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Espionage: Anything Goes?

I. INTRODUCTION

The word "spy" immediately evokes an image of a James Bond 007 type of character. The picture is not complete, however, without the addition of some secret mission in a faraway country. The country could be any one; but, if Mr. Bond is involved, it is likely to be China or the Soviet Union since communism is most often equated with the "bad guys." Suppose while Mr. Bond is on a mission in Moscow he is seized by the KGB. They accuse him of spying and throw him in a Soviet jail pending prosecution. There is a good chance the British government will be minus one spy. Or will they?

Would the picture be any different if Bond was working for the United States government? And, what if Bond was not actually a spy, but was a foreign news correspondent, instead, who was in the unfortunate predicament of having KGB secret documents planted on him? Now, switch things around a bit. Suppose the KGB has planted Soviet Intelligence Officer Mr. James Bondinov in the Soviet consulate in San Francisco to work as a diplomat. While carrying out his diplomatic functions, he also oversees clandestine operations for the KGB in the Silicon Valley. If Mr. Bondinov is discovered by the FBI, what will happen to him?

This comment will attempt to answer some of these questions as well as explore and unveil the underlying factors which affect the outcome of espionage cases. Unlike other crimes classified as felonies, political issues become intermingled with the legal issues when espionage is involved. Dissimilar treatment of individuals who have been accused of violating the same espionage laws in the United States leads one to question what legal standards are applied, if any, and why.

II. ESPIONAGE DEFINED

United States statutes do not define espionage or spying per se. However, sections 792 through 799 of the Espionage Act prohibit specific acts.¹ Section 792 generally provides that one shall not harbor or conceal persons known to have committed or about to commit an

1. 18 U.S.C. §§ 792-799 (1983).

offense under sections 793 or 794 of Title 18.² Offenses under section 793 include gathering, transmitting, or losing defense information that may be used to injure the United States, or used to the advantage of any foreign nation.³ Section 794 prohibits the gathering or delivering of defense information to aid foreign governments.⁴ This section imposes the strictest penalty: death or imprisonment for any term of years or life.⁵ Other acts prohibited include: section 795, the photographing and sketching of defense installations when such have been designated by the President as requiring protection against general dissemination;⁶ section 796, the use or granting use of an aircraft for the purpose of accomplishing acts made illegal by section 795;⁷ section 797, the sale or publication of photographs of said defense installations⁸ without special permission;⁹ and section 798, the disclosure of classified information.¹⁰ Finally, section 799 pertains to violations of the regulations of the National Aeronautics and Space Administration.¹¹

It would appear that an individual charged with violating any of these sections of the Espionage Act and subsequently indicted would be prosecuted. The natural alternatives would be to impose on the individual whatever sentence the Act provides, if convicted, or to release him, if found innocent. Unfortunately, the nature of espionage cases prevents such straightforward handling of an individual accused of spying. There are underlying, as well as obvious, factors which the government will necessarily consider. These factors determine whether or not the arrest of an alleged spy will be followed by prosecution, or whether a convicted spy will actually serve the time sentenced.

III. FACTORS INVOLVED

The political or diplomatic status of an accused is one of the most important factors in determining the treatment to be accorded him or her.¹² Communist countries frequently assign intelligence officers to

2. 18 U.S.C. § 792 (1983).

3. 18 U.S.C. § 793 (1983).

4. 18 U.S.C. § 794 (1983).

5. *Id.*

6. 18 U.S.C. § 795 (1983).

7. 18 U.S.C. §§ 795-796 (1983).

8. Those designated by the President as requiring protection from general dissemination.

9. 18 U.S.C. § 797 (1983).

10. 18 U.S.C. § 798 (1983).

11. 18 U.S.C. § 799 (1983).

12. See SENATE SELECT COMM. ON INTELLIGENCE, 99TH CONG., 2D SESS., REPORT ON ESPIONAGE, MEETING THE ESPIONAGE CHALLENGE: A REVIEW OF UNITED STATES COUNTER INTELLIGENCE AND SECURITY PROGRAMS (Comm. Print October 7, 1986) [hereinafter THE ESPIONAGE CHALLENGE].

the United States as diplomats, journalists, trade representatives, students, scientists, visitors, and in other capacities.¹³ The intelligence service with which the accused is connected is also an important question.

Among foreign intelligence services, those of the Soviet Union represent by far the most significant intelligence threat in terms of size, ability and intent to act against U.S. interests. In fact, the activities of the Warsaw Pact country [sic] and Cuban intelligence services are primarily significant to the degree that they support the objectives of the Soviets. The threat from intelligence activities by the People's Republic of China (PRC) is significant but of a different character. . . . The intelligence activities of North Korea, Vietnam and Nicaragua pose a lesser, but still significant, threat to U.S. foreign policy interests, although these countries have only a limited official presence in the United States.¹⁴

Within the Soviet Union, the KGB (Committee for State Security) and the GRU (Chief Directorate for Intelligence) are the two principal intelligence organizations.¹⁵ The KGB acts as a secret intelligence service maintaining internal security, collecting intelligence information, and conducting covert political influence operations.¹⁶ The GRU is the Soviet military intelligence organization and engages only in foreign intelligence activities.¹⁷ Both contribute to the hostile intelligence activities directed at the United States and its allies.¹⁸ This hostile intelligence threat "is divided roughly between the human side and the wide array of technical collection operations."¹⁹ Because the Soviet Union poses the greatest threat to U.S. interests through their intelligence operations, this article will focus primarily on those specific operations as implemented through the human dimension.

