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## ETHICAL DILEMMAS CONFRONTING INTELLIGENCE AGENCY COUNSEL

*Dorian D. Greene\**

### I. INTRODUCTION

The lawyer plays a crucial, yet ambivalent, role in the U.S. foreign intelligence community. The lawyer is in an uncomfortable position, attempting to bridge an enormous gap between two almost incompatible ethical (and legal) frameworks: the due process, human rights-oriented constitutional structure of U.S. domestic law, and the grey, harsh realities of power politics. Simultaneously the lawyer is both a servant for the community during the course of its relations with the remainder of the federal government and an oversight functionary within the community itself. Daniel Silver, a one time General Counsel for both the Central Intelligence Agency (CIA) and the National Security Agency (NSA), emphasizes that the "first bastion of oversight" is and must be located within, not outside, the intelligence agencies, with its focus on the Offices of General Counsel.<sup>1</sup> Yet counsel must be flexible, sensitive, and creative so that the advice does not hamstring the agency's fulfillment of its mission. Also, counsel must be sufficiently empathetic for counsel's advice to be accepted within the organization. Ignoring counsel's advice and thereby, circumventing the entire Office of General Counsel, is eminently possible in such an organized, tightly compartmentalized society. Fitting the attorney's constitutionally inspired legal and ethical concerns into the procrustean bed of foreign intelligence operations is a painful job and one which finds little sympathetic support within the intelligence community as a whole. Richard Willard, Attorney General William French Smith's Counsel for Intelligence Policy, upon assuming his duties, noted "it was immediately apparent that there was enormous pent-up hostility in the

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1. Daniel B. Silver, *The Uses and Misuses of Intelligence Oversight*, 11 Hous. J. INT'L L. 7, 13 (1988).

intelligence community toward lawyers and legalistic restrictions."<sup>2</sup> This attitude "permeated the career service."<sup>3</sup> This author can attest that ten years later this general attitude has not shown any remarkable change.<sup>4</sup>

This paper explores some of the ethical dilemmas confronting intelligence agency counsel. Its aim is to introduce an attorney with no prior knowledge of intelligence work to some of the idiosyncrasies of the community, including its chameleon ethical standards, unique recruitment characteristics, and ethical variations from the norm which can be expected in the typical government office. Special problem areas are highlighted. For example, the new attorney has to struggle with questions concerning the identity of his "client" (agency, President, or Congress). The Constitution and the courts provide little guidance. Other problem areas include defining a "violation of a legal obligation to the organization" or a "violation of law" (to use the language of the Model Rules of Professional Conduct (Model Rules)) in an ambivalent legal context,<sup>5</sup> as well as issues associated with compartmentalization, sensitive intelligence collection, covert action, and oversight. Finally, the new attorney must function in a unique litigation environment due to severe constraints on discovery and disclosure.

## II. SETTING THE STAGE: RECRUITMENT

In response to pressures generated by external (primarily congressional) oversight, foreign intelligence agency offices of general counsel have grown substantially in size since the mid-1970s and have increasingly recruited lawyers from outside the agencies to fill positions up to and including General Counsel.<sup>6</sup> Apart from the oversight role sketched out above, lawyers are called upon to support the agency before congressional investigations, to respond to the increasing workload generated by executive orders and statutes, to provide a focal point between the agency and executive oversight boards or the Attorney General's Office, and to handle the dramatic increase in litigation involving agencies.<sup>7</sup>

It is alleged that attorneys have relinquished lucrative private practices in exchange for an opportunity to participate in intelligence law.<sup>8</sup> J. Edwin Dietel, past Deputy General Counsel of the CIA and managing attorney in the agency's sixty-lawyer office, lists five reasons which attract lawyers to intelligence work: (1) responsibility for legal problems that have national or international importance; (2) assumption of high levels of responsibility quickly; (3) a variety of substantive legal challenges; (4) "a relaxed, yet dynamic work environment;

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2. Richard K. Willard, *Law and the National Security Decision-Making Process in the Reagan Administration*, 11 HOUS. J. INT'L L. 129, 130 (1988).

3. *Id.*

4. The author is drawing upon six years of experience as a foreign intelligence analyst and manager.

5. See, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1992) [hereinafter MODEL RULES].

6. Daniel B. Silver et al., *Oversight and Accountability of the U.S. Intelligence Agencies: An Evaluation* 18 (1985) (report by the Working Group on Intelligence Oversight and Accountability of the Task Force on Intelligence and Counterintelligence of the A.B.A. Standing Committee on Law and National Security).

7. J. Edwin Dietel, *Counseling Intelligence Operations*, NAT'L L. REV., Sept. 25, 1989, at 18.

8. *Id.* at 19.

and (5) [an] opportunity to apply creativity and innovation to real problems."<sup>9</sup> While Dietel's quick sketch is useful, it fails to penetrate the recruitment process with any depth, leaving certain ethical issues for further illumination.

The first step in an examination into the ethical concerns of intelligence counsel recruitment must begin with the big questions facing any attorney contemplating work with the federal government. These include whether the lawyer can maintain his duty of confidentiality, whether his employment with the government presents conflicts of interest, what duty of competence he owes to the government, and under what conditions he can accept, decline, or terminate his representation. Other questions arise about his responsibilities as an advisor distinct from his role as an advocate and how he is to confront "revolving door" issues of post-government employment. Some of these issues will be dealt with in depth at a later point. However at this juncture, it is only necessary to address the prohibition such ethical concerns have on an applicant's recruitment. The first step in this process is for the applicant to confront the restrictions incorporated in the "ethics in government" laws.

U.S. government ethics laws are complex, including several U.S. Code sections (particularly Title 18, Chapter 11),<sup>10</sup> the Ethics in Government Act of 1978 and its subsequent amendments,<sup>11</sup> Executive Order No. 11,222 and its amendments,<sup>12</sup> and specific agency regulations.<sup>13</sup> Much of Title 18 which deals with bribery, graft, and overt conflicts of interest, is not likely to weigh heavily in an attorney's decision to join the intelligence agencies. The law prohibiting attorneys from acting as an agent for, or accepting compensation from, a foreign principal while employed by the federal government will likely be anticipated, particularly as the new attorney is contemplating employment in a sensitive, national security activity where any type of foreign allegiance is unacceptable.<sup>14</sup> Many ethical concerns such as: the prohibition against participation in decisions involving entities in which he or his immediate family or associates have a financial interest,<sup>15</sup> limitations on post government employment involving representation of private interests before the government,<sup>16</sup> and public disclosure and potential financial restructuring (for General Counsel and

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9. *Id.*

10. *See, e.g.*, 2 U.S.C. app. 6 §§ 101-09 (1988); 18 U.S.C. §§ 201-17 (1988).

