

This document is made available through the declassification efforts
and research of John Greenewald, Jr., creator of:

The Black Vault



The Black Vault is the largest online Freedom of Information Act (FOIA) document clearinghouse in the world. The research efforts here are responsible for the declassification of hundreds of thousands of pages released by the U.S. Government & Military.

Discover the Truth at: <http://www.theblackvault.com>

A source by any other name is still a source

THE SUPREME COURT AND THE "INTELLIGENCE SOURCE"

Louis J. Dube and Launie M. Ziebell

On 16 April 1985, The United States Supreme Court handed down its decision in *Central Intelligence Agency vs. Sims*, a decision of extraordinary importance for the Agency. *Sims* involved a Freedom of Information Act (FOIA) request for the names of principal researchers and institutions used by the CIA in connection with MKULTRA, a project concerning research into human behavior modification between 1953 and 1966. CIA refused to release the names, claiming that the individuals and institutions were "intelligence sources" and, thus, privileged from disclosure under the DCI's authority to protect intelligence sources from unauthorized disclosure.

All nine Justices of the Supreme Court agreed that CIA could legally refuse to release the identities of the researchers and institutions. A majority of seven Justices agreed on a definition of an intelligence source as one that "provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations." In explaining the majority's decision, Chief Justice Burger stated, "Congress simply and pointedly protected all sources of intelligence the Agency needs to perform its statutory duties with respect to foreign intelligence and further that without such protection the Agency would be virtually impotent."

The Supreme Court held that the DCI, as the official responsible for the conduct of foreign intelligence activities, must have broad authority to protect all intelligence sources from the risk of compelled disclosure. The Court explicitly recognized the vital importance of the Agency's mission to the security of our country and the devastating impact upon that mission which court-ordered disclosures of sources would have. The Court concluded that the judiciary, lacking expertise in intelligence collection, must give great deference to the DCI's judgment that disclosure of a particular source could harm the Agency's mission.

The *Sims* opinion provides the strongest affirmation of the DCI's authority to protect intelligence sources against unauthorized disclosure. The implications of the *Sims* opinion go beyond the FOIA issue involved. The Court's opinion should apply in any instance where a question is raised over the need to maintain secrecy in the conduct of intelligence operations, especially where the protection of intelligence sources is involved.

The Supreme Court positively addressed the concerns of exposure that agents and prospective agents have expressed over the years since the passage of the FOIA. Under *Sims*, the CIA has the legal ability to meet the full expectations of those who confide in the Agency.

. . .

Source

CENTRAL INTELLIGENCE AGENCY et.al. v. SIMS et. al.

No. 83-1075. Argued 4 December 1984 --Decided 16 April 1985

Until the amendment to the Freedom of Information Act (FOIA) in 1974, the secrecy of CIA was seldom challenged, much less threatened, in court. The Agency, for that matter, was rarely forced to establish the legal validity of any of its operating precepts. With the advent of the amendment, individual citizens could challenge the Agency's justification for its secrecy.

In several hundred law suits in the decade following the enactment of the 1974 FOIA amendment, CIA was typically required to justify withholding records concerning secret intelligence activities. The test for CIA was usually to show, in an unclassified forum, how the withheld information, if disclosed, could expose an intelligence source. In *Sims v. CIA* the issues developed differently. The scope of issues raised in *Sims v. CIA* was not limited to the standard question: *who* is the intelligence source? It focused ultimately on the more basic question: *what* is an intelligence source?

For about three decades, the Agency—the Office of General Counsel in particular—had only occasionally been called upon to produce a legal definition of “intelligence source.” The definitions which were drafted varied and generally reflected the factual setting in which they were to be used. Indeed, there had never been a need to devise a definition which would encompass every conceivable “intelligence source” and circumstance.

Any uncertainty about the definition for “intelligence source” was finally settled in the *Sims* case by the Supreme Court. The decision was a legal triumph of major proportions for the CIA and has a profound significance for the legal footings of CIA's foreign intelligence activities.

With the publication of the *Sims* decision, the media carried some predictable emotional reactions. The American Civil Liberties Union staff attorney, who, at a minimum, had provided moral support to *Sims* and company, said: “It's a disaster! This [ruling] gives the Agency complete authority to define what it wants to keep secret.” * One of the attorneys for *Sims* said: “This comes close to being a complete exemption of the CIA from the Freedom of Information Act.” **

A senior operations officer, with several decades of experience in recruiting and handling agents, and enough experience with the FOIA to have a better than average awareness of the significance of the *Sims* case, went out of his way to compliment officers who he knew had been involved in the case. He added, as a closing observation, that he had been on the verge of retiring because he realized that the initial judicial rulings in the case, had they survived, would make it impossible to honestly assure any agent of his confidentiality and thus of his safety. It would have been a betrayal of the agents he had recruited and managed, and a breach of his personal integrity. The officer felt personally vindicated by the Supreme Court decision in *Sims* and comfortable with the prospect of continuing his professional career.

* *Boston Globe*, 18 April 1985, and *Philadelphia Inquirer*, 17 April 1985.

