

The Central Intelligence Agency's "Family Jewels": Legal Then? Legal Now?

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Congress and the media recently have claimed that various activities of the Central Intelligence Agency (CIA)—from rendition operations, to the destruction of videotapes, to the maintenance of secret detention facilities overseas—are illegal. Critics levied similar charges against the CIA thirty-five years ago, with regard to activities contained in the "Family Jewels"—the 1973 compilation of the CIA's darkest secrets. The recent release of the Family Jewels provides the opportunity to try to put today's concerns in perspective. This Article evaluates the key activities conducted by the CIA as described in the Family Jewels—experimentation on unconsenting individuals, attempted targeted killings of foreign leaders, electronic surveillance of Americans, examination of U.S. mail, and collection of information on American dissident movements. Contrary to widely held beliefs both then and now, all but one of these activities (experimentation on unconsenting individuals) were legal when they were committed, suggesting that other allegedly "illegal" activities, engaged in by the CIA now, may similarly prove to be lawful.

INTRODUCTION

Congress and the media often accuse the Central Intelligence Agency (CIA or "the Agency") of engaging in "illegal" activities. Current allegations have focused on the use of secret terrorist detention facilities overseas, the treatment of those detained in such facilities, and the destruction of videotapes of a few of those detainees.¹ Yet rigorous and definitive analysis of the legality of such CIA activities is often precluded—or at least seriously undermined—by the politics and hype of the immediate period, and the secret and classified status of the operations at issue.

The recent allegations are hardly the first time the Agency has been accused of engaging in illegal activities. The 1970s brought one of the first deluges of accusations levied against the CIA. This Article will evaluate the CIA's activities during that era, now that such operations have been generally declassified and enough time has passed to be able to consider them in context. In concluding that those activities were generally legal then, the Article suggests that allegations of other "illegal" CIA

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1. See, e.g., Editorial, *Looking at America*, N.Y. TIMES, Dec. 31, 2007, at A16 (describing the "lawless behavior" of the CIA in "plott[ing] to cover up the torture of prisoners by Central Intelligence Agency interrogators by destroying videotapes of their sickening behavior"); Editorial, *The Torture Mystery*, L.A. TIMES, July 26, 2007, at A20 (noting that the Senate has raised questions about the legality of the techniques used in the CIA's detention program).

operations may also prove erroneous when the hype dissipates, the secrecy surrounding the activity lifts, and the benefit of perspective emerges.

In May 1973, James R. Schlesinger, then director of the CIA, ordered all CIA employees to inform him personally of any current or past activities that could be construed as having violated the CIA's Charter.² The responses, totaling 702 pages and highly classified, were considered so sensitive that they were known as the CIA's "Family Jewels."³ In June 2007, almost thirty-five years later, the Agency declassified the Family Jewels with some redactions.⁴

The Family Jewels describe acts ranging from the attempted killings of Fidel Castro and Patrice Lumumba to providing LSD to unconsenting Americans.⁵ The documents also reveal operations to electronically monitor U.S. reporters, gather intelligence on protest movements in the United States, and open U.S. mail going to and from communist countries.⁶ All of these activities were highly controversial in 1973, and remain so now.⁷ Indeed, when the Family Jewels were declassified in June 2007, the media described the documents as depicting the Agency's "dirtiest secrets,"⁸ "rogue operations,"⁹ and "unsavory activities."¹⁰ More importantly, however, these media outlets portrayed the Family Jewels as documenting the many "illegal activities" engaged in by the CIA in the 1950s, 1960s, and 1970s.¹¹

This Article seeks to challenge that last assertion. It will evaluate each of the main types of activities discussed in the 702 pages of the Family Jewels to determine if those activities were indeed illegal when the Family Jewels were compiled in 1973. Thus, what follows is an assessment of whether each given activity violated the United States Constitution, any U.S. statute, or any judicially created law as existed in 1973, and if so, whether such violation would have been actionable in a U.S. court. My conclusion is that the vast majority of the activities described in the Family Jewels were indeed

2. CIA, FAMILY JEWELS 00418 (1973), available at <http://www.foia.cia.gov/> [hereinafter FAMILY JEWELS] (type "Family Jewels" in the Search Declassified Docs browser; then click on "Family Jewels" in the results).

3. Mark Mazzetti & Tim Weiner, *Files on Illegal Spying Show C.I.A. Skeletons from Cold War*, N.Y. TIMES, June 27, 2007, at A1.

4. Mary Louise Kelly, *Some Fear CIA 'Family Jewels' Could Hurt Agency*, NAT'L PUB. RADIO, June 27, 2007, <http://www.npr.org/templates/story/story.php?storyId=11417938>.

5. See FAMILY JEWELS, *supra* note 2, at 00418–18a, 00425.

6. *Id.* at 00021, 00182, 00331.

7. See Kelly, *supra* note 4.

8. *Id.*

9. Richard Willing, *CIA Discloses Past Abuses*, USA TODAY, June 27, 2007, at A1.

10. Karen DeYoung & Walter Pincus, *CIA Releases Files on Past Misdeeds*, WASH. POST, June 27, 2007, at A1.

11. DeYoung & Pincus, *supra* note 10 (noting the depiction of "illegal wiretaps" in the Family Jewels); Mazzetti & Weiner, *supra* note 3 (asserting the Family Jewels describe "illegal activities of the past" including "illegal spying operations in the 1960s and 1970s"); Willing, *supra* note 9 (describing the Family Jewels as CIA's acknowledgement of its "past illegal activities" and how "the agency repeatedly violated its own charter"); *CIA Releases 700 Pages of 'Family Jewels'*, NAT'L PUB. RADIO, June 26, 2007, <http://www.npr.org/templates/story/story.php?storyId=11433256> ("The CIA on Tuesday released hundreds of pages of classified reports describing illegal activities by the agency in the 1950s, '60s and '70s.").

legal when undertaken. While some specific operations might not have complied with the letter of the law, every type of activity—with the exception of unconsenting human experimentation—was legally permissible.

I will also evaluate the status of the law related to these activities as it currently exists. The CIA is precluding me from offering an assessment as to whether these activities would be legal today, as such an assessment could interfere with the authorized functions of the Agency. Therefore, I will provide a description of the current law in these areas, and permit the reader to draw his or her own conclusion as to the present-day legality of these activities.

Part I of this Article will provide background on the Family Jewels. This Part will first provide a history of the CIA, in order to place the documents in context. It will then discuss the events that led to the compilation of the Family Jewels, as well as their recent declassification and release.

Parts II through VI will describe and analyze the five main activities depicted in the Family Jewels: unconsenting human experimentation, attempted targeted killings of foreign leaders, electronic surveillance of Americans, examination of U.S. mail, and the collection of information on American dissident movements. These Parts will evaluate the legality of each of those activities in 1973—when the Family Jewels were compiled—and describe the law governing such activities today. I will conclude that while many critics and commentators might automatically assume that the activities in the Family Jewels were illegal when committed, such a presumption is in fact erroneous.

I. BACKGROUND ON THE CIA AND ITS FAMILY JEWELS

Until 1945, intelligence collection in this country had been an uncoordinated, disparate affair.¹² Numerous, mostly military, units acquired information for their own purposes, without coordinating and collaborating amongst themselves.¹³ The advent of World War II required a change to that formula; the attack on Pearl Harbor exposed the need for a better intelligence-gathering mechanism, while the rising power of the Soviet Union demanded a coordinated intelligence effort to counter the growing threat of communism.¹⁴

What emerged was the Central Intelligence Agency, created by the National Security Act of 1947 ("National Security Act" or "Act").¹⁵ The Act, which is considered the CIA's Charter, originally allocated five main functions to the CIA: (1) provide advice on matters concerning intelligence activities related to national security; (2) make recommendations for coordinating such intelligence activities amongst U.S. government agencies; (3) correlate, evaluate, and disseminate that intelligence, as well as protect intelligence sources and methods from unauthorized

12. SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FOREIGN AND MILITARY INTELLIGENCE: BOOK I: FINAL REPORT, S. REP. NO. 94-755, at 20 (1976), *available at* http://www.aarclibrary.org/publib/contents/church/contents_church_reports_book1.htm [hereinafter CHURCH REPORT: BOOK I].

13. *See id.*

14. *See id.*

15. *Id.* at 21.

disclosure; (4) perform services of common concern to the intelligence community; and (5) maintain the broad authority to “perform such other functions and duties related to intelligence affecting the national security” as the President may direct (known as the “Fifth Function”).¹⁶ While the list of functions did not explicitly include the “collection” of intelligence, Congress fully expected that the Agency would engage in such activities.¹⁷ Though amended several times, the core functions of the CIA—collection, evaluation, and dissemination of intelligence, as well as the “Fifth Function”—remain in effect today.¹⁸

The Act has always precluded the CIA from maintaining any “police, subpoena, or law enforcement powers or internal security functions.”¹⁹ Congress did not wish to have the Agency interfere with the authorities of the Federal Bureau of Investigation (FBI), nor become a secret police unit akin to the Gestapo in Nazi Germany.²⁰ The Act also limits the expanse of CIA activities to foreign intelligence and counterintelligence, as opposed to domestic intelligence.²¹ However, neither these provisions, nor any other portion of the Act, restrict the Agency’s intelligence collection activities solely to overseas endeavors. Indeed, the Act’s legislative history indicates that Congress expected the CIA to collect intelligence inside the United States.²²

16. National Security Act of 1947, Pub. L. No. 80-253, § 102(d), 61 Stat. 495, 498 (codified as amended at 50 U.S.C. § 403-4a(d) (Supp. V 2005)). The Act explicitly gave the National Security Council (NSC) the authority to direct the Agency under this Fifth Function; however, it is clear that this authority really vested in the President, given that the NSC performs such functions “as the President may direct.” *Id.* at 496–97.

17. REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES 48 (1975) [hereinafter ROCKEFELLER REPORT] (noting that, in enacting the National Security Act of 1947, “Congress contemplated that the CIA would be involved in all aspects of foreign intelligence, including collection”); *id.* at 51 (discussing the CIA’s authority to collect intelligence since its inception).

18. See 50 U.S.C. § 403-4a(d) (Supp. V 2005). The current version of the Act retained these key roles with some modifications. Specifically, it now explicitly authorizes the CIA to “collect intelligence” (amending the first function); eliminates the CIA’s role to protect sources and methods (part of the second function); no longer includes the CIA’s authority to perform services of common concern to the intelligence community (the fourth function); and changes the Fifth Function to authorize the CIA to engage in such other functions and duties as directed by the President and the Director of National Intelligence (as opposed to the NSC). See *id.*

19. *Id.* § 403-4a(d)(1).

20. See *Weissman v. Cent. Intelligence Agency*, 565 F.2d 692, 695 (D.C. Cir. 1977) (discussing the creation of the National Security Act and noting “[w]hile the 80th Congress obviously, and for good reason, wished to protect America’s security, it had no intention of making the mistake of creating an American ‘Gestapo’”); ROCKEFELLER REPORT, *supra* note 17, at 54.

21. 50 U.S.C. §§ 401a(1), 403-4a(d). The original Act merely limited the CIA to activities involving “intelligence,” without defining the term. See 61 Stat. 495, 495–99 (1947). However, it was always understood that this meant foreign intelligence and counterintelligence. See ROCKEFELLER REPORT, *supra* note 17, at 51–53. The congressional amendment of the Act in 1992 made this meaning explicit. Intelligence Organization Act of 1992, Pub. L. No. 102-496, 106 Stat. 3188, 3188 (1992).

22. ROCKEFELLER REPORT, *supra* note 17, at 52–53; see also *infra* text accompanying notes 430–42.

During the first twenty-five years of its existence, the CIA maintained great autonomy as Congress generally sought and received few details of the Agency's activities.²³ As one Senator stated in an attitude considered typical:

It is not a question of reluctance on the part of CIA officials to speak to us. Instead it is a question of our reluctance, if you will, to seek information and knowledge on subjects which I personally, as a Member of Congress and as a citizen, would rather not have.²⁴

Such deference evaporated in the 1970s. The notable lack of success in the Vietnam War raised questions about the CIA's operations and its intelligence gathering capabilities.²⁵ The Watergate scandal, meanwhile, reduced trust in the executive branch, and increased the need and desire for aggressive investigative reporting about U.S. government activities.²⁶ All of this led to greater scrutiny of the CIA and its activities, which increased exponentially with public revelations of some of the aggressive activities the CIA had engaged in during the decades since its creation.²⁷

The CIA's Family Jewels emerged from this period of change. In 1973, then-CIA Director²⁸ James R. Schlesinger became appalled by press reports of Agency involvement in Watergate.²⁹ Though it turned out that the Agency had virtually no role in the scandal,³⁰ Schlesinger sought to ensure that all Agency activities going forward fell "within a strict interpretation" of the Agency's "legislative charter," or the National Security Act.³¹ Therefore, on May 9, 1973, Schlesinger issued a memorandum to the entire Agency populace, ordering every Agency employee (and inviting any former

23. See *United States v. Lopez-Lima*, 738 F. Supp. 1404, 1410 (S.D. Fla. 1990) (noting that prior to 1974 "[c]ongressional oversight of intelligence activities . . . was extremely limited"); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 709 (2003).

24. JOHN PRADOS, *PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS FROM WORLD WAR II THROUGH IRANSCAM* 329 (1986) (quoting Senator Leverett Saltonstall); see also Ray S. Cline, *Covert Action as Presidential Prerogative*, 12 HARV. J.L. & PUB. POL'Y 357, 366 (1989) ("Throughout the 1950s and 1960s, a small number of senior congressional leaders monitored intelligence activities in minimal fashion.").

25. See CHURCH REPORT: BOOK I, *supra* note 12, at 27.

26. Lori Fisler Damrosch, *Covert Operations*, 83 AM. J. INT'L L. 795, 795 (1989) ("The era of congressional noninvolvement [in CIA covert operations] came to an end with the Watergate disclosures of intelligence activities that many Americans found reprehensible [and] the ensuing investigations into assassination attempts and other controversial covert actions . . .").

27. See *id.*

28. The Act originally referred to the head of the CIA as the "Director of Central Intelligence" (DCI). National Security Act of 1947, Pub. L. No. 80-253, § 102(a), 61 Stat. 495, 497 (codified as amended at 50 U.S.C. § 403(a) (2000)). Currently, the head of the CIA is known as the "Director of the Central Intelligence Agency" (DCIA). 50 U.S.C. § 403(a) (2000). Throughout this Article, I will be using the term "CIA Director" to refer to the head of the CIA whether technically a DCI or a DCIA.

29. Mazzetti & Weiner, *supra* note 3.

30. See ROCKEFELLER REPORT, *supra* note 17, at 32–33 (noting that the CIA's role was nominal and that there was "no evidence that the CIA participated in the Watergate break-in or in the Post-Watergate cover-up by the White House").

31. FAMILY JEWELS, *supra* note 2, at 00418–18a.

employee) to report to him directly “on any activities now going on, or that have gone on in the past, which might be construed to be outside the legislative charter of this Agency.”³² He further demanded to be informed if any employee received an instruction or order that appeared “in any way inconsistent with the CIA legislative charter”³³

The compendium of documents responsive to Schlesinger’s edict were originally called the “skeletons,”³⁴ but quickly became referred to as the “Family Jewels.”³⁵ The CIA kept the Family Jewels classified because it feared that exposing the various acts contained therein would cause extraordinary damage to the Agency’s reputation, and possibly lead to its demise.³⁶ As later CIA Director Colby stated: “The shock effect of an exposure of the ‘family jewels,’ I urged, could, in the climate of 1973, inflict mortal wounds on the C.I.A. and deprive the nation of all the good the agency could do in the future.”³⁷

Congress and the White House, concerned about the Agency’s activities, established three separate commissions to investigate.³⁸ Vice President Nelson Rockefeller headed the White House commission (“Rockefeller Commission”), while Senator Frank Church and Congressman Otis Pike led the Senate and House of Representatives inquiries, respectively (“Church Commission” and “Pike Commission”).³⁹ The CIA eventually provided copies of the Family Jewels to each commission.⁴⁰ Based on those documents, as well as information gained through hearings and other mechanisms, each commission assessed the CIA’s activities and released reports (“Rockefeller Report,” “Church Report,” and “Pike Report”).⁴¹ The Church Commission also issued a separate

32. *Id.* at 00418.

33. *Id.* at 00418a; see JOHN PRADOS, *LOST CRUSADER: THE SECRET WARS OF CIA DIRECTOR WILLIAM COLBY* 260 (2003) (noting that, after hearing about CIA connections to Watergate, CIA Director Schlesinger “wanted information on *any* action in the CIA’s past, especially domestic activities, that might have flap potential” (emphasis in original)).

34. See Memorandum from James A. Wilderotter on CIA Matters to the File 1 (Jan. 3, 1975), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/family_jewels_wilderotter.pdf.

35. See Mazzetti & Weiner, *supra* note 3.

36. *Id.*

37. *Id.*

38. See PRADOS, *supra* note 33, at 300.

39. *Id.* at 300, 308, 315.

40. See PRADOS, *supra* note 33, at 300, 308, 315; DeYoung & Pincus, *supra* note 10 (noting that CIA Director Colby “later turned the entire ‘family jewels’ file over to Congress, an act some agency veterans still consider a betrayal”); Press Release, Central Intelligence Agency, CIA Releases Two Collections of Historical Documents (June 26, 2007), available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/cia-releases-two-collections-of-historical-documents.html> [hereinafter CIA Press Release].

41. See SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. NO. 94-755 (1976), available at http://www.aarclibrary.org/publib/contents/church/contents_church_reports.htm [hereinafter CHURCH REPORT]; ROCKEFELLER REPORT, *supra* note 17. As noted below, all facets of the Pike Report remain classified. See *infra* note 45. None of these reports, of course, themselves created law, and their “views would not be controlling on a court” *Marks v. Cent. Intelligence Agency*, 590 F.2d 997, 1002 (D.C. Cir. 1978) (referring explicitly to the Church Report).

report regarding CIA's assassination plots of foreign leaders ("Assassinations Report").⁴² Of the reports, the Rockefeller Report, conducted by the executive branch, understandably was the least scathing.⁴³ The Rockefeller, Church, and Assassinations Reports were all released to the public.⁴⁴ The Pike Report was not officially released, but was reportedly leaked to the press and published in its entirety just days after its completion.⁴⁵

Almost thirty-five years later, current CIA Director Michael Hayden ordered the release of the Family Jewels, though with some redactions.⁴⁶ As Director Hayden stated:

The CIA fully understands that it has an obligation to protect the nation's secrets, but it also has a responsibility to be as open as possible. I've often spoke about our social contract with the American people, and the declassification of historical documents is an important part of that effort.⁴⁷

The 702 pages of the Family Jewels depict numerous activities conducted by the Agency in the 1950s, 1960s, and 1970s. All of these activities could not possibly be addressed within the space limitations of this Article. I have therefore declined to assess the considerable number of activities in the Family Jewels that appear clearly legal on their face, including the CIA's counterintelligence activities in the United States,⁴⁸ as well as its use of physical surveillance, undercover agents, alias documents, and overhead imagery.⁴⁹ I have also declined to evaluate operations that the Family Jewels mention only in passing, without sufficient detail to permit proper consideration of their legality.⁵⁰ Instead, I have focused on the five types of activities that were of significant concern to the Rockefeller and Church Commissions,⁵¹ and more

42. SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE OPERATIONS, INTERIM REPORT: ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465 (1975) [hereinafter ASSASSINATIONS REPORT].

43. See PRADOS, *supra* note 33, at 303–04.

44. See ASSASSINATIONS REPORT, *supra* note 42; CHURCH REPORT, *supra* note 41; ROCKEFELLER REPORT, *supra* note 17; see also PRADOS, *supra* note 33, at 303–04, 327.

45. See PRADOS, *supra* note 33, at 329. Because the Pike Report was never officially released and remains classified, even though allegedly published in the media, I am precluded from referring to its contents in this Article.

46. CIA Press Release, *supra* note 40.

47. *Id.*

48. Such activities, such as surveillance in the United States of a former CIA employee who had become "professionally and emotionally involved" with a Cuban national, FAMILY JEWELS, *supra* note 2, at 00026, 00059–61, are permitted by statute. See 50 U.S.C. § 403-4a(d) (Supp. V 2005) (authorizing the Agency to engage in counterintelligence activities).

