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1-15-1980

John F. Sonnett Memorial Lecture Series: Intelligence Gathering and the Law: Conflict or Compatibility?

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Recommended Citation

Civiletti, Benjamin R., "John F. Sonnett Memorial Lecture Series: Intelligence Gathering and the Law: Conflict or Compatibility?" (1980). *Lectures*. 17.

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INTRO

CIVILETTI: INTELLIGENCE GATHERING

A long time ago, Sun Tzu, the Chinese general and philosopher, stressed the importance of intelligence by stating that battles are won long before the armies meet in the field. However, the need for foreign intelligence is not limited to the wartime scenario. For example, reconnaissance missions by the U-2 spy plane uncovered the Cuban Missile Crisis and ultimately helped avert nuclear war in 1962.

The primary purpose of intelligence activities is to provide information for the President to make informed decisions in conducting international relations and maintaining national security. While our government needs the best available information to gauge the intentions and activities of foreign powers, this need for intelligence is counterbalanced by the United States Constitution itself. An inherent quality of national security is the control of information. Conversely, the First Amendment provides that the flow of information shall be free from governmental constraint. Throughout American history, the ideals of national security and the First Amendment have often clashed, producing no outright winner. For example, McCarthyism threatened an individual's right of association, while the Pentagon Papers case threatened the freedom of the press and the doctrine against prior restraint.

Courts have also curtailed Fourth Amendment rights in the name of national security. Intelligence information is used for two main purposes: to protect the national security and to gather evidence for use in criminal prosecutions. Technological

advances such as satellite photography and state of the art eavesdropping devices pose a serious threat to the Fourth Amendment prohibition against unlawful searches and seizures. With each technological improvement, it becomes more difficult to know when a particular surveillance technique requires a warrant.

To protect against such abuses by national security operations, Congress has passed several pieces of legislation in the past quarter century. The Freedom of Information Act was enacted to further the policy of governmental disclosure of official records, allowing any person or corporation to request disclosure.¹ The Hughes-Ryan Amendment requires the timely reporting of each proposed covert action operation by the CIA to seven congressional committees.² Other Congressional legislation requires a warrant to conduct electronic surveillance within the United States for intelligence purposes.³

Nevertheless, intelligence law is still in its fetal stage. In a world where the Soviet threat has diminished substantially, the role of both domestic and foreign intelligence requires redefining. In his lecture, former Attorney General Benjamin Civiletti discusses how this new field of law must develop in order to strike a balance between the government's need for information and the protection of an individual's constitutional freedoms.

A primary function of government is to protect the freedoms

¹ 5 U.S.C. § 552(a) (1) (2) (3) (1967).

² 22 U.S.C. § 2422(a) (1976).

³ See Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510-2520 (1968); Foreign Intelligence Surveillance Act, 50 U.S.C. §§1801-1811 (1977).

that society holds dear. The need to protect the nation cannot become an excuse to violate the same rights that the government was instituted to safeguard. As a result, the Executive Branch must be doubly careful to make sure that the Constitution's system of checks and balances is not eviscerated in the realm of intelligence activities. In this context, Attorney General Civiletti's lecture provides interesting opinions in the rapidly expanding field of intelligence law.