UNLEASHING THE ROGUE ELEPHANT: SEPTEMBER 11 AND LETTING THE CIA BE THE CIA

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Media outlets have argued that the United States has had an "intelligence failure", decrying the intelligence community for failing to warn the American people of the September 11 attacks on the World Trade Center in New York and on the Pentagon in Virginia. In addition, there is constant clamor that the Central Intelligence Agency (CIA) has been unwisely stifled since the Church Committee hearings of 1975-76[1] and the resultant executive orders of Presidents Ford, Carter, and Reagan that sought to govern the conduct of intelligence activities.[2] There is a cry to unleash the CIA from its perceived legal and policy restrictions and permit it to fight the terrorist threat facing the United States on terms that will succeed against this pernicious force. Some of this impetus comes from a rash of recent studies such as the report of the bipartisan National Commission on Terrorism (NCT), which urged the Director of Central Intelligence (DCI) to modify the Agency's

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1. The hearings were conducted by Senator Frank Church (D-Idaho) after revelations by the CIA and in the media of CIA violations of rights of American citizens, etc. *See* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465 (1975).

2. President Ford promulgated Executive Order (E.O.) 11,905, which was followed by E.O. 12,306 under President Reagan. *See* Exec. Order No. 11,905, 41 Fed. Reg. 7703 (Feb. 18, 1976); Exec. Order No. 12,306, 46 Fed. Reg. 29,693 (June 1, 1981). These orders were superseded by E.O. 12,333, which was promulgated by President Reagan and is still in effect. *See* Exec. Order 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

current guidelines restricting the recruitment of agents with spotty human rights records, when applied to terrorist informants, with the assertion that "one cannot prowl the back streets of states where terrorist incidents occur and recruit only nice people."[3]

Have the CIA and other intelligence community entities been unwisely constrained in their abilities to pursue the terrorist target by outmoded policies dating from the Cold War? This Article will examine four potential modifications to such policies. One possible change is to loosen restraints on the CIA in the recruitment of so-called "dirty assets". A second is to grant domestic law enforcement powers to the CIA to better pursue the terrorist target. Third, the government could repeal the prohibition in Executive Order 12,333 of assassination in peacetime. Finally, impediments could be removed that currently prevent the use of agents in special categories such as journalists, clerics, and academics, if the need is great and cooperation is voluntary. Each possibility will be addressed in turn.

The theme underlying this analysis will be one of balancing. Our need to gather better intelligence about threats posed to the United States and the international community by transnational terrorist groups must be weighed against the constraints imposed by current United States law and practice, the U.S. Constitution, and our status as a constitutional democracy.

I. RECRUITMENT OF "DIRTY ASSETS"

To some degree, the argument over the use of unsavory assets is misleading. By definition, spies are liars, law-breakers, and traitors. They may not be violating U.S. law in supplying CIA spymasters with intelligence information about their own country's defenses or political decision-making, but they are surely violating the laws of the country that they are betraying. John Le Carre wrote with much accuracy when he crafted Alec Leamas' reply to his girlfriend's complaint about using a villain as an agent of East German intelligence: "What do you think spies are: priests, saints and martyrs? They're a squalid

3. Vernon Loeb, *Panel Advocates Easing CIA Rules on Informants: Agency Disputes Commission Finding*, WASH. POST, June 6, 2000, at A25.

procession of vain fools, traitors too, yes; pansies, sadists and drunkards, people who play cowboys and Indians to brighten their rotten lives. Do you think they sit like monks in London, balancing the rights and wrongs?"[4]

Guidelines were established in 1995 that directed CIA case officers in the field to balance human rights and other criminal violations committed by their agents against the positive intelligence supplied or likely to be supplied by these agents. The unintended intersection of several different global and domestic developments after the 1991 collapse of the Soviet Union has prompted confusion over these guidelines and their implementation.