13. *Id.* at 137.

14. *Id.* at 23.

15. *Id.*

16. *Id.* Covert political influence operations are termed "active measures." See J. BARRON, *KGB TODAY: THE HIDDEN HAND* (1983).

17. *THE ESPIONAGE CHALLENGE*, at 24.

18. *Id.* "In recent years, the KGB has become a vital tool for protecting the Communist Party at home [as well as in] implementing its policies worldwide." *Id.* The Soviet Union disseminates its influence through energetic espionage and covert action operations. "Covert action efforts are coordinated with the Internal Department of the Communist Party, which has lead responsibility for worldwide Soviet 'active measures' including propaganda and political influence operations." *Id.* The GRU coordinates overhead photography, trains foreign revolutionary cadres and insurgents, and supplements the KGB with espionage and massive technical surveillance operations. *Id.*

19. *Id.* at 28.

IV. THE HUMAN DIMENSION

"The human dimension begins with the trained intelligence officer, dispatched under official or nonofficial cover to operate abroad."²⁰ These "intelligence officers recruit and handle agents who are employed by foreign governments, industries, or political organizations."²¹ Additionally, they "co-opt" other Soviet citizens for particular assignments.²² These "human intelligence operations" have been divided into four categories.²³

The first category consists of "legal" operations.²⁴ These operations are conducted by intelligence officers under official cover. A prime example is the Soviet diplomat placed in the embassy in Washington, D.C., or in the consulate in San Francisco, or perhaps in the United Nations in New York, who is also a KGB or GRU staff officer. Although the term "legal" is used here, it is not synonymous with "lawful," because these officers are participating in and inciting espionage activities.²⁵

The problem inherent in this first group of "spies" involves the immunity which these individuals generally possess. Historically, diplomatic agents have had absolute prosecutorial immunity.²⁶ The rationale behind this rule is that the diplomatic agent is not consid-

20. *Id.* at 28-29.

21. *Id.* at 29. Note the specified targeted areas: Government, politics, and technology (industry).

22. *Id.*

23. *Id.* at 29.

24. *Id.*

25. *Id.*

26. Absolute diplomatic immunity can be found embodied in the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 29, 31, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention]. Article 29 of the Vienna Convention states: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." *Id.* Article 31 of the Vienna Convention states that:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in cases of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir, or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

ered to be under the legal authority of the receiving State's criminal jurisdiction.²⁷ Because "[c]onfidentiality and secrecy [have been deemed] necessary requisites for effective diplomatic relations, [a diplomatic agent possesses] the perfect guise for espionage."²⁸ Thus, the Soviet Union is able to send over its foreign agents, cloaked with the prosecutorial immunities extended to diplomats, to engage in clandestine activities far beyond the scope of their diplomatic duties. If apprehended, they need not fear prosecution due to the protection accorded them through diplomatic immunity.²⁹ As long as the individual is successful in asserting this defense, only one action can be taken against him: He will be declared *persona non grata*³⁰ and deported to the sending State.³¹ However, if diplomatic immunity is not sustained under articles 29 and 31 of the Vienna Convention on Diplomatic Relations³² or under the Diplomatic Relations Act of 1978,³³ the accused will be tried as any other defendant.³⁴

The second category of the "human intelligence operations" is comprised of "illegals."³⁵ This particular classification of "spy" originated because, historically, many nations denied the Soviet Union diplomatic recognition during the early years of its existence. Soviet intelligence officers could therefore only enter and live in these nations illegally. "Of necessity, Soviet intelligence perfected the art of train-

Id. Thus, as far as criminal proceedings are concerned, a diplomatic agent *always* has immunity.

27. Note, *A Comparison and Analysis of Immunities Defenses Raised by Soviet Nationals Indicted Under United States Espionage Laws*, 6 BROOKLYN J. INT'L L. 259, 264-65 (1980).

28. *Id.* at 261.

29. *Id.* See also Welch, *Classified Information and the Courts*, 31 FED. B. J. 360, 361 (1972).

30. "In international law and diplomatic usage, a person not acceptable . . . to the court or government to which it is proposed to accredit him in the character of an ambassador or minister." BLACK'S LAW DICTIONARY 1030 (5th ed. 1979).

31. See generally The Vienna Convention, art. 29 (stating the procedure involved when an individual loses diplomatic status).

32. See *supra* note 26.

33. 22 U.S.C. 254(a) (1982). This United States statute presently governs diplomatic immunity in the United States. The Act repealed the Diplomatic Immunity Statute, 22 U.S.C. §§ 252-254 (1958).

34. One may also be immune from prosecution if he possesses "functional immunity." Functional immunity accorded to members of international organizations is the counterpart to full immunity accorded to diplomatic agents. If a person is performing tasks which are within his proper field of endeavor, that person is accorded immunity. See Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 WASH. & LEE L. REV. 91 (1976).

