Law Enforcement and Intelligence in the Last Years of the Twentieth Century

by Philip B. Heymann

Introduction

Several major issues about the respective roles of law enforcement and the intelligence community have emerged with the end of the cold war. Since World War II, we have had two quite different federal governmental systems charged with gathering information, but largely about different matters in different places. Suddenly, they find themselves working on the same issues in the same areas of the world. The issues created by this overlap are: what use law enforcement can make of information gathered by the intelligence community; and how the intelligence gathering activities of the agencies in the two communities can be kept from tripping over each other abroad.

In the past, law enforcement and intelligence have had different purposes, different rules, different sources and methods, and different expectations in terms of the quality of the information they collect. Intelligence agencies gather information in order to assist policy makers, most importantly in the areas of national security; law enforcement investigators gather information for prosecutions. Because of the overriding importance of national security and because the information gathering generally involves activity abroad and not U.S. citizens, there are few rules binding on intelligence gathering. The Bill of Rights and a network of

The Honorable Yuli Vorontsov, Ambassador of the Russian Federation to Washington, addressed the November 29 breakfast.

November Breakfast Speaker

Russian Ambassador Laments Lack of U.S. Support


Ambassador Vorontsov intentionally kept his opening remarks brief to permit more time for questions. He began by acknowledging the difficulties inherent in bringing together two countries that had been enemies for such a long time. While both sides have made declarations about the need for improved relations, he told the audience of more than 100 that, "so far as practical deeds are concerned, it's a very, very difficult thing" and "we haven't progressed very much in the field of practical things."

Among the relatively minor problems he mentioned was his inability to get the State Department to remove Russia from the list of "enemy countries" for the purpose of selling hunting rifles in the Unit-

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ed States. "Why, in the name of God," he exclaimed, "are we on the list of 'enemy countries' together with Libya, Iraq, and the others? There is no explanation."

Another problem he saw he described as "spy mania." Ambassador Vorontsov said that everyone in the Russian Embassy, including the Ambassador, must give notice to the State Department before they can travel beyond a 25 mile radius from Washington, DC. "Even the Albanians can travel freely now," he noted, but "we have to make the notification. Why?"

The "big things" that hinder relations between the two countries include the enlargement of NATO. He said that Russia still has a serious fight going on between "the forces of democracy" and "the forces of the old order," and the debate over enlarging NATO "strengthens the hands of the Communists" to regain control of the country. "Doesn't this mean anything to you?"

According to Ambassador Vorontsov, on both sides of the ocean leaders are "not thinking," when they make important policy statements, about the effects their words will have in the other country. He told the group that there are forty-three political parties in Russia contesting the parliamentary elections—one of them is the "beer lovers' party," and "who can expect them to think seriously about the impact of their statements on the United States?" In this respect, he argued, "we are young—you are older. You are more experienced, and you should lead in that important historical experiment of changing huge countries from totalitarian states to democratic states. I'm sorry to say, but you are not helping very much. I expected more. We are disappointed in Russia that the Americans are not leading in changes in our relationship. For some reason, you are continuing the old line, and that is a pity."

Ambassador Vorontsov said he sometimes senses a "nostalgia" among Americans that "it was better when the Soviet Union was an enemy—then you knew who was a friend, who was an enemy, ... and why your allies should listen to you more attentively."

He concluded by inviting the American legal profession to assist Russia with refurbishing its judicial system. "We have made progress with respect to freedom of the press, and political parties, but there has been no progress in the juridical system—the thinking is the old way, and practices are terrible old ones—we need serious help in all aspects of juridical change."

During the question period, Ambassador Vorontsov was asked how long he thought the United States would be in Bosnia. He replied "not very long," and—to considerable laughter—predicted that American troops would be home before the American election.

When asked whether Russia would soon ratify the START II treaty, Ambassador Vorontsov said nothing would be done before the 17 December Duma election because everyone is focusing upon getting reelected. On the basis of earlier discussions within the Duma, however, the Ambassador said he was not optimistic about START II ratification even after the election; and he attributed Russian reluctance to American interest in anti-ballistic missile (ABM) development. If the United States builds an ABM system, he said, Russia would likely want to increase its production of offensive missiles to protect itself from an American preemptive "first strike."

Asked about the conflict in Chechnya, Ambassador Vorontsov drew a comparison with the American Civil War. With a specific reference to President Lincoln's first State of the Union address, he said that Lincoln elected to respond to force with force and that "we have exactly the same situation, and we are responding forcefully." While noting that "many other countries" do not understand what is going on, he argued "the United States should understand it."