11. 5 U.S.C. app. 6 §§ 101-09.

12. Exec. Order No. 11,222, 3 C.F.R. 306-11 (1965), *reprinted as amended* in 18 U.S.C. § 201 (1988).

13. *E.g.*, 32 C.F.R. § 40 (1993).

14. 18 U.S.C. § 219 (1993). The restrictions contained within this law may be increased to a point where it begins to act as a bar to some recruitment. President Clinton indicated that he would issue an executive order which would significantly strengthen current federal government ethics requirements. Among the new requirements would be a demand that 1,100 Presidential appointees sign a pledge not to act as lobbyists for foreign governments or political parties at any time after leaving their government posts. It was intended that General Counsels of agencies and departments would be affected by this restriction. *See Lewis, Clinton Team Unveils New Code of Ethics for Incoming Officials*, SAN DIEGO UNION, Dec. 10, 1992, at A6. Obviously, potential political appointees for intelligence agency General Counsel with current practices involving significant foreign clients or domestic political parties, would be deterred from seeking such positions if this policy is put into effect.

15. 18 U.S.C. § 208(a).

16. *Id.* at § 207. The Clinton Administration indicated its intent to impose a five year ban on post-government private representation before ex-agency employers. *See Lewis, supra* note 14, at A6.

Deputy General Counsel positions) of all significant non-government income, rents, honorariums, gifts, hospitality, or debts,<sup>17</sup> will not affect an attorney seeking intelligence agency employment differently from those seeking employment with the government in general. Similarly, Executive Order 11,222 (as amended), prohibiting the solicitation of financial favors<sup>18</sup> and the personal use of federal property,<sup>19</sup> implores federal officials to meet all their "just" financial obligations<sup>20</sup> and to avoid even the appearance of conflicts of interest.<sup>21</sup> This would seem to weigh no heavier on intelligence agency counsel than attorneys employed by other government agencies.<sup>22</sup>

For the attorney, de facto "ethics in government" restrictions are also provided by the A.B.A.'s Model Rules and Model Code of Professional Responsibility (Model Code). Many of the provisions in the Model Rules and Model Code are aimed at practicing attorneys who fulfill public service roles or are employed by regulatory bodies with public oversight functions.<sup>23</sup> Here, the attorney's relations with present or past clients are subject to certain restrictions. Although an attorney employed by the intelligence agencies may be in a position to obtain a special advantage for a past (or future) client, or have the power to improperly influence a public official or agency,<sup>24</sup> it is unlikely (due to security considerations) that the attorney will know of many such agency-private sector relationships prior to his employment.<sup>25</sup> One possible exception occurs when the prospective recruit is corporate counsel for defense contractors with intelligence agency service or hardware contracts.<sup>26</sup>

17. 5 U.S.C. app. 6 §§ 101-09.

18. 5 C.F.R. § 735.202(a) (1983).

19. *Id.* §§ 735.204-205.

20. *Id.* § 735.207.

21. *Id.* § 735.204.

22. This is not to suggest that the intelligence community does not have some unique "ethics in government" concerns which fall squarely within these categories, just that attorneys employed by the community will less likely be troubled by these ethics concerns. Evidence suggests that many former CIA officers with clandestine relationships overseas have personally gained from their ties after leaving the government. These former officers engaged in a variety of personal business ventures, including the formation of multinational partnerships, lobbying American businesses, consulting, and employment abroad with American firms so as to be positioned to utilize their unique clandestine contacts. However, CIA officials insist that agency guidelines for conflicts of interest are identical to those in the Ethics in Government Act which impliedly prohibit the "revolving door" from rotating full circle. See Jeff Gerth, *Former Intelligence Aides Profiting from Old Ties*, N.Y. TIMES, Dec. 6, 1981, at 1.

23. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-4, 8-8 (1981) [hereinafter MODEL CODE].

24. *Id.* at DR 8-101(A); see also MODEL RULES Rule 3.5(a).

25. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. app. § 401 (1988). The Reagan Administration White Paper on "United States Intelligence Activities" authorizes U.S. intelligence agencies to enter into contracts with the private sector for "the provision of goods or services," but the agencies "need not reveal the sponsorship of such contracts or arrangements."

26. This may not be an insignificant number of individuals however, as the intelligence community has contracts with some of the biggest corporations in the U.S. (e.g., TRW, GM, GE, SAIC, Digital, etc.) For a critical review of information sharing between the U.S. intelligence agencies and their corporate contractors, see Robert Dreyfuss, *Company Spies: The CIA has Opened a Global Pandora's Box by Spying on Foreign Competitors of American Companies*, MOTHER JONES, May 1994, at 16. This issue unites both ends of the U.S. political spectrum. John Warner, Republican Senator from Virginia and Vice Chairman of the Senate Select Committee on Intelligence, has criticized suggestions that the CIA conduct industrial espionage and provide this information to U.S. corporations - thereby making the latter direct consumers of the foreign

At this point in the analysis, one can move from general to more specific ethical concerns in the recruitment process. Dietel indicates that interest in national issues is a draw for service with the intelligence agencies. Moreover, interest in national security issues or public service considerations are on the top of any applicant's list of reasons for wanting to engage in foreign intelligence work. It is the rare agency employee who does not articulate at least one or both of these two interests as reasons for their choice of employment.<sup>27</sup> Yet, since Watergate and the subsequent highly publicized Church Committee<sup>28</sup> hearings on alleged excesses in the intelligence community, the articulation of such interests often cuts along two very different ideological currents. One group seeks to join the agencies in an effort to shield the latter against perceived legislative zealotry, while a second group is just as motivated to protect the American (and perhaps international) public from perceived agency excesses. Unless provided with a political mandate from the White House, the agencies tend to weed out most of the latter type from the selection pool during the recruitment process. These "moral agents", who make it through the extensive interviewing and clearance process, often find themselves in an uncomfortable position once employed, and the implicit disapprobation of their colleagues usually diminishes their morale. Often, these individuals (if still enamored with intelligence work) will "defect" to Congress, and assume staff positions with the House Permanent Select Committee on Intelligence or the Senate Select Committee on Intelligence, where institutionalized functions of legislative oversight and partisan competition make for a more congenial work environment.