49. See ROCKEFELLER REPORT, *supra* note 17, at 63–64, 229–31 (discussing the legality of such activities).

50. Examples include the testing of various equipment in the United States, see FAMILY JEWELS, *supra* note 2, at 00238–40, 00331, 00544, and the confinement of a defector in a safehouse in Maryland. See *id.* at 00023–24, 00522. Both of these are mentioned in the Family Jewels, but not in extensive detail.

51. See CHURCH REPORT, *supra* note 41; ROCKEFELLER REPORT, *supra* note 17. The Church Report focused extensively on covert action, an area I will not address because it is only

importantly, which appear to be the most controversial and the most critical both in 1973 and in today's world.⁵²

II. UNCONSENTING HUMAN EXPERIMENTATION

Beginning in the early 1950s, the CIA operated a program known as MKULTRA, which mostly involved the administering of LSD and other drugs to unconsenting adults, including Americans.⁵³ The program stemmed from an Agency fear that the Soviet Union and other communist countries were developing chemical and biological agents for the purposes of interrogating, brainwashing, and possibly even attacking Westerners.⁵⁴ As the Church Report described:

The CIA had received reports that the Soviet Union was engaged in intensive efforts to produce LSD; and that the Soviet Union had attempted to purchase the world's supply of the chemical. As one CIA officer who was deeply involved in the work with this drug described the climate of the times: "[It] is awfully hard in this day and age to reproduce how frightening all of this was to us at the time, particularly after the drug scene has become as widespread and as knowledgeable in this country as it did. But we were literally terrified, because this was the one material that we had ever been able to locate that really had potential fantastic possibilities if used wrongly."⁵⁵

The MKULTRA program sought to administer LSD and other drugs to individuals in order to determine the threat of such drugs, and to design means to thwart that threat.⁵⁶ In most cases, the subjects were unwitting nonvolunteers, who were slipped the drugs in their drinks at parties or at bars.⁵⁷ The MKULTRA program eventually became quite extensive such that, by the time the CIA terminated the project in 1963, it contained 149 subprojects that the CIA contracted out to more than eighty universities,

nominally mentioned in the Family Jewels.

52. In the end, I am confined by space to focus on what appear to me to be the most significant activities contained in the Family Jewels. As with any top ten (or in this case top five) list, there will undoubtedly be other facets of the Family Jewels that the reader might have preferred had been given consideration.

53. See FAMILY JEWELS, *supra* note 2, at 00402–04, 00433; CHURCH REPORT: BOOK I, *supra* note 12, at 389–92. Throughout this Part, I will use the term “unconsenting human experimentation,” rather than the often-used phrase “unwitting human experimentation,” because the key query, as discussed below, is whether the alleged subject consented to the experimentation, not whether the subject knew that some form of experimentation was occurring. It is not a crime if the individual consents to experimentation, but is not told whether such experimentation actually occurred, such as when individuals who consent to being part of a drug experiment are provided a placebo rather than the experimental drug. Illegal activity occurs only when the subject has not consented to being part of the experiment in the first place. See *infra* notes 62–68 and accompanying text.

54. CHURCH REPORT: BOOK I, *supra* note 12, at 392.

55. *Id.* at 392–93 (alteration in original).

56. See *id.* at 389–93. The CIA also tested drugs on monkeys and mice as part of a separate program. FAMILY JEWELS, *supra* note 2, at 00413.

57. *Kronisch v. United States*, 150 F.3d 112, 118 (2d Cir. 1998); CHURCH REPORT: BOOK I, *supra* note 12, at 391–92.

hospitals, pharmaceutical companies, and other institutions.⁵⁸ However, the full range and extent of the program, as well the number of individuals affected by it, is impossible to determine because the chief of the program ordered all MKULTRA records destroyed in January 1973.⁵⁹

There is no doubt that the MKULTRA project was illegal from its inception. This may be why the CIA's Office of General Counsel was not informed of the project until years after it had been terminated.⁶⁰ Upon learning of the project, the CIA's General Counsel immediately condemned it,⁶¹ and with good reason.

Government experimentation on unconsenting individuals, such as occurred in the MKULTRA program, was a clear violation of the Constitution. The courts have long held that the Fifth Amendment's protection of liberty interests includes protection from nonconsensual experiments on a person's body. Usually described as the right to bodily integrity, this is "a right which has been recognized throughout this nation's history."⁶² Unconsenting human experimentation also constituted a tort for which the United States could be held liable under the Federal Tort Claims Act (FTCA).⁶³ Indeed, courts have upheld FTCA claims specifically made by alleged victims of MKULTRA.⁶⁴ A federal statute also prohibits unconsenting human experimentation,⁶⁵ as does a policy regulation issued by the Department of Health and Human Services,

58. CHURCH REPORT: BOOK I, *supra* note 12, at 389–91, 403–04.

59. *Id.* at 389, 391, 404.

60. *See id.* at 408.

61. Joseph L. Rauh, Jr. & James C. Turner, *Anatomy of a Public Interest Case Against the CIA*, 11 HAMLINE J. PUB. L. & POL'Y 307, 314–15 (1990).

62. *Stadt v. Univ. of Rochester*, 921 F. Supp. 1023, 1027 (W.D.N.Y. 1996); *see also* *Ammend v. Bioport, Inc.*, 322 F. Supp. 2d 848, 870 (W.D. Mich. 2004) ("The right to bodily integrity is a fundamental right protected by the Constitution."); *Heinrich v. Sweet*, 62 F. Supp. 2d 282, 290, 312–15 (D. Mass. 1999) (recognizing that unconsenting experimentation constitutes a "violation of the constitutionally protected liberty interest in bodily integrity"), *aff'd*, 308 F.3d 48 (1st Cir. 2002); *Stadt*, 921 F. Supp. at 1027–28 ("The Constitution, and more specifically, the Due Process Clause of the Fifth Amendment clearly established a right to be free from non-consensual, governmental experimentation on one's body—a right which had been in existence well before 1946").

63. *See* 28 U.S.C. § 1346(b) (2000); *see also Stadt*, 921 F. Supp. at 1023 (refusing to dismiss an FTCA claim by a woman claiming that the federal government had injected her with plutonium without her knowledge or consent).

64. *See, e.g., Ritchie v. United States*, 210 F. Supp. 2d 1120 (N.D. Cal. 2002) (same); *Orlikow v. United States*, 682 F. Supp. 77 (D.D.C. 1988) (upholding the ability of plaintiff to bring an FTCA claim based on alleged MKULTRA activities). The court eventually dismissed the *Ritchie* case for lack of evidence. *Ritchie v. United States*, 451 F.3d 1019 (9th Cir. 2006) (upholding dismissal of plaintiff's claim that the CIA administered him LSD at a Christmas party, which plaintiff believed led him to commit a bank robbery). Failure to comply with the applicable statute of limitations has also led to the dismissal of FTCA claims based upon the MKULTRA program. *See, e.g., Kronisch v. United States*, 150 F.3d 112, 123–31 (2d Cir. 1998) (dismissing all of plaintiff's FTCA claims as untimely).

65. *See* 42 U.S.C. § 3515b (2000) (prohibiting funds appropriated to the Departments of Labor, Health and Human Services, Education, or related agencies from being used on research programs involving unconsenting human experimentation).

applicable to all U.S. government agencies.⁶⁶ Finally, a presidential directive specifically prohibits the practice by U.S. intelligence agencies.⁶⁷

It is therefore unequivocal that unconsenting human experimentation, such as that conducted by the CIA in its MKULTRA program, was illegal in the 1950s and 1960s.⁶⁸ The law has not changed in any significant manner since that time. As will be seen below, however, this is the only type of activity contained in the Family Jewels that was actually illegal.

III. TARGETED KILLINGS OF FOREIGN LEADERS

Media reports consistently portray the Family Jewels as containing multiple illegal attempts by the CIA to kill several foreign leaders.⁶⁹ Yet, despite the general belief that the Agency was rampantly trying to terminate numerous heads of state, the Church Commission in its Assassinations Report concluded that the CIA, since its inception forty years earlier, had only initiated plans to kill *two* foreign leaders: Fidel Castro of Cuba in 1960–65 and Patrice Lumumba of the Congo in 1960–61.⁷⁰ Further, the CIA

66. See 45 C.F.R. §§ 46.101–.119 (2007) (requiring informed consent before conducting experiments on human subjects except in very limited circumstances not applicable here). Some commentators assert that unconsenting human experimentation also violates the Nuremberg Code, which is an international code of ethical standards for medical experiments that requires, among other things, informed consent. See Rauh & Turner, *supra* note 61, at 312. See generally Samuel B. Casey & Nathan A. Adams, IV, *Specially Respecting the Living Human Embryo by Adhering to Standard Human Subject Experimentation Rules*, 2 YALE J. HEALTH POL'Y L. & ETHICS 111, 114 (2001) (describing the genesis of the Nuremberg Code). However, the United States has never recognized the Nuremberg Code as binding U.S. law. See *Ammend*, 322 F. Supp. at 872.

67. Exec. Order No. 12,333 § 2.10, 3 C.F.R. 200, 213 (1982) (requiring written informed consent for any human experimentation by an agency within the Intelligence Community). Similar prohibitions have existed since the mid-1970s. See Exec. Order No. 12,036 § 2-302, 3 C.F.R. 112, 129 (1979); Exec. Order No. 11,905 § 5(d), 3 C.F.R. 90, 101 (1977). Executive Orders are discussed in more detail *infra* text accompanying notes 131–55.

68. Both the Church Commission Report and the Rockefeller Report found that the project violated U.S. law. See CHURCH REPORT: BOOK I, *supra* note 12, at 403; ROCKEFELLER REPORT, *supra* note 17, at 37.

69. See Kelly, *supra* note 4 (describing illegal “assassination plots” in the Family Jewels); Mazzetti & Weiner, *supra* note 3 (discussing illegal “failed assassination plots” in the Family Jewels); Willing, *supra* note 9 (listing three assassination attempts as part of the illegal activities depicted in the Family Jewels).

70. ASSASSINATIONS REPORT, *supra* note 42, at 4–5; see also FAMILY JEWELS, *supra* note 2, at 00012–16, 00038–50, 00425 (describing attempts against Castro); *id.* at 00425 (describing attempts against Lumumba); Robert F. Turner, *It's Not Really "Assassination": Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites*, 37 U. RICH. L. REV. 787, 791 (2003) (noting that the Assassinations Report connected the CIA to attempts to kill only two foreign leaders). The CIA sought to kill Castro through numerous devices that “ran the gamut from high-powered rifles or poison pills, poison pens, deadly bacterial powders, and other devices which strain the imagination.” ASSASSINATIONS REPORT, *supra* note 42, at 71. The CIA’s plot to kill Lumumba involved attempting to induce a member of his inner circle to place poison in Lumumba’s food or toothpaste. *Id.* at 28. The Church Commission also investigated the role of the CIA in the deaths of three other foreign leaders—

plots against both Castro and Lumumba proved unsuccessful. Castro evaded the CIA's attempts, while Lumumba ended up being killed in 1961 by individuals not supported by or affiliated with the United States, before the CIA could carry out its plan.⁷¹ Finally, and most critically, as intimated by the Assassinations Report,⁷² the attempted targeted killing of such foreign leaders was entirely legal in 1973.

Attempted killings of foreign leaders are not new. Nations have attempted targeted killings of political leaders for millennia. The Greeks and the Romans engaged in such activities, and "it was common practice during the Middle Ages."⁷³ The practice is even described in the Bible.⁷⁴ Such killings, however, are usually referred to as "assassinations," which creates much of the difficulty in assessing their legality.

The main problem with the term "assassination" is that it has no consensus definition.⁷⁵ No statute, presidential edict, or international document defines the term.⁷⁶ Some scholars consider "assassinations" to be a form of murder and therefore illegal by definition.⁷⁷ Others take a more neutral stance.⁷⁸ Some focus on the victim's status, others on whether the act has a political purpose, and still others on whether the act is "treacherous."⁷⁹ This lack of consensus makes evaluating the legality of "assassinations" virtually impossible. Therefore, rather than get immersed in a semantic debate, I will instead focus on the act itself, that is, the attempted targeted

Rafael Trujillo (Dominican Republic), Ngo Dinh Diem (South Vietnam), and General Rene Schneider (Chile)—but determined that there was no valid evidence that the CIA planned, supported, or effectuated their deaths. *Id.* at 5.

71. ASSASSINATIONS REPORT, *supra* note 42, at 4, 256.

72. *Id.* at 281.

73. Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 613 (1992).

74. See, e.g., *Esther* 2:21 (mentioning a conspiracy by royal officers to kill King Xerxes); *Jeremiah* 41:3–5 (discussing the "assassination" of Gedaliah); 1 *Kings* 16:16 (describing Zimri's murder of the king); 2 *Kings* 15:10–14 (depicting the targeted killing of Zechariah, king of Israel, by Shallum, who in turn was killed a month later).

75. Banks & Raven-Hansen, *supra* note 23, at 669; see also W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4, 8 (providing ten different definitions of the term "assassination," none of which is "entirely satisfactory"); Schmitt, *supra* note 73, at 611 ("[S]cholars and practitioners have struggled to craft a working definition to serve as a guide to states . . .").

76. Schmitt, *supra* note 73, at 611.

77. See, e.g., Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 762 (2003) ("Assassination, then, is clearly identified and properly classified as a type of killing that is unlawful, i.e. a form of murder . . ."); Major Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1, 5 (2002) (defining "assassination" during peacetime as "(1) a murder, (2) of a specifically targeted figure, (3) for a political purpose"); Elizabeth R. Parker & Timothy E. Naccarato, *Targeting Saddam and Sons: U.S. Policy Against Assassination*, 1 IDF L. REV. 39, 53 (2003) ("Thus, it is clear that murder is a key element of assassination . . ."); Parks, *supra* note 75, at 8 ("Assassination constitutes an act of murder that is prohibited . . ."); Turner, *supra* note 70, at 790 ("By definition, assassination is a form of murder."); *id.* at 807 ("True assassination is murder, and murder is wrong.").

78. See Banks & Raven-Hansen, *supra* note 23, at 670 (discussing scholars who believe "assassination" is not necessarily murder).

79. Schmitt, *supra* note 73, at 611–12.

killing of foreign leaders.⁸⁰ This use of a more “neutral” term in no way makes the subject matter less serious, but at least allows us to consider the legality of these attempted targeted killings without the red herring of definitional uncertainty.

Perhaps surprisingly, there is no statute prohibiting the CIA, or any other U.S. government agency for that matter, from conducting targeted killings of foreign leaders, at least within that leader’s own country.⁸¹ The only legislative restriction of any sort on the killing of foreign leaders is contained in 18 U.S.C. § 1116, which Congress enacted in 1972.⁸² Section 1116 imposes criminal sanctions on anyone who “kills or attempts to kill a foreign official, official guest, or internationally protected person.”⁸³ However, the statute defines “foreign official” as a current or former Chief of State or other enumerated senior government official or their family “while in the United States.”⁸⁴ An “official guest” refers to anyone “present in the United States” as an official guest of the U.S. government.⁸⁵ An “internationally protected person” is defined as a Chief of State or Foreign Minister and his or her family “whenever such person is in a country other than his own.”⁸⁶ Therefore, the statute precludes the targeted killing of a foreign leader who is in the United States or outside the leader’s own country. It does not preclude the targeted killing of a leader inside his or her own country.⁸⁷ The CIA sought to kill both Castro and Lumumba in their home countries.⁸⁸

80. See Banks & Raven-Hansen, *supra* note 23, at 671; Daniel B. Pickard, *Legalizing Assassination?: Terrorism, the Central Intelligence Agency, and International Law*, 30 GA. J. INT’L & COMP. L. 1, 9 (2001) (defining “assassination” as the “targeted killing of an individual, by an official agent of a nation, regardless of whether a state of war exists” (footnotes omitted)).

81. Addicott, *supra* note 77, at 757 (“Congress never enacted legislation to legally ban the use of assassination as an instrument of foreign policy . . .”); Parker & Naccarato, *supra* note 77, at 48 (“[A]s of the present time, Congress has not enacted any legislation [prohibiting assassinations].”).

82. See 18 U.S.C. (2006). The federal murder statute does not apply extraterritorially except in limited circumstances not applicable here. See 18 U.S.C. §§ 7, 1111; *United States v. Bin Laden*, 92 F. Supp. 2d 189, 204 (S.D.N.Y. 2000) (noting that Congress limited “the reach of Section 1111 to murders committed ‘[w]ithin the special maritime and territorial jurisdiction of the United States’” (alteration in original)).

83. 18 U.S.C. § 1116.

84. *Id.* § 1116(b)(3) (emphasis added).

85. *Id.* § 1116(b)(6) (emphasis added).

86. *Id.* § 1116(b)(4)(A) (emphasis added). This subsection also defines an “internationally protected person” as an official “of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack.” *Id.* § 1116(b)(4)(B). This provision protects “‘resident diplomats, consular and other foreign government personnel and their families.’” *United States v. Marcano Garcia*, 456 F. Supp. 1358, 1360 (D.P.R. 1978) (quoting S. REP. NO. 92-1105 (1972)). It therefore does not apply to foreign leaders, who are described in the first part of the definition of “internationally protected person” (discussed in the text accompanying this note), and in any case would only protect such persons “resident” in the United States.

87. Banks & Raven-Hansen, *supra* note 23, at 730–31; Patrick Cole, *The Relevance of Human Rights Provisions to American Intelligence Activities*, 6 LOY. L.A. INT’L & COMP. L.J. 37, 57 (1983) (noting that while § 1116 prohibits killing a foreign official in the United States, “there was no law making it a crime to assassinate or conspire to assassinate a foreign official while the individual was outside the United States”). One set of commentators argues that even

Thus, even had § 1116 existed at the time of such attempts, it would not have prohibited them.

Congress has attempted to prohibit targeted killings of foreign leaders in their home countries on several occasions, but each attempt has failed.⁸⁹ Some scholars have interpreted this lack of success as implicit acknowledgement that Congress wishes to have the United States retain such activities as a policy option, at least under certain restricted circumstances.⁹⁰ The so-called Fifth Function of the National Security Act of 1947 bolsters this argument. As noted above, the Fifth Function authorizes the CIA to "perform such other functions and duties related to intelligence affecting the national security" as the President may direct.⁹¹ Such unfettered language would appear to constitute implicit congressional approval for the Agency to engage in any presidentially authorized activity not explicitly prohibited by law, including targeted killings.⁹² Indeed, one court has gone so far as to assert that the Fifth Function granted the Agency such wide authority that, pursuant to it, the CIA could engage in any presidentially authorized activity it wished, even if the activity did violate U.S. law!⁹³ No other court, however, has championed this position.

Moving beyond statutory authority, the United States Constitution also does not forbid targeted killings of foreign leaders.⁹⁴ The Supreme Court has held that the Constitution protects persons in the United States and Americans abroad, but does not protect non-Americans overseas.⁹⁵ The only exception to this rule that has been carved out by the Court relates to detainees held at Guantanamo Bay, Cuba,⁹⁶ due to the

these restrictions of § 1116 have been superseded at least to some degree by subsequent acts of Congress that appear to permit targeted killings of terrorists and Saddam Hussein. Banks & Raven-Hansen, *supra* note 23, at 731–37.

88. Schmitt, *supra* note 73, at 619 n.45; *see also* ASSASSINATIONS REPORT, *supra* note 42, at 255.

89. Parker & Naccarato, *supra* note 77, at 48; Schmitt, *supra* note 73, at 662 (describing the various unsuccessful legislative attempts to ban targeted killings); *see also* Pickard, *supra* note 80, at 23.

90. Banks & Raven-Hansen, *supra* note 23, at 723; Pickard, *supra* note 80, at 26.

91. National Security Act of 1947, Pub. L.No. 80-253, § 102(a), 61 Stat. 495, 497 (codified as amended at 50 U.S.C. § 403-4a(d) (Supp. V 2005)).

92. *See* Banks & Raven-Hansen, *supra* note 23, at 698, 729.