35. THE ESPIONAGE CHALLENGE, *supra* note 12, at 29.

ing men and women to assume fictitious foreign identities and to function as normal citizens in alien societies.”³⁶ Currently, “illegals” are trained intelligence officers sent abroad, usually with false identities, who maintain no overt contact with their government. Because of their completely clandestine manner of operation, the number of Soviet illegals and their activities are very difficult to ascertain.³⁷

When an “illegal” is apprehended, prosecution is unlikely. This is due to the immeasurable value of their services to our government when some sort of “deal” can be worked out. A case example is that of Colonel Rudolf Hermann.³⁸ In 1977, Colonel Hermann, a KGB illegal agent, was living in New York with his family when he was identified by the FBI. Colonel Hermann, who had been with the KGB for twenty-five years, illegally entered the United States in 1968. With his wife Inga, and sons Peter and Michael by his side, he established a home and a successful career as a freelance photographer. He did not directly collect classified information, but rather he performed support functions such as locating drop sites for other agents and spotting potential recruits. He was prepared to conduct more active collection operations in the event of the expulsion of Soviet officials in time of crisis or war. His son Peter also had plans to work as an “illegal.” Under KGB orders, his son Peter enrolled in Georgetown law school in preparation to seek United States government employment (hopefully in a sensitive position).³⁹

When the FBI approached Colonel Hermann on May 2, 1977, they gave him two choices. The first choice was the arrest and prosecution of himself, his wife Inga, and son Peter. The three would be headed for long prison terms since no immunity would be accorded them.⁴⁰ Colonel Hermann’s second choice was to become a United States controlled double agent, working in partnership with the FBI against the KGB. In turn, Colonel Hermann and his family would be relocated and supplied with new identities, as well as guaranteed security. The FBI had been aware of Colonel Hermann’s operations for several years, and had compiled documentary, photographic, and material evidence against him.⁴¹ The FBI’s apprehension of him at this particular point in time was not happenstance. It was strategically planned to coincide with a time when Hermann felt disappointed and discouraged with the KGB. As this was the case in 1977, Colonel Hermann

36. J. BARRON, *supra* note 16, at 247.

37. THE ESPIONAGE CHALLENGE, *supra* note 12, at 29.

38. *Id.* at 35. See also J. BARRON, *supra* note 16, at 247-301.

39. THE ESPIONAGE CHALLENGE, *supra* note 12, at 29.

40. See Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L. L. 323-45 (1951); Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L. L. 53-75 (1984).

41. J. BARRON, *supra* note 16, at 301. The FBI has not revealed exactly how it discovered Rudolf Hermann and his operations.

opted for freedom over loyalty to the KGB. Thus, in Colonel Hermann's case, as with any exposed "illegal," the benefits to national security as a result of his cooperation greatly outweighed implementing standard procedures of prosecution and imprisonment.

The third category designated by the Senate Committee is that of "co-optees."⁴² "Co-optees" are officials or visitors assigned to do particular tasks, such as spotting potential recruits or servicing drops. Many Soviet officials are co-opted, as are many official visitors and emigres.

Some 2,000 Soviets come to the United States each year under the auspices of the Soviet Academy of Sciences, the Ministry of Trade, the State Committee for Foreign Economic Relations, and other Soviet agencies. They collect not only overt information for nondefense industries, but also classified and proprietary data, in response to intelligence tasking [sic] on behalf of military research projects. The number of U.S. universities and institutes subject to focused Soviet efforts reportedly increased from 20 to over 60 from the late 1970's to the early 1980's.⁴³

There are no solid case examples to be found of "co-optees." These individuals are generally in the United States for only a short period of time with perhaps one specific assignment. If and when a violation of the espionage laws is discovered, the "co-optee" will most likely be back home in the Soviet Union out of United States jurisdiction.

The final category of human intelligence operations consists of those persons who have been recruited by the Soviet Union as "agents." "'Agents' are American or third country nationals recruited for current operational purposes or, in some cases, as 'sleepers' to be activated at a later date."⁴⁴ Since these agents are usually United States citizens, the standard procedure of prosecution and imposition of criminal penalties occurs more readily than with the first three mentioned categories.

One of the more recent and highly publicized cases involving such an "agent" was that of Richard Miller.⁴⁵ Miller was the first FBI agent ever charged with and convicted of espionage. He was arrested by fellow agents at his home in Northern San Diego County on October 2, 1984, and charged with seven counts of espionage for passing FBI counterintelligence guidelines to the Soviets. He was convicted on June 19, 1986 on six counts of espionage following a lengthy

42. THE ESPIONAGE CHALLENGE, *supra* note 12, at 29.

43. *Id.* at 34.

44. *Id.* at 29.

45. See Girdner, *Spy v. Spy*, 6 CAL. LAW. 26 (1986) (citing *United States v. Miller*, No. CR 84-972(A)-KN (S.D. Cal. 1986)).

trial.⁴⁶ In Miller's case, diplomatic immunity was inapplicable; thus, there were no offers of freedom in exchange for cooperation and information. Instead, Miller received two life prison terms plus another fifty years, as well as a sixty-thousand dollar fine.⁴⁷

A similar instance occurred in 1981, when two "agents" who had done much damage to the United States, and were of great benefit to the Soviet Union, were arrested. William Holden Bell was a project manager in the Advanced Systems Division Radar Systems Group at Hughes International Corporation.⁴⁸ His responsibilities included development and promotion of the radar fire control product line of vehicles.⁴⁹ Bell's arrest was a great shock to many people who "knew him as a model husband and father, a good and friendly neighbor, who looked after their children as well as his own stepson."⁵⁰

In 1977, Polish intelligence officer Marian Zacharski⁵¹ began his seduction of Bell. This particular case demonstrates the techniques used in recruiting "agents," as well as the type of person who becomes a target for the KGB. "The employment of foreign nationals in U.S. establishments . . . affords hostile security services the opportunity to conduct a variety of observations of U.S. personnel and technical penetrations of U.S. facilities."⁵² The KGB uses the foreign national's personal observations to assess possible recruitment targets among American personnel, as well as to try to identify U.S. intelligence officers. Typically, the modern day "spy" is motivated more by greed than by other things like ideological and political beliefs. Job dissatisfaction is another common motivator. Thus, in its search for targets, the KGB looks for individuals with financial difficulties, job dissatisfaction, family problems, or even alcohol and drug addictions. William H. Bell was a prime target.

