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Executive Order 12,333: Unleashing the CIA Violates the Leash Law

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EXECUTIVE ORDER 12,333: "UNLEASHING" THE CIA VIOLATES THE LEASH LAW

"Security is like liberty in that many are the crimes committed in its name."[1]

On December 4, 1981, President Ronald Reagan promulgated Executive Order 12,333, establishing United States intelligence guidelines.[2] Restrictions on the Central Intelligence Agency (CIA) were instituted in the 1970s in response to disclosures of widespread wrongdoing.[3] The Order reflects the President's determination to "unleash"[4] America's intelligence community[5] from those limitations. The Order allows the CIA, America's chief foreign intelligence gathering entity, to direct domestic counterintelligence, foreign intelligence, covert operations, and law enforcement activity against United States citizens.[6] The drafters of the Order ignored the statutory limits on intelligence gathering activity codified in the National Security Act.[7] The President's action thus constitutes a statutorily impermissible license for renewed government intrusion, and the Order should be revoked.

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1 Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting).

2 Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 401 app. at 44-51 (1982).

3 On December 22, 1974, the New York Times exposed a "massive illegal domestic intelligence operation" conducted by the CIA against American citizens. N.Y. Times, Dec. 22, 1974, § 1, at 1, col. 1. Investigations over the next few months confirmed that the Agency had amassed dossiers on a large number of individuals and domestic political organizations; intercepted, opened, and photographed first class letters; and indexed and computerized the names of alleged political dissidents, primarily civil rights or anti-war activists. In response to the allegations, President Ford named a commission chaired by Vice-President Rockefeller to investigate domestic CIA abuses. Exec. Order No. 11,828, 3 C.F.R. 933 (1975).

The Commission documented an unprecedented pattern of "plainly unlawful" conduct, including violations of mail regulations, wiretaps, and surreptitious entries. The Commission recommended significant restrictions on CIA authority. *See generally* COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 9-42 (1975) [hereinafter cited as ROCKEFELLER COMMISSION REPORT].

4 Agency supporters commonly call for the "unleashing" of the CIA. *See, e.g.*, N.Y. Times, Oct. 11, 1981, § 4, at 20, col. 1 ("Reagan security forces act as though those careful rules are nothing but stupid red tape. Cut it, they say. Unleash the C.I.A."); Lardner, *Moynihan Unleashes the C.I.A.*, NATION, Feb. 16, 1980, at 1.

5 Statement on United States Intelligence Activities, 1981 PUB. PAPERS 1126-27.

6 *See infra* notes 59-151 and accompanying text.

7 50 U.S.C. §§ 401-405 (1982).

I
HISTORY OF THE CIA

A. CIA Creation

In 1942 President Franklin Roosevelt established the first formal United States intelligence service, the Office of Strategic Services (OSS), to gather and analyze wartime strategic data. The OSS was supervised by the Joint Chiefs of Staff.[8] The Joint Chiefs created three primary operating units: the Research and Analysis Division, responsible for intelligence production; the Secret Intelligence Division, responsible for overseas espionage; and the X-2 Division, responsible for counterespionage and protection of espionage materials.[9] An additional subgroup, the Special Operations unit, supported resistance and guerrilla groups in occupied countries.[10] The OSS undertook no domestic clandestine operations.

President Truman disbanded the OSS after World War II,[11] but he recognized the continuing need for centralized national intelligence.[12] In 1944 OSS Director William Donovan had suggested converting the OSS into a permanent peacetime intelligence service.[13] In 1946, after two years of discussion regarding structure, President Truman established the Central Intelligence Group (CIG).[14] The CIG operated only "outside of the United States and

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8 ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 45; H. RANSOM, THE INTELLIGENCE ESTABLISHMENT 66-67 (1970).

9 ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 45. Espionage is the "act or practice of spying on others." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 447 (1976). The fruit of espionage is "intelligence." Foreign intelligence is "information relating to the capabilities, intentions and activities of foreign powers, organizations or persons." Exec. Order, *supra* note 2, § 3.4(d). Counterintelligence is "information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons." *Id.* § 3.4(a).

10 H. RANSOM, *supra* note 8, at 69. The OSS conducted hazardous missions such as sabotage, circulation of propaganda, psychological warfare, and commando raids. *Id.* at 71.

11 The OSS was disbanded on Oct. 1, 1945. ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 46.

12 President Truman noted that "[t]he war taught us . . . that we had to collect intelligence in a manner that would make the information available where it was needed and when it was wanted, in an intelligent and understandable form." 2 H. TRUMAN, MEMOIRS: YEARS OF TRIAL AND HOPE 56 (1956).

13 Under Donovan's proposal, "a powerful centralized agency would have dominated the intelligence services of several departments. Donovan's memorandum also proposed that this agency have authority to conduct 'subversive operations abroad,' but 'no police or law enforcement functions either at home or abroad.' " ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 46.

14 Presidential Directive of Jan. 22, 1946, 3 C.F.R. 1080-81 (Comp. 1943-48) [hereinafter cited as Presidential Directive]. *See also* H. RANSOM, *supra* note 8, at 78 ("Shadowing the debates [concerning the creation of the CIG] was a fear in some quarters that an institutionalization of the wartime roles of the OSS would in effect amount to the estab-

its possessions."[15]

In 1947 Congress passed the National Security Act (NSA). The NSA replaced the CIG with the Central Intelligence Agency.[16] The Act charges the CIA with the coordination of federal intelligence activities and provides for the correlation, evaluation, and dissemination of *existing* "intelligence relating to the national security."[17] The NSA does not authorize the CIA to collect new intelligence.[18]

Although the NSA does not explicitly mention intelligence collection, Congress anticipated that the CIA would collect, not merely coordinate, overseas intelligence. The Church Committee, a 1976 Senate select committee investigating intelligence activities in the United States,[19] confirmed that the Act "can legitimately be construed as authorizing clandestine collection [abroad] by the CIA."[20] The NSA provides authority for these operations by allowing the National Security Council to direct the CIA to perform "other functions and duties related to intelligence"[21] and "additional services of common concern."[22]

The NSA also provides that "the Director of Central Intelli-

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lishment of an American secret apparatus that might prove to be incompatible with democratic values.").

The controversy centered on the appropriate degree of intelligence centralization. Donovan had proposed a merger of services. The Army and Navy feared that a centralized agency would be unresponsive to their unique needs. The State Department wanted to supervise all foreign operations. The Joint Chiefs of Staff "objected to Donovan's proposal that the new agency engage in foreign covert operations (such as OSS propaganda and paramilitary actions) because 'subversive operation abroad does not appear to be an appropriate function of a central intelligence service.' " ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 46-47.

15 ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 53. *See also* Presidential Directive, *supra* note 14, § 9 ("Nothing herein shall be construed to authorize the making of investigations inside the continental limits of the United States and its possessions").

16 National Security Act, Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified at 50 U.S.C. §§ 401-405 (1982)).

17 50 U.S.C. § 403(d) (1982).