93. *United States v. Lopez-Lima*, 738 F. Supp. 1404, 1409 (S.D. Fla. 1990) (stating that, pursuant to the Fifth Function, "the CIA was under no limitation that its activities could not violate U.S. law"). Though the *Lopez-Lima* decision involved the Agency's theoretical ability to authorize the hijacking of a plane, the argument would also apply to targeted killings. Banks & Raven-Hansen, *supra* note 23, at 714.

94. *See* Banks & Raven-Hansen, *supra* note 23, at 675–79.

95. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (noting that the Supreme Court has consistently "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States"); *id.* at 271 (stating that the Fourth Amendment does not protect aliens outside the United States who lack "substantial connections with this country"); *see also* Banks & Raven-Hansen, *supra* note 23, at 675–77 (discussing the inapplicability of the Constitution to aliens overseas).

96. *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008) (granting habeas rights under Article 1 of the Constitution to detainees held at the U.S. military base in Guantanamo Bay, Cuba, given the "complete and total control" the U.S. government exercises over that facility); *Rasul v. Bush*, 542 U.S. 466, 478 (2004) (suggesting constitutional habeas protections could possibly extend to detainees held at Guantanamo Bay, Cuba). However, the Supreme Court in

“complete and total control” the U.S. government exercises over that facility. As the United States does not maintain such “complete and total control” over foreign countries, our constitutional protections—to include the Fifth Amendment prohibition against deprivation of “life, liberty, or property, without due process of law”⁹⁷—would not extend to foreign leaders outside the United States, such as Fidel Castro and Patrice Lumumba, and thus would not protect foreign leaders from targeted killings.

Some scholars have argued that targeted killings of foreign leaders are illegal under international law.⁹⁸ Only two international treaties specifically address the topic of targeted killings/assassinations.⁹⁹ The Charter of the Organization of African Unity urges its members to adhere to “unreserved condemnation, in all its forms, of political assassination.”¹⁰⁰ While forceful, such a statement is hardly *international* law. It applies only to a limited region of the world, and there is no indication that it is followed or enforced even in that region.¹⁰¹ The second treaty, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (“New York Convention”), only prohibits targeted killings when the targets are outside of their home country (akin to 18 U.S.C. § 1116).¹⁰²

With a lack of explicit international law prohibiting targeted killings of foreign leaders, some scholars have pointed to international treaties that have broader scopes in an attempt to argue the illegality of such killings.¹⁰³ One scholar has pointed to statements in the Universal Declaration of Human Rights and in the Charter of the Organization of American States that a country’s leaders are to be made by the will of the people.¹⁰⁴ The scholar asserts that the targeted killing of a nation’s leader undercuts the will of that nation’s people and, therefore, violates those treaties.¹⁰⁵ Yet such an argument contains numerous flaws. If adopted, it would preclude nations from removing leaders through legitimate war, such as what happened to Adolph Hitler and Saddam Hussein, since that would be perceived as violating the will of the people of those nations. Furthermore, many leaders came to power through nondemocratic means and therefore have not been chosen by the people. Would they, but only they, then be legitimate targets under this theory?

Boumediene acknowledged that “[i]t is true before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.” *Boumediene*, 128 S. Ct. at 2270.

97. U.S. CONST. amend. V.

98. See Addicott, *supra* note 77, at 769–70; Cole, *supra* note 87, at 49, 53; Harder, *supra* note 77, at 6–11. Please note that the discussion below focuses solely on the ability of the CIA to engage in targeted killings during peacetime, since that was the scenario for the targets in the Family Jewels. There are different rules and limitations for targeted killings of foreign leaders during armed conflict. See Parks, *supra* note 75; Schmitt, *supra* note 73, at 628–45.

99. Pickard, *supra* note 80, at 19 n.56; Schmitt, *supra* note 73, at 618.

100. Charter of the Organization of African Unity art. III, May 25, 1963, 2 I.L.M. 766.

101. Schmitt, *supra* note 73, at 618.

102. *Id.* at 619.

103. For an extensive discussion of purported international restrictions on targeted killings of foreign leaders, and why such international conventions do not actually prohibit such killings, see *id.* at 618–28.

104. See Cole, *supra* note 87, at 49, 53.

105. *Id.* at 49.

A vastly more persuasive argument is made by scholars who point to Article 2(4) of the United Nations Charter.¹⁰⁶ That article states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the Purposes of the United Nations."¹⁰⁷ The first "Purpose" listed in the U.N. Charter is "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."¹⁰⁸ A clear argument can be made that killing or attempting to kill a foreign leader is a threat or use of force, as well as a breach of the peace.¹⁰⁹

However, Article 51 of the United Nations Charter provides an exception to this general prohibition.¹¹⁰ That article states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."¹¹¹ This reflects the long-standing, customary international law principle of the right to self-defense.¹¹²

Scholars are divided as to whether an armed attack must actually have occurred before a nation can deploy this right to self-defense.¹¹³ Those arguing that an armed attack must have actually occurred generally point to the above-mentioned specific language of article 51 of the Charter that allows self-defense "if an armed attack occurs." They note that this accords with the overall purpose of the United Nations Charter—to create mechanisms for keeping the peace and reducing the overall use of force. Allowing a broad interpretation of self-defense, especially one that permitted anticipatory action, would undermine this base premise of the Charter.¹¹⁴

However, the more widely accepted, and I believe better, view is that an attack need not have occurred before a state may use force (to include a targeted killing of a foreign leader) in self-defense.¹¹⁵ Known as anticipatory or preemptive self-defense, this view is justified on a number of premises. First, the United Nations Charter "does not preclude unilateral action against an immediate [perceived] threat," and therefore such action is considered permitted.¹¹⁶ Second, anticipatory self-defense often serves to prevent and reduce more extensive acts of violence.¹¹⁷ Killing a foreign leader before he or she can launch an attack may prevent that attack from ever occurring, and even

106. Harder, *supra* note 77, at 10; Pickard, *supra* note 80, at 11–13; Schmitt, *supra* note 73, at 619–20.

107. U.N. Charter art. 2, para. 4.

108. *Id.* art. 1, para. 1.

109. See Harder, *supra* note 77, at 10; Pickard, *supra* note 80, at 11–13; Schmitt, *supra* note 73, at 619–621.

110. Schmitt, *supra* note 73, at 620.

111. U.N. Charter art. 51.

112. Pickard, *supra* note 80, at 18.

113. See Harder, *supra* note 77, at 20; Schmitt, *supra* note 73, at 646.

114. See Schmitt, *supra* note 73, at 646 (describing the argument for restricting the interpretation of self-defense in Article 51 of the U.N. Charter).

115. See Addicott, *supra* note 77, at 773–79; Banks & Raven-Hansen, *supra* note 23, at 746; Schmitt, *supra* note 73, at 646; Turner, *supra* note 70, at 799–804.

116. Parks, *supra* note 75, at 7.

117. See Pickard, *supra* note 80, at 20–21.

preclude all-out war, thus saving a considerable number of lives that would have been lost through a conventional war and upholding the core principle of the U.N. Charter—the preservation of peace among nations.¹¹⁸ Third, anticipatory self-defense deters leaders from even threatening aggressive action.¹¹⁹ Finally, there is the concept of self-preservation. As one scholar has described it, “international law cannot compel a state to wait until it absorbs a devastating, or even lethal, first strike before it acts to protect itself.”¹²⁰

The United States has long recognized this principle of anticipatory self-defense.¹²¹ Pursuant to it, the United States is permitted, under international law, to attempt the targeted killing of foreign leaders if those leaders constitute “legitimate threats to the national security of the United States or individual U.S. citizens.”¹²² As with all applications of self-defense, the nation’s action would need to be necessary (i.e., alternative means to resolve the threat are ineffective) and proportional (i.e., the level of coercion is the minimum necessary to end the aggression).¹²³ This last requirement, proportionality, actually bolsters the argument for targeted killings over other military options since targeted killings seek to resolve a legitimate threat through the death of a single individual.¹²⁴

It is also worth noting that even if international law could be construed as precluding targeted killings, such policies are likely unenforceable in a U.S. court of law. In *Schneider v. Kissinger*, the sons of killed Chilean army commander René Schneider alleged that the CIA was culpable for Schneider’s death as part of a botched kidnapping attempt.¹²⁵ The Schneider incident had been one of the five main cases examined by the Church Commission in the Assassinations Report.¹²⁶ The Commission found the CIA had no plans to have Schneider killed and played no role in the kidnapping attempt.¹²⁷ Schneider’s sons, clearly not accepting that conclusion, brought suit in U.S. federal court in the District of Columbia, alleging the United States violated the “law of nations,” as well as numerous U.S. laws and treaties, including the United Nations Charter, with regard to their father’s death.¹²⁸ The district court dismissed the case for several reasons, the primary one being the political question

118. See Turner, *supra* note 70, at 800.

119. See Schmitt, *supra* note 73, at 646.

120. Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 336 (1991).

121. See Parks, *supra* note 75, at 7 (listing American uses of anticipatory self-defense in the attempted killing of foreign leaders dating back to 1804).

122. *Id.* at 8; see also Schmitt, *supra* note 73, at 646–50 (arguing that preemptive self-defense is permitted if a threat to a country is imminent or likely).

123. See Turner, *supra* note 70, at 800 (stating that necessity and proportionality are prerequisites to any form of self-defense); see also Robert J. Beck & Anthony C. Arend, “Don’t Tread on US”: International Law and Forcible State Responses to Terrorism, 12 WIS. INT’L L.J. 153, 213 (1994) (summarizing scholarly opinion on use of self-defense as requiring proportionality, timeliness, and discrimination).

124. See Turner, *supra* note 70, at 800.

125. *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 253–56 (D.D.C. 2004), *aff’d*, 412 F.3d 190 (D.C. Cir. 2005).

126. See ASSASSINATIONS REPORT, *supra* note 42, at 4–5.

127. *Id.* at 5.

128. *Schneider*, 310 F. Supp. 2d at 257.

doctrine; that is, that the case was non-justiciable because executive branch decisions on whether to attempt to change the leadership of foreign governments "implicate policy decisions in the murky realm of foreign affairs and national security best left to the political branches."¹²⁹ The D.C. Circuit agreed.¹³⁰ It is reasonable to believe that other courts would come to the same conclusion with regard to other claims of attempted targeted killings of foreign leaders.

Overall then, there is no statutory, constitutional, or international law prohibiting the CIA from attempting the targeted killing of foreign leaders, at least under certain circumstances. There is, however, an explicit presidential directive that prohibits such actions. Section 2.11 of Executive Order 12,333 ("EO 12,333"), issued by President Reagan in 1981 and in effect today,¹³¹ states: "No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in assassination."¹³² This section reflects a prohibition on "assassinations" first promulgated by President Ford in 1976¹³³ and later adopted by President Carter in 1978.¹³⁴ The term "assassination," though, is not defined in the executive order,¹³⁵ rendering the prohibition "replete with uncertainty."¹³⁶

In addition, executive orders are not law. Rather, they are published presidential directives to personnel of the executive branch, intended to effect action by those personnel.¹³⁷ "The executive branch . . . simply has no power to make the law; that

129. *Id.* at 258.

130. *Schneider v. Kissinger*, 412 F.3d 190, 198 (D.C. Cir. 2005) ("[T]his case raises political questions committed to the political branches and therefore is beyond the jurisdiction of the courts.").

131. *Parker & Naccarato*, *supra* note 77, at 42; *Schmitt*, *supra* note 73, at 652.

132. Exec. Order No. 12,333 § 2.11, 3 C.F.R. 200, 213 (1982). EO 12,333 also precludes the Agency from hiring someone else to engage in a targeted killing, even if that person is unaware of the Agency's involvement. *See id.* § 2.12 ("No element of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.").

133. Exec. Order 11,905 § 5(g), 3 C.F.R. 90, 101 (1977) ("No employee of the United States Government shall engage in, or conspire to engage in, political assassination."). President Ford issued such a prohibition in reaction to the Church Report's statement that assassinations conflicted with American morals and principles. *Addicott*, *supra* note 77, at 756. It is the first time that a President had ever enacted such a prohibition. *Id.*; *Parks*, *supra* note 75, at 4. However, CIA directors had issued memoranda to Agency personnel in 1972 and 1973 stating that Agency personnel were not to engage in assassinations. *Schmitt*, *supra* note 73, at 661.

134. Exec. Order 12,036 § 2-305, 3 C.F.R. 112, 129 (1979) ("No person employed by or acting on behalf of the United [sic] States Government shall engage in, or conspire to engage in, assassination.").

135. *See* Exec. Order No. 12,333, 3 C.F.R. 200 (1982); *Harder*, *supra* note 77, at 38 (noting that EO 12,333 fails to define the term "assassination"); *Parks*, *supra* note 75, at 4 ("Neither Executive Order 12333 nor its predecessors defines the term 'assassination.'").

136. *Schmitt*, *supra* note 73, at 652; *see also* *Harder*, *supra* note 77, at 38 (noting that the failure of EO 12,333 to define the term assassination "prevented the United States from following legal policy [of killing Saddam Hussein] that could have saved American lives" during the Gulf War); *Schmitt*, *supra* note 73, at 679 (describing EO 12,333 and stating that "[s]etting forth a prohibition without clearly delineating what it means is arguably more damaging than having no order at all" since it opens up the possibility of abuse or "has the potential to inhibit valid operations out of fear that the ban might be violated").

137. KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND

power rests exclusively with Congress.”¹³⁸ Based on this, courts generally find executive orders to be unenforceable.¹³⁹ Courts will enforce executive orders only if two criteria are met. First, the executive order must have been issued “pursuant to a statutory mandate or delegation of authority from Congress.”¹⁴⁰ Second, the order must indicate a clear intention by the President to create a private right of action.¹⁴¹

Based on these requirements, section 2.11 of EO 12,333, which prohibits “assassinations,” is clearly unenforceable in a court of law. Section 2.11’s prohibition on “assassinations” does not stem from a congressional mandate or delegation of authority since Congress has never passed a law precluding such targeted killings.¹⁴² Rather, section 2.11 reflects a congressional abdication on the subject, which Presidents Ford, Carter, and Reagan took upon themselves to address pursuant to their own presidential authority.¹⁴³ Further, EO 12,333 does not contemplate a private right of action. Indeed, the executive order expressly states that it “is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies or entities, its officers, employees, or agents, or any other person.”¹⁴⁴ EO 12,333 therefore clearly did

PRESIDENTIAL POWER 4, 34 (2001); *see also* Exec. Order No. 13,470 § 3.7(c), 73 Fed. Reg. 45,325, 45,341 (stating that “[t]his order is intended only to improve the internal management of the executive branch”). Executive orders have been issued by every President since the founding of this country. MAYER, *supra*, at 4, 34; Parker & Naccarato, *supra* note 77, at 55. By statute, all executive orders are published in the Federal Register “except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof.” 44 U.S.C. § 1505(a)(1) (2000).

138. U.S. Dep’t of Health & Human Servs. v. Fed. Labor Relations Auth., 844 F.2d 1087, 1095 (4th Cir. 1988); *see also* Addicott, *supra* note 77, at 757 (noting that “executive orders are policy and not law”).

139. Facchiano Constr. Co. v. U.S. Dep’t of Labor, 987 F.2d 206, 210 (3d Cir. 1993) (“Generally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders.”).

140. Indep. Meat Packers Ass’n v. Butz, 526 F.2d 228, 234 (8th Cir. 1975); *see also* U.S. Dep’t of Health & Human Servs., 844 F.2d at 1096 (stating that an executive order has the effect of a statute when the order is issued “pursuant to statutory mandate or a delegation from Congress of lawmaking authority”); *In re* Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980) (noting that executive orders are enforceable only when they have a “specific foundation in Congressional action”).

141. MAYER, *supra* note 137, at 59; Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1339 (4th Cir. 1995) (“An executive order issued as part of a statutory delegation of power, or as part of the process of carrying out a statute, may create enforceable private rights, but only if the statute or the order clearly intended to create such a right.”), *superseded by statute as recognized in* Yong Hao Chen v. INS, 195 F.3d 198 (4th Cir. 1999); Acevedo v. Nassau County, 500 F.2d 1078, 1084 n.7 (2d Cir. 1974) (declining to find a private right of action to enforce an executive order when such a right is not explicit in the order).

142. *See supra* note 88 and accompanying text.

143. *See supra* notes 131–34 and accompanying text.

144. Exec. Order No. 13,470 § 3.7(c), 73 Fed. Reg. 45,325, 45,341. This reflects amended language issued by President Bush in 2008. *Id.* However, the original language of EO 12,333 contained similar limitations. *See* Exec. Order No. 12,333 § 3.5, 3 C.F.R. 200, 216 (1982) (providing that nothing contained in the Order “or in any procedures promulgated hereunder is intended to confer any substantive or procedural right or privilege on any person or organization”).

not intend to create a private right of action.¹⁴⁵ Having failed both requirements for enforceability in a court of law, EO 12,333 is not judicially enforceable.¹⁴⁶

Most importantly, however, to paraphrase the Bible: what the President giveth, the President can taketh away; or more accurately, what the President taketh away, the President can giveth back. It is a presidential directive (EO 12,333) which precludes the CIA from engaging in targeted killings. Therefore, a subsequent presidential directive can amend that restriction and authorize targeted killings, either entirely or in limited circumstances.¹⁴⁷ This would not only permit such actions, but as a practical matter would immunize the killer from criminal or civil liability (assuming the targeted killing did not violate any other U.S. law, such as section 1116).¹⁴⁸ Further, even though EO 12,333's prohibition on targeted killings was publicly announced, any change or rescission of that prohibition could be done in secret.¹⁴⁹ It is likely, though,

145. See *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986) (holding that no private right of action exists for an executive order that expressly states that the order "is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person").

146. See *Zhang v. Slattery*, 55 F.3d 732, 748 (2d Cir. 1995) (holding that Executive Order 12,711 did not create a private right of action as it stemmed from no specific Congressional authority and contained no indication of an intention to create a private right of action), *superseded by statute as recognized in Yong Hao Chen*, 195 F.3d at 201; *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1510–11 (11th Cir. 1992) (finding no private right of action for Executive Order 12,324, when the language of that order indicated that no private civil action was contemplated); *Farkas v. Texas Instruments Inc.*, 375 F.2d 629, 632–33 (5th Cir. 1967) (finding no private right of action where the history and language of the executive order indicated that private civil action was not contemplated). The D.C. Circuit case of *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) is inapposite. Though the D.C. Circuit did consider whether plaintiffs there had sufficient injury in fact to raise a claim based on EO 12,333, deciding in the end that they did not, the court never considered the question of whether EO 12,333 permits a private right of action. See *id.*

147. Banks & Raven-Hansen, *supra* note 23, at 719–20 ("[An executive order] can be changed or revoked by the President, unlike a statute. Thus, if the President could prohibit political assassination, he could also allow it—by lifting that ban—unless other legal authorities or political considerations forbid him from doing so." (footnotes omitted)); Pickard, *supra* note 80, at 27 (noting that EO 12,333 "is not law and can be unilaterally revoked by the President"); see also Addicott, *supra* note 77, at 784 ("Those who think that the United States is somehow restricted by Executive Order 12,333 from targeting terrorists or rogue nations that threaten to conduct terrorist acts are mistaken."); Turner, *supra* note 70, at 809. This concept is further enforced by the Fifth Function of the National Security Act, which permits the CIA to engage in any activity authorized by the President so long as it does not violate the Constitution or any statute. See discussion *supra* note 16.

148. Turner, *supra* note 70, at 809. An executive order cannot authorize an action that violates a statute or the Constitution. *Marks v. Cent. Intelligence Agency*, 590 F.2d 997, 1003 (D.C. Cir. 1978) ("Of course, an executive order cannot supersede a statute."); Mayer, *supra* note 137, at 35–36.