When asked about the prospects for a future Russian Government hostile to the United States, the Ambassador said that "many things are possible" and criticized the "wait and see" policy of the United States. "You are sitting on your hands, saying that 'it is very unstable now, what can we do?' You'll see—you'll see something that is not very pleasant, if you are going to continue to sit on your
BOOK REVIEW

My American Journey
Colin L. Powell (With Joseph E. Persico)
Pages: 643. Price: $25.95

Reviewed by John Allen Williams

It is difficult to imagine a more formidable figure than Colin Powell: Army General, National Security Advisor, Chairman of the Joint Chiefs of Staff, and for a time the odds-on favorite to send a sitting President into retirement. He is also a contradictory figure: a warrior not eager to use force, a moral man who is not a prude, a man who has received a knighthood yet retained the common touch, and a believer in civilian control who would confound his civilian bosses on issues he deemed important. His biography makes him more human and clarifies the factors that propelled a mediocre and unmotivated student through a distinguished Army career and into national prominence.

As a cadet in the ROTC program at the City College of New York, and as a member of the elite Pershing Rifles there, Powell discovered a knack for leadership and a love for order and discipline that he did not know he possessed. In that setting he assumed leadership positions for the first time in his life. As an African American he might have found his race a barrier to advancement, but it was not so in the Army by then. Civilians do not always understand that the military was among the first major American institutions to bring down the barriers of racism, and they were significant ones. Recent racial incidents show that the battle is not yet won, but the military takes equal opportunity very seriously—to Colin Powell’s benefit. The incidents of racism he did experience were isolated, generally off post, and dealt with without much apparent rancor. If people were stupid enough to be bigoted, well, that was their problem and not his.

General Powell’s Army career as chronicled here shows him to be typical of the best officers of his generation. Like them he was profoundly affected by his Vietnam experience—particularly by the loss of a close friend. The lesson to be drawn is not that nations should not resort to the force of arms, but that they should do so reluctantly but with overwhelming force. It was a lesson the country would employ in the Persian Gulf with great effect. He learned well the lessons of soldiering: take care of your people, pay attention to details, and watch your back. These lessons would serve him well in his bureaucratic assignments.

The book is noteworthy for what it does not say as well as for what it does. It is not a kiss-and-tell effort, and no one would get on the afternoon talk shows based on its contents. Powell (with Joseph Persico, a prominent coauthor whose precise role is not detailed) adopts a style that is simple, direct, and without rhetorical flourishes. There is an old-fashioned, even courtly, tone to the book that reduces its edge and reminds one of an earlier era. People that may have disappointed the General along the way are treated gently, and skewered more effectively thereby. The image of the late Defense Secretary Les Aspin putting away thirteen hours d’oeuvres (the general was keeping count) while King Hussein of Jordan “had to carry on a monologue” will remain with the reader when other details have fled from memory.

Critics have debated the motivation for such an autobiography at this time, wondering if it is a financial enterprise or the intellectual underpinnings of a presidential campaign. It is probably a bit of both, and also a story he wants to share. As Powell disarmingly says on the fifth line of the book, “The commercial prospects could not be ignored.” The campaign biography aspect is less obvious, and may well have been intended for long-term political benefits rather than as the first salvo for the 1996 election. There are no blockbuster revelations, but readers are left with a feeling of empathy with the author that should translate well into future political support.

Occasional instances of phrases inserted for apparently political purposes are rare enough to stand out. For example, in the context of discussing his own Jamaican heritage and the fact that West Indians emigrated to the United States willingly in the same manner as did immigrants from Europe, he adds, “I appreciate and admire the impulses that have led many African-Americans as well to reclaim the culture that was stolen from them and to draw spiritual sustenance from it.” One wonders if this sentiment is expressed to defuse a notion in the African-American community that Powell is suspect because of his success, in their eyes, as “a product of those trickle-down conservative Republicans Reagan and Bush.”

Perhaps more obviously political is the final epilogue, in which he stakes out moderate positions on every issue discussed, announcing, “I am a fiscal conservative with a social conscience” and “I distrust rigid ideology from any direction, and I am discovering that many Americans feel just as I do.” These are hardly innovative policy pronouncements.

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Book Review—Colin Powell

but they likely do reflect his opinions. That they are also reassuring to a populace weary of domestic strife and wary of international overcommitment will not hurt Powell’s popularity.

At a time when political institutions have fallen into public disfavor, the popular support for Colin Powell is a true phenomenon. If some of his good sense and basic values rub off on the political system, whatever his role in it, it can only be for the good. This book is more important for understanding the man than for predicting his policy preferences, but that is a significant step. It is also a good read.

