

COMMENTARY

Unlucky SHAMROCK— The View From the Other Side

James G. Hudec

Editor's Note: The following commentary by James G. Hudec is a response to "Recollections of the Church committee's Investigation of NSA," by L. Britt Snider (Studies in Intelligence, Winter 1999-2000). In his article, Mr. Snider, who in 1975 was counsel on the staff of the Church committee, described the Congressional concern over NSA's SHAMROCK operation, which involved NSA's screening of some international telegrams leaving the United States for foreign destinations. Under this program, according to press allegations, NSA was reading telegrams sent by US citizens.

After reading Britt Snider's article on SHAMROCK, I thought it would be useful to provide the view from the executive branch perspective and to offer some insight into the ultimate conclusion of the matter. Like Britt, I was a relatively young man at the time. I had a fair number of years of experience behind me in signals intelligence, with a somewhat recent law degree and membership in the Maryland Bar, and had just completed a stint on Capitol Hill as a Congressional Fellow. In 1974, on my return to the National Security Agency (NSA), I was assigned to the Office of General Counsel, there being no legislative liaison office at NSA at that time. What little interaction

there was with the Congress was handled by the Director, the Deputy Director, and the senior Agency official responsible for budget.

The Office of General Counsel consisted of the General Counsel, the Deputy General Counsel, one staff attorney, a detached patent counsel, and a liaison with a group of attorneys working for the Army Electronics Command on Agency procurement matters. The staff attorney handled primarily personnel and security matters as well as related civil court actions. My first assignments included the implementation of the recently passed Privacy Act of 1974 as well as amendments to the Freedom of Information Act (FOIA). An additional assignment was to work with the Department of Justice (DOJ) on lawsuits and motions, including those initiated under the Omnibus Crime and Safe Streets Act of 1968 requiring that a federal defendant be apprised of any electronic surveillance that may have been conducted by the federal government against that defendant.

Some disturbing news reports had surfaced a couple of years earlier concerning alleged Intelligence Community (IC) transgressions, most notably the publication on

James G. Hudec is a retired NSA senior executive.

© Copyright August 2000 by James G. Hudec. All rights reserved. Limited rights granted to the United States Government for governmental use only. This article may not be reproduced or republished by other entities without the express written permission of the author.

June 7, 1973, by *The New York Times* of the so-called Huston Plan, named for a White House staffer assigned to work on intelligence matters. His assignment reportedly focused on such matters as broadening the collection and reporting of intelligence information on such subjects as foreign influence on domestic opposition to the war in Vietnam and on support by foreign governments or quasigovernmental entities of international drug trafficking and terrorism. But Congress was too deeply focused on Watergate and presidential impeachment and was not yet ready to explore these reports. Hence, I first learned about some of the topics with which I would later be much more deeply involved through early FOIA and DOJ requests generated, in part, as a result of these early news articles. The items with which I gained some early familiarity were reports that dealt with topics of breaches of battlefield security by civilians, international drug trafficking and terrorism, and foreign government, mostly Communist, support to antiwar elements, usually in the form of funding, travel, and training in foreign countries. SHAMROCK was not yet one of these topics.

Even before the inquiries began, efforts were underway within the executive branch to bring to a close certain activities which were to become the primary subjects of those inquiries. Questions had arisen earlier concerning unrelated electronic surveillance conducted by the White House staff as well as certain support provided to the White House by various federal agencies. Various departments and

agencies had decided to review their activities to make sure the support they were providing was consistent with their charters and statutory responsibilities.

District Court judges in several prosecutions initiated by the DOJ were becoming more demanding of the government for details concerning classified documents that had surfaced due to motions for discovery made by defendants. One case working its way through the federal courts, known as the Keith case, after the District Court judge who originally decided it, involved a ruling adverse to the federal government's position on the issue of whether a surveillance had violated the Fourth Amendment to the Constitution. The question turned on whether the information sought constituted "domestic intelligence" and therefore required a judicial warrant. The DOJ was forced to drop the case.