18 *Id.* The coordination of information must be distinguished from the collection of information. The CIG's primary function had also been the coordination of existing intelligence. FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK 1, S. REP. No. 755, 94th Cong., 2d Sess. 71, 128 (1976) [hereinafter cited as CHURCH COMMITTEE REPORT] ("nowhere does [the NSA] specify that the Agency is authorized to engage in the direct collection of intelligence").

19 The Senate created the Senate Committee, chaired by Senator Frank Church, on January 27, 1974, to investigate abuses by United States intelligence agencies. S. Res. 21, 94th Cong., 1st Sess., 121 CONG. REC. 1416 (1975).

20 CHURCH COMMITTEE REPORT, BOOK 1, *supra* note 18, at 127.

21 50 U.S.C. § 403(d)(5).

22 *Id.* § 403(d)(4). This ambiguous provision does not adequately limit potential operations. The activities of foreign policy critics, for example, might be "of concern [to] the Intelligence Community." In light of the NSA's intent, only overseas operations of this nature are permissible. *See infra* notes 42-53 and accompanying text.

gence shall be responsible for protecting sources and methods from unauthorized disclosure."[23] The CIA has interpreted this "potentially quite expansive" phrase as a broad grant of authority.[24] Congress originally inserted this language, however, only to assuage the military's fear that a civilian agency would not adequately appreciate the need for secrecy.[25] The provision does not authorize the investigation of American nationals.

The National Security Act permits the CIA to coordinate its intelligence activities with other governmental entities, including the Federal Bureau of Investigation (FBI),[26] but it denies the CIA any "police, subpena [*sic*], [or] law-enforcement powers."[27] In addition, the Act forbids the agency from assuming any "internal-security functions."[28] This prohibition on "internal-security functions" is less precise than the 1946 Truman directive establishing the CIG which explicitly barred investigations within the "United States and its possessions."[29] The architects of the NSA failed to contemplate the potential ambiguity of the phrase "internal-security functions." By failing to use clear and unambiguous language restricting internal operations by the CIA, the drafters left open the possibility that the Act could be construed to allow such activities.[30]

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23 50 U.S.C. § 403(d)(3).

24 *See* Ray v. Turner, 587 F.2d 1187, 1220 (D.C. Cir. 1978) (CIA exemption from FOIA disclosure claimed on basis of § 403(d)(3)). The CIA has commonly used this language to deny requests for agency information made pursuant to § 552(a)(3) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(3) (1982). A provision of FOIA prohibits the disclosure of matters "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (1982). The Agency routinely invokes the "sources and methods" proviso to bar disclosure. *See, e.g.*, Goland v. CIA, 607 F.2d 339 (D.C. Cir. 1978) (legislative history deemed protected document); Medoff v. CIA, 464 F. Supp. 158 (D.N.J. 1978) (documents reflecting identity of persons at university formerly employed by CIA within protective scope of CIA Act).

Nevertheless, not all courts readily accept the CIA's claims of exemption from disclosure. *See, e.g.*, Ray v. Turner, 587 F.2d at 1220 ("courts must be particularly careful when scrutinizing claims of [FOIA] exemptions based on such expansive terms"); Sims v. CIA, 479 F. Supp. 84, 87 (D.D.C. 1979) ("[T]he [CIA] Director has characterized an intelligence source as any 'contributor . . . to the intelligence process.' This definition is susceptible to discretionary application and overbroad interpretation.").

Courts occasionally challenge the Agency's unilateral characterization of material as an intelligence "source" exempt from FOIA disclosure. *See, e.g.*, Gardels v. CIA, 637 F.2d 770, 773 (D.C. Cir. 1980) (summary judgment on basis of Agency's "amorphous statement" denied); Weissman v. CIA, 565 F.2d 692, 696 (D.C. Cir. 1977) ("the Agency's interpretation of the sources and methods proviso is misplaced").

25 ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 53.

26 50 U.S.C. § 403(e). *Cf.* Birnbaum v. United States, 588 F.2d 319, 331 n.23 (2d Cir. 1978) ("there is no correlative mandate to assist the FBI's domestic operations in a *covert* manner") (emphasis added).

27 50 U.S.C. § 403(d)(3).

28 *Id.*

29 *See* Presidential Directive, *supra* note 14, § 9.

30 *Cf. infra* notes 74-120 and accompanying text (showing how Executive Order

Congress enacted the Central Intelligence Agency Act[31] in 1949. The Act contained detailed administrative provisions that had been omitted from the 1947 National Security Act.[32] The legislative history of the CIA Act reiterates the congressional prohibition of internal security operations: the CIA "relates entirely to matters external to the United States; it has nothing to do with the internal America. It relates to the gathering of facts and information beyond the borders of the United States. It has no application to the domestic scene in any manner, shape, or form."[33] Furthermore, the CIA "is purely and completely and wholly and singly in the external field . . . . Its sole effort is outside the United States."[34]

B. CIA Authority

In promulgating Executive Order 12,333, President Reagan assumed that Congress's prohibition on "internal-security functions" does not preclude clandestine CIA operations within the United States for purposes outside of this country.[35] This presumption

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12,333 violates National Security Act by allowing CIA to assume "internal security functions").

Although it is unclear why Congress failed to retain President Truman's express prohibition, conceivably Congress may have thought an explicit proscription was superfluous. General Vandenberg responded specifically to a question regarding the need for additional limitations: "I do not think there is anything in the bill, since it is all foreign intelligence, that can possibly affect any of the privileges of the people of the United States. . . . I can see no real reason for limiting it at this time." *Reprinted in* ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 52.

31 Central Intelligence Agency Act of 1949, Pub. L. No. 81-110, 63 Stat. 208 (codified at 50 U.S.C. §§ 403a-403j (1982)).

An important aspect of the the CIA Act is the statutory authorization of a secret budget. 50 U.S.C. § 403g. Section 403g provides that the Director of the Office of Management and Budget may not report to Congress about the Agency's budget. *Id. See generally* Note, *Cloak and Ledger: Is the CIA Funding Constitutional?*, 2 HASTINGS CONST. L.Q. 717 (1975); Note, *Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Coexist?*, 7 N.Y.U. J. INT'L L. & POL. 493 (1974); Note, *The CIA's Secret Funding and the Constitution*, 84 YALE L.J. 608 (1975).

32 Rear Admiral Roscoe Hillenkoetter, Director of the CIG, explained in testimony before the House Armed Services Committee why the administrative provisions were omitted from the National Security Act, which was primarily designed to unify the armed services:

> During these conferences [on the 1947 National Security Act], very detailed proposals for the administration of the Central Intelligence Agency . . . were presented. However, it was felt that to place so much detail into an overall unification bill would unnecessarily burden the latter . . . . Therefore, it was decided to omit from the unification bill the administrative provisions for the Central Intelligence Agency.

Hearings on H.R. 5871 Before the House Armed Services Comm., 80th Cong., 2d Sess. 4-5 (1948) (statement of Rear Admiral Roscoe Hillenkoetter, Director of Central Intelligence) (on file at *Cornell Law Review*).