Although it is alleged that intelligence lawyering confronts a wide range of substantive issues (and, in consequence, the Offices of General Counsel seek "generalists"<sup>29</sup>), practically speaking, security restrictions make it almost impossible for a private person to learn about the nature of the office work.<sup>30</sup> The difficulty of pre-education through internships or private research may thus act as a bar to recruitment. On the other hand, the attorney applicant will know exactly what pay grades are available and have a general appreciation for the expected rate of promotion and overall salary caps. In most cases the pay rate and promotion opportunities will be less than that which a young, aggressive attorney can expect to earn in the private sector. Since the office duties are unknown or "unknowable," pre-planned "revolving door" considerations may not

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intelligence product. *Hearing of the Senate Select Committee on Intelligence*, Federal News Service, Feb. 2, 1993, available in LEXIS, Nexis Library, FEDNEW File [hereinafter *Hearing of the Senate Select Committee*]. The current Director of Central Intelligence, R. James Woolsey, has asserted that the CIA will not engage in industrial espionage. *Hearing of the House Intelligence Committee*, Federal News Service, Feb. 24, 1994, available in LEXIS, Nexis Library, FEDNEW File [hereinafter *Hearing of the House Intelligence Committee*].

27. Other reasons may include a taste for adventure, a love of intrigue, or an attraction for those individuals who enjoy being "on the inside" or "in the know."

28. See SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS: SUPPLEMENTARY DETAILED STAFF REPORTS ON FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 755, 94th Cong., 2d Sess. (1976).

29. Dietel, *supra* note 7, at 19.

30. This may be somewhat alleviated through an internship program, but these positions are strictly limited and generally not sought after by more experienced attorneys.

feature in the recruitment process.<sup>31</sup> The combination of these factors will tend to promote those applicants with strong national security or public service interests while increasing the effect of lower pay (but financial predictability) on the overall applicant pool. With no readily perceivable benefit of intelligence agency service on subsequent private sector employment, the "careerist" will be the usual, successful applicant.

The recruitment process can be abused when the applicant seeks admission with no intent to work in the agency, but simply with the expectation of gaining the security clearances. As the applicant must gamble on the agency, so must the agency gamble on the applicant. "Semi-finalists" in the selection process must pass an extensive special background investigation (SBI) before being employed and awarded their necessary clearance. For an agency attorney with presumably broad access to Special Compartmentalized Intelligence (SCI) and Special Activities Operations (SAO) or "covert" operations, an SBI is lengthy and very expensive.<sup>32</sup> At that point, the clearances themselves become a highly marketable commodity and it is known that some applicants gain admission to an intelligence agency only to quit soon after they have been "indoc'ed" into their clearances. Usually, applicants use this information to improve their employability with private (often defense) contractors who can hire the applicants immediately, at reduced risk, and without significant expenditure on new SBI's. Contractors are known to solicit applicants at this stage of the recruitment process. The author is aware of several corporate counsel offices which have benefitted from a rapid turnover in intelligence agency personnel, and although it is impossible to distinguish premeditated applicant behavior from "second thoughts" or other inducements to leave the service, "revolving door" clearance peddling remains a hazard that the agencies have little choice but to accept.<sup>33</sup>

### III. ETHICS IN THE WORKPLACE

Once employed, counsel must confront ethics in the workplace. Ethical considerations in intelligence management and decision-making are often-times

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31. In an effort to determine whether there was a discernible pattern of employment in any given area of law *after* attorneys left the intelligence agencies, the author conducted a survey of ex-employees in the Martindale-Hubble database. Approximately 200 attorneys were identified as having been employed as intelligence agency or congressional intelligence committee counsel. A random survey of 20 of these attorneys illustrated that their subsequent legal specialties did indeed encompass a broad spectrum of legal work, including such diverse areas as contract, intellectual property, personal injury, tax, securities, labor, aviation and health care law. A minor emphasis on administrative law or government relations was found throughout the sample, but this was not deemed significant enough to invalidate the hypothesis that ex-intelligence attorneys were indeed generalists and not attracted to intelligence work with preconceived "revolving door" expectations.

32. The author is aware of SBI's which have consumed more than a year of investigative time and have cost the government over \$50,000 to complete.

33. The author has struggled with several ideas aimed at mitigating clearance peddling, but to no avail. The most promising alternative involves an employment contract which the applicant would sign just prior to employment. However, this would probably be unacceptable to the agencies, as it limits their ability to terminate employment, and national security demands that they maintain maximum flexibility in their personnel management. Such contracts may also run afoul of current federal civil service employment laws. One solution is for terminated employees to be detailed to innocuous activities for the remainder of their employment contracts.

a world apart from ethics concerns of other government offices. Two ethical frameworks exist: "locational" ethics, the ethical environment in which counsel works and "substantive" ethics, the ethical considerations upon which counsel bases his advice and decisions. Counsel generally finds himself in the position of having to accept the former, but possessing wide latitude to draw upon his own resources for a definition of the latter.

### A. *Locational Ethics*

The "locational ethics" of intelligence lawyering involves far more intrusive scrutiny into the attorney's private life than for other government positions, and certainly far more than what would ordinarily be considered acceptable in the private sector. Beginning with the SBI, a complete financial record is compiled, including as much of his financial history as is deemed necessary to determine serious debt or bankruptcy. The SBI generally goes far beyond the simple disclosure requirements incorporated in the provisions of the Ethics in Government Act.<sup>34</sup> Spending habits are investigated to determine whether the attorney spends beyond his means. Apart from demonstrating financial responsibility, this investigation attempts to determine whether the attorney may be a potential target for foreign intelligence activity (bribery and blackmail). A lifestyle sketch is also compiled during the SBI. This sketch includes a summary of activities, family, friends, organizations, narcotics or alcohol abuse (if any), and sexual preferences. This is aimed at determining whether the attorney is stable or whether he presents a significant target for subversion. At some point near the end of the SBI, a polygraph examination is administered and the attorney is asked to corroborate the truthfulness of his written application and comment on any inconsistencies found during the course of the SBI.<sup>35</sup>

The attorney may continue to be the target of intrusive scrutiny even after beginning work with an intelligence agency. Indeed, if an agency believes it has probable cause, such scrutiny may continue even after the attorney terminates his employment with that agency. Executive Order No. 12,333 provides:

Agencies within the Intelligence Community shall use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad. Agencies are not authorized to use such techniques as electronic surveillance, physical searches without consent, mail surveillance, physical surveillance, or monitoring devices unless they are in accordance with procedures

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34. 5 U.S.C. app. 6 §§ 101-09.