At the time Bell met Zacharski, he was divorced, bankrupt, and had lost his 18-year-old son in a recent tragic accident. By 1981 Bell was supplying Zacharski with extensive intelligence, specifically,

46. Miller's first trial ended in November of 1985 with the jury deadlocked 11-1, or 10-2 in favor of conviction on the various charges. See L.A. Daily J., July 15, 1986, at 1, col. 4; Girdner, *supra* note 45.

47. See L.A. Daily J., July 15, 1986, at 1, col. 4 (citing *United States v. Miller*, No. CR 84-972(A)-KN (S.D. Cal. 1986)).

48. *United States v. Zacharski*, No. CR 81-679-KN (S.D. Cal. filed 1981); *United States v. Bell*, CR 81-679-KN (S.D. Cal. filed 1981)).

49. THE ESPIONAGE CHALLENGE, *supra* note 12, at 18; see also J. BARRON, *supra* note 16, at 160-68.

50. J. BARRON, *supra* note 16, at 167.

51. Marian Zacharski lived in William Bell's apartment complex which was located in Playa del Rey, California. When Zacharski was introduced to Bell, he told Bell that he was the West Coast manager of Polamco, a Chicago company that imported and exported industrial machinery. Although Bell at first assumed the company was American, it was in fact owned by the Polish government. J. BARRON, *supra* note 16, at 162.

52. THE ESPIONAGE CHALLENGE, *supra* note 12, at 36.

classified documents concerning defense information of prime importance.⁵³ On June 23, 1981, FBI agents were waiting at Hughes Aircraft for Bell to report to work. Bell confessed to the FBI and ultimately agreed to help gather additional information against Zacharski. "On June 28, wearing a body microphone, he recorded a clandestine conversation with his friend that further and conclusively proved their guilt."⁵⁴ For his violations of espionage law, Bell was potentially subject to a ten year prison term and a ten-thousand dollar fine.⁵⁵ Because of his cooperation with the government, he was given only an eight year sentence. Zacharski, however, violated section 794 of the Espionage Act, which provides for a sentence of death, life, or a term of years.⁵⁶ He was subsequently sentenced to life imprisonment and denied all appeals. In Zacharski's case, no deals were "worked out." The United States resisted Soviet attempts at a prisoner exchange and various other attempts to extricate Zacharski.⁵⁷

In analyzing the end result of Zacharski's case, one could draw the conclusion that strict legal principles were adhered to, since both persons were fully prosecuted and are now serving time. But, this is not necessarily so. If the damage caused by Zacharski to United States national security had been minimal, and if Soviet-U.S. relations would have suffered substantially due to his detainment, the United States probably would have conditionally released Zacharski to the Soviets. Bell's situation, on the other hand, would in all likelihood have remained the same.

A final example of a recruited "agent" is the case of James Durward Harper.⁵⁸ Harper was accused of violating section 794 by "obtaining secret national defense information and knowingly and willfully transmitting it to an officer of the Polish Intelligence Service with intent and reason to believe that the information would be

53. *Id.* at 18; see also J. BARRON, *supra* note 16, at 167. According to the CIA, the information in those documents jeopardized existing weapons of the United States and its allies:

The acquisition of this information will save the Polish and Soviet governments hundreds of millions of dollars in R & D efforts by permitting them to implement proven designs developed by the United States and by fielding operational counterpart systems in a much shorter time period. Specifications will enable them to develop defensive countermeasures systems.

J. BARRON, *supra* note 16, at 167 (quoting a CIA study which was submitted to the Senate Permanent Subcommittee on Investigations).

54. J. BARRON, *supra* note 16, at 167.

55. Nat'l L. J., Nov. 9, 1981, at 6, col. 1.

56. See *supra* note 4 and accompanying text.

57. J. BARRON, *supra* note 16, at 167.

58. *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984).

used to the injury of the United States and to the advantage of the Polish People's Republic and the Union of Soviet Socialist Republics."⁵⁹ He was also charged with unlawfully obtaining national defense information in violation of section 793(b), and unlawfully retaining national defense information in violation of section 793(e).⁶⁰ "Harper received approximately \$250,000 for documents whose loss army experts have rated as 'beyond calculation.'"⁶¹ His largest single delivery took place in 1980 when he transported some one-hundred pounds of classified reports to Warsaw. There, a team of KGB experts received them and subsequently declared them to be of extreme value.⁶²

In a pretrial order, the United States District Court for Northern California held that the death penalty provision of Title 18 section 794 was constitutional. Both parties to the case (the government and defendant Harper) appealed the order. In reversing the decision, Circuit Judge Reinhardt noted that since both the government and the defendant felt that the district court erred with respect to an important matter within the criminal trial there was a stronger than normal basis to invoke the court's discretionary authority.⁶³ The second factor the court noted was that the case involved sensitive matters of national security. "During the course of an espionage trial the government may be compelled to disclose information that jeopardizes intelligence sources or even compromises national security. The interest of the government—and of the public—in disposing of such cases without trial is particularly strong."⁶⁴

The spectre of a possible death penalty may influence a defendant to plead guilty in the hope of obtaining a lesser sentence. This would serve the government's interest in avoiding a public trial. However, this is not the purpose of the death penalty provision. The constitutionality of the statute's death penalty provision should not be upheld on these grounds.