33 95 CONG. REC. 6947 (1949) (statement of Rep. Tydings).

34 *Id.* at 6948.

35 The issue underlying this assumption is whether Congress prohibited all CIA

overlooks a historic debate. The FBI has consistently interpreted the statutory language broadly to forbid "anything that CIA might be doing in the United States."[36] In contrast, the CIA has construed the "prohibition narrowly to [allow] investigations of domestic activities of American groups for the purpose of determining foreign associations."[37] The Church Committee believed it had laid this controversy to rest. The Committee concluded that "history indicates that at the time of enactment of the National Security Act, threats to 'internal security' were widely understood to include threats from domestic groups with foreign connections."[38] Responsibility for domestic activities was nonetheless to rest with the FBI.[39] The "original order from President Roosevelt to J. Edgar Hoover to begin internal security operations was to investigate foreign communist and fascist influence within the United States."[40] The Church Committee concluded that there was "no evidence that [at the time the NSA was enacted] these investigations were considered foreign intelligence."[41] The prohibition on internal security functions was adopted to protect domestic groups from improper CIA investigations. Executive Order 12,333 nonetheless embraces the CIA's position.

Congress designed the National Security Act to interdict domestic spying.[42] Administration representatives reassured Congress that this was the legislation's effect. Secretary of the Navy Forrestal testified before a House Committee that CIA activities were to be "limited definitely to purposes outside of this country."[43] CIG Director Vandenberg further guaranteed Congress that the CIA's role was limited to analyses of "the masses of readily available [foreign intelligence] material" in the United States rather than covert intel-

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domestic activity or, as Reagan assumed, only CIA domestic activity that relates to domestic matters. This Note contends that Reagan's assumption is incorrect because Congress prohibited all CIA domestic activity except for matters of CIA facility security and personnel. *See infra* notes 42-45 and accompanying text.

36 CHURCH COMMITTEE REPORT, BOOK 1, *supra* note 18, at 96-97 (*citing* testimony of former FBI liaison with CIA, Sept. 22, 1975). Nevertheless, the FBI and CIA did agree in 1966 to coordinate activities within the United States. The Church Committee indicated that under the agreement, the CIA engaged in "internal security functions" in violation of the NSA. *Id.* at 97-98.

37 *Id.* at 138.

38 *Id.*

39 T. TROY, DONOVAN AND THE CIA 413 (1982) (published by the CIA's Center for the Study of Intelligence).

40 CHURCH COMMITTEE REPORT, BOOK 1, *supra* note 18, at 138.

41 *Id.*

42 *See id.* ("By codifying the prohibition against police and internal security functions, Congress apparently felt that it had protected the American people from the possibility that the CIA might act in any way that would have an impact on their rights.").

43 *Hearings on H.R. 2319 Before the House Comm. on Expenditures in the Executive Dep't,* 80th Cong., 1st Sess. 127 (1947) (statement of James Forrestal, Secretary of the Navy).

ligence collection.[44] The CIA recently published a study that confirms this conclusion: "While there has been much controversy over the facts of the CIA's few domestic activities, there has been no controversy over the fundamental principle of the exclusion of the agency from the conduct of such operations."[45]

Congress did not completely deny the CIA authority to work within the United States. However, Congress carefully restricted domestic activity to overt CIA support activities.[46] NSA proponents asserted that CIA agents "work . . . completely outside the United States, except for the indoctrination which must take place whenever an agent is sent into a new field."[47] The Church Committee found "that the CIA would be confined out of the continental limits of the United States" and was "supposed to operate only abroad."[48] The Committee 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."[49]

The policies underlying the congressional admonition against domestic activities support this interpretation. Representative Judd summarized the reason for the prohibition during the NSA debate:

> The Central Intelligence Agency is supposed to collect military

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44 *Hearings on S. 758 Before the Senate Comm. on Armed Services,* 80th Cong., 1st Sess. 497 (1947) (statement of Hoyt S. Vandenberg, Director of the Central Intelligence Group) [hereinafter cited as *Vandenberg Statement*). CIG Director Vandenberg repeatedly emphasized reliance on overt intelligence methods:

> [I]t is safe to say that in peace time approximately 80 per cent of the foreign intelligence information necessary to successful operation can and should be collected by overt means. By overt means I mean those obvious, open methods which require, basically, a thorough sifting and analysis of the masses of readily available material of all types and descriptions. Into the United States there is funnelled so vast an amount of information from so many varied sources that it is virtually staggering.

Id.

45 T. TROY, *supra* note 39, at 413.

46 CHURCH COMMITTEE REPORT, BOOK 1, *supra* note 21, at 136 (CIA would have headquarters in United States).

47 95 CONG. REC. 6949 (1949) (statement of Rep. Tydings). According to Representative Tydings, a leading supporter of the NSA, such "indoctrination" was limited to overt contact with domestic organizations:

> Let us assume that a laboring man is part of [the CIA], and that we want to send him over to Germany, for example. . . . Obviously he would have to be sent where labor unions meet and discuss questions, and where they act, so that he could get the feel of the situation, and so that he would not be like a sore thumb sticking out when he reached a foreign country.

Id. at 6952.

48 CHURCH COMMITTEE REPORT, BOOK I, *supra* note 18, at 136-37 (citations omitted).

49 *Id. See also* ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 11 ("[Congress] understood that some [CIA] activities would be conducted within the United States").

> intelligence abroad, but we want to be sure it cannot strike down into the lives of our own people here. So, we put in a provision that "the agency shall have no police, subpoena, law-enforcement powers, or internal-security functions."[50]

Administration officials repeatedly responded to congressional fears that the CIA might evolve into an American secret police. Director Vandenberg testified that "the prohibition against police powers or internal security functions will assure that the Central Intelligence Group [*sic*] can never become a Gestapo or Security Police."[51] Dr. Vannevar Bush, chair of the Joint Research and Development Board, testified before the House Committee on Expenditures that there was "no danger" that the CIA would become a Gestapo because "[t]he bill provides clearly that [the CIA] is not concerned with intelligence on internal affairs."[52] Bush added that "[w]e already have, of course, the FBI in this country."[53] This legislative colloquy demonstrates that Congress intended the reference to "internal-security functions" to forbid any domestic activity directed against United States citizens.

Courts have confirmed the NSA's restriction of domestic CIA activity. In *Weissman v. CIA*,[54] the District of Columbia Court of Appeals found that the Act "was intended, at the very least, to prohibit the CIA from conducting secret investigations of United States citizens, in this country, who have no connection with the Agency."[55] The court noted the legislative rationale:

> Congress wisely sought from the outset to make sure that when it released the CIA genie from the lamp, the Agency would be prevented from using its enormous resources and broad delegation of power to place United States citizens living at home under surveillance and scrutiny. It denied the Agency police or internal-security functions to obviate the possibility that overzealous representatives of the CIA might pry into the lives and thoughts of citizens whose conduct or words might seem unconventional or

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50 93 CONG. REC. 9444 (1947) (statement of Rep. Judd). *See also* Weissman v. CIA, 565 F.2d 692, 695 (D.C. Cir. 1977) ("Congress was well aware [that intelligence] activities create a potential for abuse, and chose to limit the Agency's activities to intelligence gathering abroad. It was unwilling to make it a policeman at home, or to create conflict between the CIA and the FBI.").