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Russian Ambassador

hands. You should help democratic Russia now, when lots of things are being decided. We need assistance in a big way." About 75 per cent of the Russian economy is now privatized, he said, “but where is the capital to crank it up? There is no money. We asked for investments, and investments are not coming."

Ambassador Vorontsov said the United States “acted very responsibly after the Second World War, and created for Western European Nations the Marshall Plan, which was not very costly. It would not be very costly to have something like that to help the Russian economy to restart on a new basis. But you are sitting on your hands, looking, and waiting. ... The economic situation now is worse than in the Brezhnev days—that’s what people are saying."

He acknowledged that many American groups had given assistance of various types to Russia, and recognized the “good will” of the American people. To avoid a debate over “Who lost Russia?” along the lines of the debate in the early 1950s over “Who lost China,” America needs to help in a big way now: “You must act, and act decisively, now—when you can make a difference."

When asked about Russian military sales to China and other countries, the Ambassador acknowledged that “billions and billions of dollars” in sales are taking place, because the old Soviet economy was based upon military production, and until investments can be found to convert old tank plants into making tractors, the only way to keep people employed is to continue making and selling the products they are equipped and trained to build. This is not being done to help any country strengthen its military position, but purely to maintain the economic viability of Russia in these difficult times. He said Russia was selling its aircraft carriers to India because “they are good customers, and we have no need for them anymore—We’re not going to attack anybody.” As for China—a country he observed was “still Communist” and that had often been unpredictable and had engaged in border clashes with Russia—he said that China pays for Russian weapons with American dollars that are needed in Russia, dollars China gets from extensive trade with the United States. He added: “We would like to change this situation, but we are not getting assistance."

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statutes and judicial decisions regulate law enforcement investigations.

As to expectations with regard to the quality of what is reported, information gathered by intelligence agencies is expected often to be crude and of questionable reliability; careful analytic work in the agencies can transform that information, even if still uncertain, into something useful for policy makers. Law enforcement information is expected to be reliable enough to be reproduced at trial as evidence. The types of sources and methods also differ, although they overlap. Law enforcement information comes from interviews, informants (who are rarely long-term), searches, use of the power of grand juries, and physical and electronic surveillance. Intelligence information comes largely from photographic reconnaissance, interception of radio signals, and relatively long-term sources recruited abroad by intelligence officers. Both types of agencies also rely extensively on liaison relationships with foreign counterparts and public sources.

The geographic and functional separation of law enforcement and intelligence, which minimized the number of areas of concern about overlapping responsibilities, ended during the last decade for two reasons. New problems of terrorism and a new emphasis on drugs has led law enforcement to be actively engaged abroad. Statutes now empower the FBI to investigate terrorist attacks on American citizens and American planes wherever they may
take place and permit federal prosecutors to try those cases in the United States if the U.S. can obtain custody of the terrorists. Familiar notions of national jurisdiction over events abroad intended to have an effect within our borders, combined with the immense growth of cocaine trafficking, made U.S. drug enforcement in Latin America and elsewhere very extensive.

At much the same time, a second critical event occurred. The collapse of the Soviet Union resulted in a shift of the attention of the intelligence agencies away from that danger and towards the subjects of drugs, terrorism, and weapons transfers—all matters which also concern the law enforcement community. A colder, harsher way of describing the same shift would note that the budget of the intelligence community would naturally be cut substantially with the end of its primary mission—and both Houses of Congress have pressed for this—unless new missions came to justify the old budget. The intelligence community gathers information through four primary networks: photo reconnaissance, intercepted signals, human agents, and liaison with foreign intelligence agencies and other agencies of foreign governments. Justifying the very large expense of the first two, and perhaps also of the third, requires new missions.

Problems and opportunities are created by the newly overlapping interests and responsibilities of the intelligence community and law enforcement. Before turning to the problems, it will be useful to mention one truly creative use of the opportunities presented. When Kuwait revealed that it had captured plotters sent by Iraq to assassinate President Bush on his visit to Kuwait City, President Clinton had to decide whether military retaliation was appropriate. At least since the bombing of Libya by the Reagan Administration in response to terrorist events in Europe, the United States has taken the position that such actions are legitimate forms of self-defense under Article 51 of the U.N. Charter and that there is no legal requirement that such matters be first presented to the Security Council. One weakness in this position is that the fact that the injured state (in these cases, the United States) is deciding for itself on the identity of a sponsoring state and the extent of its responsibility. Such decisions have in the past been made by the President on the basis of information from the intelligence community alone, although they involve the near certainty that foreign citizens will be killed—an act that can only be justified by a correct determination of responsibility. Proof to a high measure of certainty—in criminal trials beyond a reasonable doubt—is the business of law enforcement agen-

cies; it is a less familiar requirement for intelligence agencies.