Around the same time, US Air Force Lt. Gen. Lew Allen had become the Director, NSA, and was confronted with several issues. One was the problem of increasing requests for release of information concerning highly classified sources and methods. Another stemmed from an internal review by the Department of Defense (DoD) of support provided by DoD elements to other departments and agencies, including the White House and the DOJ. General Allen was also aware that information provided to the Justice agencies was coming under increasing review with respect to its appropriateness. He conducted an internal review of his own concentrating on support provided to such

agencies, including the FBI, DEA, and the Secret Service. In 1973, he dispatched a letter to all the agencies involved, requesting that they review their requirements for watch list information and revalidate them. The result of the letter was an initial response from the agencies that they did want to continue the agreements and that they saw no legal problems in doing so. During the coordination of the responses, however, the matter was brought to the attention of the Attorney General, who then advised General Allen to suspend providing information in response to the agreements until he had an opportunity to review the programs. This was done. I only became aware of this activity sometime after the initiation of the investigations.

During the decades preceding this period, there was little consultation with the General Counsel on what were perceived to be policy matters. In fact, it was fairly common practice in American society in general not to consult with counsel before acting on matters and agreements. Often, counsel was not consulted until a problem arose after the fact. In its early years, the late 1950s, NSA had a single "legal adviser" who, according to at least one story, had so little to do he arranged to have his position abolished so he could retire. As the Agency moved out of the 1950s, however, procurement, personnel, security, patent, and other matters clearly demonstrated the need for legal advice, and the Office of General Counsel was established.

This growing consultation did not usually extend to operational matters, especially those considered to involve highly sensitive sources and methods. These were handled at the senior level by NSA with the DoD and DOJ. Part of this was due to restricted access to protect the sensitive sources; part of it was due to the fact that some of the activities were in the United States and at least partially under the purview of the FBI, which also required limitations on access to such information; and part of it was a carryover from the fact that the US Army had been the predecessor organization involved in some of the activities such as those subsequently revealed by the SHAMROCK disclosures. The responsibility for these activities had been transferred from the Army to the NSA in 1952, when it was created by President Truman from a confederation of military entities.

Thus, senior Agency officials were sensitive to the need to obtain presidential and Attorney General authorization for particularly intrusive intelligence operations conducted in the United States for foreign intelligence purposes and had done so on a periodic basis. Again, the perceived need for extreme secrecy and access controls restricted the number of officials consulted and reduced the amount of authorizing documentation to an absolute minimum. There often were no files, only a few papers retained by a senior official. Likewise, it was the understanding of most senior officials in both the intelligence agencies and the DOJ that, having once obtained a presidential authorization, it probably

was not necessary to obtain a new presidential authorization from each newly elected president. This paralleled the existing DOJ policy on other related electronic surveillance issues.

Thus, in 1973, before the coming investigations, the administration, through the Attorney General, had responded to General Allen's request and recommended the suspension of the watch list support to Justice agencies. The watch list, a list of names of individuals submitted by each agency, was viewed simply as a convenient method for providing specific information fleshing out a general requirement from them for any foreign intelligence information concerning, for example, foreign governmental influence on, or funding of, anti-war activities in the United States.

NSA did not usually undertake to develop new sources of foreign intelligence collection in order to satisfy such a requirement. Instead, it developed methods to review its sources of foreign information already being collected to determine if information satisfying those requirements could be derived from these sources and provided to the requesting customer. These foreign sources of collected information tended to be developed to satisfy a specific set of military, foreign affairs, intelligence, and other requirements. But nothing like the popular perception of NSA as the "communications vacuum cleaner" existed. We were already into the era of rapidly expanding telecommunications services, and it was impossible to collect "all communications," much less process and

analyze them. Thus, a source like SHAMROCK was not developed in response to a specific set of requirements. Instead, it was developed because it could provide foreign intelligence information concerning a number of foreign intelligence requirements, particularly those related to foreign affairs, terrorism, and espionage.