** *Los Angeles Times*, 17 April 1985.

Source

Despite the emotional media coverage, the decision was received with unaffected calm by the typical CIA employee. There had not been much in-house uncertainty on the matter. In more than 100 FOIA law suits before the *Sims* decision, the Agency had never been seriously challenged to define and defend "intelligence source." The US Circuit Court of Appeals for the District of Columbia Circuit, in its first review of this case, said "... we have never before been asked to construe this term (intelligence source)..." Curiously, the Court ignored the fact that, although it had never been asked to "construe this term," it had implicitly and routinely accepted CIA's characterization of various entities as "intelligence sources" in many previous cases, without qualification or reservation.

From a philosophical point of view, the *Sims* case is notable. That such a favorable court opinion should have its origin in such a grim segment of CIA history is remarkable. The imagery created in congressional hearings, expanded dramatically by the media, might even have strained some judicial impartiality. The Circuit Court of Appeals, in *Sims II*, referred to the factual background of the case as "grisly" and characterized the Agency's unwillingness to release the names of its principal researchers as "recalcitrance."*

There is an axiom that courtroom experience teaches: bad facts make bad law! The *Sims* case proves a second axiom: there are exceptions to some axioms!

Issue

The issue in the case rose from CIA's refusal to produce a list of the principal researchers and unacknowledged institutions involved in the MKULTRA project, in response to an FOIA request in 1977. The MKULTRA project was established in 1953 to conduct research in "human behavior modification." The impetus for that research was concern inspired by "communist brain-washing" and interrogation techniques used on prisoners in the Korean conflict. Additionally, there was continued reporting of Soviet efforts to make use of such techniques in intelligence and counterintelligence operations. Initially the Agency's focus was defensive; an interest in protecting its own people. Gradually, however, the offensive possibilities became evident and were added to the research.

MKULTRA eventually consisted of 149 subprojects in which at least 80 institutions and 185 private researchers participated. Soon after the project wound down, about 20 years after its inception, the files of MKULTRA were ordered destroyed, but the effort to comply with that order was not entirely successful. In 1975, a Presidential Commission on CIA Activities Within the United States, sometimes referred to as the Rockefeller Commission, published a report to the President. The report included a short discussion of the CIA experimentation with behaviour-influencing drugs. That report inspired FOIA requests to the CIA and congressional hearings. In responding to the FOIA request and congressional queries, a painstaking search of archival records

* The *Sims* case was heard twice in the District Court and twice in the Circuit Court of Appeals. The courts' proceedings, including their opinions, in their first hearings are identified as *Sims I* and, their second, as *Sims II*. Throughout appellate proceedings the title changes, i.e., *Sims v. CIA* or *CIA v. Sims*, reflect only which party's motion is being decided.

Source

turned up a previously undiscovered collection of MKULTRA finance records. The finance records provided a broad, but non-substantive and incomplete record of MKULTRA activities. Even so it was clear that only 69 subprojects out of the total of 149 were related in some way to research on the effects of drugs and only six of the subprojects, directed by one Bureau of Narcotics and Dangerous Drugs (BNDD) officer, involved the testing of drugs on "unwitting" subjects.

The media exploitation of the disclosures was distorted. The media and congressional attention focused almost exclusively on the testing of drugs on unwitting subjects. The morality of the activity was questioned and the Agency was severely criticized.* Even the judiciary seemed to be touched by the emotion involved. In the midst of this FOIA litigation, concerned only with a legal debate over the denial of access to official records, one of the judges asked several times whether there wasn't some way to compensate the victims.

So much for "bad facts!"

On instructions from the Subcommittee on Health and Scientific Resources of the Senate Committee on Human Resources, the Agency contacted all of the research institutions and asked their permission to have their participation publicly acknowledged. Some institutions held press conferences to acknowledge their participation while others threatened to sue the Agency if their involvement were disclosed. All told, 59 institutions consented to be acknowledged. Although the media, the plaintiffs, and others failed to notice, the congressional committees, significantly, honored the Agency's request to treat the names of the individual researchers and the unacknowledged institutions as confidential.

In 1977, while dealing with the congressional inquiries, the Agency received an FOIA request for access to records on MKULTRA. The requesters were Sims and Wolfe of the Public Citizen Health Research Group. A dogged and determined litigative effort was expected and that expectation proved realistic. The FOIA request ultimately focused on the identities of the principal researchers and the unacknowledged institutions which had been successfully protected in the heat of congressional inquiries.

* MKULTRA generated some extravagant political indignation. Some of the facts became seriously distorted. In a letter to the Chairman of the Senate Select Committee on Intelligence, on 10 May 1979, Director of Central Intelligence (DCI) Turner provided an unemotional summary of his findings regarding MKULTRA, an activity terminated before his appointment to the Agency. In his letter he stated:

"... the picture that emerges overall is one in which the research conducted was performed in a responsible manner. Rather consistently it appears that subjects of research were volunteers and that the type and amount of drugs administered were not likely to have caused long-term after-effects.