35. An excellent summary of the CIA's recruiting practices, including a candid assessment of the drawbacks to a service career, and the high level of official scrutiny into one's private affairs, can be found in David Wise, *Campus Recruiting and the CIA*, N.Y. TIMES, June 8, 1986, at 20. Senior policy makers continually wrestle with the question of to what extent intelligence agency employees should be subjected to intrusive scrutiny. William Cohen, Republican Senator from Maine and former Vice Chairman of the Senate Select Committee on Intelligence, recently summed up the dilemma:

[H]ow do you preserve the civil liberties of people who work in our government. We don't want to Stalinize our intelligence community as such by hooking people up to lie detector tests or urinalysis and . . . maybe even truth serums. . . . By the same token, we want to make sure that those people who are granted access to our . . . most treasured national secrets really give up something, they give up some of their rights of privacy.

Charlie Rose (WNET Educational Broadcasting Company broadcast, Mar. 17, 1994).



established by the head of the agency concerned and approved by the Attorney General. Such procedures shall protect constitutional and other legal rights and limit use of such information to lawful governmental purposes. These procedures shall not authorize ... [p]hysical surveillance of a United States person in the United States by agencies other than the FBI, *except for ... [p]hysical surveillance of present or former employees, present or former intelligence agency contractors or their present or former employees, or applicants for any such employment or contracting.*<sup>36</sup>

In addition to a certain amount of intrusiveness, the attorney must accept strict controls over speech, publishing and possibly association. Employees of the intelligence agencies enter into secrecy agreements with their employers to protect the confidentiality of materials with which these employees are entrusted. These agreements are binding even after the employee has severed his relationship with the government.

Breach of confidentiality in the attorney-client relationship is proscribed by law. Severe criminal sanctions attach to the unauthorized public disclosure of sensitive national security information.<sup>37</sup> The law is broadly supported by the Model Code and Model Rules which both weigh against unauthorized disclosure of confidential information.<sup>38</sup> Indeed, the net cast by the Model Rules sweeps widely, requiring government attorneys to maintain client confidentiality even while disagreeing "with the policy goals that their representation is designed to advance."<sup>39</sup> Similar restrictions on publishing also apply. The attorney is required to submit any work even remotely related to his job for review. This procedure may involve the oversight of a variety of offices or agencies and may take months to approve the final draft. Review of publications may be demanded even after the attorney has left the agency.<sup>40</sup> Lack of compliance by the attorney may result in agency-initiated litigation that will most likely result in an injunction against publication and possibly both criminal and civil penalties. Controls over freedom of association are not as overt, but may be just as pervasive. For example, the attorney may be forced to drastically curtail certain foreign and domestic contacts or social relations.<sup>41</sup>

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36. Executive Order No. 12,333, *supra* note 25, § 2.4 (emphasis added).

37. For example, criminal penalties for unauthorized release of signals intelligence (SIGINT) is authorized in 18 U.S.C. § 798(a). On the other hand, highly placed officials disclosing classified information may be shielded from criminal prosecution by Congressional or Executive immunity. During 1987, for example, Dave Durenberger, Republican Senator from Minnesota, immediate past Chairman of the Senate Select Committee on Intelligence, and once Chairman of the Senate Select Committee on Ethics, revealed to campaign supporters that the U.S. intelligence community had recruited "an Israeli to spy on Israel." Durenberger, himself a lawyer, was merely "admonished" by the Senate Ethics Committee. *David Durenberger's 'Oversights'*, WASH. TIMES, June 14, 1990 at F2; STAR TRIB., Apr. 4, 1993 at 1A, Sept. 17, 1993 at 14A.

38. MODEL CODE Canon 4; MODEL RULES Rule 1.6.

39. MODEL RULES Rule 1.6 cmt. 6.

40. Arthur S. Hulnick & Daniel W. Mattausch, *Ethics and Morality in United States Secret Intelligence*, 12 HARV. J.L. & PUB. POL'Y 509, 521 n.39 (1989).

41. Following the 1994 indictment and conviction for espionage of veteran CIA operative Aldrich Ames, six bills were introduced in Congress which would give the Executive enhanced authority to investigate the private affairs of prospective and current intelligence personnel. Three of the bills, S. 1886, S. 1869, and H.R. No. 4137, mandate that candidates for top secret security clearances consent to investigative access of their financial records, consumer credit reports, and records of foreign travel. Once employed, new hires would be required to report contacts with foreign nationals and all private foreign travel. Reporting would continue, in

Another problem in the workplace relates to information. As access to information is the heart and soul of the legal profession, the particular problems involving the lawyer's access to information in the intelligence services need to be addressed. The bedrock security institution of the intelligence services is the compartmentalization of information. Compartmentalization has been likened to the use of watertight compartments aboard a ship; if one of these is breached, only those individuals in that compartment are lost. Similarly, if an information compartment is breached, only those immediately concerned are effected. Compartmentalization thus protects the system by keeping any one person from knowing too much, thus minimizing potential loss if that individual should commit an unauthorized disclosure. In the argot of the intelligence community, one must have a "need to know" directly related to job activities before acquiring a specific clearance. Even more explicit, compartmentalization protects the source of intelligence information, restricting the number of individuals who, by virtue of their knowledge, could compromise the source's integrity.

Compartmentalization obviously makes it very difficult to discern the "big picture," an all important factor in making sound legal and ethical decisions. In all U.S. intelligence organizations, access to compartmentalized information increases with advances up the hierarchical pyramid. For instance, a superior usually has access to all of his subordinate's compartments. However, this is not true in every case. In a tightly controlled operation, access may be severely limited to a few people, not all of whom are in a clear chain of command. Indeed, these people may not even know one another, but an overview of the entire operation is maintained by one or two people at the top.<sup>42</sup>

Access may also be divided functionally into informational, operational, and administrative channels. Thus, access to a type of activity may be classified and restricted by end product ("finished" intelligence), means of collection, or dissemination channels. For example, consider a satellite collection system. The scientists who designed the system may have one clearance, the engineers and technicians who operate the system and see the raw data, another clearance, the managers who task the system, a third clearance (or set of clearances), and the analysts who place requests for data, a fourth clearance. The same is true for intelligence collected from people. The operative who handles the "source" of the information is generally unwilling to provide more than the necessary

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some cases, for up to five years after termination of employment. Two other bills, S. 1948 and S. 1890, would force employees to open their tax returns, bank and investment accounts, and other assets to investigative scrutiny, or to submit financial disclosure statements under the Ethics in Government Act. The bill introduced by the Clinton Administration, "The Counterintelligence and Security Enhancement Act of 1994," incorporates many of these measures into a framework relying upon agency discretion rather than legislative fiat. *Senate Select Intelligence Committee Hearing on Counterintelligence Efforts*, Federal News Service, May 3, 1994, available in LEXIS, Nexis Library, FEDNEW File.

