for reporters in Washington, D.C., explained why this total exemption wasn't possible for the CIA. "There wasn't anybody in the Senate who would sponsor the total exemption."

And if the ACLU opposed this legislation? Lynch says "if the ACLU opposes this bill, it won't go through Congress." Most knowledgeable congressional sources agree.

One respected reporter has an opinion of why the ACLU can't oppose this legislation. Society of Professional Journalists President Steven Dornfeld says "it would be difficult to pursuade the ACLU to oppose the bill. The reason is that staff members of that group had much to do with giving birth to the measure."

Remember, the ACLU's Adler said that if this bill lives up to CIA *promises*, it will be a good bill. Remember the CIA *assurances* that there will be no more improprieties. Remember agency *hopes* for speeding up its Information Act response time?

The ACLU seems to have forgotten something it once knew.

It has forgotten the testimony of its legislative director John H.F. Shattuck in July, 1981 when he spoke against an FOIA-CIA exemption before Congress. He told a committee, "CIA Director William Casey . . . is determined to pursue a broader FOIA exemption for the CIA. What is the public to make of this when confronted with reports of a proposed Reagan Executive Order authorizing the CIA to carry out broad domestic security functions inside the United States. Why should the Congress accept this 'trust us' approach to CIA accountability . . . ?"

Yet the ACLU is now engaging in just that "trust us" mentality.

"Basically, you've got the CIA and the ACLU. There are no other players. If they're in agreement, who is going to pick a fight?" That is how one congressional FOIA expert sees this legislation floating through Congress to the President's pen.

In this game, the ACLU should continue its fight for less secrecy in government. The ACLU should tell Congress the deal is off. The ACLU should use its good power to kill this legislation.

The Nation
September 1983

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Help Pry the Truth From the CIA

Angus Mackenzie is suing the Central Intelligence Agency and is preparing to sue the Federal Bureau of Investigation under the Freedom of Information Act to make public files from their operations against the dissident U.S. press. Their efforts to destroy newspapers are detailed in this booklet.

Most files from CIA and FBI newspaper-smashing campaigns are still secret. Many of the records may stay secret, even though the CIA September 9, 1982, agreed to produce some of them over the next year. Now the CIA is claiming that many of its documents on the smallest of U.S. periodicals are exempt from release to the public because exposure of those files would violate "national security." That "national security" claim may allow the CIA to keep secret its activities against the underground press.

We are fighting that "national security" claim in court. It is a tough fight. Courts presume the CIA is right. The burden to prove otherwise is on us. The lawsuit, Mackenzie *v.* CIA, is being handled by a team of top-notch attorneys in Washington, D.C., obtained free by the joint project of the Reporters Committee for Freedom of the Press and the Society of Professional Journalists.

But even with free attorneys, investigative costs for this suit are running $40,000 per year. That is why we need donations.

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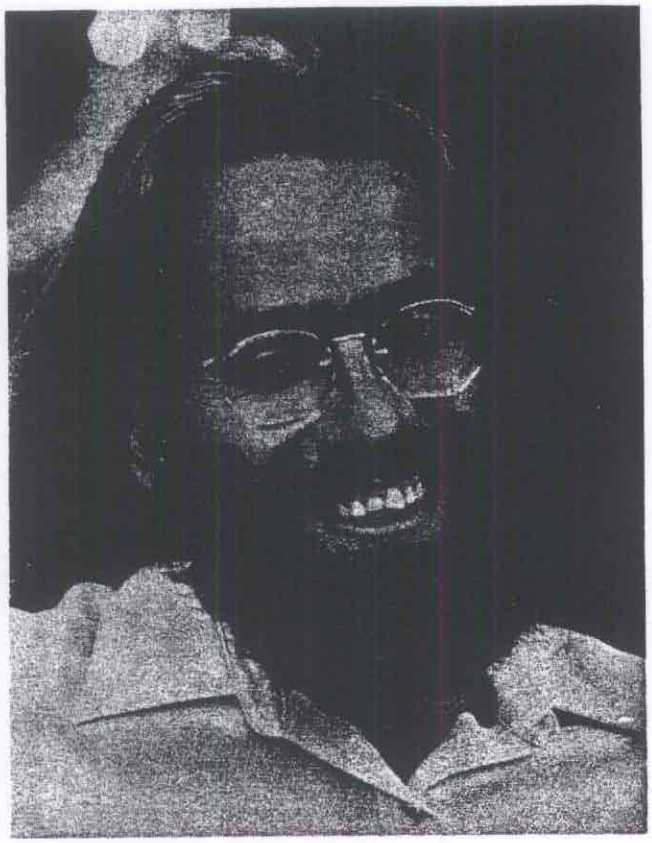

About the Author

Angus Mackenzie is director of the Media Alliance Freedom of Information Project and is an associate of the Center for Investigative Reporting in San Francisco. Portions of his writings in this booklet have been distributed by Los Angeles Times Syndicate, Associated Press, NBC radio network news, and National Public Radio.

Mackenzie's study of government-press relations began after he was repeatedly arrested for selling newspapers on the streets in 1970. Later that year, in June, his newspaper The People's Dreadnaught *was raided by Beloit, Wisconsin, police. In 1975 he took those police to trial for entering his newsrooms without a warrant and for arresting him. He won a $2,500 judgment from a federal jury which found the police had knowingly violated his civil rights.*

In 1978 he began his search for evidence that suppression of the anti-war press had been coordinated from Washington, D.C. Much to his surprise, he found the Central Intelligence Agency at the center of the plot. He sued the CIA for its files on the underground press June 16, 1982. Here are his findings, some of which are reprinted from the prestigious Columbia Journalism Review.

Cover: Jane Norling

Photo: Tema