"... in most cases the research conducted at private institutions would have gone forward without support from CIA funds. Typically, research programs were initiated and sponsored by the institution itself prior to supporting funds being made available from external contributors. In many cases programs involving CIA funds were funded previously, concurrently or subsequently by other contributors. In general, then, the research was conceived, planned and carried out in accordance with institutional protocol and procedures, without direction or control by CIA. In those cases in which the knowledge to be acquired was defined by CIA, the methods employed and procedures followed nonetheless remained under the control of the institution or individual researcher. Our review discloses no case in which the research conducted stands out as a departure from professional and ethical standards of the time. Results were available generally to those interested with concealment only of the fact of CIA interest and support."

Source

The Agency decided it was necessary to continue to protect the identities from public disclosure. The test in the litigation, which commenced in November 1978, would be whether the names of the researchers and the unacknowledged institutions could be protected under the terms of the FOIA exemptions. Several FOIA exemptions seemed to provide lawful justification for withholding the identities from public disclosure.

The first considered was the FOIA exemption (b)(1). It protects information which is currently and properly classified in the interest of national security or foreign policy. A decision was made not to assert exemption (b)(1) to protect the identities.

Asserting classification might have been viable but its rationale was troubled. The principal, classifiable secret of MKULTRA was the nature of the scientific research in which CIA was interested. Most of the details of that work, however, had already been declassified and made public in connection with CIA congressional testimony and professional publication by researchers. Moreover, the Agency was particularly sensitive to the provision of the new Executive Order 12065 which specifically prohibited the use of classification to conceal evidence of wrongdoing. Congressmen and the media had angrily criticized CIA's involvement in MKULTRA as amoral, if not immoral. In the minds of many, MKULTRA was synonymous with unlawful drug experiments—scientific tinkering of Frankensteinian proportions. The outcome of a legal debate on the propriety of asserting classification was uncertain at best. It seemed entirely possible that the legal issue could become obscured or even lost in the heat of the evident emotion. In short, asserting classification posed many uncertainties. It became more plainly evident later that asserting classification might have been a very damaging choice.

The FOIA exemption (b)(3) was the next logical possibility. This exemption applies when another statute requires that a specific kind of record be protected from public disclosure. The National Security Act of 1947 provides in part:

That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

That statute had repeatedly been successfully used by the Agency as a (b)(3) statute in FOIA litigation to protect a broad variety of intelligence sources.

In an affidavit filed with the District Court, in *Sims I*, DCI Turner explained that "the term" 'intelligence sources' is a phrase of art, encompassing a variety of entities. By that I do not mean that it is so vague or imprecise as to shroud whatever the CIA may wish to conceal. But certainly, it includes more than simply those individuals directly involved in collecting and reporting foreign 'intelligence information.' " Turner went on to point out that "CIA must engage in a variety of related activities." He illustrated the point by describing a variety of intelligence roles, such as couriers, safehouse keepers, unwitting sources, and others. He explained that the diversity of intelligence activities, in effect, determined the span of intelligence roles that the term "intelligence sources" must encompass.

Source

To illustrate the point the DCI offered a definition previously drafted by the Special Coordination Committee of the National Security Council. It had been approved by the President and provided to the Senate Select Committee on Intelligence for inclusion in a draft Senate Bill S.2525 of the 95th Congress as part of a proposed Intelligence Charter for the CIA. That definition read:

The term "intelligence source" means a person, organization, foreign government, material or technical or other means from which foreign intelligence, counterintelligence or counter terrorism intelligence is being, has been or may be derived.

Turner further explained that "[t]he ability and willingness of the CIA to protect the identity of intelligence sources is the linchpin that enables the Agency to collect human source intelligence. . . . Source protection is an absolute." In brief, it was essential that the Agency have the authority to protect all of its intelligence sources and that the definition of "intelligence source" had to be broad enough so as not to limit CIA's ability to accomplish its broad and changeable objectives.

FOIA exemption (b)(6) was also a logical choice. This exemption is used to protect "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." * Given the taint the media had placed upon MKULTRA, there was little reason to doubt that individual researchers who might be identified with the project would personally experience some unjustified, negative consequences. On the other hand, a possible disclosure of the identities did not seem to offer the probability of any real benefits to the general public.

Taking these considerations into account, the Agency decided to assert both exemptions (b)(3) and (b)(6) to justify withholding the identities of the principal researchers and the unacknowledged institutions.

Definitions

In the District Court, CIA offered a definition of an intelligence source, as follows;

[a]ny individual, entity or medium that is engaged to provide, or in fact provides, the CIA with substantive information having a rational relation to the nation's external national security.

This carefully crafted definition reflected a prime concern with anticipated counter-arguments and, secondarily, the need to express a broad concept in simple terms. CIA also pointed out, with regard to privacy, that both the individual researchers and the institutions were likely to experience damaging consequences if publicly identified with MKULTRA. On the other hand, it did not seem likely that there would be an over-balancing benefit to the general public if the information were disclosed.

* Section 102(d)(3) of the National Security Act of 1947, codified at 50 U.S.C. 403(d)(3).

Source

The District Court found that neither the researchers nor the institutions were "intelligence sources." The Court also determined that the privacy exemption did not apply. The Court, however, did invite CIA to reconsider the possibility of asserting national security classification, the FOIA exemption (b)(1). The Court further instructed both parties to submit briefs on the possibility that a contract theory concerning CIA's assurances of confidentiality might apply as a constitutional protection against disclosure of the identities; a novel notion in the context of FOIA litigation.