At the end of the Cold War, the then-Deputy Director of Operations (DDO) at the CIA, Richard Stolz, observed that the Directorate probably had more reporting agents on its payroll than it needed to deal with the new post-Soviet world. Always sensitive to the accusation from the ranks that the quantity of spy recruitments counted more than the quality, Mr. Stolz sought to reverse this perception by instituting an asset validation system. Under this asset validation system, pursuant to agreed principles relating to the value and number of intelligence reports produced by a given spy, the Directorate of Operations (DO) could trim its roster of non-reporting or marginally-reporting agents. Mr. Stolz retired before he could evaluate the results of his validation system, so the Inspector General (IG) of the CIA made it the subject of one of his periodic inspections of the Directorate of Operations in 1994. The Office of Inspector General (OIG) concluded in its 1994 inspection report that the Directorate had made a substantial start at validating its agent base and eliminating marginal producers in some offices, but there had not been complete buy-in by other offices. Thus, it was recommended that the DCI lend his support to the effort.[5]

At about the same time, the *New York Times* reported that an agent on the CIA's payroll in Guatemala had been involved in the murder of an American citizen inn-keeper and the husband of an American citizen.[6] Even though subsequent

4. JOHN LE CARRE, THE SPY WHO CAME IN FROM THE COLD 246 (1963).
5. The IG report on the asset validation system remains classified.
6. *See* Tim Weiner, *Guatemalan Agent of C.I.A. Tied to Killing of American*, N.Y.

investigations by the CIA OIG and the President's Intelligence Oversight Board both concluded that neither CIA employees nor Guatemalan Colonel Julio Alpirez had been involved in the murders of the two Americans, the reports found that CIA headquarters and the U.S. Congress had been inadequately informed about human rights violations by agents in Guatemala. The CIA had on its payroll several agents whose human rights records were notoriously poor, and they were not producing much positive intelligence information on drug trafficking or other post-Cold War targets to justify their salary or retention.[7] Out of these reports, and the disciplinary measures taken by DCI John Deutch pursuant to them, came the infamous 1995 guidelines concerning the recruitment of foreign intelligence assets with egregious human rights records. The CIA Office of General Counsel drafted a regulation requiring headquarters' involvement in the recruitment or retention of spies with unsatisfactory human rights records or a record of substantial criminal violations.[8] Although originally intended as a "sanity check" for field agents to enable them to advocate the retention of a spy with dirty hands who nonetheless had ample potential to aid U.S. intelligence collection, the regulation became an invitation to do nothing in an allegedly risk-averse CIA culture. Because spy runners had more on their plates overseas than they could possibly accomplish, it has apparently become easier not to seek a waiver (which in some instances had to go to the DCI for approval) and let the relationship with the malefactor expire.

In any event, that is history. Congress urged the CIA to alter the "dirty hands" guidelines to encourage risk-taking in the recruitment of assets knowledgeable about terrorism after September 11.[9] The DCI has responded by eliminating the requirement of a DCI waiver in the recruitment or retention of

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TIMES, March 22, 1995, at A1; *see also* Tim Weiner, *Shadowy Alliance—A Special Report; In Guatemala's Dark Heart, C.I.A. Lent Succor to Death*, N.Y. TIMES, April 2, 1995, at A1.

7. *See* INVESTIGATIONS STAFF, OFFICE OF INSPECTOR GENERAL, CENTRAL INTELLIGENCE AGENCY, REPORT NO. 95-0024-IG, REPORT OF INVESTIGATION: GUATEMALA 2 (1995); INTELLIGENCE OVERSIGHT BOARD, REPORT ON THE GUATEMALAN REVIEW 4 (1996).

8. *See* Walter Pincus, *CIA Steps Up 'Scrub Down' of Agents: Agency May Weigh Rights Violations Against Value of Information*, WASH. POST, July 28, 1995, at A25.

9. *See* Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, 115 Stat. 1394 (2001).

dirty assets, leaving that to a dialogue between the field agent and the DDO. Importantly, however, the Agency has retained the requirement of an audit trail in these cases in recognition of a need for some explanation to headquarters why a dirty asset ought to be on the payroll. Left untouched is § 1.7(a) of E.O. 12,333 requiring senior officials of the intelligence community to "[r]eport to the Attorney General possible violations of federal criminal laws by employees and of specified criminal laws by any other person as provided in procedures agreed upon by the Attorney General and the head of the department or agency concerned, in a manner consistent with the protection of intelligence sources and methods, as specified in those procedures."[10] Presumably this would still cover knowledge by an American spy runner of an agent's involvement in the death of an American citizen or a U.S. person (an alien legally residing in the United States).