51 *Vandenberg Statement, supra* note 44, at 497. Although Vandenberg referred to the CIA in his testimony, he noted that the purpose of the legislation was to convert the CIG into a permanent intelligence organization. *Id.* at 491.

52 *Hearings on H.R. 2319 Before the House Comm. on Expenditures*, 80th Cong., 1st Sess. 559 (1947) (testimony of Dr. Vannevar Bush, Chairman, Joint Research and Development Board, War and Navy Departments).

53 *Id.*

54 565 F.2d 692 (D.C. Cir. 1977).

55 *Id.* at 695.

subversive.[56]

In *Birnbaum v. United States,*[57] the Second Circuit Court of Appeals agreed that "[t]here was no room in the charter for a 'policy judgment' that the CIA should involve itself in gathering secret data on domestic problems."[58]

This analysis of the legislative history and purpose underlying the restriction on "internal-security functions" suggests that Congress defined any domestic CIA activity, even if based on an apparent connection to a foreign power, as an internal security function beyond the scope of permissible CIA activity. The assumption that domestic CIA activity is permissible as long as the purpose of the investigation relates to a foreign threat is contrary to the language and intent of the NSA. Executive Order 12,333 is therefore illegal.

II
EXECUTIVE ORDER 12,333

Executive Order 12,333 sets forth a panoply of permissible CIA activities[59] in violation of the National Security Act. The Order authorizes the CIA to engage in domestic counterintelligence activities.[60] Many of these activities constitute "internal-security functions" in violation of the langnage and spirit of the National Security Act. Furthermore, the Order authorizes three types of law enforcement activities: protection of the CIA's own facilities, assistance to local law enforcement agencies, and retention of "incidentally obtained information."[61] This authority violates the NSA's

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56 *Id.*

57 588 F.2d 319, 331 (2d Cir. 1978).

58 *Id.* at 332.

59 The purpose of the Order is to improve the United States's intelligence gathering activities. President Reagan resolved to "provide America's intelligence community with clearer, more positive guidance and to remove the aura of suspicion and mistrust that can hobble our nation's intelligence efforts." PUB. PAPERS, *supra* note 5, at 1127. Attorney General William French Smith stated that the Administration intended to bolster "an intelligence community that had been demoralized and debilitated by six years of public disclosures, denunciations, and—in addition—budgetary limitations." N.Y. Times, Dec. 19, 1981, at 32, col. 1.

The Reagan plan has three elements: to increase funding and restoration of previous wartime CIA personnel levels; to exempt the CIA and other key intelligence agencies from the Freedom of Information Act (FOIA); and to impose criminal penalties for the exposure of the identities of classified agents. The last goal was achieved with the enactment of the Intelligence Identities Protection Act, Pub. L. No.97-200, 96 Stat. 122 (codified at 50 U.S.C. §§ 421-426 (1982)). For a discussion of the constitutional constraints on the protection of agent identities, see Note, *The Constitutionality of the Intelligence Identities Protection Act,* 83 COLUM. L. REV. 727 (1983). The 98th Congress considered S. 1324 to exempt CIA "operational files" from FOIA search and disclosure requirements. The bill did not emerge from committee hearings.

60 Exec. Order, *supra* note 2, § 2.3.

61 *Id.* §§ 1.8(h), 2.3(i), 2.6.

prohibition of "police . . . [and] law-enforcement functions."[62]

A. Background

The Reagan administration has asserted that "the major change [in the Order] is in . . . tone and approach."[63] One member of the Reagan administration explained that to overcome "bureaucratic lethargy," the drafters attempted "to take the language of an executive order and instead of having it all phrased in all the 'thou shalt nots,' to try to phrase it in positive language."[64] In fact, the changes are neither "very marginal" nor merely "technical."[65] The Order legitimizes potential violations of the National Security Act by departing from both congressional recommendations and the safeguards of a previous executive order concerning intelligence gathering activities.

1. *Collection Techniques*

The Order substantially expands the scope of approved information collection techniques. The Order recoguizes generally that "[a]gencies are not authorized to use such techniques as electronic surveillance, unconsented physical search, mail surveillance, physical surveillance, or monitoring devices unless they are in accordance with procedures established by the head of the agency concerned and approved by the Attorney General."[66] The Attorney General's authority is virtually unlimited, however, because those procedures are not subject to review or substantiation by any public body. Thus, although this provision may prevent completely indiscriminate intrusions, the vast discretion bestowed upon the Attorney General undercuts the illusory restrictions of the rule.

The Order does not prohibit overseas electronic surveillance, even if the CIA has no reason to believe the target is acting as an "agent of a foreign power."[67] In contrast, President Carter's Order completely prohibited surveillance against United States persons abroad.[68] Like the Reagan Order, President Carter's Order allowed domestic electronic surveillance for "training, testing, or [as] coun-

62 50 U.S.C. § 403(d)(3).

63 Background Briefing by Senior Administration Officials at 9 (Dec. 4, 1981) (statement of "Senior Administration Official") [hereinafter cited as Senior Official Statement] (on file at *Cornell Law Review*).

64 *Id.*

65 *See id.* at 18.

66 Exec. Order, *supra* note 2, § 2.4.

67 The Attorney General may authorize electronic surveillance only against "a foreign power or an agent of a foreign power." *Id.* § 2.5. No such limitation restricts electronic surveillance conducted outside the United States.

68 Exec. Order No. 12,036, § 2-202, 3 C.F.R. 112 (1979) [hereinafter cited as Carter Order].

termeasures."[69] President Carter specified, however, that "[n]o information derived from communications intercepted in the course of such training, testing or use of countermeasures may be retained or used for any other purpose."[70] The Reagan Order contains no such prohibition. Information gained from such surveillance may, therefore, be used for "internal security" purposes.

The Reagan Order permits the physical surveillance of CIA applicants, employees, and contractors within the United States without any limitations on the purpose or scope of such observations.[71] The Order also authorizes the Agency to conduct unconsented physical searches of the personal property of foreign nationals or foreign corporations within the United States.[72] The property must be "lawfully" in the Agency's possession, but the Order does not define "lawfully" and does not expressly require a warrant. The Carter Order allowed only the FBI to conduct unconsented physical searches within the United States.[73] Reinstatement of this restriction would more clearly obviate the spectre of CIA internal security functions.