149. Banks & Raven-Hansen, *supra* note 23, at 720 n.377, 725–26. Given the sensitivity of the topic, it is unlikely that any President would publicly announce a revocation of, or exception to, the ban. This is especially true if the exception to the ban was limited to particular individuals or categories of people, since any public announcement would alert those potential targets, and would preclude the United States from any future plausible deniability.

that the President would notify the congressional intelligence oversight committees of such activities, at least in a classified setting.¹⁵⁰ Indeed, any attempted targeted killing by the CIA would almost certainly be considered a “covert action,” and therefore trigger congressional notification as a matter of law.¹⁵¹

Applying all of the above analysis to the CIA’s attempted targeted killings of Fidel Castro and Patrice Lumumba in the early 1960s, a compelling argument can be made that the plots against both leaders were entirely legal. Constitutional protections did not and do not extend to such foreigners overseas.¹⁵² Section 1116 did not exist in the early 1960s, but would have been inapplicable anyway, as the targeted killings were to take place within each leader’s home country.¹⁵³ EO 12,333 and its predecessor executive orders also did not exist in the 1960s,¹⁵⁴ and, in any case, could have been revoked by presidential directive and congressional notice.¹⁵⁵

The only legal limit, then, to the attempted killings of Fidel Castro and Patrice Lumumba could possibly stem from the international law concepts of the use of force and anticipatory self-defense, which were well in place in the 1960s.¹⁵⁶ As the *Schneider* case indicates, courts would probably preclude such claims under the political question doctrine.¹⁵⁷ However, if a court chose to consider such a claim, the CIA’s plots would pass this international law hurdle if, as noted above, a showing could be made that each leader posed a legitimate threat to U.S. national security or U.S. citizens, and if the targeted killing of the leader was necessary and proportional.¹⁵⁸

Fidel Castro fulfilled these requirements in the early 1960s. Soon after seizing power in Cuba in January 1959,¹⁵⁹ Castro began advocating armed struggle in Latin America, seeking to export revolution throughout the continent and the Caribbean.¹⁶⁰ The United States believed that Cuba was encouraging and assisting violent revolution in virtually every country in Latin America, including assisting revolutionaries in Argentina, smuggling guerillas into Bolivia, plotting targeted killings in Colombia, shipping weapons to Venezuela, and initiating student riots in Puerto Rico.¹⁶¹ Castro’s

150. See Banks & Raven-Hansen, *supra* note 23, at 726–29; Pickard, *supra* note 80, at 34.

151. See 50 U.S.C. § 413b (Supp. V 2005). A “covert action” is defined as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly. . . .” *Id.* § 413b(e). A targeted killing would almost certainly fall in this category. The executive branch is required to keep the Congressional intelligence oversight committees “fully and currently informed” of covert action operations. *Id.* § 413b(b).

152. See *supra* notes 94–96 and accompanying text. Again, the only exception is with regard to detainees held at Guantanamo Bay, Cuba, where the United States maintains “complete and total control.” See *supra* note 96.

153. See *supra* notes 81–88 and accompanying text.

154. See *supra* note 132.

155. See *supra* note 147 and accompanying text. As an aside, the Assassinations Report did not find that any President authorized any of the attempted killings. ASSASSINATIONS REPORT, *supra* note 42, at 7.

156. See *supra* notes 105–11 and accompanying text.

157. See *supra* notes 125–30 and accompanying text.

158. See *supra* notes 122–23 and accompanying text.

159. Turner, *supra* note 70, at 796 n.55.

160. See CARLA ANNE ROBBINS, *THE CUBAN THREAT* 27, 57, 90, 131 (1983).

161. *Id.* at 3, 57.

Cuba was also viewed as a launching point for Soviet intervention in the Western Hemisphere.¹⁶² By the early 1960s, thousands of Soviet specialists and advisors had entered Cuba, Soviet ships carrying military weapons were arriving almost daily at Cuban ports, and Cuban military sites were undergoing extensive construction.¹⁶³ As President John F. Kennedy stated: "The American people are not complacent about Iron Curtain tanks and planes less than ninety miles from their shore."¹⁶⁴ Castro's willingness to allow the Soviet Union to place nuclear missiles on the Cuban island represented the apex of this threat to the United States.¹⁶⁵ Castro was seen as such a threat that the United States sent 23,000 troops to the Dominican Republic to stop that country from being taken over by what the United States government called "Castro Communists,"¹⁶⁶ trained, supported, and equipped an invasion of Cuba in April 1961 via the Bay of Pigs;¹⁶⁷ and risked nuclear war with the Soviet Union during the Cuban Missile Crisis.¹⁶⁸ The Assassinations Report stated that Castro only posed physical danger to the United States during the Cuban Missile Crisis.¹⁶⁹ However, it seems abundantly clear that he constituted a considerable threat to the national security of the United States throughout the early 1960s, and that his death was viewed as necessary and proportional to the threat. Thus, Castro's activities warranted acts of self-defense by the United States, including an attempted targeted killing.¹⁷⁰

The CIA's attempt to end the life of Patrice Lumumba is admittedly more difficult to justify legally. Nonetheless, an argument can still be made that he too posed a legitimate threat to the national security of the United States, even though the Assassinations Report found that he never posed any physical danger to the United States.¹⁷¹ Lumumba rose to power in the summer of 1960, when Congo was declaring its independence from Belgium.¹⁷² He briefly served as Premier of the new country before being ousted and joining the opposition party, where he continuously posed a threat to return to power.¹⁷³ He was killed in early 1961 by forces not affiliated with the United States.¹⁷⁴

162. See *id.* at 103–04; Adlai Stevenson, U.S. Ambassador to the United Nations, Speech to the United Nations Security Council (Oct. 23, 1962), in 8 THE PAPERS OF ADLAI E. STEVENSON 309, 319 (Walter Johnson ed., 1979) [hereinafter Stevenson Speech] ("The crucial fact is that Cuba has given the Soviet Union a bridgehead and staging area in this hemisphere—that it has invited an extra-continental, anti-democratic and expansionist power into the bosom of the American family—that it has made itself an accomplice in the communist enterprise of world domination.").

163. ROBBINS, *supra* note 160, at 105.

164. *Id.* at 103.

165. Stevenson Speech, *supra* note 162, at 309 (noting that the placing of nuclear missiles on Cuba "constitutes a threat to the peace of this hemisphere" and "to the peace of the world").

166. ROBBINS, *supra* note 160, at 1.

167. *Id.* at 101–02.

168. *Id.* at 105–10; Stevenson Speech, *supra* note 162 (urging the United Nations Security Council to take action against Cuba during the Cuban Missile crisis).

169. ASSASSINATIONS REPORT, *supra* note 42, at 258.

170. See Turner, *supra* note 70, at 797.

171. ASSASSINATIONS REPORT, *supra* note 42, at 258.

172. *Id.* at 13.

173. *Id.* at 13–14, 16, 18.

174. *Id.* at 4.

The CIA initiated plans to kill Lumumba soon after he became Premier.¹⁷⁵ The concern arose from Lumumba's perceived strong affiliation with the Soviet Union, which provided him advisors as well as considerable military aid and equipment.¹⁷⁶ At the time, "American officials believed the basic premise of Cold War ideology: the threat of aggressive, monolithic international communism They knew the Congo would be a valuable prize for the communists due to its size, central location in Africa, and vast mineral wealth."¹⁷⁷ There was fear that "a Communist victory in this large, centrally located state could create a base for the subversion of Central Africa."¹⁷⁸ Based on this, Acting Secretary of State C. Douglas Dillon considered Lumumba "dangerous to the peace and safety of the world,"¹⁷⁹ while CIA Director Allen Dulles regarded Lumumba as "a grave danger."¹⁸⁰ Numerous members of Congress agreed.¹⁸¹ So concerned was the United States about Lumumba that it positioned an attack carrier off the coast of Congo, and drew up contingency plans for a limited war.¹⁸²

While the United States' perception of Lumumba may have been excessive and even misguided,¹⁸³ the fact remained that he threatened to lead the largest country in Africa into the Soviet fold. Such fears might seem overly alarmist now with the collapse of the Soviet Union, and may have seemed exaggerated to the Church Committee examining the CIA's attempted killing of Lumumba more than a decade after the fact. The truth, however, is that the communist threat in Africa in the early 1960s was both real and considerable. The United States fervently believed that its way of life was under attack and that the only way to prevent a communist takeover of the world was to control Soviet influence anywhere it appeared. The Congo was not any African country—due to its size and location, it represented a critical area to prevent the communist infiltration of Africa that could spread beyond that continent and threaten

175. *See id.* at 4, 13–14.

176. *See id.* at 14, 62; CENT. INTELLIGENCE AGENCY, CURRENT INTELLIGENCE STAFF STUDY: SOVIET POLICY TOWARD THE UNDERDEVELOPED COUNTRIES 102 (1961), *available at* <http://www.foia.cia.gov> (type "Soviet Policy Toward the Underdeveloped Countries" in the Search Declassified Docs browser; then click on "SOVIET POLICY TOWARD THE UNDERDEVELOPED COUNTRIES (XIII–61*)" in the results) (noting that the Soviet Union provided Lumumba with "relief supplies, technicians, and advisers" and promised "almost unlimited economic aid"); STEPHEN R. WEISSMAN, AMERICAN FOREIGN POLICY IN THE CONGO 1960–1964, at 81, 262 (1974).

177. WEISSMAN, *supra* note 176, at 52; *see also* ASSASSINATIONS REPORT, *supra* note 42, at 256 (discussing how the CIA's assassination plots were planned in the depths of the Cold War, when "our country faced a monolithic enemy in Communism").

178. WEISSMAN, *supra* note 176, at 53; *see also* ASSASSINATIONS REPORT, *supra* note 42, at 18 n.4 (noting the fear expressed by the Chief of CIA's Africa division that Soviet control of the Congo would create a domino effect in Africa).

179. ASSASSINATIONS REPORT, *supra* note 42, at 58.

180. *Id.* at 62. Even after being ousted from power, Lumumba was considered extremely dangerous due to his ability to influence the Congolese people. As Secretary Dillon noted, were Lumumba given the chance to talk to the Congolese Army, "he probably would have had them in the palm of his hand in five minutes." *Id.* at 63.

181. WEISSMAN, *supra* note 176, at 140.

182. *Id.* at 279.

183. *See generally id.* at 257–90 (discussing how the United States misunderstood Lumumba and his politics).

the national security of the United States. And Lumumba was not any African leader—his affiliation with the Soviet Union, as well as his magnetic personality,¹⁸⁴ led the United States to believe that his leadership of the Congo threatened the United States' security concerns for the entire African continent. Just as many scholars have argued that a targeted killing of Saddam Hussein before the invasion of Iraq was justified due to his threat to the Middle East,¹⁸⁵ so too could the United States have deemed an attempted killing of Lumumba as necessary and proportional in order to prevent a perceived Soviet take-over of Africa.

Thus, in 1973, the CIA could engage in targeted killings of foreign leaders so long as the target posed a threat to U.S. citizens or U.S. national security, the action was proportional and necessary (per international law), and the attempt took place within the leader's own country (section 1116). The only change since 1973 has been the proscription contained in EO 12,333, which could be amended or reversed if the President issued a specific directive and provided notice to the congressional intelligence oversight committees.¹⁸⁶

IV. ELECTRONIC SURVEILLANCE OF AMERICANS

The Family Jewels describe two CIA operations involving the electronic surveillance of Americans in the United States. In neither operation did the CIA seek or acquire a warrant. In one operation, the CIA listened to radio telephone calls between alleged drug traffickers in the United States and South America.¹⁸⁷ The surveillance ended after four months, when the CIA's General Counsel rendered an opinion that the activity was illegal.¹⁸⁸ A more notorious CIA electronic surveillance operation was Project Mockingbird, which involved tapping the Washington, D.C. telephones of two U.S. newspaper reporters in 1963.¹⁸⁹ The operation was done with the support of the telephone company,¹⁹⁰ and with the apparent knowledge and consent of the Attorney General.¹⁹¹ The reporters had published extensive news articles that contained highly classified CIA information.¹⁹² The CIA tapped the reporters' phones to identify the sources of that classified information, in order to prevent such leaks from continuing.¹⁹³ The operation culminated in the identification of dozens and dozens of the reporters' sources, including a White House staffer, an Assistant

184. ASSASSINATIONS REPORT, *supra* note 42, at 63.

185. See, e.g., Turner, *supra* note 70, at 789 n.12, 807 (noting Professor Turner's own views as well as that of "Pentagon 'super-lawyer'" W. Hays Parks that killing Saddam Hussein would have been justified).

186. For additional discussion on the legality of targeted killings today, see Banks & Raven-Hansen, *supra* note 23, at 749; Parks, *supra* note 75; Pickard, *supra* note 80, at 34–35; Schmitt, *supra* note 73, at 675; Turner, *supra* note 70, at 807–08.

187. See FAMILY JEWELS, *supra* note 2, at 00537.

188. See *id.* at 00331, 00534–35, 00537–39.

189. See *id.* at 00021, 00457.

190. See *id.* at 00021.

191. See *id.* at 00021; ROCKEFELLER REPORT, *supra* note 17, at 164.

192. FAMILY JEWELS, *supra* note 2, at 00021.

193. See *id.*

Attorney General, twenty-one congressional staffers, six Members of Congress, and twelve Senators.¹⁹⁴

The question of whether the United States government is permitted to conduct this type of warrantless electronic surveillance of Americans has been an on-going debate for forty years, and remains unresolved.¹⁹⁵ The tension stems from two competing facets of the United States Constitution. The Fourth Amendment prohibits the United States government from searching the property of an American absent a warrant.¹⁹⁶ In juxtaposition is what is referred to as the inherent constitutional authority of the President to engage in foreign affairs.¹⁹⁷ This tension is aided by the fact that the Framers of the Constitution did not, and could not, foresee the concept of electronic surveillance (as there were no telephones in 1776, much less a means to tap them), and therefore could not even contemplate the problems such surveillance would place on the Fourth Amendment in the area of national security.¹⁹⁸

The Supreme Court first addressed the constitutionality of electronic surveillance in 1967 when it held that warrantless searches in a domestic criminal context generally were “per se unreasonable under the Fourth Amendment”¹⁹⁹ However, the Court explicitly demurred as to whether a warrant would be required for electronic surveillance “in a situation involving the national security. . . .”²⁰⁰ The Court addressed that latter issue in 1972, in analyzing a warrantless wiretap of three individuals accused of conspiring to destroy a CIA office in Michigan.²⁰¹ Though the Court found that the actions of the government there violated the Fourth Amendment’s requirement of a warrant, it was cautious to indicate that its opinion “involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”²⁰²

194. *Id.*

195. See *Warrantless Surveillance and the Foreign Intelligence Surveillance: The Role of Checks and Balances in Protecting Americans’ Privacy Rights (Part I): Hearing Before the H. Comm. of the Judiciary*, 110th Cong. 25 (2007) [hereinafter *Warrantless Surveillance*] (prepared statement of Robert F. Turner) (describing the decades-long debate over warrantless electronic surveillance).

196. U.S. CONST. amend. IV.

197. See *Constitutional Limitations on Domestic Surveillance: Hearing on Warrantless Surveillance and the Foreign Intelligence Surveillance Act Before the H. Comm. of the Judiciary*, 110th Cong. 76 (2007) [hereinafter *Constitutional Limitations*] (prepared statement of Louis Fisher) (explaining the “inherent authority” concept); *Warrantless Surveillance*, *supra* note 195, at 37–43 (noting that this inherent authority stems from the powers provided the president by Article II of the Constitution).

198. William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1221 (2007).

199. *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted); see also *Warrantless Surveillance*, *supra* note 195, at 40 (noting that *Katz* was the first Supreme Court case to consider the issue of electronic surveillance).

200. *Katz*, 389 U.S. at 358 n.23.

201. See *United States v. U.S. Dist. Court for the E. Dist. of Mich. (Keith)*, 407 U.S. 297 (1972).

202. *Id.* at 321–22 (footnote omitted); see also *id.* at 308–09 (emphasizing that the opinion applied only to domestic matters and “requires no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country”).

The Supreme Court has yet to address this last issue regarding foreign national security concerns. The Fourth Circuit, however, considered this issue in the well-known case of *United States v. Truong Dinh Hung*, an espionage case in which Truong and others stood accused of transmitting classified information to representatives of the Socialist Republic of Vietnam.²⁰³ In investigating the case, and seeking to discover the scope and sources of the espionage, the United States government placed a tap on Truong's phone, and bugged his apartment, with Attorney General approval but without seeking a warrant from a court.²⁰⁴

The Fourth Circuit upheld the warrantless tap and bug under the Fourth Amendment, noting that thwarting overseas threats requires speed and secrecy; requiring a warrant "would add a procedural hurdle" that would reduce the President's ability to act quickly and would risk exposure.²⁰⁵ The court also recognized that the executive branch possesses "unparalleled expertise" in the arena of foreign affairs, which the courts do not have and should not second-guess.²⁰⁶ Finally, and most importantly, the court recognized that the executive branch is "constitutionally designated as the pre-eminent authority in foreign affairs" and therefore separation of powers requires the courts "to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance."²⁰⁷ The *Truong* court, however, placed some limits on warrantless foreign intelligence surveillance. The target of the surveillance must be a foreign power, or an agent or collaborator of a foreign power; the surveillance must be primarily for foreign intelligence purposes; and the surveillance must be reasonable.²⁰⁸

Every other lower court that considered the matter has come to the same conclusion and has upheld the executive branch's ability to conduct warrantless electronic searches in the United States so long as there is Attorney General approval and the purpose of the surveillance is to acquire foreign intelligence information.²⁰⁹ The

203. 629 F.2d 908 (4th Cir. 1980).

204. *Id.* at 912.

205. *Id.* at 913.

206. *Id.* at 913–14.

207. *Id.* at 914.

208. *Id.* at 915–16.

209. See *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977) ("Foreign security wiretaps are a recognized exception to the general warrant requirement . . ."); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974) (upholding a warrantless tap as reasonable under the Fourth Amendment since the tap was "solely for the purpose of gathering foreign intelligence information"); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) (permitting the use of evidence obtained from a warrantless wiretap, where the wiretap was for the purpose of gathering foreign intelligence, due to "the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs"); *United States v. Clay*, 430 F.2d 165, 171–72 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971) (allowing information from a warrantless tap of a former boxing champion since the purpose of the tap was for "foreign intelligence surveillance"); see also *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) ("The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information."); *Warrantless Surveillance*, *supra* note 195, at 24 ("Since *Keith*, every single Federal court of appeals to decide the issue has agreed the President has independent constitutional power to [collect

conduct of such warrantless electronic surveillance for this purpose not only precludes any allegation of constitutional violation, but, being based on the constitutional power of the President, also would appear to vitiate any claim that such activities violate federal statutes that prohibit warrantless electronic surveillance.²¹⁰

The law in this area changed in 1978 with passage of the Foreign Intelligence Surveillance Act (FISA),²¹¹ which was meant to place the constitutional debate on hold.²¹² FISA represented a contentious and difficult compromise regarding the collection of foreign intelligence.²¹³ The Supreme Court had left the door open regarding warrantless wiretaps for foreign intelligence purposes, and the lower courts had uniformly permitted the government to go through that door. However, the executive branch worried that the Supreme Court might decide to take up the matter and issue a less favorable ruling.²¹⁴ Furthermore, numerous lawsuits had been filed challenging warrantless electronic surveillance, and most telephone companies and government agencies were becoming reluctant to engage in such surveillance without a court order.²¹⁵

FISA thus sought to balance the public's concern about an unfettered government with the executive branch's need to collect foreign intelligence quickly and in secret.²¹⁶ One of FISA's main tenets was the creation of the Foreign Intelligence Surveillance Court (FISC), which is a special tribunal comprised of eleven district court judges.²¹⁷ FISA authorizes judges on the FISC to issue foreign intelligence warrants if certain

foreign intelligence information without a warrant].”).

210. See *Butenko*, 494 F.2d at 598–602 (stating that the President's authority to gather foreign intelligence trumps section 605 of the Communications Act of 1934, which prohibits the warrantless interception of communications); *Clay*, 430 F.2d at 171–72 (same). The basis for this stems from the President's constitutional power, not any “exemption” language in section 605 of the Communications Act of 1934. Admittedly, in the 1970s, section 605 did contain a provision that nothing contained in that act “shall limit the constitutional power of the President to take such measures as he deems necessary . . . to obtain foreign intelligence information deemed essential to the security of the United States.” 18 U.S.C. § 2511(3) (1974). However, the Supreme Court expressly refused to interpret this language as exempting any presidential action, but rather considered it a “clear[] expression of congressional neutrality. . . . [N]othing in § 2511(3) was intended to *expand* or to *contract* or to *define* whatever presidential surveillance powers existed in matters affecting the national security.” *United States v. U.S. Dist. Court for the E. Dist. of Mich. (Keith)*, 407 U.S. 297, 308 (1972) (emphasis in original). As the Court held, “the statute is not the measure of the executive authority asserted in this case. Rather, we must look to the constitutional powers of the President.” *Id.* As noted in the text, the President's constitutional powers permit warrantless electronic surveillance for foreign intelligence purposes.

