

Memorandum

cc: Olson
Tarr
Shanks
Simms
Files
Retrieval
Sudol



Subject

Legality of Proposed Prepublication
Review Requirement in SCI Access
Agreement

Date

AUG 24 1983

To

From

Richard K. Willard
Deputy Assistant Attorney General
Federal Program Branch
Civil Division

Larry L. Simms
Deputy Assistant
Attorney General
Office of Legal Counsel

The purpose of this memorandum is to memorialize the basis upon which this Office withdrew its objection to paragraph 5(c) of the proposed SCI Access agreement based on our telephone conversation of July 19, 1983 on this subject. I would have sent this memorandum sooner, but, as you know, I have been on vacation.

As you are aware, our July 15, 1983 memorandum to you on this subject set out a series of concerns regarding the legality of a proposed prepublication review requirement contained in a draft SCI access agreement that was prepared by an inter-agency working group under the direction of the Information Security Oversight Office (ISOO). ^{1/} Our primary concern was directed to the absence of any attempt to define and, by defining, limit the reach of the term "intelligence activities" as it appeared in paragraph 5(c) of the draft agreement.

^{1/} Because this Office was not represented on that working group, and because of the short time given us to review the end-product of that effort, it may well be that other legal problems exist with the proposed SCI access agreement that are not raised in our July 15 memorandum to you. Indeed, during the first week of August I received a call from a member of the National Security Council staff, who proceeded to relay to me a number of non-constitutional legal concerns of Mr. Clark regarding the agreement. I referred the call to you, and I assume that those concerns were addressed by you as appropriate.

In our conversation of July 18, you indicated that changing the language of paragraph 5(c) in an attempt to define the term "intelligence activities" would be very difficult from a bureaucratic standpoint because other relevant agencies had already signed off on the draft agreement and that there were substantial pressures to finalize an agreement. On that basis, I agreed that this Office would interpose no objection to the forwarding of the agreement to the ISOO if provisions were made to ensure that each agency, in utilizing the agreement, would define the term "intelligence activities" to include, at a bare minimum, reference to the definition of that term contained in § 3.4(e) of Executive Order 12333.

We were prepared to withdraw our objection to the inclusion of that phrase in paragraph 5(c) based on a belief that substantial efforts by the concerned agencies to define the term "intelligence activities" would make paragraph 5 defensible in court against an overbreadth attack. 2/

It should be understood, however, that our withdrawal of our objection to the agreement on its face in no way should be regarded as a renunciation of any points made in our July 15, 1983 memorandum to you. Specifically, we believe that a complete review of the issue whether sufficient legal authority exists -- as a matter of authority and in view of substantial First Amendment concerns -- to read paragraph 5(c) as encompassing material that is neither appropriately classified nor classifiable will have to be undertaken when, and if, this Department considers

2/ We would add a rather obvious point, which is that however "intelligence activities" might ultimately come to be defined, it would presumptively not comprehend the other classes of information set forth in paragraph 5 of the draft agreement. Thus, as a matter of logic and accepted principles of contract interpretation, "intelligence activities" would necessarily mean something less than that term as defined in § 3.4(e) of Executive Order 12333.

bringing litigation to enforce the prepublication review requirement without being prepared to prove, as part of its case-in-chief, that the material published was indeed appropriately classified or classifiable. As I made clear to you in our conversation of July 18, it is my personal belief that the courts would read a "classified or classifiable" standard into the term "intelligence activities" to avoid decision of the substantial constitutional issues raised were they not to do so. As you acknowledged, were the courts to do so, then the proposed SCI access agreement would be, in a very real sense, narrower and more protective of First Amendment values than the agreement upheld by the Supreme Court in Snepp v. United States 444 U.S. 507 (1980) (per curiam), because the Government would be required to plead and prove, in every case, that material published in violation of this prepublication review requirement was appropriately classified or classifiable.

cc: A.R. Cinquegrana
Deputy Counsel
Office of Intelligence Policy and Review