The Order also attenuates previous limitations on mail surveillance. Federal law has prohibited the obstruction, interception, or opening of mail since 1948.[74] In the early 1950s, CIA agents nonetheless began opening, reading, and copying first-class mail to gain "insights into Soviet intelligence activities and interests."[75] In the course of Operation HTLINGUAL, CIA agents handled and computerized over two million letters with the knowledge and approval of the Attorney General. The practice continued until 1973.[76] Under the Reagan Order, the Attorney General may again direct mail surveillance without a warrant "in accordance with procedures established by the head of the agency concerned."[77] The Carter Order made the determination legal rather than discretionary: the CIA could undertake mail surveillance only "in accordance with applicable statutes and regulations."[78] Past CIA abuse militates in favor of these more restrictive guidelines. Moreover, the Reagan Order may violate the applicable statutory limits on mail surveillance.[79]

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69 *Id.*

70 *Id.*

71 Exec. Order, *supra* note 2, § 2.4(c)(1).

72 *Id.* § 2.4(b)(2).

73 Carter Order, *supra* note 68, § 2-204.

74 18 U.S.C. §§ 1701-1703 (1982).

75 ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 101. For a general discussion of the CIA's mail interception activities, see *id.* at 101-15.

76 *Id.* at 112.

77 Exec. Order, *supra* note 2, § 2.4.

78 Carter Order, *supra* note 68, § 2-205.

79 *See* 18 U.S.C. § 1702 ("Whoever takes any letter, postal card, or package out of

Finally, Executive Order 12,333 permits the Attorney General to authorize "any technique for which a warrant would [normally] be required" upon a unilateral judgment "that the technique is directed against a foreign power or an agent of a foreign power."[80] Characterization of the target is completely within the Attorney General's volition because the Order does not define an "agent of a foreign power." The Attorney General need not find that the subject is involved in any illegality. Furthermore, reviewing courts consider wiretap orders by the Attorney General presumptively valid,[81] even though the Attorney General is not the "neutral and detached" official normally required to find a warrant justified.[82]

The creation of an "agent of a foreign power" exemption from the fourth amendment underlies this grant of authority.[83] Although a few lower courts have approved a "foreign agent" exception,[84] the Supreme Court has reserved a decision on its validity.[85] In *Zweibon*

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any post office or any authorized depository for mail matter . . . before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, . . . shall be fined . . . or imprisoned . . . .). Nothing in the National Security Act exempts the CIA from this provision.

80 Exec. Order, *supra* note 2, § 2.5.

81 *See, e.g.*, United States v. Feldman, 535 F.2d 1175, 1180-81 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976) (electronic surveillance of illegal bookmaking suspects approved); United States v. Turner, 528 F.2d 143, 150-51 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975) (interception of wire communications of alleged narcotics conspirators approved).

82 *See* Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971) (determination of probable cause to search may not be made by official in charge of investigation).

83 *See generally* Note, *Executive Order 12333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L.J. 611 (1983) (argues that warrantless searches both violate Constitution and exceed presidential authority).

84 *See, e.g.*, United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982) ("the Executive Branch need not always obtain a warrant for foreign intelligence surveillance"); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977), *cert. denied*, 434 U.S. 80 (1977) ("[f]oreign security wiretaps are a recognized exception to the general warrant requirement"); United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974) (en banc), *cert. denied sub nom.*, Ivanov v. United States, 419 U.S. 881 (1974) ("on balance, the better course is to rely . . . on the good faith of the Executive"); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974) ("because of 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, we reaffirm . . . that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence"); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971) ("we do not read [the law] as forbidding the President, or his representative, from ordering wiretap surveillance to obtain foreign intelligence in the national interest").

85 In United States v. United States District Court, 407 U.S. 297 (1972), the Supreme Court rejected a "domestic security" justification for surveillance without a court order. The Court noted that:

> Though the investigative duty of the executive may be stronger in [national security] cases, so also is there greater jeopardy to constitutionally protected speech. . . . Fourth Amendment protections become the

v. Mitchell,[86] the Court of Appeals for the District of Columbia Circuit suggested that the President should seek a warrant for surveillance of domestic organizations even when the operation is predicated upon foreign threats to the national security or intelligence activity conducted overseas.[87] After examining CIA abuses, the Church Committee agreed that "[a]ll non-consensual electronic surveillance, mail-opening, and unauthorized entries should be conducted only upon authority of a judicial warrant."[88]

2. *Oversight*

Vigilant congressional oversight is an essential concomitant to increased CIA authority. Yet the Reagan Order neglects to impose any affirmative duty on the intelligence community to assist congressional monitoring activity. Rather, the Order only requires that the Director of the CIA cooperate with Congress "to the extent provided by law."[89] In place of congressional oversight, President Reagan provides for internal supervision by a three-member Intelligence Oversight Board within the Executive Office of the President.[90] The lack of Senate confirmation of these Board members, however, taints their independence[91] and weakens public confidence in the oversight process.

The absence of public disclosure is equally troubling. Regulations drafted by the Agency itself without congressional or other

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> more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security."

Id. at 313-14. The Court did not reach the issue of foreign involvement: "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". *Id.* at 321-22.

86 516 F.2d 594 (D.C. Cir. 1975) (en banc).

87 The court indicated that its "analysis would suggest that, absent exigent circumstances, *no* wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny, irrespective of the justification for the surveillance or the importance of the information sought." *Id.* at 651 (dictum) (emphasis in original).

88 CHURCH COMMITTEE REPORT, BOOK 1, *supra* note 18, at 327.

89 Exec. Order, *supra* note 2 § 3.1. The law requires the director of Central Intelligence to keep the Congressional Intelligence Committees "fully and currently informed concerning intelligence activities." 50 U.S.C. § 413 (1982). This provision was adopted from the Carter Order. Carter Order, *supra* note 68 § 3-401. The effect of the Reagan Order may be similar to the Carter requirements, but the change in the language of the second order betrays the fundamental philosophical shift that permeates the Reagan approach.

90 Exec. Order No. 12,334, 3 C.F.R. 216 (1982), *reprinted in* 50 U.S.C. § 401 app. at 51 (1982).

91 The director of Central Intelligence, in contrast, must be approved by the Senate. 50 U.S.C. § 403 (1982). The current director, William Casey, was President Reagan's 1980 campaign manager.

public review will implement the Order.[92] The Administration argues that intelligence is an area "where the government is going to say, 'Trust me,' and the legislative branch is going to have to be the means by which you measure whether or not that occurs."[93] Responsibility for legislative oversight rests, however, solely with two congressional committees which often meet in closed session and may only receive selective information from the Agency.[94]

B. Internal Security Functions

1. *Counterintelligence*

Counterintelligence activity includes operations conducted to insulate the United States against espionage by foreign powers.[95] The Reagan Order directs the CIA to "conduct counterintelligence activities within the United States in coordination with the FBI."[96] It also permits the Agency to collect counterintelligence[97] and "[i]nformation obtained in the course of a lawful . . . counterintelligence . . . investigation."[98]

The Reagan Order provides that the CIA will carry out these domestic activities "without . . . performing any internal security functions."[99] The drafters thus implicitly assume that the Agency can engage in domestic operations without performing "internal security functions."[100] This assumption contradicts Congress's intention in the National Security Act. Congress intended its prohibition against "internal security functions" to ban all CIA domestic covert

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92 The Order provides that "[t]he NSC, the Secretary of Defense, the Attorney General, and the Director of Central Intelligence shall issue such appropriate directives and procedures as are necessary to implement this Order." Exec. Order, *supra* note 2, § 3.2. The Order provides that the regulations be "made available" to the congressional intelligence committees, *id.*, but presumably only after promulgation.