II. GRANTING DOMESTIC LAW ENFORCEMENT POWERS TO THE CIA

When the CIA was created in 1947 out of the elements of the wartime Office of Strategic Services (OSS), it was statutorily prohibited from having "police, subpoena, law-enforcement powers, or internal security functions."[11] This was due to President Truman's aversion to creating an American gestapo and some fancy footwork by Federal Bureau of Investigation head J. Edgar Hoover, who was determined to keep the fledgling CIA on a short leash if he could not accrue overseas intelligence powers for his own organization.[12]

For the first two decades of the CIA's existence, the prohibition on the exercise of domestic law enforcement powers was not controversial. The CIA's mission was clearly overseas, countering the spread of Stalinist Communism first in Europe, then in the Far East, and soon all over the globe. It concentrated on clandestine reporting and analysis of political and economic events overseas for the President and his senior policymakers. Congress had little oversight or interest in means used to achieve what was universally considered laudable

10. Exec. Order No. 12,333, *supra* note 2, at 59,945.
11. National Security Act of 1947 § 102a, 50 U.S.C. § 403 (1994).
12. *See* CHRISTOPHER ANDREW, FOR THE PRESIDENT'S EYES ONLY 156 (1995).

ends. Lawmakers encouraged the CIA in covert action projects designed to roll back the sweep of Communism, and otherwise remained largely supportive, from a distance, of the Agency's overseas mission.

The Vietnam War and the presidential terms of Lyndon Johnson and Richard Nixon saw a breakdown in the consensus of support for the CIA in Congress and the American public. Part of this breakdown was caused by revelations in *Ramparts* magazine, Seymour Hersh's articles for the *New York Times*, and Congressional hearings conducted by Senator Frank Church (D-Idaho) and Congressman Otis Pike (D-N.Y.) beginning in 1974. These three sources of information indicated the CIA had become substantially involved in domestic activity during its short history.[13] Revealed for the first time to the American public was the CIA's involvement with the National Student Association, the establishment of proprietary domestic foundations to support anti-Communist activity abroad, and an operation aptly named CHAOS designed to infiltrate American student organizations opposed to the Vietnam War to determine if there were foreign links. It was out of this pungent stew that the current system of congressional oversight for the intelligence agencies was ladled. Congressional initiatives reinforced the presidential executive orders mentioned earlier. The new congressional oversight committees, the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI), made it clear in the Intelligence Authorization Act for Fiscal Year 1981 that they wanted to be kept "fully and currently informed of all intelligence activities" by the intelligence agencies.[14] Congress's purposes also included conformity by the CIA with the statutory ban on domestic law enforcement activities.

The principal force pulling the CIA into the domestic arena prior to the end of the Cold War was its shared jurisdiction with the FBI in counterintelligence matters involving U.S. citizens and U.S. persons. The FBI clearly has primacy in counterintelligence investigations conducted within the borders of the United States, but the responsibility is shared for

13. *See id.* at 405.

14. § 501(a), Pub. L. No. 66-450, 94 Stat. 1975, 1981 (1980) (codified as amended at 50 U.S.C. 413 (1994)).

suspected CIA spies like Aldrich Ames. Furthermore, many domestic cases have overseas connections that are often the province of the CIA to investigate. Advances in technological surveillance in recent years have complicated matters further, blurring the lines between that which is clearly domestic and foreign, when information from both domains can easily be intercepted by both organizations.

The U.S. Constitution's Fourth Amendment prohibition against "unreasonable searches and seizures"[15] extends to counterintelligence cases involving U.S. citizens and U.S. persons. When, however, the U.S. government proposes to conduct surveillance of an individual suspected of being the "agent of a foreign power," it can do so without presenting itself to an Article III court or magistrate, under the terms of the Foreign Intelligence Surveillance Act (FISA) of 1978.[16] Instead, the government can go to the special FISA court and obtain a warrant as long as "the primary purpose" for the surveillance is "to obtain foreign intelligence information."[17] If the government believes that there is enough evidence to support a possible criminal prosecution, as it did in the Ames investigation, then the government must go to an Article III court or magistrate to obtain criminal warrants before proceeding with the surveillance.[18] (The government never obtained Article III judicial warrants in the Ames case. Although Mr. Ames's attorney intended to challenge this in court, the case never went to trial.)