Both parties appealed the District Court's decision to the Circuit Court of Appeals.

On appeal the Circuit Court of Appeals determined that the District Court had ruled properly in denying the application of the privacy exemption (b)(6).

The Circuit Court further ruled that the District Court had not applied the proper legal standard regarding "intelligence sources." The Circuit Court then provided a new definition of "intelligence source", as follows;

an intelligence source is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

The Circuit Court ordered the case remanded to the District Court for further proceedings. The Circuit Court noted that the District Judge had given the Agency additional time to reconsider its decision not to rely on the FOIA (b)(1) exemption and that the Agency had chosen not to pursue that suggestion. The inference that the Agency should be more attentive to the District Court's suggestion was not subtle.

Although confidentiality was a new element in the definition of "intelligence source," the role of confidentiality had not been ignored in Agency affidavits and briefs. Directorate of Science and Technology affidavits filed in the case had explained that confidentiality traditionally surrounded CIA's relationship with its intelligence sources, including those who were scientists doing laboratory research, and the reasons why it was essential.

At this stage the Agency had several other choices ** but decided to return to the District Court, as instructed by the Circuit Court, and try to demonstrate how the MKULTRA researchers fell within the boundaries of the Circuit Court definition. The Agency reasoned that there was no disagreement on whether the researchers met the first standard of the definition. They had provided information the Agency needed to fulfill its mission. Indeed, both the District and the Circuit Courts had agreed on that point. As to the second standard, the Agency felt comfortable, if not confident, that it could demonstrate the necessity for guaranteed confidentiality.

*We forgo further discussion of the (b)(6) exemption and privacy since it was no longer an issue when the case reached the Supreme Court nor was it incorporated in the Court's opinion.

** Decisions were made and actions taken usually only after agonizing debate over the alternatives and their consequences.

Source

The District Court demonstrated that reasonable minds could differ. That Court ruled that the confidentiality standard would be met if the Agency could provide proof that the researchers (1) requested and (2) were given assurances of confidentiality by the Agency. In brief, the District Court had concluded that the preference of the individual source would determine whether confidentiality was necessary. The court reasoned that if a source insisted on assurances of confidentiality, then confidentiality was clearly necessary.

With due deference, the Agency expressed its contrary conviction that the Circuit Court could not have intended to leave it entirely to the personal preference of the individual as to whether or not he would insist on confidentiality and, consequently, whether he was legally an intelligence source. The Agency made its position plain; only the DCI could make that determination. The Agency argued that a determination to expose a government intelligence operation could not be left to the personal preference of an individual participant, ignoring all the damaging consequences possible to other participants, as well as to the government's interests.

To meet the demands of the District Court to find proof of the circumstances defined by the Court, full-scale name trace searches were done on all of the principal researchers. Until this point only the MKULTRA finance records had been at issue and consequently no attempt had been made to consider everything that might be recorded on all of the researchers. Upon completing the traces it became clear that about half of the researchers had also been active sources of disseminated intelligence reports or had otherwise been operationally active for various components of the Agency, particularly the Directorate of Operations, in addition to their MKULTRA work.

Detailed statements and voluminous collections of retrieved records were presented to the Court. The District Judge engaged the Directorate of Operations witness in four vigorous, *in camera*, *ex parte** hearings concerning the evidence found in the retrieved records and the related operating policies of the Agency. The Judge personally inspected the many documents retrieved in the name trace search.

In affidavits and during the relatively informal hearings with the District Court, Agency representatives tried to illustrate how the demand for documentary proof of negotiations regarding confidentiality was neither reasonable nor realistic. The records involved were, in many cases, 20 to 30 years old. Intelligence activities conducted in the early days of the project were frequently not recorded in great detail. Moreover, people working in or with the Agency were all very conscious of the importance of secrecy or confidentiality. Like fidelity in a happy marriage, it didn't have to be written down. In many cases it wasn't! Indeed, many individuals collaborating with the Agency resisted, even objected to, having a record made of the fact.

Further Agency representations were made as to why a source's expectation of confidentiality could not be a matter of prime concern, and certainly not the

* An *in camera* hearing is a non-public hearing. An *ex parte* hearing is one in which one of the contending parties is not present, in this case the plaintiffs (requesters).

Source

sole determinant. There were too many kinds of intelligence sources, animate and inanimate, to which such a consideration could not be uniformly applied. A concealed microphone obviously was incapable of worrying about confidentiality, much less negotiating over its necessity; nor could an individual, whose remarks were secretly acquired by the microphone, be consulted. Other examples were described: the unwitting source, one who doesn't realize that what he knows and talks about is being relayed to the CIA; the source who believes he is reporting to CIA's opponents; or the source who reports because he suspects he will be exposed as an intelligence source if he doesn't, to mention but a few.

The District Court, on several occasions, reminded the Agency representatives that the case only involved American scientists conducting scientific research in laboratories on American university campuses. The Court seemingly felt that the future application of the precedent of this case would be limited to the same or similar sets of circumstances or, conversely, that the definition would not be applied to other kinds of more traditional intelligence sources. Each time this line of reasoning was suggested, the Agency representatives pointed out that no such limitations or expectations were included in the definition itself. Further, that the Circuit Court and the District Court had both treated the definition as generic; one that could and would be applied to any intelligence sources, not just those whose circumstances resembled those of the researchers in MKULTRA. This rather basic difference was never conclusively resolved in the District Court.