42. Senator Frank Church once remarked "how elusive the chain of command can be in the intelligence community," stating that this institutionalized ambiguity "underscores dramatically the necessity for tighter internal controls." L. JOHNSON, *SEASON OF INQUIRY: CONGRESS AND INTELLIGENCE* 76 (1985). Senator Howard Baker, commenting on allegations of domestic intelligence operations conducted by the CIA, implored Congress not to be so concerned that "the CIA...was engaged in domestic intelligence, but whether someone was running the show. I know that Congress was not running the show; and I want to be relieved of that shuddering fear I have that the White House was not, either." *Id.* at 10.

administrative details of his operation to anyone other than his superior (indeed, this is often a condition imposed by the source). Eliciting information from the source may be the result of money payments or may be generated out of ideological motives, but the operative may also be applying some illegal or unethical pressure on the source. Information of this nature is rarely widely disseminated. The operative relates the source's information to a "reports officer" who acts as a conduit, transferring substantive information from the operative to the analyst, and vice versa, the analyst's requirements back to the operative. The final information may be distributed in "tailored" packets designed for a variety of consumers, each packet varying in degree of detail. Reference to the information's mode of origin may ultimately be entirely eliminated, thus the consumer does not know how the information was collected, processed, or analyzed.

Compartmentalization obviously places forbidding restrictions on an attorney's access to information. Therefore, it is very difficult for an attorney to assess single activity in the context of the "big picture." Such an assessment is an important step in determining whether the activity under legal scrutiny represents, to use the language of the Model Rules, a "violation of law" or a "violation of a legal obligation to the organization."<sup>43</sup> On the other hand, attorneys are required "to the extent permitted by law" to report any "intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive"<sup>44</sup> to the President's Intelligence Oversight Board (PIOB). The PIOB reports directly to the President.<sup>45</sup> Counsel is also required to keep the PIOB current with respect to more routine activities by means of quarterly reports.<sup>46</sup> The PIOB is critically dependent upon General Counsel's initiative. The part-time Board meets one day every other month, is supported only by one lawyer and one secretary, and lacks subpoena power.<sup>47</sup> Therefore, it has neither the time nor the resources to effectively investigate suspect agency activities without a clear Presidential directive. Counsel's role is, thus, clearly not just based on advice or liaison, but also devoted to oversight. The system, however, is constructed to strenuously resist full disclosure to counsel. Dietel obliquely suggests that counsel will have to pry information out of the system: "[a] maturity for dealing with seasoned operational officers as clients ... is critical to a successful practice in this

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43. MODEL RULES Rule 3.12.

44. Exec. Order No. 12,334 § 4, 3 C.F.R. 217 (1982), reprinted in 50 U.S.C. § 401.

45. *Id.* § 3. Note however, during the Reagan Administration, reporting "directly" to the President meant in practice, reporting through the President's Assistant for National Security Affairs, who generally acted as a filter or conduit. See Bretton G. Sciaroni, *The Theory and Practice of Executive Branch Intelligence Oversight*, 12 HARV. J.L. & PUB. POL'Y 397, 414 n.67, 430 (1989).

46. This process originated during the Ford Administration, as set forth in Exec. Order No. 11,905 § 6(b)2, 3 C.F.R. 102 reprinted in 50 U.S.C. §401 (1976). This process was discontinued during the Carter Administration, but resumed during the Reagan-Bush years. Sciaroni, *supra* note 45, at 414.

47. Observations by Senators Rudman and Tribble during the Iran-Contra hearings. See 5 IRAN-CONTRA INVESTIGATION: JOINT HEARING BEFORE THE SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, 100th Cong., 1st Sess. 431, 442 (1988) [hereinafter IRAN-CONTRA INVESTIGATION].

field."<sup>48</sup> Counsel's access to information may depend as much upon establishing personal relationships based upon mutual trust, as it does upon legal requirements for full disclosure. Once this mutual trust breaks down, counsel may find his access restricted to generic information only, devoid of telling detail.

Further compounding the problem of access, counsel may not have the benefit of advice from others in his immediate office,<sup>49</sup> a situation generally unanticipated for most types of legal practices.<sup>50</sup> The dictates of compartmentalization may restrict program oversight to a single attorney and General Counsel or Deputy General Counsel. Both of the latter are designated "senior employees," at least by the CIA,<sup>51</sup> and thus may be political appointees. This situation could potentially be difficult for counsel, particularly if he is uncomfortable with the legal uncertainties associated with a decision, but is feeling some political pressure to "rubber stamp" the process.<sup>52</sup>

### B. Substantive Ethics

Difficulties associated with "substantive ethics" will be even more poignant than with "locational ethics," because it is upon the bedrock of "substantive ethics" that counsel will base advice and decisions. Dietel indicates that "the most important qualification for an intelligence lawyer is the ability to step back

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48. Dietel, *supra* note 7, at 19.

49. *Id.*

50. The Model Rules, for example, indicate that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." MODEL RULES Rule 1.6 cmt. 8. Similarly, the Model Code provides that "[u]nless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm." MODEL CODE EC 4-2. However, language of EC 4-2 does anticipate that counsel may be highly restricted from seeking advice from colleagues:

[t]hus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer.

MODEL CODE EC 4-2.

51. 5 C.F.R. § 737.33; FED. ETHICS HANDBOOK (Michie Supp. 1984).

52. One possible way of ameliorating this type of political pressure would be to require that Presidential appointees for the Offices of General Counsel be confirmed by the Senate before assuming their duties. This was a proposal suggested by the Iran-Contra Investigative Committee's Majority Report. See SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS, S. Rep. No. 216 & H. R. Rep. No. 433, 100th Cong., 1st Sess. 425 (1987). The end result of this would be to politicize the positions of General Counsel and Deputy General Counsel in yet another fashion (increasing the tension between the Office of General Counsel and the remainder of the agency). Benefits, on the other hand, would be more insurance that General Counsel and Deputy General Counsel's substantive ethical world views were acceptable to the majority party in the Senate, a useful brick in building an Executive-Legislative consensus on intelligence operations. In May 1991, Senator John Glenn attempted to tack a bill onto the Intelligence Authorization Act of 1991 which would require that agency General Counsel and Deputy General Counsel be confirmed by the Senate, however, the bill was voted down on the floor. See Marcus Raskin, *Let's Terminate the CIA*, NATION, June 8, 1992, at 776. The Clinton Administration also disfavors this approach. *Hearing of the Senate Select Committee on Intelligence*, *supra* note 26.

and ask: Is the proposed result fair? Is it just? Is it right?"<sup>53</sup> Counsel will be asked to judge the appropriateness of sensitive intelligence collection or covert operations with relation to the rough and tumble world of international politics, without the comforting insulation of the Model Rules, the Model Code, or even constitutional considerations of due process and fundamental human rights. At the same time, counsel must remain aware of the social tenor of the times (particularly as represented by the press) and partisan considerations (both within Congress and between Congress and the Executive). The latter factor is particularly relevant in view of eventual legislative oversight of, and reaction to, intelligence programs.