Indeed, SHAMROCK's antecedents predated World War I, as telegram services became available and were used by, among others, foreign governments to transmit open and, more often, encrypted diplomatic, military, and other reports from foreign embassies, consulates, and other official representational entities back to their home government ministries. Herbert O. Yardley, who conducted some of these efforts, documented them in his famous book *The American Black Chamber*, published after the Secretary of State decided that the State Department no longer needed his services. This did not bring an end to the efforts.

Subsequent to publication of Yardley's book, Congress enacted a public law, Section 952 of Title 18 of the United States Code. This law made it a crime to publish or otherwise release information derived from "diplomatic codes and communications." Although one of the primary purposes of the law was to prevent Yardley from publishing any more books revealing the full extent of US intelligence efforts against foreign diplomatic and other entities, it may also be viewed as protecting those efforts and by implication acquiescing in them.

The US Army picked up the efforts and continued them between the two world wars. At times, the Army wondered about legal problems associated with the efforts, especially after the enactment of the Communications Act of 1934, most notably Section 605 of that Act. In the late 1930s, however, when the Army was seriously considering pursuing an amendment to the Act to remove any ambiguity about the legality of its operations, World War II was looming and then underway. It automatically brought legal authority, as Section 606 provided the president with broad wartime powers, which he exercised at the onset of World War II and which may have remained in place until 1947. The Army continued the activity after the end of World War II.

The NSA General Counsel was not initially involved in the Agency's responses to the congressional investigations. These were viewed as policy matters and were handled much like budgetary matters or individual congressional inquiries in the past. While the NSA in 1975 did not have an extensive oversight relationship with the Congress, it had encountered painfully intrusive inquiries in the past, including the defection by two NSA employees to the Soviet Union, which resulted in the passage of a public law mandating strict security procedures for access to classified cryptologic information, and the Pueblo seizure by the North Koreans. NSA and its predecessors had succeeded in obtaining legislation that provided protection and criminal penalties for the unauthorized release of classified

cryptologic information as well as legislation that provided certain personnel and information protection authorities for the NSA. Likewise, the Agency had a somewhat difficult and detailed relationship, which included something resembling an oversight relationship, with the House Appropriations Committee, which zealously pursued its annual responsibility for appropriating funds for the operation of the NSA. But most of these relationships, except for the budgetary one, were ad hoc and were handled by the Director and Deputy Director, sometimes with the assistance of one or more senior officials or experts. Some were handled by the DoD, with some assistance and support from the NSA. Only the House Appropriations Committee relationship remotely resembled the subsequent oversight relationships with the two permanent intelligence committees.

After the detailed operational and administrative briefings were provided to the Senate committee's staff, one or more of the congressional staffers began to ask some more difficult questions, such as "What are your legal authorities to conduct these operations or even to exist?" The initial policy responses, pointing to NSA and DoD directives and the famous Truman memorandum directing the establishment of the Agency, apparently did little to fend off the flurry of follow-up questions and assertions that none of those items constituted congressionally mandated authority to exist and to conduct operations. Nor did assertions that continued annual reviews and

appropriations by the House and Senate acting through the two Appropriations Committees seem to satisfy those conducting the inquisition, as it was perceived by the recipients of the questions. My recollection of the conduct of the inquiries by Senate staffers such as Britt Snider and his partner, Peter Fenn, was that it was generally very professional. Rhett Dawson, the minority staff director, was supportive. This was not the case, however, with some of the younger and more zealous staff attorneys from several different congressional committees, including the Senate committee. Sometimes, disagreements were accompanied by threats of criminal and obstruction of justice sanctions, which did little to foster amicable and cooperative relationships.