The court further reasoned that if the case were to go to trial, the government's interest would be that of having a prompt and efficient trial, for the same national security reasons. The court then noted the adverse effect that a potential death sentence would have on the trial:

Where a potential death sentence is at stake, the trial is likely to be longer and more complex, and to involve a large number of bitterly-fought legal issues. Obtaining a conviction may be more difficult when execution is a possible end result, and the prosecution may feel compelled to release even more

59. *Id.* at 1217-18.

60. *Id.* at 1218 n.2.

61. THE ESPIONAGE CHALLENGE, *supra* note 12, at 18.

62. *Id.*

63. *United States v. Harper*, 729 F.2d at 1223-24.

64. *Id.* at 1224.

sensitive information than it might otherwise have to disclose.⁶⁵

Thus, by removing the question of execution, the government's national security interests properly played a major role in the actual prosecution of Harper.

V. PROSECUTION OF A SPY

Whether or not prosecution will actually occur when an individual has been arrested on espionage charges often depends upon which category of the "human dimension" he falls within. The category of "legals" can be immediately put aside since these persons will be afforded diplomatic immunity and are therefore protected from prosecution.⁶⁶ "Illegals," "co-optees," and "agents" are not granted such immunity. These three categories consist essentially of "spies in disguise."⁶⁷ Arguably, it is those persons acting in disguise or under false pretenses who are the "real" spies.⁶⁸ Historically and presently, international law has deliberately neglected to protect these "unprivileged belligerents" because of the danger their acts present to their opponents.⁶⁹ "The soldier in uniform or the member of the volunteer corps with his distinctive sign have a protected status upon capture, whilst other belligerents not so identified do not benefit from any comprehensive scheme of protection."⁷⁰

Historically, this "clothes philosophy" was applied to soldiers who were prisoners of war in determining whether their sentences should be life or death.⁷¹ Although the Hague Regulations⁷² ensure that a spy will be entitled to a trial, he will not enjoy any privileges afforded to a prisoner of war.⁷³ Presently, in peacetime, spies who are

65. *Id.*

66. If the person has "diplomatic" status, he will be accorded "absolute" diplomatic immunity and will thus be afforded protection whether or not he was acting within his realm of duty. On the other hand, if he has only "functional" immunity, then he must have been acting within the scope of his duties when he was arrested. Functional immunity does not cloak those who are acting beyond the scope of their duties. See Note, *supra* note 27, at 259-88; see also Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1817 (1986).

67. Delupis, *supra* note 40, at 61.

68. *Id.* at 62.

69. See generally Baxter, *supra* note 41.

70. *Id.*

71. *Id.* International law has long provided for the treatment of spies: "[i]n war they may be executed; in peacetime they may be punished as severely as the municipal law prescribes." *Id.*

72. The Hague Convention (IV) of 1907 Respecting the Laws and Customs of War On Land, Oct. 18, 1907, art. 29, 36 stat. 2277, 230, T.S. No. 539, at 647.

73. Delupis, *supra* note 40, at 62 n.56.

not in uniform (i.e., Colonel Rudolph Hermann, Richard Miller, and James Harper) are subject to the penalties of the country in which they are apprehended. The rationale for this "harsh" treatment of spies is straightforward: "[S]pies are not agents of states for their diplomatic relations, so that they cannot legally excuse themselves by pleading that they were only following orders of the government."⁷⁴

Consider the following illustration involving our fictitious James Bondinov. Mr. Bondinov, a KGB intelligence officer, has come to the United States as an "illegal." Shortening his last name to Bond, he and his family have discretely moved into a small community in northern California. The Bond family is the ideal picture of an all American family. James Bond, through years of effort and persistence, has obtained a position as a professor at Stanford University, teaching industrial engineering. Meanwhile, Bond is gathering high technology information to send to the Soviet Union, and participating in other covert operations as well. Subsequently, Bond is apprehended by the FBI and is charged with violating Title 18 sections 793 and 794.⁷⁵ Will prosecution follow? He has no diplomatic or official

74. *Id.* at 62.

75. While neither this statute, nor any other, defines espionage per se, section 793 prohibits certain activities which constitute espionage:

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning [any thing] or . . . place connected with the national defense . . . or under the control of the United States . . . ; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy . . . or obtain, any sketch, photograph . . . blueprint, plan, map, model, . . . document, writing or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, . . . of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, . . . blueprint, plan, map, . . . or note relating to the national defense . . . which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits, or causes to be communicated . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 793 (1983). Section 794 proscribes "gathering or delivering information to aid foreign governments":

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government . . . information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

18 U.S.C. § 794(a) (1983).

status; thus, no immunity. According to international law, he was acting in disguise and is therefore subject to the laws and penalties of the country in which he was arrested. Prosecution would appear to be the next stage in the natural course of things. However, consider the following cases.