In this context, one might ask: "What are the ethical standards of American intelligence operations?" No clear answer emerges. The author believes that the agencies work within a dual, or even a three-tiered moral framework: operations directed against U.S. citizens, at home or abroad, are conducted within the framework of U.S. law and expected propriety; operations conducted against foreigners, most explicitly abroad, are generally expected not to breach some basement standard of "American values and fair play;" and, possibly, a nebulous category of "no holds barred" activities may be permissible if required to protect critical U.S. interests from an overarching and imminent threat.

The Working Group on Intelligence Oversight and Accountability of the A.B.A.'s Standing Committee on Law and National Security circulated a questionnaire to intelligence agency managers, asking for their estimate of, among other things, the ethical standards of American foreign intelligence operations. It is interesting to note that twenty-five percent of the respondents of this survey were intelligence agency counsel and approximately fifty percent were lawyers.<sup>54</sup> The group received a wide variety of opinions ranging from "substantive" to "procedural." The responding opinions included the following ideas: moral standards must be based upon American values and measured by what is appropriate in "targeting" U.S. citizens; certain forms of necessary intelligence activity may involve deception, extortion, bribery, theft, untoward intrusions into personal privacy, and violence, none of which can be squared with morality, to avoid hypocrisy, a "just war" analysis is imperative; flexibility at all costs; even assassination may be required (e.g. in the event of an imminent terrorist attack on the President or a nuclear attack), but there is no need for torture; a dual standard is required; one for U.S. citizens and a second for foreigners; permanent standards are unwise, instead the standards should vary within a historical context, and individual agencies should establish their own standards of conduct, with ad hoc commissions established after-the-fact to illuminate/correct the worst abuses; the oversight process is akin to the Anglo-American case law system, where Executive oversight agencies and Congress provide boundaries of the acceptable; standards of behavior should be established in charter documents and given life through "good will" exchanges between

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53. Dietel, *supra* note 7, at 19.

54. Silver, *supra* note 6, at 113-14.

Congress and the Executive; procedures adopted for approving covert activities develop standards, but categorical lists of "do's and don'ts" do not.<sup>55</sup>

Thus, the basic question becomes what the lawyer expects his substantive ethical role in the U.S. foreign intelligence community to be: moral agent, ethical safety net, neutral advisor, or public advocate? The answer to this question is complex and depends upon a variety of circumstances: the substantive ethics of the attorney, the foreign policy ethics of both the administration and the working ranks of the intelligence community, the amount of bipartisan consensus or partisan discord between the Executive and Congress, the general ethical concerns of the public, and the adversarial position of the press. Since space constraints are a consideration, we will use this context to examine only the first and the last of the four substantive ethical roles outlined above. The roles of "moral agent" and "public advocate" are chosen because they represent the range of choice within which counsel will be forced to operate.

### 1. Counsel as Moral Agent

This emphasis is most likely to occur after a change in administrations when the incoming administration attempts to redirect the broad direction of U.S. foreign intelligence activities as inherited from its predecessors. Here, the lawyer as a "moral agent" is generally used to "rein in" the intelligence community. The Clinton Administration appears to conform to this pattern of behavior.<sup>56</sup> The Carter Administration however, provides the best recent example of executive use of counsel in this role.

President Carter assumed office in the wake of the Church Committee hearings on foreign and domestic intelligence agency abuses. The community was alleged to have been involved in assassination plots against a variety of foreign figures, the destabilization of governments and foreign currencies, secret wars, coups, and covert arms transfers. Also, the community had been targeted with accusations of covert administration of experimental drugs to unsuspecting people both at home and abroad, and the intrusive surveillance upon and manipulation of U.S. dissident groups. Carter indicated that he was deeply troubled by intelligence community involvement in these types of activities and stated that during his administration, "moral principles" would guide the exertion of American power and influence abroad.<sup>57</sup> Carter's Director of Central Intelligence (DCI), Admiral Stansfield Turner, echoed his boss' approach to intelligence activities: "There is one overall test of the ethics of human

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55. *Id.* at 40-44.

56. In the wake of the Ames scandal, Director Woolsey has vowed to institute oversight procedures holding operations personnel to higher standards of ethics and accountability. Tim Weiner, *Agency Chief Pledges to Overhaul 'Fraternity' Atmosphere at C.I.A.*, N.Y. TIMES, July 19, 1994, at A1. Gender discrimination within the agency has also been targeted by the Clinton Administration, with Woolsey pledging to change those CIA personnel practices currently favoring an "all-male fraternity." *All Things Considered* (NPR radio broadcast, Sept. 21, 1994). Woolsey has had significant experience in the adversarial legal oversight of intelligence activities. As general counsel of the Senate Armed Services Committee during the early 1970s, he did much of the staff work supporting the Committee's investigation of the CIA's role in Watergate. *Hearing of the Senate Select Committee on Intelligence*, *supra* note 26.

57. JIMMY CARTER, KEEPING FAITH: MEMOIRS OF A PRESIDENT 143 (1982).

intelligence activities. That is whether those approving them felt that they could defend their decisions before the public if the actions became public."<sup>58</sup> Faithful to their word, at least one quarter of the Carter Administration's major policy paper on foreign intelligence dealt with detailed prohibitions on covert activities, including a ban on assassination, severe restrictions on all manner of surveillance against U.S. citizens, and restrictions on the use of third party contractors.<sup>59</sup> Even prior to the publication of Carter's policy, Turner had begun cutting Directorate of Operations (DO) personnel at Langley, and within the next month, it was announced that twenty percent of the DO staff had received pink slips.<sup>60</sup> During the following year, a substantial portion of the remaining mid-to-senior level covert staff resigned or took early retirement.<sup>61</sup> By 1979, Turner, commenting on the small number of covert operations left functioning in the U.S. intelligence services, stated flatly that there were so few, "not because we are not allowed to do them, but because we can't find the applicability of covert action to our country's needs."<sup>62</sup>

Turner was not alone in his efforts to minimize covert activities. Vice President Walter Mondale worked diligently throughout Carter's tenure, in a coordinated effort with the Senate Select Committee on Intelligence, to produce an intelligence community "charter" which would set clear limits on U.S. foreign intelligence activity.<sup>63</sup> Various drafts of these charters barred the agencies from specific activities such as: assassination, overthrowing democratic governments, employing torture, planting agents in domestic news gathering or religious organizations, using infiltrators to provoke political organizations into committing illegal acts, influencing the policies of corporations, committing intrusive acts of surveillance on U.S. citizens abroad without a court order, creating shortages of food and water, starting epidemics or floods, assisting foreign security forces in human rights violations, etc.<sup>64</sup> Each of these restrictions were to be policed primarily by agency counsel. The charter effort ultimately died, a victim of a more conservative mood swing in Congress.<sup>65</sup> However, the legal requirements during the Carter Administration restricting covert activities, including a statutory requirement to notify up to eight congressional committees, virtually eliminated secret American foreign intervention. Senator Daniel Patrick Moynihan caustically commented that by this time, the CIA had become limited to "doing research that might as well be done in the Library of Congress."<sup>66</sup>

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58. STANSFIELD TURNER, *SECRECY AND DEMOCRACY* (1985) *reprinted in part in* NEWSWEEK, May 20, 1985, at 81.