211. 50 U.S.C. §§ 1801–62 (2000).

212. *Ellsberg v. Mitchell*, 709 F.2d 51, 66 n.66 (D.C. Cir. 1983) (noting that the enactment of FISA “seems likely to result in indefinite postponement of definitive resolution of the constitutional minima” in the area of foreign intelligence surveillance).

213. Banks, *supra* note 198, at 1225; Diane Carraway Piette & Jesselyn Radack, *Piercing the “Historical Mists”: The People and Events Behind the Passage of FISA and the Creation of the “Wall”*, 17 STAN. L. & POL'Y REV. 437, 441 (2006).

214. Piette & Radack, *supra* note 213, at 442–43.

215. See *id.* at 441–42, 448; Banks, *supra* note 198, at 1225.

216. *ACLU v. Barr*, 952 F.2d 457, 461 (D.C. Cir. 1991); Banks, *supra* note 198, at 1228; Piette & Radack, *supra* note 213, at 486.

217. See 50 U.S.C. § 1803(a) (2000).

criteria are met.²¹⁸ Requests to the FISC must be in writing and under oath, and must be approved by the Attorney General after personal review.²¹⁹ For a warrant to issue, the FISC judge must find probable cause to believe that the target is a foreign power or an agent of a foreign power, and that foreign intelligence information is being sought.²²⁰ FISC judges hold hearings in secret and *ex parte*, and their decisions are usually not published.²²¹ The Attorney General may still authorize warrantless electronic surveillance, but only in very limited circumstances.²²² Criminal and civil liabilities attach to violations of FISA, and a private right of action exists.²²³

Per its terms, FISA is considered the "exclusive means" of engaging in electronic surveillance for foreign intelligence purposes.²²⁴ Nonetheless, a recent argument has been made that the restrictions of FISA can be superseded in certain circumstances. Supporters of this position note that portions of FISA contain the provision "unless authorized by statute."²²⁵ Therefore, it has been argued that a statute authorizing the President to engage in wide-ranging activities designed to protect the nation in time of emergency, such as the Authorization for Use of Military Force Resolution (AUMF) enacted in the wake of 9/11,²²⁶ can serve to overcome the restrictions of FISA, including the preclusion of electronic surveillance absent a FISC-ordered warrant.²²⁷ Indeed, this was the legal argument employed by the Bush Administration to validate the National Security Agency's "Terrorist Surveillance Program."²²⁸ Critics of this

218. *See id.* § 1804.

219. *Id.* § 1804(a), (e).

220. *Id.* §§ 1804(a)(4), 1805.

221. Banks, *supra* note 198, at 1231; *see* § 1803(c).

222. This includes when there is an emergency during the fifteen days following a congressional declaration of war, or if the surveillance is directed solely at communications between or amongst foreign powers and "there is no substantial likelihood that the surveillance will acquire the contents of any communications to which a United States person is a party." §§ 1802(a)(1), 1805(f), 1811. Recent amendments to FISA also authorize the Attorney General and the Director of National Intelligence to conduct warrantless electronic surveillance of persons "reasonably believed to be located outside the United States," under certain criteria. Foreign Intelligence Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 101, 122 Stat. 2436 (to be codified at 50 U.S.C. § 1881).

223. §§ 1809–10.

224. 18 U.S.C. § 2511(2)(f) (2006); *Constitutional Limitations*, *supra* note 197, at 74; Banks, *supra* note 198, at 1232 (quoting § 2511(2)(f)).

225. *See, e.g.*, 50 U.S.C. § 1809 (providing for criminal sanctions for engaging "in electronic surveillance under color of law except as authorized by statute").

226. S.J. Res. 23, 115 Stat. 224 (2001).

227. *See An Examination of the Call to Censure the President: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 122 (2006) (statement of Robert Turner) (noting that the AUMF trumps FISA and "clearly empowers [the President] to exercise the intelligence-gathering component of his Commander in Chief power").

228. *See Constitutional Limitations*, *supra* note 197, at 74–75; *see also* Press Briefing, Attorney General Alberto Gonzales (Dec. 19, 2005). The program authorized the NSA to monitor—without prior FISC or other court approval—phone calls and other communications where the NSA believed one party to the communication was affiliated with Al Qaeda and outside the United States, even if it was possible that the other party resided in the United States. *Id.*

argument, who are numerous, assert that the specific restrictions contained in FISA cannot be overcome by a much broader and less specific statute such as the AUMF.²²⁹

An additional, and more fundamental, argument in favor of Presidential primacy in this area asserts that FISA cannot usurp the aforementioned inherent presidential authority over foreign affairs. As Professor Robert Turner, one of the most forceful advocates of this position describes:

At the core of exclusive presidential constitutional powers are the conduct of diplomacy, the collection of foreign intelligence, and the supreme command of military forces and conduct of military operations. Into these areas, Congress was not intended by the Founding Fathers to interfere. This was the consistent view of the *Federalist Papers* and the courts have repeatedly affirmed these principles.²³⁰

Per Professor Turner and others, including the Bush Administration, this authority provides the President with power to engage in warrantless searches, a power that cannot be taken away by Congress through FISA or any other mechanism, as a matter of constitutional law.²³¹ The FISC Court of Review, in the only opinion it has ever issued, appears to confirm this position. The court, in discussing whether the President has the inherent authority to conduct warrantless searches to obtain foreign intelligence information, stated: “We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President’s constitutional power.”²³²

However, this assertion is hotly contested. Critics have asserted that the Constitution is not as clear cut as Professor Turner suggests; that the executive branch has acceded to the exclusivity of FISA when President Carter signed FISA into law in 1978; that such accession is further evidenced by the executive branch’s continued use of the FISC; and that the proper mechanism for concerns about FISA is to seek a legislative amendment.²³³ Congress apparently sought to resolve this issue when it amended FISA in 2008 to, *inter alia*, expressly provide that FISA “shall be the exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic communications may be conducted.”²³⁴ However, such legislation does not resolve the underlying constitutional argument.

229. See, e.g., *Constitutional Limitations*, *supra* note 197, at 75 (statement of Louis Fisher) (asserting that the broad language in the AUMF does not allow the President to have unfettered power: “If Congress after 9/11 wanted to modify [the FISA] procedures and permit the President to engage in national security surveillance without a judicial check, it knows how to amend a statute”); Piette & Radack, *supra* note 213, at 443 n.26 (citing numerous critics of the Administration’s argument).

230. *Warrantless Surveillance*, *supra* note 195, at 29.

231. *Id.* at 36 (“[T]he foundation of FISA from the start was not a lawful and binding Act of Congress at all but rather a usurpation of presidential constitutional power that as a matter of U.S. constitutional law was void . . .”); Press Briefing, *supra* note 228.

232. *In re Sealed Case*, 310 F.2d 717, 742 (FISA Ct. Rev. 2002).

233. *Constitutional Limitations*, *supra* note 197, at 76–79; see also *Warrantless Surveillance*, *supra* note 195, at 58–59 (summarizing the critics’ argument); Piette & Radack, *supra* note 213, at 443 n.26 (citing numerous critics of the program).

234. Foreign Intelligence Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 102(a), 122 Stat. 2436 (to be codified at 50 U.S.C. § 1812 (2000)).

Finally, it should be noted that EO 12,333 also precludes the CIA from "engag[ing] in electronic surveillance within the United States except for the purpose of training, testing, or conducting countermeasures to hostile electronic surveillance."²³⁵ However, as noted previously, the limitations of EO 12,333 can be countermanded by presidential directive.²³⁶

Overall then, it seems clear that at the time of the Family Jewels in 1973 the CIA could engage in electronic surveillance in the United States without a warrant but with Attorney General approval, so long as the purpose was to collect foreign intelligence.²³⁷ It is also possible that the target of the surveillance needed to be a foreign power or an agent of a foreign power, as mandated by some courts.²³⁸ These requirements continue today, with the additional requirement that the Agency likely would need to acquire a warrant from the FISC or at least a presidential directive.²³⁹

Applying the above requirements to the circumstances described in the Family Jewels is not simple, especially given the lack of factual information surrounding those electronic surveillance activities and the current legal uncertainty in this area. However, Project Mockingbird—the CIA's warrantless telephone tap of the phones of U.S. reporters to determine their sources of information—does not appear to have been legal in 1973. Though the Agency had Attorney General approval to conduct the taps,²⁴⁰ the surveillance does not appear to have been done to collect foreign intelligence, but rather to assess the source of leaks,²⁴¹ and therefore would not comply with the basic requirements of the foreign intelligence exception. It is possible that the project could have complied with that exception, and been legal, if the CIA originally believed that the leaks were being made by or to agents of a foreign power, or that the reporters were acting as agents of a foreign power. However, there is no indication that the CIA ever held such a belief or acted for such a purpose, and therefore the project would appear to have been illegal.²⁴²

The CIA's practice of tapping telephone conversations between alleged narcotics traffickers in the United States and in South America would seem on its face to be a more legal endeavor because such information has clear foreign intelligence value.²⁴³ The CIA's General Counsel, however, determined the telephone taps were not done for foreign intelligence purposes. Instead, the General Counsel determined that since the "ultimate destination" of the information from the taps was to the then predecessor of

235. Exec. Order No. 12,333 § 2.4, 3 C.F.R. 200, 212 (1982).

236. *See supra* note 147 and accompanying text.

237. *See supra* note 209 and accompanying text.

238. *See supra* text accompanying note 208.

239. *See supra* text accompanying notes 211–35.

240. *See supra* text accompanying note 191.

241. *See supra* text accompanying note 193.

242. The Rockefeller Commission agreed, noting that the Agency has authority to conduct investigations of present or former employees, but "has no authority to investigate newsmen simply because they have published leaked classified information." ROCKEFELLER REPORT, *supra* note 17, at 165–66.

243. *See, e.g.*, 21 U.S.C. § 801 (2006) (reciting Congressional concerns regarding international narcotics trafficking, including a finding that the "illegal importation . . . of controlled substances [has] a substantial and detrimental effect on the health and general welfare of the American people").

the Drug Enforcement Administration, "it appears to be collection for law-enforcement purposes, which . . . is barred to this Agency by statute."²⁴⁴ It should be noted, however, that the mere fact that the information was provided to a law enforcement agency does not in itself preclude collection from being done for foreign intelligence purposes. Indeed, *Truong* involved a joint collection operation by the FBI and the CIA, where information acquired from warrantless electronic surveillance was eventually used in a criminal prosecution.²⁴⁵ Nonetheless, there are insufficient facts in the Family Jewels to assess the true purpose of the telephone taps of the narcotics traffickers. It is also unclear whether the CIA acquired Attorney General approval to engage in this electronic surveillance, and whether the traffickers were acting as agents of a foreign power. The CIA did end the operation because of the General Counsel's opinion.²⁴⁶

V. EXAMINATION OF U.S. MAIL

From the early 1950s until 1973, the CIA, with the general knowledge and consent of the United States Postal Service, engaged in a systematic operation to examine extensive amounts of mail sent between Americans and individuals in communist countries, most particularly the Soviet Union.²⁴⁷ The purpose of the operation was to "give United States intelligence agencies insight into Soviet intelligence activities and interests."²⁴⁸ The operation took place mostly in the main post office in New York, though short-lived mail examination programs also occurred in post offices in San Francisco, Hawaii, and New Orleans.²⁴⁹

The mail program, known by the cryptonym SRPOINTER-HTLINGUAL,²⁵⁰ began with CIA engaging purely in a "mail cover" operation, in which CIA officers examined just the outside or "cover" of mail mostly received from, but also sent to, communist countries.²⁵¹ The program soon progressed to opening certain select envelopes and reviewing their contents.²⁵² If the contents were of interest, the cover of the envelope and its contents were photographed, with the copies sent to CIA headquarters and often to the FBI for review.²⁵³ The original letters would then be resealed and reinserted into the mail system for delivery.²⁵⁴ Generally, the evaluation of the covers and letters, to include the opening and resealing of envelopes, took place at the actual postal facilities located at the intercept points, for example New York and San Francisco, with the

244. FAMILY JEWELS, *supra* note 2, at 00539.

245. *See United States v. Truong Dinh Hung*, 629 F.2d 908, 912 (4th Cir. 1980).

246. *See supra* text accompanying note 188.

247. ROCKEFELLER REPORT, *supra* note 17, at 101; *see also* FAMILY JEWELS, *supra* note 2, at 00331 (discussing the CIA's reading of Russian and other mail).

248. ROCKEFELLER REPORT, *supra* note 17, at 101 (quoting a report from the CIA Chief of Counterintelligence to DCIA Schlesinger).

249. *Id.* (noting that the San Francisco program operated during four separate periods of time of a month or less between 1969 and 1971; the Hawaii program ran from late 1954 to early 1955; the New Orleans program existed only during a three-week stretch in 1957).

250. *See* FAMILY JEWELS, *supra* note 2, at 00644.

251. ROCKEFELLER REPORT, *supra* note 17, at 103.

252. *Id.*

253. *Id.* at 105.

254. *See id.*

analysis occurring at CIA headquarters, in Langley, Virginia.²⁵⁵ Much of the determination as to which envelopes were to be opened stemmed from watch lists, created by the CIA or FBI, of individuals or organizations of particular interest.²⁵⁶

During its inception in the early 1950s, the operation involved examination of only a few letters.²⁵⁷ By 1959, the number had grown to 13,000 letters per year.²⁵⁸ The project ballooned from there. In 1972, the last full year of operation, the New York intercept facility, which was the only program in operation at the time, examined the covers of over 2.3 million items of mail coming into and going out of the United States, photographed the exterior of approximately 33,000 items, opened and analyzed 8700 items of mail, and sent 1400 items of information from the mail intercept program to the FBI.²⁵⁹

The CIA notified, and acquired permission from, the Chief Postal Inspector of the Postal Service, as well as other Postal Inspectors, regarding the "mail cover" portion of the project (though not the "mail opening" portion) both in writing and verbally before the operation commenced.²⁶⁰ Moreover, the Chief Postal Inspector who served from 1969 through the end of the Agency's program in 1973, having been a former Agency officer, was aware of both the mail cover and mail opening portions of the Agency's program.²⁶¹ The CIA also briefed, and received approval from, many of the other Postmasters General, and at least one other Chief Postal Inspector, throughout the duration of the program, though it is unclear whether such briefings included discussion of the mail opening portion of the program.²⁶² The CIA also briefed Attorney General John Mitchell on the program in 1971; Attorney General Mitchell fully concurred with continuing the operation.²⁶³ There is no indication that the CIA ever briefed any other high-level official in the executive branch (to include any President) on the program during its operation.²⁶⁴ Nor is there any indication that Congress or the courts were aware of the program, much less had a chance to evaluate

255. FAMILY JEWELS, *supra* note 2, at 00644; ROCKEFELLER REPORT, *supra* note 17, at 105, 112–15. The Church Report indicates that at least some of the mail opening operations took place at a CIA "laboratory" located at Kennedy Airport. SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE AND THE RIGHTS OF AMERICANS: BOOK III: FINAL REPORT, S. REP. NO. 94-755, at 572 (1976), *available at*, http://www.aarclibrary.org/publib/contents/church/contents_church_reports_book3.htm [hereinafter CHURCH REPORT: BOOK III]. It is unclear whether that laboratory was affixed to, or part of, the U.S. Postal facility at that airport.

256. ROCKEFELLER REPORT, *supra* note 17, at 105; *see also* FAMILY JEWELS, *supra* note 2, at 00644–45 (discussing the CIA's maintenance of the watch list).

257. ROCKEFELLER REPORT, *supra* note 17, at 105.

258. *Id.*

259. *Id.* at 111–12.

260. *Id.* at 103.

261. *Id.* at 108–09.

262. *See id.* at 104–10 (discussing several Postmasters General who were briefed during the program). *But see* CHURCH REPORT: BOOK III, *supra* note 255, at 585 (stating that the CIA provided no information on the program to several of the Postmasters General who served while the program was in place).

263. ROCKEFELLER REPORT, *supra* note 17, at 110.

264. *Id.* at 111.

its legality, until after the program had been terminated.²⁶⁵ The CIA never acquired a warrant for the program.²⁶⁶

The CIA ended the program in 1973 when the postal service refused to allow the program to continue without high-level approval, presumably from the President.²⁶⁷ By then, much of the take from the operation involved matters of greater interest to the FBI than to the CIA.²⁶⁸ With the risk of exposure high, the CIA determined the operation should be completely turned over to the FBI.²⁶⁹ Nonetheless, both the CIA and FBI believed that the project had provided valuable strategic and technical intelligence, as well as numerous counterintelligence leads.²⁷⁰

The Rockefeller Commission, without much analysis, concluded that the Agency's mail intercept program was "unlawful," as it had violated unspecified "United States statutes" and the National Security Act of 1947, and "raise[d] Constitutional questions."²⁷¹ A more extensive analysis of the program, however, indicates that the mail cover portion of the program was legal throughout its duration, while the mail opening portion was legal during its peak years, and may have been since its inception.

A. Mail Cover Portion

Three statutes impose criminal sanctions for interference with U.S. mail—18 U.S.C. §§ 1701, 1702, and 1703. Section 1701, in relevant part, imposes criminal penalties on anyone who "knowingly and willfully obstructs or retards the passage of the mail."²⁷² Section 1702 prohibits the opening of mail, or the taking of letters out of a post facility or out of the custody of a mail carrier "with design to obstruct the correspondence, or to pry into the business or secrets of another."²⁷³ Section 1703 prohibits postal employees from "unlawfully" opening or delaying any correspondence, and prohibits anyone (postal employees or otherwise) from opening or destroying any mail "without authority."²⁷⁴ These statutes apply to all mail in the United States, even if originating overseas.²⁷⁵ All of these statutory provisions have remained the same in relevant part since they were enacted in 1948.²⁷⁶

265. See *Avery v. United States*, 434 F. Supp. 937, 940 (D. Conn. 1977) (noting that the CIA never sought or obtained judicial approval for its mail operation). See generally ROCKEFELLER REPORT, *supra* note 17, at 101–15 (discussing interaction of CIA officials with other government officials but notably never mentioning Congress or the courts).

266. *Avery*, 434 F. Supp. at 940.

267. ROCKEFELLER REPORT, *supra* note 17, at 20, 111.

268. FAMILY JEWELS, *supra* note 2, at 00028 (noting that by the end of the operation it appeared that the "bulk of the take involved matters of internal security interest which was [sic] disseminated to the Federal Bureau of Investigation").

269. ROCKEFELLER REPORT, *supra* note 17, at 111.

270. *Id.* at 112.

271. *Id.* at 115.

272. 18 U.S.C. § 1701 (2006).

273. *Id.* § 1702.

274. *Id.* § 1703.

275. *Id.* § 1692.

276. See 18 U.S.C.A. §§ 1701–1703 notes (West 2000) (indicating only nominal changes since each provision's inception).

Courts have consistently held that mail cover operations do not violate §§ 1701, 1702, or 1703 as long as there is a legitimate government purpose to the operation and there is "only an insubstantial delay of the mail as the result of an authorized 'mail cover' or 'mail watch.'"²⁷⁷ In *United States v. Costello*, postal authorities, at the request of law enforcement officers and without seeking a warrant from a judge, recorded the names and return addresses that appeared on mail addressed to the defendant, who was believed to be engaged in tax evasion.²⁷⁸ The Second Circuit held that this mail cover operation in *Costello* did not violate §§ 1701, 1702, or 1703, as any delay in delivery of the defendant's mail was minimal (§ 1701), the defendant's letters were never removed from the post office (§ 1702), and any delay had a lawful purpose (§ 1703).²⁷⁹

The same should be true for the CIA's mail cover program. There is no indication that the CIA's review of the cover of mail coming in from, and going out to, the Soviet Union and other communist countries resulted in anything more than minimal delay of that mail.²⁸⁰ When only the covers of letters were analyzed, the letters never left the post office, as the CIA ran this operation in the postal facilities.²⁸¹ It is also clear that there was a lawful government purpose to the review of the mail covers. The National Security Act authorizes the CIA to collect foreign intelligence information,²⁸² which would clearly include information on suspected communist intelligence operations.²⁸³ Thus, there is no basis to find any criminal violation from the CIA's mail cover program.²⁸⁴

There is also no basis for civil liability. There is no civil statute precluding mail cover operations, and courts are uniform in holding that §§ 1701–1703 do not contain a private right of action, and therefore are unenforceable in a civil context.²⁸⁵ Courts

277. *United States v. Upshaw*, 895 F.2d 109, 110–111 (3d Cir. 1990) (summarizing the case law of mail cover).