In 1960, Igor Y. Melekh⁷⁶ was charged with three ten-year counts of espionage for violations of sections 793(a), (b), and (c).⁷⁷ He was not charged under the provisions of section 794 which carry a penalty of life imprisonment. The government successfully moved the court to reduce the \$50,000 bail, thereby enabling Melekh to leave the country. The indictment was dismissed upon further motion by the government.⁷⁸

In 1970, the United States government charged Aleksandr Vasilyevich Tikhomirov with violating section 793(b).⁷⁹ The case never reached the court due to its dismissal upon a government motion. The government chose to dismiss the case on the grounds that continued prosecution would be detrimental to the interests of the United States.⁸⁰ Thus, instead of being prosecuted and receiving a possible ten year prison term, Tikhomirov was simply expelled from the country.⁸¹

The same scenario took place with Valeriy Ivanovich Markelov.⁸² Markelov was a Soviet citizen employed by the United Nations. He was indicted in 1972 on two counts of espionage, both carrying a ten year prison term. As with Tikhomirov and Melekh, Markelov's indictment was subsequently dismissed upon the prosecution's motion in consideration of national security interests, which otherwise would have been prejudiced.⁸³

Thus, in each of these examples, the United States strongly believed that its national security would have been jeopardized if the

76. *United States v. Kostadinov*, 572 F. Supp. 1547, 1551 (S.D.N.Y. 1983), *aff'd*, 721 F.2d 441 (2d Cir. 1983), *cert. denied*, 469 U.S. 881 (1981) (citing 18 U.S.C. § 794 (1982)); *United States v. Igor Y. Melekh* (N.D. Ill. 1960) (opinion unpublished due to classified information).

77. *Kostadinov*, 572 F. Supp. at 1554.

78. *Id.*

79. *Id.* (citing *United States v. Aleksandr Vasilyevich Tikhomirov*, (W.D. Wash. 1970) (opinion unpublished due to classified information)).

80. *Id.*

81. *Id.* Bail was posted for \$75,000.

82. *Id.* (citing *United States v. Valeriy Ivanovich Markelov*, (E.D.N.Y. 1972) (opinion unpublished due to classified information)).

83. *Id.* Bail was originally set at \$500,000, but later reduced to \$100,000 which was posted. *Id.*

cases had gone to trial. This, of course, was due to the sensitive type of information generally involved in espionage cases. In the past, a favorite defense tactic in these kinds of cases was "graymail."⁸⁴ "Graymail" is the use of discovery tactics that threaten disclosure of classified information to force reduction or dismissal of the charges.⁸⁵ A second obstacle in the path of prosecuting spies was the assumption made for many years by United States counterintelligence officials that information acquired by intelligence techniques could not be used for law enforcement purposes because of legal obstacles and the need to protect sources and methods.⁸⁶

These problems clearly reflect the principal difference between espionage investigations and other criminal cases: the compelling need for secrecy. In normal criminal cases, the objective, either immediate or long-term, is always prosecution in open court. Counterintelligence operations on the other hand have different objectives that may be more strategically important, such as learning the methods of the hostile service. According to a recent Senate Report,⁸⁷ federal law does not adequately take into account the inherent problems of an espionage investigation. Nevertheless, congressional attempts and recent legislation show that progress is being made in this area.

In 1978, Congress created a special secure court order procedure under the Foreign Intelligence Surveillance Act (FISA).⁸⁸ Under this Act, a uniform surveillance procedure was established for the collection of foreign intelligence information by government officials. Essentially, the Act provides that "[u]pon an affidavit filed by the United States Attorney General stating that disclosure of the surveillance materials would harm the country's security, the legality determination is made *ex parte* by a district court judge based upon an *in camera* examination of the relevant materials."⁸⁹ Such a method allows violators of the espionage laws to be fully prosecuted and held subject to the criminal penalties without fear of the disclosure of national security secrets during the trial process. Since the enactment of FISA, United States intelligence capabilities have been greatly en-

84. Girdner, *supra* note 45, at 29.

85. Girdner, *supra* note 45, at 29.

86. THE ESPIONAGE CHALLENGE, *supra* note 12, at 78.

87. *Id.* at 79.

88. 50 U.S.C. §§ 1801-1811 (1982).

89. Comment, *Constitutional Law—Foreign Intelligence—Determining the Legality of Foreign Electronic Surveillance in Ex Parte Proceeding is Constitutional*, 7 SUFFOLK TRANSNAT'L L. J. 493, 493 (1983) (citing 50 U.S.C. § 1806(f) (1982)). "A judicial proceeding . . . is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." BLACK'S LAW DICTIONARY 517 (5th ed. 1979). *In camera* is "either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom." *Id.* at 387.

hanced.⁹⁰ According to the Senate Committee on Intelligence, FISA has "contributed directly to the protection of the constitutional rights and privacy of U.S. persons."⁹¹

Another fairly recent statute which strives to effectuate this same purpose is the Classified Information Procedures Act (CIPA) of 1980.⁹² CIPA allows prosecutors to argue that classified information is not relevant to the defense; it allows judges in some cases to bar defense lawyers from closed door preliminary hearings; and, it authorizes prosecutors to turn over to the defense only summaries or excerpts of sensitive documents.⁹³ As in FISA, the aim of the Act is to prevent dangerous disclosures which pertain to our national security. In so doing, CIPA places sizeable obstacles to be overcome in the defense of an espionage case that may be difficult, if not impossible, to surmount. San Francisco attorney Jerrold Ladar, who defended James Harper, criticized CIPA for being over-protective. "It permits the government to hide anything you want to talk about"⁹⁴ Ladar explained:

When you have a judge who believes there will be terrible, serious consequences to disclosure, you get a series of rulings that prevent you from analyzing whether the case is as monumentous as the prosecution claims, [or] whether it's solid or so lame that it falls apart when you bang on it.⁹⁵

Even so, both CIPA and FISA are designed to reach a proper balance between the national security interests of the United States and the privacy interests of its citizens, while enabling the government to carry through with prosecution of an accused spy. With the protective cover of these laws surrounding any sensitive information that may be involved in such a trial, the likelihood of prosecuting Mr. Bondinov has increased from the time of *Melekh*, *Tikhomirov*, and *Markelov*.