The Court was eventually persuaded that disclosure of the MKULTRA activities of a researcher, who was also engaged in additional, more traditional, intelligence activities, would be tantamount to disclosing participation in the latter activity as well. The Court accordingly agreed that the latter activity met the standards of the Circuit Court definition and hence the researchers' relationship with the Agency, including their MKULTRA role, was to be protected. Therefore, the Court held that the identities of such unacknowledged researchers and institutions should be protected against disclosure and not released.

The District Court granted partial summary judgment to the CIA, allowing it to withhold the identities of the principal researchers and their related, unacknowledged institutions but only if documentary proof of assurances of confidentiality was available, or if individuals had been engaged in the more traditional capacity of collection of information in addition to their MKULTRA activities. For those on which no documentary proof was found, the identities were ordered disclosed. Sims and company appealed that portion of the order allowing identities to be withheld. The Agency appealed that portion of the order requiring the disclosure of certain identities.

The case was now back in the D.C. Circuit Court of Appeals.

Atmosphere

An appearance in the Circuit Court of Appeals is not a convivial affair. After all, one or both of the contending parties are there to question the wisdom of the judiciary in the lower court. The proceedings are highly formal. The attorneys do not control the process nearly to the extent they do in the District Court.

Source

Moreover, the Circuit Court sits in a panel of three judges, each of whom is free and often inclined to put enormous pressure on the participants.

In this instance the atmosphere seemed more inhospitable than typical. As the proceedings commenced it became obvious that the Circuit Court was not pleased with the outcome of the proceedings in the District Court. The District Court had not performed as expected and the Agency's actions apparently struck the Circuit Court as defiant.

Simply put, the District Court had decided that if the Agency had documentary evidence that the individual had demanded and received assurances of confidentiality, CIA would thus have proof that confidentiality was necessary, and the individual thus qualified as an intelligence source. If on the other hand, the information had been obtained without the assurance of confidentiality, then the assurance was not necessary and the individual did not qualify as an intelligence source.

CIA, even while attempting to satisfy the District Court's demand for proof, kept insisting that the necessity for confidentiality was a determination to be made by the DCI, not by the individual source; and that such a judgment had to be based on Agency operational and policy considerations.

The Circuit Court responded with a longer version of "you're both wrong!"

The Circuit Court opinion commenced assuring the reader that "Almost all of the District Court's various rulings were judicious and proper." All, that is, except for the ruling allowing the Agency to withhold certain identities. The Circuit Court explained that "One aspect of its [the District Court's] analysis, however, was flawed; the court misconceived the level of generality at which the definition of 'intelligence source' should apply." The Circuit Court patiently pointed out that in its opinion in *Sims I*, it had shown that the Court must first define the class or kind of information involved. Then, the trial court, "can and should consider whether the agency could reasonably expect to obtain information of that type without guaranteeing its providers confidentiality."

By way of further explanation the Circuit Court stated that "Much of the information obtained by the CIA obviously could only be gathered through some kind of covert activity. There is no question that the agency in general could not reasonably expect to obtain data of that type without guaranteeing secrecy to those who provide it." It began to seem possible that the Circuit Court did not believe that the researchers in MKULTRA met their criteria for sourcehood. It became even more likely when the Court continued: "It is only in cases like the present, where a great deal of information is not self-evidently sensitive, where the reasons why its sources would desire confidentiality principally from fear of a public outcry resulting from revelation of the details of its past conduct, that the CIA will be obliged to adduce extrinsic evidence in order to demonstrate its entitlement to the statutory exemption."

Here the Circuit Court seemed again to be suggesting, as the District Court had earlier, that the definition would apply only in limited circumstances. Again the Agency pointed out that the plain language of the definition was not limited.

Source

The Court continued: "Second, there is the fact that, if revelation of the identity of a source of information would in any way impair national security, the agency can easily justify withholding his name by invoking exemption 1 of the FOIA." Exemption 1 being for national security classification.

The Circuit Court criticized the District Court for accepting the rationale that the individual's demand for confidentiality was an absolute qualification for intelligence sources. The Circuit Court felt that the mere demand for such confidentiality could not automatically qualify the individual as an intelligence source, even though he was otherwise qualified.

In a footnote the Circuit Court seemingly faulted the Agency by pointing out that "The CIA never complied with the District Court's repeated suggestions that, in order to obtain some evidence of the status of the individual researchers, the agency should contact them and ascertain their understanding of the terms of their past relationship with the CIA." Curiously, the Court next suggested that "A further reason for not automatically allowing the CIA to shield the identities of informants who request anonymity is the possibility of collusion between the agency and its sources." Later in its opinion the Court also suggested that "First, there is a serious potential for widespread evasion of the letter and spirit of the FOIA that would be created by the rule advocated by the dissent." * More on the dissent later.