President Clinton's National Security Council staff asked the FBI and the Department of Justice to assess and supplement (by sending experts to Kuwait) the information suggesting Iraqi responsibility for the assassination plot in parallel with a CIA review of the same information. FBI jurisdiction was established by the existence of extra-territorial criminal statutes making such terrorist acts against Americans punishable in the United States even if the act occurs abroad. The relationship was sometimes uncomfortable for both the law enforcement and intelligence agencies, but the process was far more careful than any we had seen before. Human decency and international responsibility both demand extreme care in such situations and the existence of overlapping responsibilities permitted the President to guarantee that care.

There are, however, three serious problems that arise out of the blurring of boundaries between the intelligence community and law enforcement that has occurred in recent years. It is important to see that they are separate problems, requiring different approaches for solution. First, and surprisingly the least troublesome, is the risk that the more lenient (i.e., less protective of civil liberties) rules for intelligence gathering will be used disingenuously for purposes of law enforcement. The second problem is that the use of human intelligence and the carrying out of clandestine operations by a number of U.S. agencies working independently of each other poses a high risk of confusion, embarrassment, and internal conflict. The third and final problem, perhaps well on its way to being solved, is that the use of extremely expensive and long lasting

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The ABA's Central and East European Law Initiative (CEELI) is seeking experienced lawyers and judges to fill several pro bono positions in Russia, Moldova, Kyrgyzstan, Ukraine, and other countries in the region. Expertise in criminal law, appellate procedure, court administration, commercial law, legislative drafting, and many other fields is needed. Benefits include air travel, housing, health insurance, a living stipend, and the gratitude of people struggling to establish governments under the rule of law. For further information, contact CEELI at 1-800-98CEELI or (202) 682-1754.
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resources of the intelligence community, such as satellites, to gather information for law enforcement purposes poses an increased risk of revelation of critical information about these means and capacities, these "sources and methods," of intelligence gathering, thereby permitting far more dangerous enemies than almost any criminal to take protective counter-measures. The focus of the last problem is on technical means of gathering information, particularly through the use of satellites. The focus of the second is on human sources.

The Problems Created By Different Rules Regulating Law Enforcement and Intelligence Agencies

There are important differences in the rules binding on law enforcement and intelligence agencies, both as to gathering and as to dissemination of information. There are few specific rules constraining the methods of intelligence agencies in gathering information abroad about foreign nations and their citizens. This contrasts sharply with the many and complicated rules limiting the gathering of information by law enforcement agencies about the activities of American citizens or others in the United States. The existence of one lenient and one strict body of rules for government information gathering creates fears, in every democracy, that the lenient rules for those advising national security decision makers will be misused for law enforcement purposes of prosecution.

The fears are evident among U.S. judges and policy makers, but the problem is far more real for other Western democracies than for the United States. The general pattern abroad is for an internal intelligence agency to operate wholly independently of law enforcement, obtaining information for policy makers who must deal with issues of terrorism, spying, drugs, etc. In most Western countries, the internal intelligence agency is carefully denied the power to arrest. It may legally provide its information to law enforcement agencies for use as "leads," but not to be used at trial or as the required basis for some legal step such as a search by police. Limited in this way in objectives, the intelligence agencies are generally freed from many of the restrictions imposed on the use by the police of investigative techniques such as electronic surveillance. Obviously, if they were to depart from their role as providers of policy advice and become instead criminal investigators, the civil-liberties-based restrictions imposed on the police before engaging in various investigative activities would be evaded at a substantial cost to civil liberties.

This is a real but less substantial problem in the United States, because we define quite carefully the powers of government officials even when their purpose is intelligence gathering for advice to policy makers. Thus, investigatory powers in the intelligence area in the United States depend upon several factors: whether the target of an investigation is a U.S. person (citizen or resident alien), whether the investigative activity takes place in a foreign nation or in the United States, whether the individual has assisted in international terrorism or espionage, and whether the individual is an agent of a foreign government or organization. The last two factors must be present if a physical or electronic search for intelligence purposes is to take place against an American person or in the United States.

Although someone working in an "intelligence" capacity in the United States is bound by quite specific rules, the U.S. does have the same problem other nations have, albeit to a much lesser extent. The standards for intelligence searches and electronic surveillance for intelligence purposes remain easier to satisfy. The length of electronic surveillance can be longer; and there is no requirement of minimization to reduce the collection of extraneous, private information. Still, the United States has not had any serious misuse of intelligence powers for law enforcement purposes in dealing with U.S. persons or events occurring within the United States. With regard to non-U.S. persons and investigations abroad, although there is no evidence of either set of agencies misusing its powers to serve the other's purposes, some intelligence agencies (particularly the National Security Agency) fear charges of overstepping their legitimate powers.