Since the end of the Cold War, however, the CIA's mission has changed radically. The principal targets of intelligence concern are no longer just political and economic developments abroad that impinge on American national interests, but terrorism, the proliferation of weapons of mass destruction, and drug-trafficking, all of which have domestic law

15. U.S. CONST. amend. IV.

16. 50 U.S.C. § 1805 (1994).

17. 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B); United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984); *see also* United States v. Nicholson, 955 F. Supp. 588, 591 (E.D. Va. 1997) (holding that a FISA physical search was "constitutionally indistinguishable from the FISA-authorized electronic surveillance unanimously upheld by federal courts"); United States v. Bin Laden, 126 F. Supp. 2d 264, 285 (S.D.N.Y. 2000).

18. *See* United States v. Truong Dinh Hung, 629 F.2d 908, 915-16 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

enforcement ramifications. Well before September 11, the CIA sat alongside colleagues from domestic law enforcement agencies (such as the FBI, the Drug Enforcement Administration (DEA), Customs, and the Bureau of Alcohol, Tobacco and Firearms (ATF) of the Treasury Department) in DCI Centers dealing with counterterrorism, counternarcotics, and counterintelligence issues. Today, the movement of people, money, and illegal goods can proceed seamlessly from country to country, including the United States—a negative byproduct of globalization. Any distinction between the requirements of domestic law enforcement and foreign intelligence gathering are becoming hopelessly blurred in these new world disorders of terrorism and proliferation.

Arguably, the United States has just taken a major step in resolving the ancient question of "should spies be cops?" in the affirmative with passage of the USA PATRIOT Act.[19] Along with the creation of an Office of Homeland Security, this Act represents a decision on the part of the President and the Congress that the nation expects its defenders to be proactive in the struggle against terrorism of all kinds. Instead of merely responding to threats and criminal acts after they happen, the USA PATRIOT Act seeks to create the basis for prevention. Unquestionably, the gathering and analysis of foreign intelligence is intended to play a prominent role in this mix, and a greater involvement of the intelligence community and CIA in domestic law enforcement proceedings is inevitable.

Let us quickly examine several of the legal changes in the USA PATRIOT Act and their consequences for the intelligence community. Section 203 of the Act amends Rule 6(e)(3)(c) of the Federal Rules of Criminal Procedure to permit disclosure of grand jury information when the matters involve "foreign intelligence and counterintelligence."[20] Such disclosures can be made "to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in

19. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

20. USA PATRIOT Act § 203(a)(1)(i), 115 Stat. at 279; *see generally* Sara Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act's Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL'Y 699 (2002)

order to assist the official receiving that information in the performance of his official duties."[21] Although these disclosures may be used by the recipient "only as necessary in the conduct of that person's official duties," [22] this represents a major departure from the traditional legal principle of grand jury secrecy. Although this provision is bound to be tested in the courts, grand jury secrecy has never been absolute; if the executive branch establishes some safeguards in the use of grand jury material, section 203 may pass constitutional muster given the enormity of the threat posed to American citizens by international terrorist attacks.

Less clear is what happens to the line separating the CIA from domestic law enforcement when it is sitting at the elbow of the FBI and the Immigration and Naturalization Service, trying to help make a criminal case against a U.S. person based upon a seamless chain of evidence provided by foreign sources and domestic informants.

Section 504 of the Act amends the FISA to permit consultation between intelligence officials conducting FISA-approved surveillance efforts and law enforcement officials.[23] The matters to be consulted upon must pertain to terrorist threats, but there is opportunity for definitional creep as the pressure for preventive action in this area of concern intensifies.

Finally, section 218 of the Act further amends the FISA to change the standard with which the FISA court will grant authority to conduct foreign intelligence surveillance.[24] Instead of the "primary purpose" test, section 218 amends the certification by the government to require only that foreign intelligence be "a significant purpose" for the FISA surveillance or physical search.[25] This change allows the scope of permitted national security surveillance to creep close to the boundaries of Fourth Amendment limitations. The fact that the domestic legal authority prohibition continues to haunt these determinations also means that the executive branch will have to exercise great care to specify guidelines for the application of

21. *Id.*
22. § 203(a)(1)(ii), 115 Stat. at 279.
23. § 504, 115 Stat. at 364-65.
24. § 218, 115 Stat. at 291.
25. *Id.*

these significant statutory changes.