The Circuit Court seemed willing to assume the worst of the Agency. In fact, it was becoming difficult to ignore the suspicion that the Court perceived CIA's foreign intelligence function as an effort undertaken solely to acquire information it could then withhold from FOIA requesters.

Dissent

For the Circuit Court *Sims II* hearing, the three-judge panel consisted of judges who had not previously been involved in the case. The new panel was not unanimous in its decision. A two-judge majority wrote the opinion in the case. The third judge concurred in part and dissented in part. That dissenting opinion found that many of the arguments the Agency had previously presented unsuccessfully were, in fact, persuasive.

For example, the dissenting opinion stated: "But the majority is incorrect, I believe, in holding that an informant-solicited promise of secrecy does not automatically qualify the informant as an intelligence source. This seems to me to follow both from precedent and common sense." The dissenting opinion cited "This court's opinion in *Holy Spirit Ass'n v CIA*, 636 F2d 838 (D.C.Cir. 1980) applied the *Sims I* definition of 'intelligence source' . . . and focused on the type of information obtained in explaining its conclusion that certain of the documents at issue were properly withheld because their release would disclose intelligence sources . . ." The dissent reminded the Court that "It relied solely on the existence of those [confidentiality] promises." That "Only by straining and by supplying missing language can the *Holy Spirit* opinion be read as treating a promise of confidentiality as mere evidence."

* The dissent was a separate opinion by one member of the three-judge panel. The rule advocated by the dissent was that a demand for confidentiality necessarily qualified an informant as an intelligence source.

Source

The dissent continued: "Without it [the promise-of-confidentiality test], individuals who give information to the CIA cannot rely on the promise of confidentiality if the information turns out to be the sort the CIA can get elsewhere without promising secrecy, something the sources of information will often not be in a position to know. There is, moreover, no guarantee that a judge, examining the situation years later and deciding on the basis of a restricted record, will come to an accurate conclusion. . . . The CIA and those who cooperate with it need and are entitled to firm rules that can be known in advance rather than vague standards whose application to particular circumstances will always be subject to judicial second-guessing." Referring to the ordered disclosure of certain of the names of researchers, the dissent said "This is no honorable way for the government of the United States to behave and the dishonor is in no way lessened because it is mandated by a court of the United States."

In dealing with the Circuit Court's use of the "practical necessity of secrecy" test, the dissent said: "I know of no reason to think that section 403(d)(3) was meant to protect sources of information only if secrecy was needed in order to obtain the information."

The dissent concluded that ". . . the CIA's litigating position is hardly frivolous and disagreement with the CIA's assessments either of its intelligence needs or of its legal obligations is insufficient reason to cast doubt on the CIA's good faith belief in those assessments. In these circumstances it is inappropriate for the court to suggest that CIA's position was adopted in bad faith."

The Agency found the dissenting opinion familiar and persuasive. Unfortunately, despite its eloquence, it was a minority opinion and the District Court would have to implement the terms of the majority opinion for "expeditious reconsideration of the researchers' statuses."

Still optimistic, the Agency filed a motion for a rehearing *en banc* * with the Circuit Court. Such a rehearing of all the arguments made on the appeal would occur only if a majority of the 13-judge panel voted in favor. In fact, only three did.

The Agency was now faced with two options. We could return to the District Court and try to convince the Court that the MKULTRA researchers met the standards as now defined by the Circuit Court, or we could appeal to the Supreme Court of the United States. To return to the District Court meant tacit acceptance of the newly expatiated Circuit Court definition of "intelligence source." Moreover, the Agency would surely be foreclosed from any further debate over the validity of the definition, probably indefinitely. In the District Court, the Agency would face the near impossibility of convincing the Court that the MKULTRA researchers provided information that could only have been obtained through secrecy. On the other hand, appealing to the Supreme Court would be the last roll of the dice.

We picked the dice!

* A rehearing before all (13) judges of the D.C. Circuit Court.

Source

The Agency requested the Solicitor General of the United States to authorize a petition for *certiorari** to the Supreme Court. The span of the Agency concerns which warranted mention in the petition was considerable. The Agency's initial legal concern rose from the fact that the Circuit Court opinion ignored the plain language of the statute and the congressional intent in enacting 50 U. S.C. 403(d)(3). It thus violated two basic legal and common-sense principles in interpreting legislation. However, the prime concern of the Agency was the destructive impact the definition of "intelligence source" would have on the Agency's ability to do its business and the fact that the opinion constituted an unprecedented and unacceptable judicial interference with the DCI's explicit statutory responsibility to protect intelligence sources and methods from unauthorized disclosure.

Conferences with the Department of Justice, Civil Division and the Solicitor General's office took place. The Agency was challenged to defend its proposal to petition for *certiorari* and was faced with intentionally skeptical questions. In responding to those challenges and questions, the Agency explained that the net effect of the Court's definition was to limit the DCI's choice of intelligence sources to those meeting a federal judge's approval—which could only be obtained after the fact in the event the Agency's judgment were challenged in the context of an FOIA request. In short, an informant whose intelligence report might become subject to an FOIA litigation might consequently be ordered exposed by a Federal District Judge. The judge could so order if he decided that the information in that particular report did not require secrecy to obtain. The DCI could not meet his statutory responsibilities hobbled by such uncertainties. How could the DCI give a source the necessarily absolute assurances of confidentiality while knowing such assurances were actually conditional, and beyond the control of the DCI? Is it possible that the framers of the Freedom of Information Act meant to use the Act to empower any Federal District Judge with the authority to limit the DCI's choice of intelligence sources needed to meet the national security needs of the nation?