The Problem of Conflict and Confusion Created By the Overlap of Responsibilities of Law Enforcement and Intelligence Agencies

Since the collapse of the Soviet Union, there is a very substantial overlap of the information-gathering objectives of law enforcement and the intelligence community. Consider, for example, the description of the scope of its inquiry given in June, 1995 by the Presidential Commission on Roles and Capabilities of the United States Intelligence Com-
munity. The Commission recognized its primary question to be: "What categories of information about 'things foreign' will be needed by the U.S. government in the post-cold war era..." Without an answer to this question it could not address a succeeding one: "Are the resources currently allocated for intelligence activities well justified...?"

As it provided tentative answers to these questions, the Commission gave highest priority to intelligence about countries and activities threatening to the security of the United States. That makes obvious good sense. But then the Commission went on to place narcotics trafficking and other forms of international organized crime presumptively within the high priority category of "activities that threaten the security of the United States." President Clinton restated this view in July 1995 in a speech at the Central Intelligence Agency. That the Commission placed these law enforcement related activities (and not just terrorism and weapons transfers) so high among the justifications for maintaining intelligence capabilities says a great deal about the need for new missions for the intelligence community and the importance that community places on intelligence about law enforcement targets.

The potential overlap in activities is not resolvable by noting that intelligence objectives in this common area should be policy oriented and law enforcement interest, prosecution oriented. The United States needs several types of information about criminal activities abroad. First, what the perpetrators are doing (such as transporting drugs to Florida) that may affect the United States. Second, what local law enforcement and intelligence organizations are or could be doing about it (such as the Colombian attorney general attacking, or ignoring, the problem). Third, what the perpetrators are doing that affects the foreign government (such as the Russian mafia or Italian terrorists threatening government authorities). Fourth, what the impact of this is likely to be on the behavior of the government in areas that are important to us (such as the decision of the Italian Prime Minister Craxi not to extradite Abul Abbas after the hijacking of the Achille Lauro in 1985). The first two are of obvious relevance to our law enforcement agencies as they seek success in prosecutions of those causing harm in the United States. All four are within the new mandates of the intelligence agencies as matters about which high policy makers in the United States want to be informed.

Nor can the crowding of jurisdictions be handled by separating the means through which law enforcement and intelligence should pursue overlapping objectives. For there is substantial overlap in the human sources of information that are crucial for these questions. Both law enforcement and intelligence agencies of the United States would like to be in touch with foreign law enforcement agencies, foreign internal security agencies, and other knowledgeable officials of the foreign government. Both would also like to learn what they can from unofficial sources abroad, although most nations regard even voluntary interviews by U.S. officials within their territory a violation of their sovereignty unless carried out in cooperation with their own agencies. (This objection poses less of a problem for our intelligence agencies than for our law enforcement agencies.)

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Journal of National Security Law Seeks Articles

The recently established Journal of National Security Law is soliciting original articles, essays, comments, student notes, and book reviews from scholars and practitioners in the field of national security law and related disciplines. The Journal is cosponsored by the University of Virginia Center for National Security Law, the Duke University Center on Law, Ethics and National Security, and the University of Mississippi School of Law. Its premier issue, scheduled for publication this fall, will include papers from the Standing Committee's fifth annual review of the field conference held last October in Washington.

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In a variety of ways, uncoordinated, competing efforts to use human sources of intelligence may compromise each other in our foreign policy. Consider a wholly fictional example. Suppose that, to discover the "middlesmen" responsible for arranging the sale of sophisticated weapons, the CIA has both developed a reporting relationship with a knowledgeable official of country X (where the weapons are now stored) and has created a cover operation in country Y to pretend to purchase these weapons. The FBI, following its own trail, could easily ask the police of country X to investigate the official who has become a CIA agent. Or it may itself seek to establish an informant relationship with the same individual, not knowing of the CIA contact but, by its efforts, inadvertently suggesting that a CIA promise of confidentiality has been breached. An FBI investigation of the CIA cover operation in country Y is equally possible. Or that operation might draw a response from the law enforcement authorities of country Y, urged on by the FBI representative in that country. The possibilities are compounded if not only the FBI, but one or more additional U.S. law enforcement agencies, such as Customs or DEA, become involved. If the United States ambassador to either country is taken by surprise when the host country learns of an intelligence or law enforcement operation within its borders, other national efforts failing under the ambassador's responsibility are also likely to be compromised.