My view is that the CIA should squarely address the inconsistencies that its new foreign intelligence mission is creating and seek legislative clarification and amendment of the prohibition against domestic law enforcement powers. It is better to seek an alteration of its 1947 charter to account for the new realities of its role in combating terrorism, proliferation of weapons of mass destruction, and drug-trafficking. This route of caution and clarification is preferable to being forced to change as a consequence of judicial action, which will understandably focus more on the rights of Americans than the difficulty of the anti-terrorist mission.

III. REPEALING THE PROHIBITION OF ASSASSINATION

No issue has generated more heat and produced less light than the feckless debate as to whether the provisions in Executive Order 12,333 prohibiting direct and indirect participation in assassination by the U.S. Government and its employees should be rescinded.[26]

Previously, presidents contemplating a military response to an attack on Americans have successfully argued that their powers under the U.S. Constitution as Commander in Chief and executor of the nation's laws[27] gave them ample authority to strike back at the attackers, even if the strike was likely to kill the head of state or commander who may have authorized the attack. President Ronald Reagan's bombing of Muammar Qaddafi's compound in Libya in 1986—after the United States recovered signal intercepts implicating Libyan intelligence officers in the bombing of a Berlin discotheque in which several U.S. soldiers were killed—might have been justified as death incident to a military action had Qaddafi died in the strike. Likewise, President Bill Clinton's response to terrorist attacks on the U.S embassies in Dar-es-Salaam and Nairobi in 1998, in which a pharmaceutical factory in Sudan and a terrorist training camp in Afghanistan were destroyed by U.S. cruise missiles (the latter strike having been directed at the supposed perpetrator, Osama bin Laden), could also have been justified as death incident to military action.

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26. *See* Exec. Order 12,333, *supra* note 2, at 59, 592.
27. *See* U.S. CONST. art. II, §§ 2-3.

There is little doubt in the wake of the September 11 attacks and the Joint Resolution of Congress of September 14 authorizing the use of force[28] that the efforts of the United States to capture or destroy Osama bin Laden and the Al Qaeda network will be governed by the Joint Resolution, the constitutional authorities of the President, and the laws of war, rather than Executive Order 12,333's provisions prohibiting assassination.

What activity then *is* affected by these executive order provisions? The answer would appear to be political assassinations occurring in peacetime. For that reason, it is worth reviewing the final report of the Church Committee in 1975, which first gave rise to the prohibitions of peacetime political assassinations.[29] Church concluded that the "cold-blooded, targeted, intentional killing of an individual foreign leader has no place in the foreign policy of the U.S."[30] The Church Report documented involvement by the U.S. Government in assassination plots against five foreign leaders during the 50s, 60s, and early 70s, four of whom died violently at the hands of others.[31] In fact, no foreign leader was assassinated by U.S. operatives, but it was not for want of trying. Indeed, the failures came about largely as a consequence of a lack of developed competence in this line of work by the CIA. The first conclusion one draws from this record is that the CIA did not relish the task of assassination planning. It was not what intelligence officers signed up to do, and they were not very good at it.[32]

Second, what happens if the plot is successful? Who would succeed Saddam Hussein if we assassinated him? Might any new leader be worse than the assassinated one? Although it was not the result of assassination, when President Arbenz decamped from Guatemala in 1954 as a consequence of U.S-sponsored covert action, the United States became the de facto

28. Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001).

29. *See* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *supra* note 1.

30. *Id.* at 6.

31. *See id.* at 4.

32. *See* JOHN RANELAGH, THE AGENCY: THE RISE AND DECLINE OF THE CIA 336 (1986).

guarantor of his incompetent successor, Castillo Armas. Guatemala, in effect, became a ward of the United States for the next forty-five years because the United States had chosen to intervene to replace an elected leader. So much for plausible deniability.