278. 255 F.2d 876, 881 (2d Cir. 1958).

279. *Id.* at 881–82.

280. See ROCKEFELLER REPORT, *supra* note 17, at 101–15 (discussing the mail cover program without suggesting that anything more than a minimal delay was caused). The Church Commission noted that even the mail opening portion of the operation resulted in an average delay of only one day. CHURCH REPORT: BOOK III, *supra* note 255, at 572.

281. See ROCKEFELLER REPORT, *supra* note 17, at 105.

282. See *supra* note 21.

283. See *infra* text accompanying notes 329–30 for additional discussion of the lawful government purpose of the Agency's mail operation.

284. See *Lustiger v. United States*, 386 F.2d 132, 139 (9th Cir. 1968) (stating that the government does not violate § 1703 when it places a "mail watch" on incoming mail to an individual believed to be involved in an illegal scheme to sell land in Arizona through misleading brochures sent through the mail); *Cohen v. United States*, 378 F.2d 751, 759 (9th Cir. 1967) (finding no violation of §§ 1701–1703 where the government placed a mail cover on the incoming mail of an individual suspected of conducting an illegal gambling business); *United States v. Costello*, 255 F.2d 876, 881 (2d Cir. 1958) (finding no violation of §§ 1701–1703 for a mail cover operation).

285. See *Woods v. McGuire*, 954 F.2d 388, 391 (6th Cir. 1992) ("[F]ederal courts uniformly have held that there is no private right of action under [§ 1703]."); *Contemporary Mission, Inc. v. U.S. Postal Serv.*, 648 F.2d 97, 103 n.7 (2d Cir. 1981) (holding that there is no private cause of action for §§ 1701–1703); *United States ex rel. Pope v. Bruckno*, 330 F. Supp. 793, 795

have also consistently found that mail cover operations do not violate the Constitution.²⁸⁶ Anyone who uses the United States postal service is clearly aware that the outside of their mail will be seen by others, and in particular by government officials. At the very least, “persons who sent or received mail knew or ought to have known that postal employees must examine the outside of the mail in order to deliver it.”²⁸⁷ Furthermore, there is knowledge that at least incoming international mail is subject to inspection by United States law enforcement. As Justice Friendly has stated: “it is difficult to see how there can be any [reasonable expectation of privacy] with respect to the outsides of incoming international mails which are subject to inspection and even in some cases to opening in aid of the enforcement of the customs laws.”²⁸⁸ Indeed, the courts have analogized the issue to telephone calls:

Just as courts have held that a person’s expectations of privacy concerning telephone communication attach only to the Contents of the conversation and not to the fact the communication was made, so also the courts have held that a person may reasonably expect privacy only with respect to the contents of an envelope and Not with respect to information knowingly exposed to third parties on the envelope’s exterior.²⁸⁹

Nonetheless, the Rockefeller Commission found the CIA’s cover operation to be illegal, stating that mail cover operations “are legal when carried out in compliance with postal regulations on a limited and selective basis involving matters of national security. The [CIA’s mail cover program] did not meet these criteria.”²⁹⁰ However, there is no statutory requirement that mail cover operations be “limited and selective” or that they involve “national security.” Sections 1701, 1702, and 1703 do not contain such requirements, no court has placed such restrictions on mail cover operations, and courts have certainly upheld mail cover operations that do not contain such limitations (especially the requirement of a national security facet).²⁹¹

(E.D. Pa. 1971) (finding no private right of action under § 1702).

286. See *United States v. Mayer*, 490 F.3d 1129, 1137 (9th Cir. 2007) (finding “no constitutional violation” in a mail cover operation “[b]ecause a person has no legitimate expectation of privacy in the outside of his mail . . .”); *United States v. Huie*, 593 F.2d 14, 14–15 (5th Cir. 1979) (“[T]he courts uniformly have upheld the constitutionality of mail covers.”); *United States v. Choate*, 576 F.2d 165, 173–83 (9th Cir. 1978) (determining that a mail operation undertaken for legitimate government purposes does not violate the First, Fourth, or Ninth Amendments to the Constitution); *United States v. Bianco*, 534 F.2d 501, 508 (2d Cir. 1976) (“[T]he reading of the outside of an envelope does not violate any constitutional principles.”).

287. *Vreeken v. Davis*, 718 F.2d 343, 348 (10th Cir. 1983), *overruled on other grounds by* *Grantham v. Ohio Cas. Co.*, 97 F.3d 434, 435 (10th Cir. 1996).

288. *United States v. Leonard*, 524 F.2d 1076, 1087 (2d Cir. 1975).

289. Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1056–57 (D.C. Cir. 1978) (capitalization in original).

290. ROCKEFELLER REPORT, *supra* note 17, at 115; see also *id.* at 64 (stating that courts had held that examination of envelopes is legal if conducted within the regulations of the postal office and the mail is not unreasonably delayed).

291. See 18 U.S.C. §§ 1701–1703 (2006); *supra* notes 284–87 (citing cases containing no such restrictions).

The Rockefeller Report did not provide any specifics regarding how the Agency's mail cover operation purportedly violated postal regulations. However, other than perhaps a minor technical violation, the operation appears to have complied with the regulations then in place. In 1973, a Chief Postal Inspector could order a mail cover if he or she received a written request from a "law enforcement agency" articulating reasonable grounds as to why a mail cover "is necessary to . . . protect the national security" ²⁹² The regulations define a "law enforcement agency" as a federal, state, or local government authority "one of whose functions is to investigate the commission or attempted commission of acts constituting a crime." ²⁹³ The Chief Postal Inspector must approve any mail cover in effect for more than 120 days, ²⁹⁴ but there is no restriction on the breadth of the operation. ²⁹⁵ There is also no requirement that the mail cover be conducted by postal employees. ²⁹⁶

The CIA's mail cover operation generally complied with all of these postal regulations. As noted above, the CIA sent a written request to the Chief Postal Inspector for the mail cover operation before its initiation. ²⁹⁷ Though that request does not appear available for public view, given the concerns about the Soviet and communist threat at the time, it is easy to believe that the CIA request demonstrated reasonable grounds to believe that the mail cover operation was needed to protect national security. The CIA request was approved. ²⁹⁸ The CIA then continued to brief subsequent Chief Postal Inspectors, as well as Postmasters General, who outrank Chief Postal Inspectors, on at least the mail cover operation throughout the duration of the program. ²⁹⁹ All of these individuals consistently approved the program. ³⁰⁰

The main problem, of course, is that the CIA is not now, and was not then, a "law enforcement agency" as that term was defined by the postal regulations; that is, an entity "one of whose functions is to investigate the commission or attempted commission of acts constituting a crime." ³⁰¹ Indeed, as discussed above, the CIA's

292. 39 C.F.R. § 233.2(d)(2)(ii) (1975). On March 11, 1975, the Postal Service outlined new regulations for mail covers. *See* Inspection Service Authority, 39 Fed. Reg. 11,579 (Mar. 11, 1975). These new regulations effectively combined portions of the Postal Service Manual and the Postal Manual that had dealt with mail covers. *Id.* at 11,579. However, the new regulations made "no substantial changes" to the prior regulations, which had been in place since 1965. *Id.*; *see also* United States v. Choate, 422 F. Supp. 261, 263 (C.D. Cal. 1976), *rev'd on other grounds*, 576 F.2d 165 (9th Cir. 1978) (en banc) (noting that the postal regulations outlining mail covers "were first promulgated on June 17, 1965; they were republished without substantial change in March 1975" as 39 C.F.R. § 233.2 (footnote omitted)). The regulations note that they constitute the "sole authority and procedure for initiating, processing, placing and using mail covers." 39 C.F.R. § 233.2(b).

293. 39 C.F.R. § 233.2(c)(4).

294. *Id.* § 233.2(f)(5).

295. *See generally* 39 C.F.R. § 233.2 (outlining restrictions and requirements for mail cover operations, but providing no limit on the number of individuals who could fall within a mail cover).

296. *See generally id.*

297. ROCKEFELLER REPORT, *supra* note 17, at 103.

298. *See id.*

299. *See supra* text accompanying notes 257–62.

300. *See supra* text accompanying notes 257–62.

301. 39 C.F.R. § 233.2(c)(4) (1975).

charter expressly precludes it from operating as a law enforcement entity.³⁰² Nonetheless, it is possible that the Postmasters General and the Chief Postal Inspectors deemed the CIA to fall within the definition of the term. The regulations expressly state that “[t]he Chief Postal Inspector’s determination in all matters concerning mail covers shall be final and conclusive”³⁰³ Further, the Postal Service’s interpretation of its own regulations “becomes of controlling weight unless it is plainly erroneous or inconsistent”³⁰⁴ Given the initial and then continuous approval of the CIA’s cover program by Chief Postal Inspectors and Postmasters General,³⁰⁵ it would appear that they made a “final and conclusive” determination that the CIA’s cover program filled the requirements of the postal regulations.

In addition, the Postmaster General appears to have the authority to waive any substantive provision of the postal regulations.³⁰⁶ Thus, to the extent that the CIA’s mail cover program could be interpreted as marginally inconsistent with the postal service’s regulations, the Postmasters General waived such regulations by consistently and continuously approving the Agency’s program.³⁰⁷

Current postal regulations have resolved any uncertainty in this area by explicitly expanding the definition of “law enforcement agency” to include any federal, state or local government authority, “one of whose functions is to . . . [p]rotect the national security.”³⁰⁸ The phrase “protection of the national security” is then defined as protecting the United States from “actual or potential threats to its security by a foreign power or its agents” via an attack, sabotage, international terrorism, or clandestine intelligence activities.³⁰⁹ It seems clear that the CIA would fall within this definition.

302. *See supra* text accompanying notes 19–20.

303. 39 C.F.R. § 233.2(h)(2).

304. *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413–14 (1945); *see also* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.11 (4th ed. 2002) (noting that, in non-penalty situations such as the instant case, courts give “substantial deference” to an agency’s interpretation of its own regulations).

305. *See supra* text accompanying notes 257–62.

306. 39 U.S.C. § 402 (2000); 39 C.F.R. §§ 1.2, 2.6, 3.3 (2007). While these regulations do not explicitly authorize the Postmaster General to waive substantive provisions of postal regulations, such power is implied from the broad powers provided to the Postmaster General to “issue regulations.” *See Pent-R-Books, Inc. v. U.S. Postal Serv.*, 328 F. Supp. 297, 312–13 (E.D.N.Y. 1971) (describing the extensive powers given to the Postmaster General); *Ex Parte Willman*, 277 F. 819, 821 (S.D. Ohio 1921) (“[The Postmaster General] has power to promulgate regulations generally as to the conduct of the department, and such regulations are controlling, have the force of law, and are judicially noticed.”). Since the Postmaster General has the ability to issue regulations, logic would dictate that the Postmaster General also has the power to waive substantive regulations, which is effectively “issuing” an exception regulation. Of course, the Postmaster General does not have the ability to waive Postal Service regulations applying to procedural rights, especially when such rights are required by statute or the Constitution. *See Myers & Myers, Inc. v. U.S. Postal Serv.*, 527 F.2d 1252, 1259–62 (2d Cir. 1975) (noting that the Postmaster General may not ignore procedural requirements for a hearing).

307. *See supra* text accompanying notes 257–62.

308. 39 C.F.R. § 233.3(c)(8)(ii) (2007).

309. *Id.* § 233.3(c)(9).

Finally, it should be noted that the Agency's mail cover program complied with the National Security Act. As noted above, the purpose of the program was to gather information about Soviet intelligence interests and activities. It therefore clearly falls within the Agency's function of collecting and coordinating foreign intelligence.³¹⁰ The Rockefeller Report, however, assessed that the "nature and assistance given by the CIA to the FBI in the New York mail project indicate that the primary purpose eventually became participation with the FBI in internal security functions,"³¹¹ which is expressly precluded by the National Security Act.³¹² It is difficult to understand how the Rockefeller Commission came to that determination, however. The vast majority of the mail that the CIA reviewed (approximately seventy percent) was mail coming into the United States from communist countries.³¹³ This suggests a focus on foreign intelligence as opposed to internal domestic interests. Further, while the CIA did send copies of some of the opened letters to the FBI, the vast majority went to CIA headquarters for evaluation,³¹⁴ again indicating the program focused on foreign affairs of interest to the CIA as opposed to issues of interest to the FBI.

Thus, it would appear that the CIA's mail cover program was legal during its operation. It did not violate any criminal or civil statute, constitutional provision, or the National Security Act. In addition, contrary to the unspecified claims made by the Rockefeller Commission, the CIA's mail cover operation did not violate postal service regulations. The law regarding mail cover operations has not changed since 1973, except for the increased breadth of the Postal Regulations in this area. Indeed, EO 12,333 expressly permits the CIA to engage in "mail surveillance" operations so long as they comply with procedures established by the CIA Director and approved by the Attorney General.³¹⁵

B. Mail Opening Portion

From the beginning, the CIA had suspicions that the mail opening portion of the operation was illegal.³¹⁶ The Rockefeller Report was more definitive: "While in operation, the CIA's domestic mail opening programs were unlawful. United States statutes specifically forbid opening the mail."³¹⁷ This was undoubtedly a reference to

310. See *supra* notes 16–17 and accompanying text.

311. ROCKEFELLER REPORT, *supra* note 17, at 115.

312. See *supra* note 19.

313. ROCKEFELLER REPORT, *supra* note 17, at 112.

314. See *id.* (stating that, in the last year of operation, 3800 disseminations of intelligence from the mail program were sent to CIA headquarters and 1400 were sent to the FBI).

315. Exec. Order No. 12,333 § 2.4, 3 C.F.R. 200, 212 (1982).

316. CHURCH REPORT: BOOK III, *supra* note 255, at 566; ROCKEFELLER REPORT, *supra* note 17, at 107–08, 114. It should be noted that nobody ever requested an opinion on the legality of the mail opening operation from the CIA's General Counsel. CHURCH REPORT III, *supra* note 255, at 607. Indeed, the evidence suggests that the CIA's General Counsel was never even made aware of the operation until after its conclusion. *Id.*

317. ROCKEFELLER REPORT, *supra* note 17, at 115. The Department of Justice eventually decided not to prosecute any individuals for their roles in the CIA's mail program. *Avery v. United States*, 434 F. Supp. 937, 940 n.4 (D. Conn. 1977).

the express language of §§ 1702 and 1703.³¹⁸ The relevant parts of those provisions prohibit the opening of mail “to pry into the business or secrets of another”³¹⁹ and the opening of mail “without authority,”³²⁰ respectively. The Rockefeller Commission concluded that the Agency had violated such provisions as “[t]he statutes set forth no exception for national security matters.”³²¹

The Rockefeller Commission’s overarching conclusion, however, was incorrect. It is true that neither § 1702 nor § 1703 contains an express provision exempting CIA activities from their reach. However, neither section expressly exempts customs and prison officials from opening mail pursuant to their authorities, or U.S. law enforcement officials from doing so pursuant to a valid warrant. Yet these are clearly legal activities that do not violate §§ 1702 or 1703.³²²

The same applies for the CIA’s opening of mail for national security matters, or more specifically, for foreign intelligence purposes. As noted in Part IV above, prior to the enactment of FISA, the courts recognized a foreign intelligence exception to the warrant requirement for electronic surveillance.³²³ The courts have recognized a similar exception for physical searches, including the opening of mail, based upon the constitutional power of the President.³²⁴ Just as the federal government did not violate

318. Section 1701 would not bar the CIA’s mail opening operation. Section 1701 prohibits the obstruction or retardation of United States mail. 18 U.S.C. § 1701 (2006). Courts have acknowledged that minimal delay, with “proper considerations,” does not violate § 1701. *United States v. Austin*, 492 F. Supp. 502, 504 (N.D. Ill. 1980); *see also* *United States v. Wooden*, 61 F.3d 3, 5 (2d Cir. 1995) (finding no violation of § 1701 unless the defendant has an “illegitimate or improper intent”). The minimal delay incurred as part of the CIA’s mail opening operation would likely be deemed a “proper consideration” as it was for governmental purposes. *See* *United States v. Beckley*, 335 F.2d 86, 89–90 (6th Cir. 1964) (providing that delay from customs officials opening a package pursuant to their government authority does not violate § 1701); *United States v. Costello*, 255 F.2d 876, 881 (2d Cir. 1958) (stating that minimal delay from valid mail cover operation does not violate § 1701).

319. 18 U.S.C. § 1702.

320. *Id.* § 1703.

321. ROCKEFELLER REPORT, *supra* note 17, at 64. The Church Commission came to a similar conclusion. CHURCH REPORT: BOOK III, *supra* note 255, at 564 (citing to §§ 1701–1703 and concluding “[t]he only persons who can lawfully open first class mail without a warrant, in short, are employees of the Postal Service for a very limited purpose [e.g., to determine the address for delivery]—not agents of the CIA or FBI”).

322. *See* *United States v. Beckley*, 335 F.2d 86, 88–90 (6th Cir. 1964) (holding that customs agents who open packages coming into the United States “violated no statute or regulation,” including §§ 1701–1703, nor the Fourth Amendment); *Adams v. Ellis*, 197 F.2d 483, 485 (5th Cir. 1952) (holding that prison officials who open prisoner mail do not violate § 1702 or any other criminal statute).

323. *See supra* notes 203–10 and accompanying text.

324. *See* *United States v. Truong Dinh Hung*, 629 F.2d 908, 917 & n.8 (4th Cir. 1980) (holding that, without a warrant but with executive authorization, searches of a letter and a package sent via U.S. mail did not violate the Fourth Amendment); *United States v. Marzook*, 435 F. Supp. 2d 778, 793 (N.D. Ill. 2006) (“[B]efore Congress expanded FISA to include physical searches the Executive Branch maintained the authority to conduct warrantless foreign intelligence investigation, which would include physical searches.” (footnote omitted)); *see also* *United States v. Bin Laden*, 126 F. Supp. 2d 264, 285 (S.D.N.Y. 2000) (“[T]he Court finds that the foreign intelligence exception to the warrant requirement applies with equal force to

federal criminal statutes when it conducted warrantless electronic surveillance pursuant to the foreign intelligence exception,³²⁵ the CIA did not violate §§ 1702–1703 when it conducted warrantless mail opening operations pursuant to the same exception.³²⁶

The requirements of the foreign intelligence exception for warrantless physical searches are similar to those for electronic surveillance. Courts have allowed such searches if the activity was conducted primarily for foreign intelligence reasons, the target was a foreign power or an agent of a foreign power, and the Attorney General approved such activity.³²⁷ The Agency's mail opening program appears to have fulfilled the first requirement, since, as noted above, the purpose of the program was to "give United States intelligence agencies insight into Soviet intelligence activities and interests."³²⁸ As stated above, while the program may have collected information of interest to the FBI, the primary purpose of the program remained foreign intelligence collection until its termination.³²⁹ The program also appears to have fulfilled the second requirement, as the target of the operation was a foreign power (the Soviet Union and other communist countries) or its purported agents. Though we lack facts regarding every letter that the CIA opened, the CIA seemed to believe that the letters it was opening belonged to or were in transit to or from a foreign power or an agent of a foreign power, given the purpose and focus of the program.³³⁰

The last requirement—approval by the Attorney General—proves the most problematic. The CIA did brief Attorney General Mitchell in June 1971 about the program, and that briefing appears to have included both the mail opening and mail cover portions of the program.³³¹ The Attorney General approved the program and had no "hang ups" about it.³³² However, his approval came near the end of the program (though at its high point). There is no indication that the CIA previously briefed the program to either Attorney General Mitchell or his predecessor Attorneys General. Courts have not accepted after-the-fact Attorney General approval for the foreign intelligence exception, at least for purposes of use of the information in criminal prosecutions.³³³ Thus, while it is unclear whether the initial portions of the program received Attorney General approval and thus are valid, at the very least any mail openings between June 1971 (when the Attorney General gave his approval) and

residential searches.").