What is needed is a powerful coordinating mechanism. Simply telling the intelligence community that it should restrict itself to gathering information for policy makers and the law enforcement community that it should restrict itself to pursuing individual cases is not workable. There remains too much of an overlap between these categories.

To some extent, two working presumptions may help. First, the FBI should have the primary responsibility for relating to law enforcement agencies abroad. There is a camaraderie among law enforcement agencies of different countries; and foreign law enforcement agencies should not be asked to deal routinely with the foreign intelligence agency of another government. On the other hand, the relationship to foreign police cannot be exclusive to the FBI. Foreign law enforcement is often corrupt. It is often closely controlled by the military or intelligence arms of foreign government. For both of these reasons, intelligence agencies can and should be of assistance even in dealing with foreign law enforcement agencies.

Second, the FBI should not violate foreign or international law in gathering information, at least in friendly countries. Unless the violation involves the most trivial and technical of offenses, perhaps committed only with the prior permission of the Department of Justice, such actions by U.S. law enforcement confuses a powerful message we would like to send about obedience to the rule of law. Moreover, experience teaches that it is difficult to confine authority to violate law to a single area, and nothing is more important than the lawfulness of our domestic law enforcement agencies. Since most countries forbid foreign investigative agencies from conducting investigations without the consent of the local authorities, most secret investigations as well as any outright violation of local or international law should thus be outside the normal jurisdiction of the FBI. There will be costs to this. The CIA is not as well trained in developing information that could be used at trial. Even revealing the source of the information may threaten compromise of "sources and methods" needed for other purposes and thus, the intelligence agency may be reluctant to furnish the information it has found.

Still, the importance of lawfulness of law enforcement agencies demands working out these problems rather than abandoning the principle.

Beyond these presumptions, law enforcement should not duplicate "borrowable" capacities of the intelligence community—put in place for the more fundamental purpose of protecting the U.S. against foreign enemies—except to the extent that the marginal gain from creating additional capacities in law enforcement is worth the cost. The temptation will be great to seek enough law enforcement funding of overseas operations to provide independence of the decisions and concerns of the intelligence agencies that have human resources and networks already in place. But that is both unnecessarily costly and likely to result in destructively competitive field operations. (For those who worry about the rapidly growing centralization of control of law enforcement in the FBI with the creation of new centralizing structures both for law enforcement and for counter-intelligence, preventing one more important jurisdictional enhancement of the FBI also has civil liberties implications.)

The core of a solution, however, must lie in developing some scheme of embassy-based mandatory coordination among all relevant law enforcement and intelligence agencies in a particular country. That seems straightforward enough, until one recognizes that the FBI does not generally make available the names of its informants, even to prosecutors, unless that is essential for purposes of trial.
The CIA is likely to take a similar position with regard to its agents. What are needed are devices that each set of agencies can trust with just enough information to alert the other to the possibilities of interference with its operations or to alert the ambassador to the possibility of a serious embarrassment in the pursuit of foreign policy. For example, a single high-level official in each embassy (such as the Deputy Chief of Mission) could be charged with the responsibilities I have described and the law enforcement and intelligence agencies could be required to provide the DCM with such information as she felt necessary for that purpose. She, in turn, could be forbidden from revealing information to anyone else without giving sufficient notice to the agency furnishing the information so that it could protest the further disclosure at the headquarters' level in Washington.

The Problem of Risk to High-Value Intelligence Assets: Protecting Sources and Methods

One type of rule binding on law enforcement agencies is a source of great concern to intelligence agencies asked to assist prosecutors. Under several statutes and decisions of the Supreme Court, prosecutors are required to provide a defendant in any criminal trial information that may be helpful to the defendant and which is known to the prosecutor, investigators, or others who have assisted in the investigation of the case. Indeed, the requirements may go further than this, including any intelligence agency "aligned" with law enforcement, even by such devices as the counter-terrorism and counter-narcotics centers at the CIA, which are designed to facilitate the exchange of information between law enforcement and intelligence agencies. That requirement, most broadly stated in a series of Supreme Court cases following Brady v. Maryland, 373 U.S. 83, includes any evidence that would be useful to impeach the government's witnesses.