Third, if the United States starts down the road of political assassination for its own foreign policy goals, what will stop other nations from targeting our leaders for assassination? What does it say about our respect for the law of nations and our own adherence to the rule of law?[33] I agree with the Church Committee's conclusion that "[i]t may be ourselves that we injure most if we adopt tactics 'more ruthless than the enemy.'"[34] Short of war, the Committee noted, "[a]ssassination is incompatible with American principles, international order, and morality."[35]

Fourth, there is little evidence that retaliating against terrorists by assassinating their leaders is an effective deterrent to future terrorist acts. Assassination appears to beget assassination, if we are guided by the example of the Israelis. Assassination has been no more successful in the struggles between the IRA and the Protestant majority in Northern Ireland, or those of the Basque separatists in Northern Spain.

Finally, if the U.S. chooses to embark upon a course of political assassination in peacetime to nip a potential future Hitler in the bud, who makes the judgment that any given leader is another Hitler? Who exercises control, and what audit trail will exist to establish accountability for the decision?

I would like to see the answers to these questions before the executive order banning assassinations is lifted, especially since there appears to be ample authority in the hands of the President to pursue the September 11 attackers under both the Joint Resolution of Congress of September 14 and the U.S. Constitution.

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33. *See* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *supra* note 1, at 258, 282.

34. *Id.* at 259.

35. *Id.* at 1.

IV. PROHIBITION ON RECRUITMENT OF JOURNALISTS, CLERICS, AND ACADEMICS

As controversial and unproductive as lifting the ban on peacetime assassinations would be, the removal of the barriers against the intelligence community's use of journalists, clerics, and academics would be equally controversial but, unlike assassinations, could be productive.

Use of so-called "angel" assets, including Peace Corps and USAID workers, by the CIA fell into disfavor at the same time that the Church and Pike committees were holding hearings on the CIA's behavior and Seymour Hersh was writing exposes on the CIA's "family jewels" in the *New York Times*. The *Times* editorialized in 1996 that from the Agency's creation in 1947 until the Church and Pike Committee investigations in 1975, about fifty journalists were paid by CIA for their services at various times.[36] In addition, foreign correspondents and CIA station chiefs often swapped information informally, and many other journalists were used as "unwitting sources" of intelligence information.[37] At the time of the investigations, there were eleven CIA officers working under journalistic cover provided by fifteen news organizations.[38]

As a result of the controversy engendered by the revelations of Agency use of journalistic cover, then-DCI George H.W. Bush issued regulations in 1976 limiting the CIA's use of the clergy and the media.[39] The regulations provided that the CIA would not enter into any paid or contractual relationships with full or part-time U.S.-accredited journalists or any similar clandestine relationships with clergymen or missionaries.[40] The

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36. *See*, Editorial, *No Press Cards for Spies*, N.Y. TIMES, Mar. 18, 1996, at A14.

37. *See id.*

38. "Assets" are generally defined as sources that provide information to intelligence agencies as part of a salaried relationship that is based on gifts, reimbursement of expenses, or regular financial payments. There may or may not be an element of control. "Cover" is the use of employment, name, or facilities of any non-official U.S. organization to provide an identity for CIA employees or activities.

39. *See The CIA and the Media: Hearings Before the Subcomm. on Oversight of the House Permanent Select Comm. on Intelligence*, 95th Cong. 331-32 (1978). For a list of the ways in which intelligence agencies cooperate with journalists, see Lt. Col. Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT'L. L. & POL'Y 321, 345 (1996).

40. *See The CIA and the Media: Hearings Before the Subcomm. on Oversight of the House Permanent Select Comm. on Intelligence, supra* note 39.

regulations did not prohibit, however, the gathering of information "volunteered" by journalists or clergy, or the use of journalistic or clerical cover.[41]

One year later, in recognition of the "special status afforded the press under the Constitution," then-DCI Stansfield Turner promulgated stricter regulations prohibiting "any relationship" with full or part-time U.S.-accredited journalists, as well as non-journalist staff employees of the print media, without the express approval of their senior management.[42] The 1977 regulations also prohibited the use of any U.S. media organization as cover for Agency employees or activities.[43] Like the 1976 regulations, the Turner policy permitted voluntarily-supplied information from journalists. Unlike the Bush regulations, however, the new policy established a small loophole allowing the DCI to make exceptions to the stated prohibitions in the event of an emergency.[44]