The problem took on the proportions of a nightmare with recognition of the fact that some 30 years of records had been created with no awareness of the problem which had only now been created. Justice Department logically asked: "Given the damaging conditions this opinion creates, what instructions have you sent to your field stations to remedy the situation?" Our answer was, "None! There is no lawful remedy for the situation." In fact the only practical remedy for the situation would have been to destroy the 30 years of accumulated records, which probably couldn't be accomplished without violating a criminal statute, and to operate without creating records in the future, which, for an intelligence agency, was totally untenable.

Ultimately the Solicitor General was persuaded and a petition for *certiorari* was filed with the Supreme Court. A legal brief was presented summoning up all of the most persuasive arguments and precedents available from the record of the proceedings in the lower courts. In the Supreme Court you are dependent

* A review of the lower court record by a superior court.

Source

principally upon the established record—the facts and arguments used in the lower courts.

Decision

Certiorari was granted and the oral argument took place on 4 December 1984. The Agency was represented by an Assistant Attorney General. With unusual dispatch, the Supreme Court decided the case on 16 April 1985. Even more unusual, the Court ruled, 9 to 0, in the Agency's favor! The Chief Justice delivered the opinion with two Justices presenting a separate but concurring opinion.

The following are verbatim extracts of the decision itself. The language is clear and expresses principles quite familiar to Agency employees.

The plain meaning of the statutory language, as well as the legislative history of the National Security Act, however, indicates that Congress vested in the DCI very broad authority to protect all sources of intelligence information from disclosure. The Court of Appeals' narrowing of this authority not only contravenes the express intention of Congress, but also overlooks the practical necessities of modern intelligence gathering—the very reason Congress entrusted this Agency with sweeping power to protect its intelligence sources and methods.

Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence. . . . The reasons are too obvious to call for enlarged discussion; without such protections the Agency would be virtually impotent.

The Court of Appeals narrowed the Director's authority under Sect. 102(d)(3) to withhold only those "intelligence sources" who supplied the Agency with information unattainable without guaranteeing confidentiality. That crabbed reading of the statute contravenes the express language of Sect. 102(d)(3), the statute's legislative history, and the harsh realities of the present day. . . . Under the Court's approach the Agency would be forced to disclose a source whenever a court determines, after the fact, that the Agency could have obtained the kind of information supplied without promising confidentiality. . . . To induce some sources to cooperate, the Government must tender as absolute an assurance of confidentiality as it possibly can. . . . We seriously doubt whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information. . . . There is no reason for a potential intelligence source, whose welfare and safety may be at stake, to have great confidence in the ability of judges to make those judgments correctly.

The Court of Appeals also failed to recognize that when Congress protected "intelligence sources" from disclosure, it was not simply protecting sources of secret intelligence.

Source

... Under the Court of Appeals' approach, the Agency could not withhold the identity of a source of intelligence if that information is also publicly available. This analysis ignores the realities of intelligence work, which often involves seemingly innocuous sources as well as unsuspecting individuals who provide valuable intelligence information.

... The Director, in exercising his authority under Sect. 102(d)(3), has power to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source. ... The decisions of the Director, who must of course be familiar with the "whole picture," as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.

Congress did not mandate the withholding of information that may reveal the identity of an intelligence source; it made the Director of Central Intelligence responsible only for protecting against *unauthorized* disclosures.

... The national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources. And, it is the responsibility of the DCI, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process.

The Supreme Court provided the authoritative, legal definition of an intelligence source, in familiar and unequivocal terms:

An intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations.

The broad authority of the DCI, now confirmed by the Supreme Court opinion, was made even more apparent in some of the language of the separate but concurring opinion of two of the Justices. The separate opinion criticized the majority for "playing into the hands of the Agency" and not taking into consideration the fact that the Executive Order for National Security Classification is intended to protect national security information and that Congress, in crafting the FOIA, provided the (b)(1) exemption for the protection of information related to national security.

The separate opinion stated that the Agency ought to be required to assert classification, the FOIA (b)(1) exemption, to protect intelligence sources because a national security interest is being served. This, however, ignores several practical considerations. Information which might, in combination with other information, lead to the exposure of the identity of an intelligence source might not necessarily meet the criteria for classification under a current Executive Order. The Executive Order which establishes the criteria for classification has proven to be relatively fluid and controversial—having been rewritten three times between 1972 and 1982. In brief, assurances of confidentiality based upon the frequently amended Executive Order can only be defined as tenuous. By way

Source

of contrast, section 102(d)(3) of the National Security Act remains as written in 1947.

The separate opinion does not acknowledge another consequence of its position. If an individual doesn't meet the criteria to be an "intelligence source" under 102(d)(3), that individual might also be judged to have failed to meet the criteria for classification under E.O.12356. The pertinent category of classifiable information in E.O.12356 is in Section 1.3(a)(4) which reads "intelligence activities (including special activities), or intelligence sources or methods." To meet the criteria for classification, information would have to fall within that category, i.e. be an "intelligence source." This circumstance would obviously deny the protection of classification to those individuals not meeting the criteria for an "intelligence source."