VI. CONSEQUENCES OF PROSECUTION

Whether prosecution occurs may be of no consequence. Although Mr. Bondinov may be of only minor importance in the hierarchy of KGB operations, he is still a Soviet pawn. The Soviets want their

90. THE ESPIONAGE CHALLENGE, *supra* note 12, at 78.

91. *Id.* at 80.

92. Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980).

93. Girdner, *supra* note 45, at 29.

94. *Id.* (quoting San Francisco attorney Jerrold Ladar, defense counsel for James Harper).

95. Comment, *supra* note 89; see also S. REP. NO. 604, 95th Cong., 1st Sess. 9 (1977) (discussing congressional statement regarding the need for such legislation).

KGB agents abroad to be continually assured that they will not "be left twisting in the wind, should they get caught in the act."⁹⁶ More often than not, the Soviets will strongly urge some sort of "trade-off," and history has taught us that such "trade-offs" are not uncommon occurrences.

One well known example is the case of Valdik Aleksindrovich Enger and Rudolph Petrovich Chernyayev, two Soviet spies who were charged with conspiracy to violate United States espionage statutes.⁹⁷ The defendants raised the defense of diplomatic immunity under both U.S. law and basic principles of international law.⁹⁸ The court denied this claim due to the defendants' lack of diplomatic status.⁹⁹ This was done notwithstanding two letters sent to the United States by the Ambassador of the Soviet Union to the United States, Anatoly F. Dobrynin, in support of their diplomatic status.¹⁰⁰

Subsequently, a seemingly coincidental arrest was made in the Soviet Union. The Soviets arrested Francis Jay Crawford, an American businessman, on black market currency charges three weeks after the arrest of Chernyayev and Enger.¹⁰¹ The Soviets then suggested a swap, which the U.S. strongly resisted due to their belief that Crawford had been framed.¹⁰² Next, they convicted and sentenced Crawford to a five year suspended sentence.¹⁰³ In the end, however, Enger and Chernyayev spent little time in jail. After pressure from then Secretary of State, Cyrus R. Vance, the two spies were traded for five Soviet dissidents.¹⁰⁴

An almost identical situation occurred eight years later. According to United States officials, Gennady F. Zakharov, a Soviet citizen who was employed by the United Nations Center for Science and Technology Development in New York, began his spy operations from the minute he first arrived in the United States.¹⁰⁵ Almost four years after his arrival, Zakharov was arrested¹⁰⁶ by the FBI on spying

96. L.A. Times, Sept. 21, 1986, § 1, at 9, col. 1.

97. United States v. Enger, 472 F. Supp. 490 (D. N.J. 1978).

98. *Id.* at 495.

99. *Id.* at 507. The court denied defendants such status because defendants offered no proof that either of them had performed any diplomatic functions for the Soviet Union while in the United States; and even if such proof had been offered, the court stated that the United States Department of State determination that the defendants were not recognized as being entitled to diplomatic status would control the decision of the court. See Note, *supra* note 27, at 270.

100. Note, *supra* note 27, at 268 (citing Enger, 472 F. Supp. at 495-96 (quoting Letter to the court of Anatoly F. Dobrynin, Ambassador to the United States)).

101. L.A. Times, Sept. 21, 1986, § 1, at 8, col. 2.

102. *Id.*

103. *Id.* § 1, at 8, col. 4.

104. *Id.* § 1, at 9, col. 1.

105. *Id.* § 1, at 1, col. 6.

106. "Zakharov's arrest came at a time when the Soviet espionage network had

charges.¹⁰⁷ Two weeks later, the Soviets seized U.S. News and World Report correspondent Nicholas Daniloff and charged him with espionage.¹⁰⁸ The Soviets then demanded equal treatment for Daniloff and Zakharov.¹⁰⁹ The United States insisted that Daniloff be freed immediately and that Zakharov had to stand trial.¹¹⁰ There was no doubt that Zakharov was guilty of violating United States espionage statutes¹¹¹ while Daniloff was merely an innocent victim of a political "tit for tat." Herein lies the real difficulty inherent in espionage cases involving defendants who are citizens of another country, particularly the Soviet Union. Not only are legal implications present when a Soviet citizen is charged with spying, but weighty political considerations are also a factor.

The FBI decision to arrest Zakharov was relayed to senior State Department officials and perhaps to Secretary of State George P. Schultz; to top intelligence-agency officials, and to the chairmen of the House and Senate intelligence committees. At the White House, John M. Poindexter, the President's national security adviser, gave the go-ahead for the arrest.¹¹²

Apprehending a non-U.S. citizen suspected of espionage activities involves burdensome political considerations that simply are not present in the arrest of a thief or murderer.

In Zakharov's case, officials concluded that, "the benefits of arrest and prosecution, including letting the Soviets know that such spying efforts can and will be stopped, seemed to outweigh the possible risks"¹¹³ Such a conclusion sounds good on paper, but in actuality it

taken a yearlong battering, beginning with the breakup of the Walker spy ring in the U.S. and extending through a string of KGB defections." *Id.* § 1, at 9, col. 1.

107. *Id.* See also Church, *Iceland Cometh*, *TIME*, Oct. 13, 1986, at 26. In the case that led to his arrest, an FBI affidavit states that in 1983 Zakharov approached a Queens College computer science student in New York, professing to be a U.N. employee who would pay for "research time" on robotics and computer technology. The student, known by the code name "Birg," immediately informed the FBI and later met frequently with Zakharov, receiving money in return for supplying microfiches of unclassified data, much of it stolen from libraries. In 1985, Birg went to work for a Queen's company which produced unclassified provision components for military aircraft engines and radars. Zakharov then began requesting documents from the company on its manufacturing. He also asked Birg to photocopy the first few pages of operating manuals the company uses to make aircraft components. On May 10, 1986, Zakharov struck a written agreement with Birg to obtain classified data for 10 years and be paid according to the quantity and quality of information he fed the Soviets. *L.A. Times*, Sept. 21, 1986, § 1, at 8, col. 2-3.