325. See *supra* text accompanying notes 213–14.

326. One district court has posited the more radical assertion that, prior to the issuance of EO 12,333, "the CIA was under *no limitation* that its activities could not violate U.S. law" due to the Fifth Function. *United States v. Lopez-Lima*, 738 F. Supp. 1404, 1410 (S.D. Fla. 1990) (emphasis added).

327. *Truong*, 629 F.2d at 917 & n.8.

328. See *supra* text accompanying note 248.

329. See *supra* text accompanying notes 313–14. As noted above, the CIA terminated the program in 1973 due in part to the fact that the program began generating more internal security information than foreign intelligence. See *supra* text accompanying notes 268–69.

330. ROCKEFELLER REPORT, *supra* note 17, at 101–03.

331. *Id.* at 110 (noting that the mail cover portion of the operation was certainly briefed at the meeting, but expressing some uncertainty amongst the parties as to whether the mail opening portion was also discussed).

332. *Id.*

333. See *United States v. Bin Laden*, 126 F. Supp. 2d 264, 279 (S.D.N.Y. 2000) (holding that approval by Attorney General for warrantless surveillance pursuant to the foreign intelligence exception in April 1997 does not apply to surveillance conducted prior to that date).

February 1973 (when the program was terminated) appear to have complied with the requirements of the foreign intelligence exception for physical searches.

An argument, however, can be made that Attorney General approval was not in fact required for the CIA's mail opening operation, because there was no reasonable expectation of privacy in mail going to or from communist countries. In *Truong*, discussed above,³³⁴ one portion of the opinion discussed the fact that the named defendant had sent a poorly wrapped package from the United States to Paris.³³⁵ The FBI and CIA searched the package without obtaining either Attorney General approval or a search warrant.³³⁶ The Fourth Circuit nonetheless upheld the warrantless search of the package: "[B]ecause the package was poorly wrapped and because it was destined for foreign delivery, Truong could not have harbored a reasonable expectation that the contents of the package would remain undisclosed; and consequently neither a search warrant nor executive authorization was necessary for this search."³³⁷ While there is no suggestion that the letters opened as part of the CIA's mail operation were poorly wrapped, such letters likely enjoyed an even lesser expectation of privacy than in *Truong*. While Truong's package was sent to France, which may or may not routinely open such packages, the letters opened as part of the CIA's program were all going to or coming from the Soviet Union or other communist countries.³³⁸ As the Rockefeller Report notes: "Presumably all mail to and from the USSR is censored by the Soviets."³³⁹ Based on this statement, an argument could be raised that such letters enjoyed no expectation of privacy, were therefore not protected by the Fourth Amendment at all,³⁴⁰ and thus, as in *Truong*, could be searched without either a warrant or Attorney General approval.

Beyond constitutional and criminal considerations, a civil provision existed in 1973 that also precluded the opening of U.S. mail. Specifically, 39 U.S.C. § 3623(d) precluded the opening of any mail of domestic origin, except in cases where either a search warrant had been authorized, the addressee authorized the letter opening, or a postal employee needed to open the letter to determine the address for delivery.³⁴¹ However, the foreign intelligence exception that applied to §§ 1701–1703 would also apply to this civil provision. Indeed, when the postal service statutes were revised in 2006, and 39 U.S.C. § 3623(d) was reconstituted as 39 U.S.C. § 404(c) with the same general restrictions,³⁴² President Bush explicitly stated that the executive branch would

334. See *supra* notes 203–08 and accompanying text.

335. *United States v. Truong Dinh Hung*, 629 F.2d 908, 917 (4th Cir. 1980).

336. *Id.*

337. *Id.*

338. See *supra* text accompanying notes 247–49.

339. ROCKEFELLER REPORT, *supra* note 17, at 101 n.2.

340. See *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) (holding that to prevail on a Fourth Amendment claim, the complainant must not only prove that the search or seizure was illegal, but also "that it violated his reasonable expectation of privacy in the item or place at issue"); *Couch v. United States*, 409 U.S. 322, 336 n.19 (1973) (noting that there is a "necessary expectation of privacy to launch a valid Fourth Amendment claim").

341. 39 U.S.C. § 3623(d) (1970), *repealed by* Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 201(b), 120 Stat. 3198, 3205 (2006) (codified at 39 U.S.C.A. § 404(c) (West 2007)).

342. See 39 U.S.C.A. § 404(c) (West 2007).

construe § 404(c) "in a manner consistent [with] . . . the need for physical searches specifically authorized by law for foreign intelligence collection."³⁴³

Subsequent to 1973, of course, Congress passed FISA to contend with foreign intelligence collection. FISA, when originally enacted in 1978, did not provide guidelines for physical searches to obtain foreign intelligence.³⁴⁴ Congress amended FISA in 1994 to include such guidelines.³⁴⁵ The amended provisions, which remain in effect today, mirror the main requirements for electronic surveillance.³⁴⁶ Thus, requests must be submitted to the FISC after personal approval by the Attorney General, who certifies that the target of the search is a foreign power or an agent of a foreign power, that the property to be searched contains foreign intelligence, and that the property to be searched is owned, used by or in transit to or from a foreign power or an agent of a foreign power.³⁴⁷ As noted in the above section on electronic surveillance, the exclusivity of FISA remains an open question, and therefore these FISA procedures may not always be necessary to conduct physical searches for foreign intelligence.³⁴⁸

Finally, postal regulations in effect both in 1973 and now do prohibit postal employees from opening, or permitting the opening, of any first class mail without a search warrant, except in limited circumstances not relevant here.³⁴⁹ However, as noted above, the Postal Service Regulations in effect both then and now appear to grant the Postmaster General the authority to waive any substantive provision of the regulations, such as the preclusion of a mail opening operation absent a search warrant.³⁵⁰ As discussed, the CIA briefed Postmasters General on the CIA's program.³⁵¹ To the extent that such briefings included the mail opening portion of the operation, which is

343. Statement by President George W. Bush upon Signing H.R. 6407 (Dec. 20, 2006), reprinted in 2006 U.S.C.C.A.N. S76, S77.

344. *United States v. Marzook*, 435 F. Supp. 2d 778, 785 (N.D. Ill. 2006); see also *Global Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779, 789 (N.D. Ill. 2002) (explaining that FISA was amended in 1994 to address physical searches), *aff'd*, 315 F.3d 748 (7th Cir. 2002).

345. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807, 108 Stat. 3243, 3443-53 (codified as amended at 50 U.S.C. §§ 1820-1829 (2000 & Supp. V 2005) (amending Foreign Intelligence Surveillance Act, §§ 301-309); *Global Relief Found., Inc.*, 207 F. Supp. 2d at 789 (explaining that FISA was amended in 1994 to address physical searches), *aff'd* 315 F.3d 748 (7th Cir. 2002). As with electronic surveillance, there are limited exceptions not relevant to the instant discussion. See, e.g., 50 U.S.C. § 1824(e) (allowing the Attorney General to authorize a warrantless physical search in an emergency).

346. *Marzook*, 435 F. Supp. 2d at 785. Compare 50 U.S.C. §§ 1801-1811 (outlining procedures regarding electronic surveillance), with *id.* §§ 1821-1829 (outlining procedures regarding physical searches).

347. 50 U.S.C. § 1823(a).

348. See *supra* text accompanying notes 224-36.

349. The exceptions are for situations where postal employees need to open mail to determine payment of proper postage or to assess mailability. See 39 C.F.R. § 233.3(g)(1)-(2) (2007); 39 C.F.R. § 233.2(f)(1) (1975). As noted in note 292, *supra*, the postal regulations regarding postal covers and openings, implemented in 1975, merely reflected a formal culmination of standard postal practice in effect since the mid 1960s without any "substantive changes." 40 Fed. Reg. 11,579 (Mar. 12, 1975) (noting that implementation of the 1975 regulations was merely a "republishing" of existing rules).

350. See *supra* text accompanying notes 301-07.

351. See *supra* text accompanying notes 260-65.

uncertain, the continuous approval of the program by those senior postal officers would constitute a waiver of the postal regulations requiring a warrant to conduct a mail opening.³⁵² Even if the Postmasters General did not waive these postal regulations, the Supreme Court, in analyzing the authority of customs agents, has held that postal regulations, which preclude the opening of mail absent a search warrant, are trumped if the Constitution or a statute authorizes a warrantless search.³⁵³ As noted above, that is precisely the situation here.³⁵⁴

The above analysis should preclude most lawsuits based on the CIA's mail opening program in the 1950s, 1960s, and 1970s. The Supreme Court case of *Bivens v. Six Unknown Named Federal Narcotics Agents* authorizes claims against federal employees for constitutional and statutory violations.³⁵⁵ However, federal employees are immune from such *Bivens* claims if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."³⁵⁶ This so-called "qualified immunity" should attach here. Certainly by June 1971, having believed they had secured Attorney General approval for the mail opening portion of the operation,³⁵⁷ CIA employees would have had reasonable basis to believe that they were in full compliance with the foreign intelligence exception and thus not in violation of the Constitution or any civil statute.³⁵⁸ For the period prior to June 1971, a reasonable person could believe that, pursuant to *Truong*, individuals sending mail to the Soviet Union had no reasonable expectation of privacy and thus no Fourth Amendment protection.³⁵⁹

In today's world, the enactment of FISA obviously changes the situation, especially as FISA authorizes a civil penalty for violations and contains a private right of action.³⁶⁰ However, as noted above, it is unclear whether the President's constitutional powers trump the FISA statute. A successful *Bivens* claim would need to show that, in such a legal climate, the employee's conduct violated a clearly established statutory or constitutional right of which a reasonable person should have known.

Though no plaintiff has brought a *Bivens* claim based on the CIA's mail opening program, at least one plaintiff has filed a claim pursuant to the Administrative Procedures Act (APA) and the Tucker Act.³⁶¹ The claim proved unsuccessful on both

352. See *supra* text accompanying notes 260–66. Indeed, the Church Commission noted that two of the Postmasters General briefed on the program appeared to believe that the mail opening program was legal, or at least that the program's illegality was less than clear. CHURCH REPORT: BOOK III, *supra* note 12, at 606. As one of those Postmasters General stated: "If the CIA lawyers concluded that the CIA could not open mail to and from Communist countries in the early 1960's without violating the law, I think the CIA needs better lawyers." *Id.* at 606 n.208

353. *United States v. Ramsey*, 431 U.S. 606, 623–25 (1977) (upholding warrantless searches by customs agents despite the explicit postal regulation precluding the opening of mail absent a search warrant).

354. See *supra* notes 323–27 and accompanying text.

355. 403 U.S. 388 (1971).

356. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981).

357. See *supra* note 263 and accompanying text.

358. See *Harlow*, 457 U.S. at 818.

359. See *supra* notes 332–37 and accompanying text.

360. 50 U.S.C.A. § 1828 (West 2003).

361. *Kipperman v. McCone*, 422 F. Supp. 860 (N.D. Cal. 1976) (dismissing plaintiff's claims that the CIA's mail opening program violated the Tucker Act and the APA).

counts.³⁶² The APA permits "relief other than money damages" when an agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or violates a statute or the United States Constitution.³⁶³ As noted above, certainly by June 1971, and possibly throughout its operation, the CIA's mail opening program complied with statutory and constitutional law.³⁶⁴ This may well bar any APA claim for the same reasons as with a *Bivens* claim. Further, the bases for relief under the APA (and *Bivens*) are discretionary.³⁶⁵ Courts have declined to employ that discretion for matters concerning sensitive areas within the executive branch's particular expertise, such as foreign affairs.³⁶⁶ Such discretion might well be used with regard to a foreign intelligence matter such as the CIA's mail opening operation.³⁶⁷

The relevant portion of the Tucker Act grants district courts jurisdiction over claims against the United States, not in excess of \$10,000, which are based upon the Constitution, an act of Congress, or any regulation of an executive department.³⁶⁸ However, the Tucker Act is "merely jurisdictional."³⁶⁹ It does not create a "substantive right enforceable against the Government."³⁷⁰ Rather, it permits suit based on violation of an underlying constitutional provision, statute, or regulation and only if that provision "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."³⁷¹ Thus, for a provision to create a right of action under the Tucker Act, it must be "reasonably amenable to the reading that it mandates a right of recovery in damages."³⁷² The one court to consider a Tucker Act claim in the context of the CIA's mail opening program properly found no such provision existed at the time of the CIA's mail opening operation.³⁷³ Today, of course, such a penalty does exist under FISA.³⁷⁴

The only basis under which plaintiffs have successfully challenged the Agency's mail opening operation has come pursuant to the Federal Tort Claims Act (FTCA).³⁷⁵ The FTCA authorizes a civil claim against the federal government for the negligent or wrongful activities by a government employee acting within the scope of his or her

362. *Id.* at 867.

363. 5 U.S.C.A. §§ 702, 706(2)(A)–(C) (West 2007).

364. *See supra* notes 357–59 and accompanying text.

365. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207–08 (D.C. Cir. 1985).

366. *Id.* at 208 (dismissing a claim where the plaintiffs sought injunctive relief to preclude the United States from supporting the Contras in Nicaragua). The D.C. Circuit applied this same discretion in refusing to grant relief under *Bivens*. *Id.* at 208–09.

367. *See, e.g., Webster v. Doe*, 486 U.S. 592, 600–01 (1988) (determining that the CIA Director's discretion to discharge individual Agency employees precluded an APA claim).

368. 28 U.S.C. § 1346(a) (2000). The relevant portions of the Tucker Act were the same in 1973 as they are now. *Compare Kipperman v. McCone*, 422 F. Supp. 860, 868 (N.D. Cal. 1976) (quoting relevant portions of the Tucker Act as existed in 1973), with 28 U.S.C. § 1346(a).

369. *United States v. Testan*, 424 U.S. 392, 400 (1976).

370. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003).

371. *Id.* (quoting *Testan*, 424 U.S. at 400).

372. *Id.* at 473.

373. *Kipperman*, 422 F. Supp. at 868.

374. *See supra* note 360 and accompanying text.

375. *See generally Avery v. United States*, 434 F. Supp. 937, 940 n.5 (D. Conn. 1977) (noting that at least eight cases challenging the CIA's mail opening operation have been made pursuant to the FTCA).

employment if a private person would have been held liable for such activities under the law of the state where the activity took place.³⁷⁶ The CIA has raised numerous defenses to these claims, which have been uniformly rejected by the courts.³⁷⁷

However, these courts appear to have wrongly determined that one of those defenses—the discretionary function exception to the FTCA—fails to shield the CIA’s operation. The discretionary function exception provides that the government is not liable for actions or omissions “in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused.”³⁷⁸ As the Supreme Court has consistently stated, the act must “involv[e] an element of judgment or choice, and it is the nature of the conduct, rather than the status of the actor, that governs whether the exception applies.”³⁷⁹ Based on this, the Supreme Court has held: “Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception”³⁸⁰

The CIA’s mail opening operation falls squarely within this description. Congress, in enacting the National Security Act of 1947, clearly delegated foreign intelligence collection to the executive branch, and specifically the CIA. The very functions of the CIA, as set out in the Act and later amended, definitively authorize the CIA to acquire, protect, and disseminate such intelligence.³⁸¹ The only limit on such functions is that the CIA must comply with the law and the United States Constitution, as well as not engage in police, subpoena, law enforcement, or internal security matters.³⁸² This area already falls within the President’s inherent authority, as discussed above.³⁸³ The Supreme Court has long recognized the executive branch’s primacy in such matters.³⁸⁴ Applied here, the Agency’s mail opening operation fell completely within the CIA’s foreign intelligence function, and represented a “planning-level decision[] establishing programs” to fulfill that function.³⁸⁵ Indeed, the CIA’s program is akin to other programs established by other federal agencies which the Supreme Court has found fall within the discretionary function exception, such as the regulation and oversight of

376. 28 U.S.C. § 1346(b)(1) (2000).

377. *See, e.g., Avery*, 434 F. Supp. at 941–45 (declining to dismiss the case pursuant to the scope of employment, discretionary function, postal matter, or intentional tort exceptions to the FTCA); *Cruikshank v. United States*, 431 F. Supp. 1355, 1356–60 (D. Haw. 1977) (same).

378. 28 U.S.C. § 2680(a).

379. *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (internal citations and quotations omitted).

380. *Id.* at 323.

381. National Security Act of 1947, Pub. L. No. 80-253, § 103(d), 61 Stat. 495, 499 (codified as amended at 50 U.S.C. § 403–4a(d) (Supp. V 2005)).

382. 50 U.S.C. § 403–4a(d).

383. *See supra* note 197.

384. *See Regan v. Wald*, 468 U.S. 222, 242 (1984) (“Matters relating ‘to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952))).

385. *Gaubert*, 499 U.S. at 323.

savings and loans by the Federal Home Loan Bank Board,³⁸⁶ the release of vaccine lots by the Food and Drug Administration,³⁸⁷ and the implementation of airline safety standards by the Federal Aviation Administration.³⁸⁸

Courts have found that there is no discretionary act, however, if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow [because] the employee has no rightful option but to adhere to the directive."³⁸⁹ The two district courts that have reviewed the discretionary function exception with regard to the CIA's mail opening operation have focused on this in holding the exception did not apply, asserting that the program "trespasses in violation of constitutional guarantees"³⁹⁰ or involves "illegal acts committed by government officials."³⁹¹ Yet, this interpretation would appear erroneous. As noted above, certainly by June 1971, and possibly from its inception, the CIA's mail opening program did not violate the United States Constitution or statutory law.³⁹² Thus, the discretionary function exception should apply to the CIA's mail opening operation, and preclude any FTCA claim made pursuant to that operation.

Yet, even if a plaintiff could overcome the discretionary function exception and pursue an FTCA claim, the claimant would need to show that the CIA's mail opening program constituted an actual tort, that is, that "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."³⁹³ This requires the plaintiff to establish that, under the law of the state where the alleged act took place, "a private actor could be found liable in tort for the unauthorized opening of another's mail," that is, an invasion of the right to privacy.³⁹⁴

However, not all states recognize an invasion of the right to privacy as a tort.³⁹⁵ Most critically for the CIA's mail program, the state of New York, where most of the mail opening operations occurred, does not recognize such a tort.³⁹⁶ Indeed, in 1989, the Second Circuit dismissed an FTCA claim based upon the CIA's mail opening program because the law of New York confers no cause of action "to right the wrongs complained of in this case."³⁹⁷ The Commonwealth of Virginia also does not recognize such a tort.³⁹⁸ This is most critical because the Commonwealth of Virginia is the home to the CIA's headquarters in Langley, where opened mail was usually analyzed.³⁹⁹

386. *Id.* at 332–34.

387. *Berkovitz v. United States*, 486 U.S. 531, 545–48 (1988).

388. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814–20 (1984); *see also Stables v. United States*, 366 F. Supp. 2d 559, 567 (S.D. Ohio 2004) (summarizing the three decisions discussed in the text).

389. *Berkovitz*, 486 U.S. at 536.

390. *Avery v. United States*, 434 F. Supp. 937, 944 (D. Conn. 1977).

391. *Cruikshank v. United States*, 431 F. Supp. 1355, 1359 (D. Haw. 1977).

392. *See supra* notes 357–59 and accompanying text.

393. 28 U.S.C. § 1346(b)(1) (2000).

394. *Hurwitz v. United States*, 884 F.2d 684, 686 (2d Cir. 1989).

395. *See* DAVID A. ELDER, *PRIVACY TORTS*, § 2:19, at 2-205 n.10 (2002).

396. *Hurwitz*, 884 F.2d at 685.

397. *Id.* at 686.

398. ELDER, *supra* note 395, § 2:3, at 2-36–2-39 & 2-39 n.37. Other states that do not recognize this tort are Illinois and North Dakota. *Id.* at 2-36–2-39.