This two-sentence loophole remained buried for nearly twenty years until the Council on Foreign Relations presented its report on intelligence reform at the end of the Cold War. It included a suggestion that the CIA rethink its policy on non-official cover and reconsider the use of journalistic cover.[45] In response, then-DCI John Deutch made the disclosure, startling to many, that the CIA had in fact used the loophole on several occasions since the regulations were enacted.[46]

The firestorm that ensued in Congress led to the insertion in the Intelligence Authorization Act of FY 1997 of section 309, which declares it to be the "policy" of the United States that the intelligence community may not use a U.S.-accredited correspondent of a U.S. news media organization for intelligence purposes unless the President or the DCI signs a waiver that such use is "necessary to address the overriding

41. *See id.*

42. *See id* at 333.

43. *See id.*

44. *See id* at 334.

45. *See* COUNCIL ON FOREIGN RELATIONS, MAKING INTELLIGENCE SMARTER: THE FUTURE OF U.S. INTELLIGENCE (1996).

46. Former DCI Turner admitted to approving the use of journalists three times but asserted that on at least one occasion the permission was not used. *See* Walter Pincus, *Turner: CIA Nearly Used a Journalist in Teheran*, WASH. POST., Mar. 1, 1996, at A15. Deutch stated that he had not used the loophole at all during his tenure. *See* 142 CONG. REC. 12,153 (1996) (letter from DCI John Deutch).

national security interest of the United States."[47] Voluntary cooperation by a journalist is still permitted as long as it is in writing.[48] Unstated is any congressional position on journalistic cover.

In the aftermath of September 11, the President and Congress are obliged to raise again the issue of the use of "angel" assets and the cover they might provide. As observers call for greater flexibility and creativity from the intelligence community, especially in the recruitment and deployment of non-official cover human sources of intelligence, it seems arbitrary and absurd to rule out any potential method of getting close to Al Qaeda and other anti-American terrorist networks. To be sure, consideration of the privileged position certain professions occupy under the U.S. Constitution should continue to carry weight, but the waiver provision set forth in section 309 provides a sensible solution to a tough problem. Under section 309, the waiver and finding procedure is sufficiently cumbersome and weighty that it is unlikely to be invoked on a casual basis, and the requirement that a proposed waiver must go to the HPSCI and the SSCI insures a measure of accountability. Furthermore, it contemplates that the individuals involved in the intelligence gathering activity will only do so on a voluntary basis. I would broaden the section 309 test to all of the "angel" asset categories: clerics, academics, and Peace Corps and USAID workers.

From this, it is clear that some changes in the laws and rules governing intelligence activities are necessary for the intelligence community to be successful in its struggle to prevent international terrorist acts, especially those directed at Americans. By the same token, it is equally important that these changes not throw the CIA back into the pre-1974 era of limited congressional oversight and little executive branch accountability that led to earlier excesses. The terrorist threat need not become an excuse for abusing the rights of Americans.

If the failure to warn of the September 11 attacks indeed constitutes a massive "intelligence failure"[49] these changes will

47. Intelligence Authorization Act for Fiscal Year 1997 § 309, Pub. L. No. 104-293, 110 Stat. 3461, 3467 (codified at 50 U.S.C. 403-7 (Supp. 1997)).

48. *See id.*

49. I continue to believe that it is rather a "failure of intellect" as Harlan Ullman argued skillfully last October. Harlan Ullman, *Intellect Over Intelligence*, FIN. TIMES,

not alone save the day for the CIA and the intelligence community. A greater understanding of the cultures and circumstances in the Near East and South Asia that produced Osama bin Laden and Al Qaeda will be of far greater importance in sharpening human source intelligence operations against terrorism and fundamentalist Islam than changing the rules under which the intelligence community operates. To accomplish this mission successfully, U.S. intelligence will have to do it the old fashioned way. It will have to learn the languages, spend time on the ground, get its hands dirty, and listen to chatter in the bazaar.[50]

Oct. 19, 2001, at 17.

50. The author has written an op-ed piece on this subject. *See* Frederick P. Hitz, Editorial, *Not Just a Lack of Intelligence, a Lack of Skills*, WASH. POST, Oct. 21, 2001, at B3.