93 Senior Official Statement, *supra* note 63, at 17.

94 Furthermore, Congress has sometimes allowed the CIA to abuse its authority because Congress has been lax in its oversight responsibilities. The Church Committee found that Congress "has failed to define the scope of domestic intelligence activities as intelligence collection techniques, to uncover excesses, or to propose legislative solutions. Some of its members have failed to object to improper activities of which they were aware and have prodded agencies into questionable activities." CHURCH COMMITTEE REPORT, BOOK 1, *supra* note 18, at 277. *See generally id.* at 277-81; H. RANSOM, *supra* note 8, at 159-79.

95 Exec. Order, *supra* note 2, § 3.4(a). The Order defines counterintelligence as "information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons." *Id.*

96 *Id.* § 1.8(c).

97 *Id.* § 1.8(a).

98 *Id.* § 2.3(c).

99 *Id.* § 1.8(c).

100 *See supra* notes 33-37 and accompanying text.

activity.[101] Any domestic activity, including counterintelligence operations, violates the National Security Act's prohibition on internal security functions.[102]

The Order's requirement that the CIA conduct domestic counterintelligence only with the FBI does not legitimize domestic CIA activity. Requiring the FBI to cooperate with the CIA enhances the potential for NSA violations. Providing the CIA with access to the well-developed investigative resources of the FBI improves the ability of the Agency to engage in domestic operations against United States citizens. The NSA's legislative history demonstrates that Congress intended to broadly define "internal security functions" to preclude any domestic clandestine operations by the CIA.[103] CIA domestic activity thus violates the NSA, regardless of FBI participation.

In 1966, the CIA had negotiated an agreement with the FBI similar to the Order to enhance coordination between the two agencies.[104] The Church Committee found that "[t]he policies embodied in [that] agreement . . . clearly involved the CIA in the performance of 'internal security functions.' "[105] The Committee declared that "[t]he CIA should not be in the business of investigating Americans as intelligence or counterintelligence targets within the United States—a responsibility which should be centralized in the FBI."[106]

2. *Foreign Intelligence*

Foreign intelligence refers to the collection of data regarding other nations for use by the United States government.[107] In contrast, counterintelligence refers to defensive operations designed to thwart the efforts of other governments to gain information about the United States.[108] The Order's foreign intelligence provisions allow two types of domestic CIA activity. First, the Order allows the CIA to collect "significant" foreign intelligence if such collection is not "for the purpose of acquiring information concerning the do-

101 *See* 50 U.S.C. § 403(d)(3); *see also supra* notes 35-50 and accompanying text.

102 The legislative history of the National Security Act indicates that Congress regarded the investigation of foreign influences in the United States as an "internal security function." *See supra* notes 38-50 and accompanying text.

103 *See supra* notes 28-33 and accompanying text.

104 CHURCH COMMITTEE REPORT, BOOK 1, *supra* note 18, at 97; *see also supra* note 36.

105 CHURCH COMMITTEE REPORT, BOOK 1, *supra* note 18, at 97-98.

106 *Id.* at 301; *see also supra* note 36.

107 Exec. Order, *supra* note 2, § 3.4(d). The Order defines foreign intelligence as "information relating to the capabilities, intentions and activities of foreign powers, organizations or persons, but not including counterintelligence except for information on international terrorist activities." *Id.*

108 *Id.* § 3.4(a).

mestic activities of United States persons."[109] Second, the Order permits the CIA to collect information obtained in "lawful" foreign intelligence investigations.[110] Both of these clauses violate the National Security Act because they potentially enable the CIA to engage in domestic activity.[111]

The Order authorizes the CIA to collect significant foreign intelligence in the United States, but fails to define "significant." Instead, the Order allows the Agency itself to promulgate confidential standards to determine "significance."[112] Because this discretion enables the Agency to broadly define significance, the Agency could conceivably assume "internal-security functions" merely by designating someone a source of potentially significant information.

Moreover, the absence of any guidelines to limit CIA discretion in identifying "significant" foreign intelligence may allow the CIA to commence surveillance merely to explore whether the subject might be a source of "significant" information.[113] The CIA can target domestic persons whenever it even remotely suspects that it can gather "significant" intelligence. The Agency can gather information even from those citizens who desire to avoid CIA contact.

The FBI's electronic surveillance of columnist Joseph Kraft in 1969 demonstrates the potential for abuse. The Nixon Administration bugged Kraft's hotel room because he was "asking questions of some members of the North Vietnamese Government."[114] Acting FBI Director William Ruckelshaus later admitted that "this was not an adequate national security justification" for surveillance.[115] The Church Committee found "no substantial indication of any genuine national security rationale" for the surveillance.[116] Yet identical circumstances could constitute adequate grounds for a CIA operation

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109 *Id.* § 2.3(b).

110 *Id.* § 2.3(c).

111 *See* 50 U.S.C. § 403(d)(3) ("the Agency shall have no . . . internal security functions").

112 Exec. Order, *supra* note 2, § 3.2. The Order makes no provision for public disclosure of agency procedures.

113 Under the Reagan Order, the CIA may simply assume a potential target is a source of information. As one Administration official noted,

> In [Carter's Order] 12036 . . . you had to establish the likelihood of someone being the agent of a foreign power before you could pursue the activity. The practical effect has been, in this fast-moving world, you often missed events entirely . . . .
>
> . . . [Under the Reagan Order] you don't have to begin . . . with a presumption that you cannot pursue the activity until you have established beyond a reasonable doubt that the individual is positively involved as an agent of a foreign power.

Senior Official Statement, *supra* note 63, at 9-10.

114 CHURCH COMMITTEE REPORT, BOOK 2, *supra* note 18, at 121.

115 *Id.*

116 *Id.*

under Executive Order 12,333, even within the United States, because Kraft could discover "significant" information.

Under the Order, the CIA may also collect information in the course of a "lawful" intelligence investigation.[117] Because of its inherent ambiguity, a lawfulness standard inadequately protects against overreaching. Even though the Order does not explicitly authorize the CIA to assume internal security functions, the use of vague terms such as "significant" and "lawful" may allow the Agency to interpret the Order as a license to engage in prohibited domestic activity. The CIA has previously targeted citizens for surveillance because of their political predilections rather than their threat to national security. As the Church Committee noted, "[t]he Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power."[118] Presidential or CIA approval alone may deem an investigation "lawful."