399. *See supra* note 255.

Whether this precludes all FTCA claims against the CIA for its mail opening program depends on determining where the alleged act took place, that is, the venue. The Supreme Court has ruled, in a case involving the CIA's mail program, that in actions for money damages, such as FTCA claims, the only proper venue would be in the district where all federal employee defendants reside; where a substantial part of the event or omissions giving rise to the claim occurred; or where any defendant may be found, but only if the action cannot be brought in any other district.⁴⁰⁰ The Supreme Court then noted in dicta that, for cases seeking money damages stemming from the CIA's New York mail operation, venue "would have been the Eastern District of New York where the alleged claim rose, or perhaps the Eastern District of Virginia, where some acts may have occurred at the headquarters of the CIA."⁴⁰¹ If all the defendants "resided" in the same state, that too could be a possible venue;⁴⁰² however, that venue would likely be either New York or Virginia where the employees' official duties took place—"[i]n determining the residence of a public official sued in his official capacity, the test of residence is where official duties are performed."⁴⁰³ As noted above, given the lack of a right to privacy cause of action in New York and Virginia, it would appear likely that plaintiffs would be unable to bring FTCA claims against the CIA for its mail operations.⁴⁰⁴

Finally, EO 12,333 also prohibits the CIA from engaging in mail opening operations.⁴⁰⁵ However, as noted previously, the President has the authority to amend or retract this restriction with a presidential directive.⁴⁰⁶

Thus, in the end, it would appear that the CIA's mail cover program was legal throughout its operation. The CIA's mail opening operation certainly appears to have been legal after June 1971 and may have been before then. Further, plaintiffs face considerable barriers to bringing a claim based upon the mail opening operation. Since 1973, Congress has enacted FISA, which may or may not be the exclusive method for engaging in physical searches, and the president has issued EO 12,333, which can be revoked through presidential directive.

400. *Stafford v. Briggs*, 444 U.S. 527, 544 (1980); *see also* 28 U.S.C. § 1391(b) (2000).

401. *Stafford*, 444 U.S. at 544 n.11; *see also* *Kipperman v. McCone*, 422 F. Supp. 860, 879 (N.D. Cal. 1976) (concluding, though published prior to *Stafford*, that the Northern District of California was the improper venue for a claim based on the CIA's mail opening operation, and that the court "believes venue would lie in the Southern District of New York where the East Coast Mail Intercept operated during its twenty-year life").

402. 28 U.S.C. § 1391(b).

403. *Doe v. Casey*, 601 F. Supp. 581, 585 (D.D.C. 1985), *remanded on other grounds*, 796 F.2d 1508 (D.C. Cir. 1986). The *Doe* court noted, however, that proper venue for at least the Director of the Central Intelligence Agency could be either Virginia or the District of Columbia. *Id.*

404. However, this might not preclude claims based on the small portion of the CIA's mail opening operations that took place in San Francisco, Hawaii, and New Orleans. *See supra* note 249 and accompanying text.

405. Exec. Order No. 12,333 § 2.4(b), 3 C.F.R. 200, 212 (1982) (stating that only the FBI can engage in "unconsented physical searches in the United States" except under circumstances not relevant here).

406. *See supra* note 147 and accompanying text.

VI. COLLECTING ON AMERICAN DISSIDENT MOVEMENTS

From 1967 to 1974, the Agency operated a program known as Operation CHAOS to collect information and produce studies regarding various dissident movements in the United States.⁴⁰⁷ Initiated pursuant to a presidential request, the purpose of the program was to assess whether these groups had been penetrated by, or were being used by, foreign intelligence services.⁴⁰⁸ At first, the Agency merely culled through information already in its possession.⁴⁰⁹ The operation quickly evolved to where the CIA maintained agents in the field for the sole purpose of gathering information on various dissident groups.⁴¹⁰ These agents generally were not directed to collect information about United States domestic affairs.⁴¹¹ However, the Rockefeller Report found that several of these agents ended up acquiring such information while they were in the United States bolstering their dissident credentials, and on three occasions agents were specifically directed to collect information on domestic U.S. matters.⁴¹² The operation also resulted in the accumulation of large amounts of information on U.S. citizens.⁴¹³ There is no indication, however, that anyone connected to Operation CHAOS utilized clandestine means, such as electronic surveillance, wiretaps, or break-ins, to acquire any of this information.⁴¹⁴ The CIA terminated the program in 1974,⁴¹⁵ after the *New York Times* published a front-page story about the operation.⁴¹⁶

The Family Jewels describe the three foci of Operation CHAOS—student groups, the anti-Vietnam War protestors, and the “black power” movement. The CIA initiated collection on worldwide student dissidence in 1968 at the request of Walt Rostow, then Special Assistant to the President for National Security Affairs.⁴¹⁷ According to an Agency document, the purpose of the study was to assess whether the various international student dissident groups were interconnected, whether they bred from the same causes worldwide, and whether they were “financed and hence manipulated by forces or influences hostile to the interests of the US and its allies; or likely to come under inimical sway to the detriment of US interests.”⁴¹⁸ The resulting paper was given the whimsical title “Restless Youth.”⁴¹⁹ The CIA created two versions of the document—the highly sensitive version, which included a chapter on radical students in the United States, was distributed to only nine individuals, including the President

407. See FAMILY JEWELS, *supra* note 2, at 00180–82; ROCKEFELLER REPORT, *supra* note 17, at 130, 132, 148–49.

408. See FAMILY JEWELS, *supra* note 2, at 00184, 00591–93; CHURCH REPORT: BOOK III, *supra* note 255, at 688; ROCKEFELLER REPORT, *supra* note 17, at 130.

409. See ROCKEFELLER REPORT, *supra* note 17, at 133–36.

410. See *id.* at 137–42.

411. See *id.* at 131.

412. *Id.*

413. *Id.* at 130.

414. *Id.* at 24.

415. *Id.* at 148 (“On March 15, 1974, the Agency terminated operation CHAOS.”).

416. See Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at A1.

417. FAMILY JEWELS, *supra* note 2, at 00190.

418. *Id.*

419. *Id.* at 00171.

and Mr. Rostow,⁴²⁰ the other version, which excluded that chapter, was provided to approximately twenty people outside the CIA.⁴²¹

The CIA's collection on the anti-Vietnam War movement emerged from a 1967 order from President Lyndon B. Johnson for the CIA to gather evidence supporting the President's conviction that communist governments led and financed the movement.⁴²² When then CIA Director Richard Helms informed President Johnson that the Agency could not spy on Americans, President Johnson stated: "I'm quite aware of that. What I want for you is to pursue this matter, and to do what is necessary to track down the foreign communists who are behind this intolerable interference in our domestic affairs."⁴²³ It appears that the Agency did just that—focusing not on the domestic facets of the movement, but rather on the connection of foreign entities to it.⁴²⁴ The result was several short memoranda prepared in 1967 and 1968 that analyzed foreign connections to the movement in the United States.⁴²⁵ In the end, the CIA assessed that while some informal connections existed, there was "no evidence of direction or formal coordination" by any foreign entity.⁴²⁶

The CIA also conducted limited analysis of the "black power" movement.⁴²⁷ Two papers on the topic were produced, one in 1969 and the other in 1970.⁴²⁸ In each paper, one paragraph considered the ties between the black power movement and various Caribbean movements, focusing mostly on contacts and visits between U.S. activists, including Stokely Carmichael, and the Caribbean activists.⁴²⁹ The CIA produced other memoranda regarding the connections between the two entities.⁴³⁰

CIA Director Helms stated that, through these programs, "we're not trying to do espionage on American citizens in the United States."⁴³¹ However, many both inside and outside the Agency believed that the CIA was doing just that, and that such activities violated the Agency's Charter, the National Security Act.⁴³² Indeed, on the cover memo of the more restricted report on student dissident movements, Director Helms stated that the section on American students "is an area not within the charter of this Agency, so I need not emphasize how extremely sensitive this makes the paper.

420. *Id.* at 00171, 00191.

421. *Id.* at 00171.

422. *See* Mazzetti & Weiner, *supra* note 3.

423. *Id.* (quoting from President Johnson's memoirs).

424. FAMILY JEWELS, *supra* note 2, at 00193 (providing that the purpose of gathering information about the antiwar movement was to "determine whether any links existed between international Communist elements or foreign governments and the American peace movement").

425. *See id.* at 00193–94.

426. *Id.* at 00193.

427. *See id.* at 00188.

428. *Id.*

429. *Id.*

430. *See id.* at 00188–89, 00330.

431. *Id.* at 00442.

432. *See id.* at 00173, 00443; *see also* ROCKEFELLER REPORT, *supra* note 17, at 131, 134; DeYoung & Pincus, *supra* note 10 (noting that Agency officials became nervous about collecting on certain domestic dissidents because "[u]nder its charter, the CIA is not allowed to conduct domestic intelligence-gathering"); Mazzetti & Weiner, *supra* note 3 (discussing how the CIA "illegally spied on Americans decades ago"). This may be why many CIA officers disliked working on Operation CHAOS matters. FAMILY JEWELS, *supra* note 2, at 00326.

Should anyone learn of its existence it would prove most embarrassing for all concerned."⁴³³

Whether the Agency violated the National Security Act in collecting information on these dissident groups hinges on whether the Act permitted the Agency to collect intelligence on Americans within the United States, and, if so, under what conditions.⁴³⁴ As of 1973, the Act vaguely permitted the Agency to collect "intelligence," but did not define the term, and did not indicate the limits to such collection.⁴³⁵ The Church Commission, after evaluating the legislative history of the Act, concluded that "in establishing the CIA Congress contemplated an agency which not only would be limited to foreign intelligence operations but one which would conduct very few of its operations within the United States."⁴³⁶ Those U.S. operations were restricted to training in the United States, protecting the Agency's physical headquarters, and gathering information from willing Americans who had traveled abroad and had information of interest to the Agency.⁴³⁷

The Rockefeller Commission took a more expansive view. It noted that though the Act does not expressly limit the CIA's intelligence activities to "foreign intelligence," that was nonetheless the intention of Congress.⁴³⁸ The Commission then stated that the term "foreign intelligence" had no settled meaning, but that the legislative history of the National Security Act indicated that the CIA was expected to collect foreign intelligence from inside the United States,⁴³⁹ and that in 1948 the National Security Council, pursuant to the Fifth Function, had expressly given the CIA responsibility for collecting foreign intelligence in the United States by overt means.⁴⁴⁰ As the only restriction in the Act on the CIA's collection capability precluded the use of police powers or internal security functions,⁴⁴¹ the Commission concluded that the Agency could collect on Americans in the United States, so long as the purpose was to gather information on foreign countries, individuals, or organizations, and not on domestic matters.⁴⁴² As the Report stated: "[T]he subject matter of the information and not the location of its source is the principal factor that determines whether it is within the purview of the CIA."⁴⁴³

The Rockefeller Report has the better argument. If Congress wished to preclude the Agency from engaging in intelligence collection in the United States, Congress clearly

433. ROCKEFELLER REPORT, *supra* note 17, at 134; *see also* FAMILY JEWELS, *supra* note 2, at 00040 (noting the "risk and impact of revelation" should these domestic collection operations become public knowledge).

434. *See* ROCKEFELLER REPORT, *supra* note 17, at 59.

435. *See id.*

436. CHURCH REPORT: BOOK I, *supra* note 12, at 136.

437. *See id.* at 136–38.

438. ROCKEFELLER REPORT, *supra* note 17, at 59.

439. *Id.* at 52–53.

440. *See id.* at 55.

441. *See id.* at 59.

442. *Id.*

443. *Id.* The report, however, remained uncertain whether the Act permitted the CIA to acquire foreign intelligence in this country by covert means, *id.*, though this does not appear to have been an issue in Operation CHAOS, which did not collect via covert methods, *see supra* text accompanying note 414.

had the ability to so state in 1947, when it passed the Act, or in any of the decades subsequent. As Congress never took such action, the Agency had to follow the actual authorities and restrictions contained in the Act. That Act permitted the Agency to collect intelligence so long as the CIA did not engage in “police, subpoena, or law enforcement powers or internal security functions.”⁴⁴⁴ Collection of foreign intelligence information in the United States does not, in and of itself, fall within that latter restriction. Therefore, the collection of foreign intelligence information was permissible under the Agency’s charter, as it existed in 1973 when the Agency compiled the Family Jewels.⁴⁴⁵

Applying this to Operation CHAOS under the Act as it existed in 1973, most of the activities undertaken by the Agency were entirely legal. The stated purpose of the Agency’s activities in tracking dissident movements was to determine the foreign influences, if any, on those movements.⁴⁴⁶ Thus, the purpose was not to collect domestic information, nor to collect information for the purpose of prosecution (i.e., law enforcement), but rather for foreign intelligence purposes. The collection therefore fell within the confines of the Act and was entirely permissible. The Rockefeller Commission came to the same conclusion, though it did note that some of the collected information contained no foreign or counterintelligence and should be purged from the Agency’s files.⁴⁴⁷ The Commission also properly found that the sporadic use of Agency recruits to collect purely domestic information within the United States “was beyond the CIA’s authority” and that the dissemination of the portion of the Restless Youth report that concerned only domestic affairs was “improper.”⁴⁴⁸

It is worth noting, however, that there may be limited mechanisms for enforcing even these minimal violations of the Act. The Act does not provide for a criminal sanction.⁴⁴⁹ Courts have also concluded that the Act does not permit a private right of action and therefore is “singularly inappropriate for the implication of private damage actions.”⁴⁵⁰ A plaintiff may still be able to bring a claim under the APA, but could have difficulty showing standing, and courts still possess discretion to dismiss such claims when they concern sensitive areas within the executive branch’s particular expertise.⁴⁵¹

444. National Security Act of 1947, Pub. L. No. 80-253, § 103(d)(1), 61 Stat. 495, 498 (current version at 50 U.S.C. § 403-4a(d)(1) (Supp. V 2005)).

445. *Weissman v. Cent. Intelligence Agency*, 565 F.2d 692 (D.C. Cir. 1977), is not to the contrary. The D.C. Circuit, based on the “sketchy” legislative history of the National Security Act, did make the overarching assertion that the CIA did not have the authority “to place United States citizens living at home under surveillance and scrutiny.” *Id.* at 695. However, the case concerned the collection of purely domestic information about an American for possible recruitment, not the instant situation of collection for foreign intelligence purposes. *See id.* at 693–94.

446. *See supra* note 418 and accompanying text.

447. *See* ROCKEFELLER REPORT, *supra* note 17, at 24–25, 42, 149. The Rockefeller Report acknowledged that the Agency probably needed to evaluate the information when it was first collected to determine if there was a foreign connection (since the FBI refused to do so), but once done, the purely domestic information needed to be purged. *See id.* at 25.

448. *Id.* at 25.

449. *See generally* National Security Act of 1947, Pub. L. No. 80-253, § 103(d)(1), 61 Stat. 495, 498 (current version at 50 U.S.C. §§ 401–422 (2000 & Supp. V 2005)).

450. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).

451. *See supra* notes 365–66 and accompanying text.

Subsequent to 1973 and the compilation of the Family Jewels, Congress amended the Act to define "intelligence" as including "foreign intelligence," which is then denoted as "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities."⁴⁵² This clearly does not restrict the Agency's intelligence collection activities solely to overseas endeavors, though Congress certainly had the ability to impose such a restriction had it so desired.

However, section 2.3 of EO 12,333, issued in 1981, does create such a limitation. That section explicitly authorizes the CIA to engage in the collection, retention, and dissemination of information concerning Americans, including foreign intelligence and counterintelligence information.⁴⁵³ However, the section provides that the FBI, not the CIA, is to engage in such collection in the United States.⁴⁵⁴ The CIA may engage in such collection in the United States only if it concerns "significant foreign intelligence" (not defined) that does not involve "the domestic activities of United States persons."⁴⁵⁵ Further, collection techniques in the United States cannot include electronic surveillance, unconsenting physical searches, mail surveillance, physical surveillance, or monitoring devices absent a FISA warrant, or Attorney General approval.⁴⁵⁶ As stated previously, however, executive orders can be amended or negated by presidential directive.⁴⁵⁷

Thus, the Act permits the Agency to collect intelligence within the United States so long as it is for foreign intelligence purposes, and not for domestic purposes or law enforcement actions. EO 12,333 would allow the CIA to engage in this collection so long as it consists of "significant foreign intelligence," though the CIA could engage in any foreign intelligence collection in the United States with a presidential directive.

CONCLUSION

The Family Jewels contain what are purportedly the "worst of the worst" of the first thirty-plus years of the CIA's existence—a complete compilation of the Agency's supposedly illegal activities. Admittedly, several of the operations mounted during that period failed to comply fully with the laws then in place. Yet, the vast majority of those operations did. Further, except for unconsenting human experimentation, each of the main types of activities depicted in the Family Jewels—targeted killings of foreign leaders, electronic surveillance of Americans, examination of U.S. mail, and collecting information on American dissident movements—was legal in the 1950s, 1960s, and 1970s.

Beyond the issue of the legality of these activities, of course, lies the question of whether the CIA should have engaged in such activities as a practical matter. In

452. Intelligence Organization Act of 1992, Pub. L. No. 102-496, § 702, 106 Stat. 3188, 3188 (current version at 50 U.S.C. § 401a (2000)).

453. Exec. Order No. 12,333 § 2.3(b), 3 C.F.R. 200, 211 (1982).

454. *Id.*

455. *Id.*

456. *Id.* § 2.4. All of these require Attorney General approval. *Id.* All but physical surveillance may also require a FISA warrant. See *supra* notes 225–36, 340–48 and accompanying text.

457. See *supra* note 147 and accompanying text.

hindsight, many of these activities appear to have had little utility. None of the Agency's targeted killings actually materialized. The CIA's mail cover and mail opening operations yielded only modest foreign intelligence information. The collection on American dissident groups failed to reveal the expected connection between such groups and the nation's external enemies. Further, the eventual revelation of the activities in the Family Jewels led to critical review of the Agency's actions by three separate commissions and diminished the CIA's overall image.

Yet hindsight is, as always, 20/20. At the time, the CIA was battling a perceived life-threatening enemy in the Soviet Union, akin to the current threat to the United States posed by terrorist organizations. The Agency's actions—from engaging in electronic surveillance aimed at determining the sources of leaks of sensitive information to attempting to kill leaders connected to the Soviet threat—as flawed and misguided as some might believe, were directed solely towards combating that Soviet threat. Given the primary task of collecting, evaluating, and disseminating foreign intelligence, an argument can be made that the CIA needed a multiplicity of methods to locate, track, and defuse those threats, especially where a perception existed that Soviet spies were infiltrating the United States. Under this viewpoint, it would have been inimical to our country's interests to have had the Agency's attempts to acquire critical foreign intelligence information turn off at the precise moment that the potential enemy became the greatest threat, that it when that enemy actually crossed into, or resided in, the United States.

A further argument could be made that the CIA needed to have the ability to take even drastic action to protect this country, including the targeted killing of threatening foreign leaders. As horrific as such an act might have been, it would have paled in comparison to the bloodshed that could have occurred to this country if, for example, Castro had launched a nuclear attack against the United States. In addition, had the attempted targeted killing of Castro been successful, the United States might have been less inclined to engage in more drastic measures with regard to Cuba, such as the ill-fated Bay of Pigs invasion. Merely having the option available, even if never utilized, might have served as a deterrent to the nation's enemies, who become aware of the extent of our capabilities and uncertain as to their limits.

Obviously, the benefit of the activities undertaken by the CIA in the Family Jewels is a matter of debate, and certainly additional oversight and approvals would have benefited the Agency's operations. Nonetheless, those types of activities (with the exception of unconsenting human experimentation) were in fact legal when undertaken, despite widespread beliefs, both then and now, to the contrary. The actual legality of these supposedly "illegal" types of activities raises the question of the lawfulness of many of the purportedly *ultra vires* operations allegedly conducted by the CIA today. Only time, perspective, and eventually declassification will reveal whether today's activities are indeed unlawful. However, it is dangerous to leap to the conclusion that these various activities violate U.S. law. It may some day come to be revealed that, like the vast majority of the activities in the Family Jewels, many of the suspected "illegal" activities engaged in by the CIA are, in the end, entirely lawful.