108. *L.A. Times*, Sept. 21, 1986, § 1, at 8, col. 1.

109. Church, *supra* note 107, at 26.

110. *Id.* The U.S. suggested that Zakharov could later be exchanged for some prominent Soviet dissidents.

111. 18 U.S.C. §§ 793-794 (1976).

112. *L.A. Times*, Sept. 21, 1986, § 1, at 8, col. 1-2.

113. *Id.* § 1, at 8, col. 2.

has little or no weight. Arguably, the media exposure that coincides with the arrest of Soviet spies such as Zakharov and Enger will deter the KGB from further pursuing their clandestine operations. But this result is very doubtful. More likely, such arrests serve only as slight impediments in Soviet covert operations. The results of the Zakharov case exemplify this conclusion.

The United States government possessed clear and convincing evidence that Gennady Zakharov had violated sections 793 and 794 of Title 18.¹¹⁴ Section 793 provides for a maximum penalty of \$10,000 or a prison term of ten years.¹¹⁵ Violators of section 794 are subject to punishment by death or by imprisonment for any term of years or for life.¹¹⁶ Yet, none of these penalties were imposed on Zakharov. Instead, he received a mere slap on the wrist. After much debate between Washington and Moscow, an agreement was reached. On an October afternoon, Daniloff was informed that he was free to leave Moscow immediately. The next day Gennady Zakharov appeared in a Brooklyn courtroom, changed his previous not guilty plea to no contest, and was told to get out of the United States within twenty-four hours.¹¹⁷ There were two other sideline agreements: (1) the release of a Soviet dissident, Yuri Orlov¹¹⁸ and his wife Irina Valitova, who had been sentenced to internal exile in Siberia by the Soviet Union; and (2) a two week stay of the expulsion of twenty-five Soviets assigned to the United Nations in New York.¹¹⁹

According to *Time* magazine, "American conservatives grumbled that the deal amounted to the swap of an innocent hostage, Daniloff, for a real spy, Zakharov . . ."¹²⁰ However, administration officials explained the "trade-offs" differently: "[T]he U.S. had secured the release of Daniloff without any trial, while Zakharov had really been exchanged for Dissident Orlov."¹²¹ In looking beyond policy explanations, and who was actually traded for whom, one thing remains certain: United States espionage laws were violated, yet, prosecution and sanctions were not pursued. The end result, freedom for the accused, will not likely deter further acts of espionage against the United States.

114. See *supra* note 107.

115. 18 U.S.C. § 793(f) (1976).

116. 18 U.S.C. § 794(a) (1976).

117. Church, *supra* note 107, at 28.

118. Yuri Orlov, a physicist, had helped organize the first Helsinki Watch Group which publicized Soviet violations of the human rights accords signed in the Finnish capital in 1975. For that temerity, Orlov was imprisoned for seven years, ending in 1984, and then sent into "internal exile" in a remote village in Siberia. *Id.* at 26.

119. *Id.* at 26-28.

120. *Id.* at 28.

121. *Id.*

VII. CONCLUSION

"When it comes to espionage, the rules are cited by the Soviets only when they get caught. In short, there are no rules of the game.'"¹²² In many aspects this reflects the present state of affairs in espionage. Fortunately, this is not an altogether accurate reflection.

There are existing "rules" in the form of laws. The Espionage Act itself dates back to 1917. Additionally, there have been recent legislative measures to aid in the implementation of prosecution under the espionage statutes. Yet, case examples demonstrate an absence of consistent application of these existing laws. The cause of this inconsistency is attributed to numerous factors which are involved in espionage cases. These factors include the status of an individual. If the accused is a "legal," he may be automatically immune from prosecution. If, on the contrary, he is an "illegal" or perhaps an "agent," further prosecution will depend on how much he knows, what country he is from, and what type of information is involved in the case.

While the Espionage Act provides for punishment of espionage activities, the contingencies abound. If the accused is or has become knowledgeable of opposing intelligence operations, he may be able to secure his freedom or a reduced sentence simply by cooperating with the United States government. And, if the defendant is a citizen of the United States, his chances of prosecution and imprisonment are much greater than if he were a citizen of a foreign nation. If information on a top security level is endangered by public disclosure in an espionage prosecution, the case will probably be dismissed. Likewise, if political considerations override the need for maintaining legal standards, a potential conviction may be given up in order to grant the defendant automatic freedom and preserve foreign relations. In light of the recent onslaught of espionage activities with the United States, the need for a new approach becomes apparent.

A reconciliation of interests between the executive, legislative, and judicial branches would be a good starting point. Although there is a need for flexibility in matters concerning foreign policy, there is also a need for consistent attitudes among the three governmental branches toward our espionage laws. Cohesive, uniform application of the laws should be the norm, rather than multifarious decisions stemming from forced reactions to circumstance. The United States should take a harder line toward enforcing our espionage laws

122. L.A. Times, Sept. 21, 1986, § 1, at 9, col. 2-3.

against violators from other countries. Unless combined efforts among the three branches of government become directed toward a more uniform treatment of spies, according to the respective laws, the result may be that—with espionage—anything goes.

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