A Reagan Administration official has asserted that the Order merely simplifies standards for conduct to "permit shorter, more understandable implementing procedures."[119] Administration officials suggest that "[t]he detailed, complex provisions of the previous Order led to such lengthy procedures that it virtually required a lawyer to decipher [them]."[120] Clear and understandable guidelines are a legitimate goal, but the Order does not simply clarify "unnecessarily complex"[121] standards. Instead, the Order uses vague terminology that may be construed to license activities prohibited by the NSA.

The Order attempts to limit foreign intelligence collection inside the United States by forbidding activities "undertaken for the purpose of acquiring information concerning the domestic activities of United States persons."[122] The effectiveness of this restriction turns on the CIA's interpretation of "domestic activities." If the implementing gnidelines broadly construe "domestic activities" to include any activity occurring within United States borders, then the Order arguably precludes internal security functions. If, however, "domestic activities" are narrowly construed to include only those activities intended to influence domestic issues, an activity designed to indirectly influence foreign affairs would be subject to CIA inves-

117 Exec. Order, *supra* note 2, § 2.3(c).

118 CHURCH COMMITTEE REPORT, BOOK 2, *supra* note 18, at 5.

119 Remarks of Deputy Director of Central Intelligence, Bobby R. Inman, in Senior Official Statement, *supra* note 63, at 3.

120 *Id.*

121 *Id.*

122 Exec. Order, *supra* note 2, § 2.3(b).

tigation even though the activity took place solely within the United States.[123]

The CIA's surveillance of domestic anti-war organizations in the 1960s demonstrates the dangers of narrow construction. Operation CHAOS was undertaken merely because "high government officials" could not believe that "a cause that is so clearly right for the country, as they perceive[d] it, would be so widely attacked if there were not some [foreign] force behind it."[124] Under a narrow construction of "domestic activities," an overzealous Attorney General could simply declare that a "foreign power" masterminded a "domestic" activity and direct the CIA to commence surveillance. Although the Reagan Order leaves room for this interpretation, this CIA activity would violate the National Security Act's ban on CIA participation in internal security functions.[125]

3. *Covert Activities*

The Order empowers the CIA to conduct "special activities approved by the President."[126] "Special activities" are those "conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States government is not apparent or acknowledged publicly."[127] Hence, the Order permits the Agency to conduct some covert operations. The Order permits these activities as long as these operations are "not intended to influence United States political processes, public opinion, policies, or media."[128] For example, the Order authorizes the Agency to infiltrate and influence domestic political organizations as long as "the organization concerned is composed primarily of individuals who are not United States persons and is reasonably believed to be acting on behalf of a foreign power."[129]

A comparison of the Reagan Order with President Carter's Order concerning intelligence activities illustrates the latitude that Ex-

123 Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), is a paradigmatic case. The plaintiffs in *Zweibon* were members of the Jewish Defense League (JDL), a domestic organization primarily concerned with the Soviet Union's restrictive emigration policy. *Id.* at 605. Attorney General John Mitchell authorized repeated, warrantless electronic surveillance of the group's headquarters in order to "provid[e] advance knowledge of any activities of JDL causing international embarrassment to this country." *Id.* at 609. The court refused to allows this warrantless surveillance on the specious ground of possible retribution by the Soviet Union. *Id.* at 654. Nevertheless, such improper activity might be within the scope of Executive Order 12333.

124 Testimony of Joseph Califano, Sept. 27, 1976, *quoted in* CHURCH COMMITTEE REPORT, BOOK 2, *supra* note 18, at 98.

125 *See* 50 U.S.C. § 403(d)(3).

126 Exec. Order, *supra* note 2, § 1.8(e).

127 *Id.* § 3.4(h).

128 *Id.*

129 *Id.* § 2.9(b).

ecutive Order 12,333 gives the CIA. Executive Order 12,333 defines "special activities" as those "*conducted* in support of national foreign policy objectives *abroad*."[130] In contrast, the Carter Order contained a restrictive provision by defining special activities as those "*conducted abroad* in support of national foreign policy objectives."[131] While the Carter definition explicitly restricted CIA activities to overseas undertakings, the Reagan Order could permit CIA activities not only abroad, but also in the United States, "in support of" overseas foreign policy objectives. Had President Reagan sought to prohibit internal security functions, he could have retained the less ambignous langnage of the Carter order.

C. Police and Law Enforcement Functions

In addition to ignoring the National Security Act's prohibition of domestic CIA activities, the Order authorizes the CIA to assume police and law enforcement functions in violation of the NSA's restrictions.[132] The Order allows the CIA to engage in three types of police activities: protection of domestic CIA facilities, assistance to local law enforcement organizations, and retention of incidentally obtained information acquired without a warrant founded on probable cause.[133]

First, the Order directs the CIA to "[p]rotect the security of its installations, activities, information, property, and employees by appropriate means."[134] The CIA should perhaps police its own facilities because of the necessity for secrecy surrounding CIA

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130 *Id.* § 3.4(h) (emphasis added).

131 Carter Order, *supra* note 68, § 4-212 (emphasis added).

132 *See* 50 U.S.C. § 403(d)(3) ("the Agency shall have no police . . . [or] law-enforcement powers").

133 *See infra* notes 134-51 and accompanying text.

134 Exec. Order, *supra* note 2, § 1.8(h). The Order also authorizes the Agency to operate against American citizens to "protect foreign intelligence or counterintelligence sources or methods from unauthorized disclosure." *Id.* § 2.3(e). This provision of the Executive Order resembles a provision in the National Security Act. *See* 50 U.S.C. § 403(d)(3); *see also supra* notes 25-30. The Church Committee found that the Agency had abused this provision:

> The CIA has construed the sources and methods language broadly to authorize investigation of domestic groups whose activities, including demonstrations, have potential, however remote, for creating threats to CIA installations, recruiters or contractors. In the course of carrying out these investigations the Agency has collected general information about the leadership, funding, activities, and policies of targeted groups.

CHURCH COMMITTEE REPORT, BOOK 1, *supra* note 18, at 138. Section 2.3(e) of the Executive Order specifies that the CIA may only collect information within the United States concerning "present or former employees, present or former intelligence agency contractors or their present or former employees, or applicants for any such employment or contracting. . . ." Exec. Order, *supra* note 2, § 2.3(e). However, nothing in the Order precludes a broad construction of this provision to commission CIA abuses overseas.

installations. This rationale, however, gave rise to the CIA's most egregious infiltration and surveillance of American political associations. In 1967 the CIA's Office of Security began Project MERRIMACK. CIA agents infiltrated activist organizations including the Women's Strike for Peace, the Washington Peace Center, and the Student Non-Violent Coordinating Committee to provide "timely advance notice of impending demonstrations in the Washington, D.C., area in order to protect the facilities, employees and operation of the Agency."[135] The Church Committee found that "the program expanded into a general collection effort whose results were made available to other components in the CIA, and . . . the FBI."[136]

Project MERRIMACK illustrates precisely the harm that Congress sought to prevent by explicitly prohibiting CIA police or law enforcement functions within the United States.[137] At the 1948 congressional hearings on the proposed National Security Act, administration witnesses had assured Congress that the CIA would conduct only limited operations within the United States.[138] Congress denied the CIA any authority to operate within this country because it feared the possible effect of turning loose the Agency's powerful investigative ability on United States citizens.[139] The Church Committee agreed: "Given the prohibition against internal security functions, it is unlikely that the provision [the NSA directive to protect sources and methods] was meant to include investigations of private American nationals who had no contact with the CIA, on the grounds that eventually their activities might threaten the Agency."[140] Hence, the Church Committee recognized that a broad grant of power to the CIA to protect its own installations, similar to the Reagan Order, could violate the NSA.[141]

Second, the Order authorizes the Agency to provide "[s]pecialized equipment, technical knowledge, or assistance of expert personnel" to support local law enforcement agencies.[142] This

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135 ROCKEFELLER COMMISSION REPORT, *supra* note 3, at 152. The project was rapidly expanded to additional groups to supply information about membership, finances, and meetings. CHURCH COMMITTEE REPORT, BOOK 3, *supra* note 18, at 723-26.