These rules for law enforcement, requiring disclosure to criminal defendants and at a public trial, are directly contrary to the practices and rules of the intelligence community intended to protect "sources and methods." The difference creates considerable difficulties when information gathered by the intelligence agencies is made available to assist a prosecution. This concern was largely limited to espionage cases during the many years when the focus of intelligence was the Soviet Union and its supporters (a subject matter that did not much concern law enforcement except in espionage cases) and when the physical location of law enforcement activities was limited to the United States (an area where intelligence agencies did not actively participate in gathering information.) The difficulties where there was an overlap of responsibility—in espionage cases—were formidable until the passage of the Classified Information Procedures Act of 1980, which established procedures to assure that the government could minimize the exposure of national security material at trial, consistent with fairness to the defendant, and could weigh the remaining risks prior to the beginning of a trial, deciding then whether the case was worth its costs. Since 1980, the great majority of cases potentially involving classified material have been able to proceed to trial without serious risk to our national security.

The extent of the risk to intelligence sources is particularly acute when the source of information is an intelligence community asset that has three characteristics common to the satellites which provide photo reconnaissance and signals intelligence. These characteristics are: (1) the assets are extremely valuable in what they can produce; (2) their capacities would be extremely costly to replace, if they could be replaced at all; and (3) they will remain productive of extremely valuable information only so long as their capacities are kept secret from sophisticated agencies of other governments, which might otherwise devise effective counter-measures. The problem caused by such rules as the Brady decision with respect to this category of assets is that their capacities may be revealed, in a way very helpful to hostile nations or groups, as part of the normal processes of trial, if information from such an intelligence resource, e.g. a satellite, is used by the prosecution.

It is worth being careful about the meaning of the first condition. For the purposes of this argument, it is sufficient that the value of the information the asset is likely to produce over the foreseeable future about governments hostile to the United States or about a planned weapons transfer or about a terrorist attack and the role the asset plays in discouraging secret efforts to construct or place weapons dangerous to the United States is many times more important than the benefits the asset can produce in terms of law enforcement against drug cartels or other organized crime. The relevant time horizon is the useful life of the system. The United States faces few serious military threats in 1995, but we may need the secrecy of a particular system in the year 2000.

As a nation, we should be investing in expensive, long-term capacity for information gathering (such Continued on page 10
as satellites) if, and to the extent that, such investment is warranted to maintain our safety against foreign enemies. (Extra-ordinary, multi-billion-dollar investments in overseas capacity are unwarranted for law enforcement purposes.) The great cost of exposing "sources and methods" of this type on any occasion is the resulting reduction in assurance against very harmful surprises by a hostile or reckless nation. This seems very real when the U.S. has powerful enemies; less so, when it does not.

Gathering information for law enforcement by using expensive intelligence capacities that have been built for other purposes has a very small marginal cost in dollars or political fallout. Its real cost is in risk to the secrecy about the sources and methods on which we rely for protection against dangerous surprises by hostile nations. If we take the need for that protection very seriously, even now, then we must take elaborate steps to avoid compromising it in a criminal investigation of, for example, one of a number of major drug dealers; for the stakes in terms of national well being are far less in any such criminal investigation. Only if one thinks that protection against hostile and reckless nations is an obsolete need in today's world, or that secrecy about sources and methods is not crucial to that protection, would one decide to accept any great risk of revealing "sources and methods" in such a case. That means that great weight must be given to determinations by national security agencies about the amount of tolerable risk to the secrecy of these capacities. Law enforcement efforts to gain access to such information may depend on demonstrably reducing the risk to sources and methods. There will always be disputes about the amount of such risk and the importance of a prosecution. Ultimately, that decision will have to be made by the National Security Council.

This conclusion, of course, depends upon the belief that it remains extremely important to be warned of dangers from hostile and reckless nations—relative to the importance of the foreign aspects of law enforcement even in a world of crime becoming increasingly international. The argument also depends upon a belief that the technical and human capacities necessary for protecting against other nations are readily compromised by exposure of sources and methods.

To the extent that one believes that foreign states are no longer likely to pose any significant danger to the United States, or at least not in the next decade or so, or that those nations which may im-
mand on the capacity of intelligence agencies to search their records for *Brady* or other discovery materials. The intelligence community would also worry about the extensive access of judges and short-term prosecutors to highly sensitive national security information that would follow from such a policy of all-out cooperation.

The third alternative—now being actively considered by the Department of Justice and the Central Intelligence Agency—is to create a centrally managed system that makes case-by-case decisions in a way that adds much cooperation that would be lacking with the first alternative without incurring the risks and costs of the second.

In short, such a system would channel through a central office all requests by prosecutors or investigative agencies for information from the intelligence agencies and limit the occasions and scope of any request both in light of the likely pay-off from the request and how likely it is that a particular form of request might cause judges to give similar access to the defense in any prosecution. Then, the Department of Justice would insist, in argument in court, that the now-limited extent of its coordination with the intelligence community only rarely justifies a search of intelligence files—and even then a search of only some files—at the request of a defendant seeking exculpatory information. The Department would rely heavily, as it has since 1980, on the Classified Information Protection Act to limit the scope of discovery and to challenge the necessity of revelation of national security information at trial. If all these barriers failed, the Department of Justice would have to be prepared to dismiss a case that might compromise sources and methods.