It becomes obvious then that the Circuit Court definition of intelligence source would have denied the MKULTRA researchers the protection of 102(d)(3), as well as classification under E.O.12356; notwithstanding the repeated suggestions by the lower courts that the Agency should have asserted classification.

The separate opinion proposed an alternative definition, reminiscent of that of the Circuit Court. The separate opinion suggested that . . . "the phrase 'intelligence source' refers only to sources who provide information either on an express or implied promise of confidentiality, and the exemption protects such information and material that would lead to disclosure of such information." Strangely this definition of "intelligence source" seems to protect information rather than intelligence sources, despite the language of the statute and the Executive Order. Fortunately it is not the law of the case.

Although fashioned as criticism, the separate opinion provides the most graphic description of the practical effect of the majority opinion. The following is, again verbatim, from the separate opinion.

The Court identifies two categories of information—the identity of individuals or entities, whether or not confidential, that contribute material related to Agency information-gathering, and material that might enable an observer to discover the identity of such a "source"—and rules that all such information is *per se* subject to withholding as long as it is related to the Agency's "intelligence function." The Agency need not even assert that disclosure will conceivably affect national security, much less that it reasonably could be expected to cause at least identifiable damage. It need not classify the information, much less demonstrate that it has properly been classified. Similarly, no court may review whether the source had, or would have been to have had (sic) any interest in confidentiality, or whether disclosure of the information would have any effect on national security. No court may consider whether the information is properly classified or whether it fits the categories of the executive order.

—It is difficult to conceive of anything the Central Intelligence Agency might have within its many files that might not disclose or enable an observer to discover something about where the Agency gathers information.

Source

—The result is to cast an irrebuttable presumption of secrecy over an expansive array of information in Agency files, whether or not disclosure would be detrimental to national security, and rid the Agency of the burden of making individualized showings of compliance with an executive order.

The majority opinion of the Supreme Court, in conclusion, ruled that the DCI properly invoked Section 102(d)(3) of the National Security Act of 1947 to withhold disclosure of the identities of MKULTRA researchers as "intelligence sources." The Court also ruled that the institutional affiliations were properly withheld, since that disclosure could lead to an unacceptable risk of disclosing the sources' identities. The rulings of the Circuit Court of Appeals which were adverse to the Agency were reversed.

In August 1985, in compliance with the ruling of the Supreme Court, the United States District Court for the District of Columbia issued the following:

ORDER

Pursuant to the mandates of the Supreme Court and the Court of Appeals, it is this 21st day of August, 1985, hereby

ORDERED: that judgment should be, and hereby is, entered for defendant; and it is further

ORDERED AND ADJUDGED: that this action should be, and hereby is DISMISSED.

Significance

Seven years of litigation left the Agency with a landmark decision, the significance of which goes far beyond the relatively narrow concerns of the Freedom of Information Act.

The DCI's authority to maintain the kind of secrecy which is essential to successful intelligence activities has been authoritatively affirmed by the Supreme Court. The value of that decision was enormously enhanced by the Chief Justice's comprehensive explanation of the reasoning and detailed description of the practical necessities which impelled the decision.

Historically, the United States involvement in intelligence activities has been sporadic but the 200-year record, commencing with the Revolutionary War, makes it fairly clear that secrecy concerning intelligence sources has long been recognized as a practical necessity. That common knowledge allowed the courts to recognize the need to protect intelligence sources in the several hundred FOIA law suits which preceded the *Sims* case.

Now, with the *Sims* decision there can be little question that the DCI has the responsibility and, necessarily, the authority to protect any and all sources of information and related services which the Agency needs to fulfill its mission, against unauthorized disclosure. Further, that any information which tends to show an observer the identity of an intelligence source is similarly protectable, even when the information standing alone may be quite innocuous and innocent of meaning. It seems equally obvious that the same kind of privileged status

Source

surrounds information concerning intelligence methods used by the Agency in the conduct of its intelligence activities, including innocuous or innocent information which acquires a protectable status when seen in the context of Agency intelligence activities.

Even more importantly, the DCI's choice of foreign intelligence sources, needed to meet the national security needs, can not be arbitrarily restricted by the unintended application of an unrelated statute, e.g. the Freedom of Information Act.

This Supreme Court opinion is destined to have an impact. The publication of such a perceptive commentary on the very basic principles of such an arcane, though ancient, profession will have a cumulative benefit for all involved in US intelligence activities. It provides the assurance that intelligence activities are neither a fad nor an art form understood only by its practitioners. It demonstrates the imperative of secrecy for all who are involved in such activities; indeed, even for those who only become witting by reading the product of such activities. Case officers can speak with confidence and credibility when assuring their intelligence sources of the confidentiality of their relationship. The beneficial effect will be gradual and cumulative, but inevitable.

The definition of "intelligence source" stands without qualifications or exceptions, limitations or conditions precedent. It is as positive and flexible as the Agency has to be to meet its ever changing intelligence responsibilities.