136 CHURCH COMMITTEE REPORT, BOOK 3, *supra* note 18, at 725.

137 *See* 50 U.S.C. § 403(d)(3).

138 *See supra* note 46 and accompanying text.

139 *See supra* notes 51-53 and accompanying text.

140 CHURCH COMMITTEE REPORT, BOOK 1, *supra* note 18, at 139.

141 President Carter's Order more effectively harmonized the need for security with the National Security Act's restrictions by only permitting the collection of "information concerning persons or activities that pose a clear threat to any facility or personnel of an agency within the Intelligence Community." Carter Order, *supra* note 68, § 2-208(k). Carter's Order restricted retention of the collected data only to "the agency threatened and, if appropriate, . . . the United States Secret Service and the FBI." *Id.*

142 Exec. Order, *supra* note 2, § 2.6(c).

provision violates the National Security Act's express prohibition of law enforcement activities by the CIA.[143] In addition to these specific provisions, the Order permits the Agency to "[r]ender any other assistance . . . *not precluded* by applicable law."[144] While the Carter Order only permitted the CIA to engage in those law enforcement activities "*expressly authorized* by law,"[145] the Reagan Order presumes such authority exists. This presumption is patently counter to the NSA. It is anomalous to require additional legislation to preclude what Congress has already prohibited. The NSA expressly prohibits *any* law enforcement activity.

Third, the Order permits the CIA to retain and disseminate "information acquired by overhead reconnaissance not directed at specific United States persons"[146] and "incidentally obtained information that may indicate involvement in [illegal] activities."[147] Although efficiency may suggest that the CIA should disseminate to other law enforcement bodies important information once "incidentally obtained," collecting intelligence regarding violations of the law constitutes a law enforcement function. The CIA's dissemination of "incidentally obtained" information thus violates the prohibition of the National Security Act.

Moreover, the CIA need not determine the legality of retaining and disseminating information. The Order allows the recipient to determine whether it may retain and use the information.[148] This provision potentially violates the Constitution. The fourth amendment requires police and other investigatory agencies to obtain warrants prior to searches and seizures.[149] The CIA, however, does not need a warrant under the Order. If a law enforcement agency could not demonstrate probable cause to justify a warrant, the agency could conceivably ask the CIA to declare the subject an "agent of a foreign power," commence surveillance, and disseminate the infor-

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143 *See* 50 U.S.C. § 403(d)(3).

144 Exec. Order, *supra* note 2, § 2.6(d) (emphasis added).

145 Carter Order, *supra* note 68, § 2-308 (emphasis added).

146 Exec. Order, *supra* note 2, § 2.3(h).

147 *Id.* § 2.3(i).

148 *Id.* § 2.3(j) ("agencies . . . may disseminate information . . . for purposes of allowing the recipient agency to determine whether the information is relevant to its responsibilities and can be retained by it").

149 The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall be issued, but upon probable cause, supported by oath or affirmation, and particularly describing tbe place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV. *See* United States v. Ventresca, 380 U.S. 102, 106-07 (1965) (exceptions to warrant requirement are very limited); Jobnson v. United States, 333 U.S. 10, 14-15 (1948) (same).

mation to the local entity—in "conscious contravention"[150] of the warrant requirement.[151]

CONCLUSION

Executive Order 12,333 illegally defines the contours of intelligence community activity. The Order exceeds the limits of the National Security Act by sanctioning intrusive domestic activity and law enforcement functions. By its failure to adequately circumscribe domestic operations, the Order implicitly licenses the CIA to perform internal security functions.[152] Moreover, by explicitly authorizing CIA cooperation with law enforcement agencies within the United States, the Order eviscerates the Act's prohibition of police or law enforcement activity.[153] Finally, the Order repudiates a plethora of executive and judicial actions that more properly demarcated the CIA's authority.

The 1947 National Security Act delineates the scope of the intelligence activities approved by Congress. The Act specifically prohibits domestic activity.[154] In addition, the legislative history of the Act is replete with congressional admonitions against a domestic secret police.[155] Courts have confirmed this prohibition.[156] The NSA does not allow the activities authorized by Executive Order 12,333.

The President's conclusion that intelligence efficacy outweighs statutory mandates is untenable. Invocation of the national security does not justify talismanic immunity for presidential action.[157] Fur-

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150 CHURCH COMMITTEE REPORT, BOOK 2, *supra* note 18, at 142.

151 The Church Committee offered another example:

> It is also possible to institute electronic surveillance of a foreigner for the primary purpose of intercepting the communications of a particular American citizen with that target; since the "foreign" surveillance in this situation can accomplish indirectly what a surveillance of the American could accomplish directly, the former may be used to circumvent the generally more stringent requirements for surveillances of Americans.

CHURCH COMMITTEE REPORT, BOOK 3, *supra* note 18, at 312-13. In addition, the Committee noted that excessive dissemination may contribute to the inefficiency of the intelligence process: "Dissemination has not been confined to what is appropriate for law enforcement or other proper government purposes. Rather, any information which could have been conceived to be useful was passed on, and doubts were generally resolved in favor of dissemination." *Id.* BOOK 2, at 253.

152 *See supra* notes 95-131 and accompanying text.

153 *See supra* notes 132-51 and accompanying text.

154 *See supra* notes 28-58 and accompanying text.

155 *See supra* notes 42-50 and accompanying text.

156 *See supra* notes 55-58 and accompanying text.

157 [T]his concept of "national defense" cannot be deemed an end in itself, justifying any . . . power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which [make] the defense of the Nation worthwhile.

thermore, instituting amorphous standards to unencumber the Agency unreasonably exonerates the CIA's past abuse. Fastidious compliance with the law will more effectively restore proper respect for the CIA than will institution of the quixotic standards embodied in the Order. The integrity of the intelligence process is at least as important as the Agency's dubious interest in routine intrusion into the lives of private citizens. The President should rescind Executive Order 12,333.

Sherri J. Conrad

United States v. Robel, 389 U.S. 258, 264 (1967).