59. Exec. Order No. 12,036 § 2, 3 C.F.R. 125-40 (1978).

60. *American Survey*, ECONOMIST, Dec. 24, 1977, at 28; *Controversy Over "Czar" for Intelligence*, U.S. NEWS & WORLD REP., Feb. 6, 1978, at 50.

61. FACTS ON FILE WORLD NEWS DIGEST, Feb. 23, 1979, at 132, col. G3.

62. *Is the CIA Hobbled?*, NEWSWEEK, Mar. 5, 1979, at 44.

63. George Lardner, Jr., *Intelligence Charter: Time May Run Out as Spies Argue*, WASH. POST, Feb. 14, 1979, at A10; Bernard D. Nossiter, *Effort to Curb Spy Agencies Turns into a Permission List*, WASH. POST, Mar. 31, 1979, at A2.

64. *Id.*

65. Anne Karalekas, *Intelligence Oversight: Has Anything Changed?*, 6 WASH. Q., Summer 1983, at 22.

66. *Should the CIA's Black Arts Go Back into Darkness?*, ECONOMIST, May 12, 1979, at 43.

Throughout this "reining in" process, lawyers played a critical role. Turner wrote, "[i]t's almost mandatory today that the agency's lawyers be consulted before sensitive operations are undertaken and often as they progress .... Lawyers have become part of the operations team."<sup>67</sup> Daniel Silver, CIA General Counsel between 1979 and 1981, believed that it was:

[E]ssential that the general counsel and lawyers on that person's staff be independent, strong-minded and conceive of the office in a broader role than merely serving as the personal legal counsel to the agency head ... [I]t is important that the agency head and agency management respect the law and recognize that the General Counsel's Office should be involved in the planning stages of [all] significant operations; in decisions relating to the interpretations of any legal requirements ... and generally in all decisions raising issues of sensitivity ... whether or not a direct question of legal interpretation can be discerned.<sup>68</sup>

Lawyers, both within the Carter Administration and of the staff for the Senate Select Committee on Intelligence, played an active role in the unsuccessful attempt to force the intelligence community to accept charter documents that would explicitly prohibit a variety of collection and covert activities. Thus, the intelligence lawyer's role during the Carter years was, most explicitly, that of a "moral agent," whose goal was to bring the intelligence community into legal and ethical parity with the American public. However, the price of moral agency and the zeal to achieve community consistency with domestic ethical and legal standards, may be the virtual elimination of covert U.S. foreign activities, thereby depriving the President of a whole spectrum of tools for American foreign policy.

## 2. Counsel as Public Advocate

In contrast to the Carter Administration's approach, during the Reagan Administration intelligence agency counsel acted as public advocates for community activities. They did so primarily by providing the Executive with constitutional and legal justifications to use before potentially hostile congressional committees. Particularly during the first term of the Reagan Presidency, counsel assumed an activist public relations role, justifying increased collection efforts and covert operations not by reference to American domestic morality, but to the global superpower competition. *Realpolitik* concerns became paramount, and means, short of war, were again judged as necessary tools in the expanding ideological and political competition. The Republican platform was clear on this point: "[we] will undertake an urgent effort to rebuild the intelligence agencies, and to give full support to their knowledgeable staffs ... we will seek the repeal of ill-considered restrictions sponsored by Democrats, which have debilitated U.S. intelligence capabilities while easing the intelligence collection and subversion efforts of our adversaries."<sup>69</sup> William J. Casey, both as a lawyer and as Reagan's first Director of Central Intelligence, saw a large part of

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67. Kirk Victor, *CIA Counsel's Role Questioned*, NAT'L L.J., Feb. 2, 1987, at 3 (quoting STANSFIELD TURNER, *SECRECY AND DEMOCRACY* (1985)).

68. Silver, *supra* note 1, at 14-15.

69. 126 CONG. REC. 20,633 (1980) (Republican Platform).



his duties as public relations specialist, as selling enhanced community responsibilities to Congress, the press, and the public.

One of Casey's first directives as DCI was to pack-up the CIA's Office of General Counsel and send it as far from the headquarters building as possible.<sup>70</sup> The symbolism of this act was not lost on agency personnel; counsel was to have a minimal role in the day-to-day operations of the community. On Casey's initiative, Silver, still CIA General Counsel, produced a major revision of Carter's foreign intelligence policy planning document. Silver substantially downgraded executive agency oversight requirements, relaxed restrictions on agency infiltration of domestic organizations, reduced warrant requirements for searches and surreptitious entries, and dropped the "probable cause" standard for initiating many covert activities. He also once again distanced the President from covert operations by reintroducing the concept of plausible deniability.<sup>71</sup> Silver was soon replaced by William P. Barr, an activist conservative who quickly developed a reputation as willing to go to the mat with congressional intelligence committees.<sup>72</sup> Barr's successor, Stanley Sporkin, was accused by the Chairman of the Senate Intelligence Committee of justifying retroactively authorized covert activity on questionable legal grounds, and of stretching the legal interpretation of what constitutes "timely" notification of Congress beyond acceptable limits.<sup>73</sup> Other executive agency intelligence oversight positions, such as General Counsel for the PIOB, were staffed by legal "unknowns" with strong conservative credentials and minimal foreign policy background. They were given none of the tools or time which would allow them to conduct effective oversight, and they were pressured to justify administration policy rather than confront it.<sup>74</sup>

The role of public advocate can often be uneasy. Judge William H. Webster, DCI during the latter Reagan years and for most of the Bush Administration, was specifically selected to succeed the flamboyant Casey due to his impeccable legal credentials and reputation for judicial caution. Yet, in the wake of a failed coup attempt against Panama's Manuel Noriega, Webster was the administration's front man in advocating a repeal on the prohibition against foreign assassinations. It is most likely that intra-administration politics compelled Webster to take this position. Given Webster's low-key style, his efforts to reestablish ties with hostile, partisan congressional intelligence commit-

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70. Silver, *supra* note 6, at 104.