In this third strategy, the central question is how far the Department of Justice can turn to the intelligence agencies for help without triggering some form of reciprocal access by defendants at trial. The possible variations range themselves along a continuum that runs from: asking an intelligence agency to gather information on a named individual or organization either by some form of surveillance or, next along the continuum, by seeking information from the files of a foreign intelligence agency; to the intelligence agency offering, in response to a law enforcement request for a check of files with regard to a named defendant or witness, substantial information to investigative agencies which is then used at trial; to the same information being offered without request; to the intelligence agency offering such information, without request, but not to be used as evidence at trial; and, finally, to the intelligence agency offering only suggestions as to likely targets and locations of investigation (for it might make a difference how extensive the leads were.)

The cutting edge issues today are near the center of this continuum. No one is very sure whether a request by law enforcement for a check of an intelligence agency’s files for information about a particular individual or an organization would automatically entitle the defense to a check of the same files for exculpatory information, a form of reciprocity that may seem convenient and fair to judges. And it is at least a somewhat risky assumption that no judge will allow the defense to demand a search of intelligence agency files for exculpatory material simply on the ground that an intelligence agency volunteered case-specific information to law enforcement. In fact, “volunteering” is an ambiguous concept; for the intelligence agency, which wants to justify its budget by serving potential users, will frequently have become—or been made—aware of law enforcement’s interest in a particular suspect.

The fears of revealing their sources and methods make the intelligence agencies reluctant to press forward with cooperation in these middle areas; the need for new missions to justify the high costs of

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The National Security Agenda . . .

by Daniel L. Richard

SFRC Agrees to Report Chemical Weapons Convention—After being stuck in the Senate Foreign Relations Committee for several years, the Chemical Weapons Convention is expected to be considered by the full Committee as early as late April and eventually to be reported to the full Senate for its expected consent to ratification. Committee Chairman Jesse Helms had blocked action on the treaty—which prohibits both the use and possession of chemical weapons—out of concern that its intrusive inspection provisions unacceptably ceded American sovereignty to foreign governments, who under the treaty would be allow to inspect U.S. factories and warehouses to assure compliance.

New Journal on Organized Crime Published—In October, the first issue of Trends in Organized Crime was published. Designed to help government and nongovernmental specialists around the world anticipate and counter organized crime, the new journal collects and analyzes information from a broad range of sources, including public policy “think tanks” and law enforcement organizations. For further information, contact Jeffrey Berman at (202) 429-0129.

Notes

1 I will deal infra with the problems created by differences in rules for dissemination of information. The reasons for differences are obvious. Some intelligence capacities—for example, those dependent upon sophisticated satellites—are far more expensive and difficult to put into place than any resources of law enforcement. Their payoff—at least when they reveal the intentions of a foreign enemy—are also far greater. For these reasons as well as because intelligence capacities are often directed over an extended period of time at the same target (which could, if it knew of our capacities, take countermeasures), a variety of very strict rules and practices limit the dissemination of information gathered by intelligence agencies. There are also very important and, wholly inconsistent, rules regarding the dissemination of law enforcement information—particularly the rule that the prosecution must give to a defendant all exculpatory information gathered by the prosecutor and those working with him.

2 Generally, the Federal Bureau of Investigation will be in charge when the investigative activity takes place within the United States, whether the purpose is intelligence for policy makers or evidence for prosecution. Information obtained in compliance with statutes applicable either to intelligence gathering or law enforcement should be available for use for either purpose. There is some lower court precedent suggesting that when the “primary” purpose of the investigation changes from counter-intelligence to law enforcement, different processes should be invoked. This makes very little sense when both intelligence and law enforcement purposes are almost always powerfully present in dealing with a likely spy or terrorist working as the agent of a foreign government. The notion of primacy of purpose is nearly meaningless in this context.

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remarkably sophisticated technology presses them in the opposite direction. The potential usefulness of their information makes law enforcement adamant in its demands, despite reminders by intelligence experts that their files only rarely contain credible, useful information about individual suspects.

Uncertainty is upsetting to both sides. It would be wise for the federal government to propose a statute in an effort to use the weight of legislation to settle open questions, as the CIPA statute did fifteen years ago. Even when the issue involves Constitutional requirements of disclosure, as in Brady, the Supreme Court is likely to give great deference to the views of the executive and legislative branches on an issue that has such significant national security dimensions.