71. Robert Pear, *Intelligence Groups Seek Power to Gain Data on U.S. Citizens*, N.Y. TIMES, Mar. 10, 1981, at A1, B9.

72. Michael Isikoff, *No. 2 Aide at Justice Quits Post; Ayer Reportedly 'Frozen Out' at Top*, WASH. POST, May 12, 1990, at A1.

73. TURNER, *supra* note 58, at 3. Monroe Freedman, Distinguished Professor of Legal Ethics at Hofstra University Law School, suggests that Sporkin may have failed to investigate the Iran-Contra covert operation with a standard of "due diligence" calculated to have assured Sporkin that these activities were "not designed to frustrate the public interest." Monroe Freedman, *Sporkin's Question Backfires*, TEX. LAW., Jan. 25, 1993, at 15.

74. Kenneth Jost, *Reagan's 'Inquire No Evil' Legal Team*, LEGAL TIMES, June 22, 1987, at 16.

tees in the wake of the Iran-Contra hearings, and his innate conservatism, it is highly unlikely that he would voluntarily reopen this highly charged issue.<sup>75</sup>

Even murkier are those questions dealing with perjury before congressional committees,<sup>76</sup> investigative commissions,<sup>77</sup> executive oversight bodies,<sup>78</sup> and court proceedings in support of (or shielding) illegal or sensitive covert operations. It can be surmised that there are numerous reasons for perjury of this type, including protecting the agency or personnel of the agency from embarrassment or litigation, protecting sources or operatives from potentially lethal exposure, and shielding expensive operations and assets from compromise. Perjury is also possible when the witness believes it necessary to protect political figures in the administration, such as the President, from direct association with exposed covert activities. Counsel could easily find himself in a very difficult ethical position where actively supporting a client's perjury would not only shield his client, the agency, and even the President, but might be instrumental in protecting the lives of covert operatives. On the other hand, counsel could be transgressing key ethical requirements of his profession, as well as actively committing contempt of Congress (or other duly constituted oversight bodies). Withdrawal may not be an option in this case because alternative counsel may not be readily available, and the stakes of failure are high. As of this moment, agency counsel has not been directly implicated in perjury. However, to what extent they may have knowingly assisted clients, with full knowledge of the client's intent to commit perjury, is unclear.

Public advocacy also extends into court, where it may, on occasion, border on overzealous representation. CIA and NSA counsel are frequently called upon to defend suits filed under the Freedom of Information Act and occasionally, the Federal Tort Claims Act. Often discovery is blunted by the National Security Act of 1947,<sup>79</sup> which provides blanket protection for intelligence "sources and methods," and blocks discovery requests for classified information. Judges must review the CIA documents in camera under the Classified Information Procedures Act of 1980<sup>80</sup> and have proved most reticent to order the release of classified information. Plaintiff's lawyers suspect the agencies of hiding embarrassing or incriminating information under the cover of the National Security Act as well as legitimately secret information. Indeed, such information

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75. David B. Ottaway, *Coming Out of the Cold; Webster Publicly Seeks Leeway for the CIA*, WASH. POST, Oct. 22, 1989, at A1; Thomas Powers, *The Perils of Covert Policy: Snares and Seductions*, L.A. TIMES, Oct. 29, 1989, at M1.

76. In the most recent example, the Deputy Director of the CIA for Operations, Clair George, was convicted on Dec. 9, 1992, of two counts of lying under oath to the House Intelligence Committee on Oct. 5, 1986, and then to the Senate Intelligence Committee on Dec. 3, 1986. The lies concerned agency involvement with the covert resupply of Nicaraguan rebels. SAN DIEGO UNION-TRIB., Dec. 10, 1992, at A25.

77. Joseph F. Fernandez, CIA Chief of Station in Costa Rica between 1984 and 1986, was indicted for lying to the Tower Commission, charged with investigating U.S. government involvement in Iran-Contra activities. Fernandez successfully invoked the Classified Information Procedures Act, 18 U.S.C. App. § 1 (1982), to produce a ruling that classified information needed to convict him was inadmissible and thus the indictments against him dismissed. *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990).

78. *Fernandez*, 913 F.2d at 150.

79. 50 U.S.C. § 401.

80. 18 U.S.C. § 6(e) (1982).

can be either of the above.<sup>81</sup> Agency counsel are also suspected of effectively using the lengthy review procedures incorporated in the Act to provide a ready-made statute of limitations defense, as well as exhausting plaintiff's time and financial resources.<sup>82</sup> If either of these charges are valid, agency counsel may be skirting perilously close to the ethical line provided in the Model Code. As a government lawyer, "he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."<sup>83</sup> Similarly, he "should not suppress evidence that he or his client has a legal obligation to reveal or produce."<sup>84</sup>

#### IV. CONCLUSION

An attorney seeking entry into the intelligence community as agency counsel must be prepared to confront a variety of ethical dilemmas. Some of these concerns are widely known, such as the financial disclosure requirements, conflict of interest regulations, and representational restrictions enforced by general government ethics laws. Obstacles to recruitment peculiar to the intelligence community, such as the lack of general knowledge concerning counsel's duties and the continuing scrutiny of counsel's personal life, makes the choice of such a career even more difficult. Finally, the unique demands of intelligence work place counsel under severe restrictions in accessing information, restrictions which may prove to be insurmountable obstacles to performing competently unless counsel is endowed with exceptional interpersonal skills. Litigation and counsel's position of strength, supported by various national secrecy laws, place demands on ethics due to the ever present possibility such legal shields may entice him to commit overzealous representation. Complicating the entire picture are external circumstances such as the philosophy toward foreign intelligence operations, as established by the White House and Congress. Such circumstances exert enormous pressure on counsel to conform to a given set of ethical norms. Yet, counsel will have great latitude to conduct oversight and advisory responsibilities within a personal, substantive, and ethical framework. If such views clash with those held by counsel's superiors, the working environment may not be pleasant, but there is still the opportunity to affect the conduct of daily intelligence operations.

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81. Marianne Lavelle, *They Keep the CIA's Secrets Secret*, NAT'L L.J., June 13, 1988, at 1.

82. *Id.* See also, Neil A. Lewis, *Iran-Contra Judge Proves to be a Master of Control*, N.Y. TIMES, Aug. 21, 1992, at A21.

83. MODEL CODE EC 7-14.

84. *Id.* at EC 7-27.