The raising of these legal questions prompted the Agency leadership to consult with and involve the General Counsel. Faced with several ongoing investigations, including the Church and Pike committees, the House Subcommittee on Government Information and individual rights, the DOJ, a GAO inquiry, and a few other ad hoc congressional inquiries, the senior Agency leadership was somewhat overextended. An ad hoc legislative liaison office was established with a new Executive Assistant to the Director, and the General Counsel was asked to provide legal assistance in responding to the inquiries.

The two primary Senate and House congressional committees could be viewed as having divided up the subjects for investigation, even though there apparently was no

formal agreement to do so. The Senate committee headed by Democratic Senator Church and his Republican co-chairman, Senator Tower, was focused on alleged misdeeds and remedies needed to address same. The House committee, ultimately headed by Democratic Representative Pike, was focused more on the structure and responsibilities of the IC and the need to reform and legislate a statutory basis for it. The Deputy General Counsel handled the Pike committee matters. I was initially asked by the General Counsel to work with him and to handle the day-to-day matters related to the Senate side of the inquiry, any matters pertaining to operational authorities, the DOJ investigation, the House Judiciary Committee inquiry, and the GAO inquiry, many of which overlapped. Later, I was designated the Agency's Assistant General Counsel and asked to assume more responsibility for the same matters plus the subsequent House Subcommittee on Government Information and Individual Rights investigation, although the Deputy General Counsel continued to work with the Director on direct appeals to the House leadership on the antics of that subcommittee.

By this time, the requests for information, briefings, testimony, and documents were coming so fast and from so many different directions that it was almost impossible to keep track of all of them, much less find all of the documents and provide all the information demanded. While the committee sometimes wondered why documents were not located earlier or only came to light after

the fact, those staffers who subsequently worked in positions at the DoD and DOJ, among other government entities, soon learned that records often are difficult to locate, are held by individuals who may not have been consulted when the request was received (nobody knew he or she was involved), or they were boxed up and shipped to records storage with little or no identifying information because the individual had retired or left. That apparently is how some of the highly sensitive SHAMROCK documents from the DoD ended up in the hands of a persistent staffer from Representative Bella Abzug's House Subcommittee on Government Information and Individual Rights.

As a result of their extensive briefings, the Senate staff initially had more insights into some Agency operations than I did. My extensive earlier background in several Agency efforts, however, was to provide the detailed knowledge that allowed me to correct some misperceptions and put information into the proper context. For example, there were significantly more legislative "authorities" than one might have perceived at the outset of the investigations. As mentioned earlier, Congress had on a number of occasions enacted laws protecting cryptologic information, providing security protections and administrative authorities to NSA and the Secretary of Defense. Moreover, the President had directed the Secretary of Defense to establish the NSA and provide it with further authorities available through delegation pursuant to the Secretary's statu-

tory authorities. Over time, most of the assertions of lack of authority by the staff became moot.

In addition, while the Senate committee majority viewed the Omnibus Crime and Safe Streets Act of 1968 as only providing authority for communications companies to provide communications to the federal government pursuant to a court order, this is not the whole story of that statute and, among others, the SHAMROCK relationship to that Act. There was occasional, continuing concern that the president's constitutional authority to conduct electronic surveillance for foreign intelligence purposes might be subject to challenge as that law was being considered by the Congress. As a result, a provision, Section 2511(3), which provided that nothing in the Act affected the president's authority to conduct electronic surveillance for foreign intelligence purposes, was added to that portion of the 1968 Act that dealt with the prohibition of surveillance without a court order. Section 605 of the Communications Act, mentioned earlier, was also amended at the same time to provide that its requirements did not affect the president's authority to conduct such surveillance for foreign intelligence purposes. Thus, provided that the surveillance was for foreign intelligence purposes and, provided further, that there was some evidence of presidential authorization, a collection activity such as SHAMROCK was no longer subject to the warrant requirements or constraints of those two acts. While some argued that this provision did not authorize such

collection, they could not deny that it did recognize the existence of such activity and a legislative intent to avoid circumscribing it, to the extent it might be constitutional. Thus, the collection still had to pass muster under the constitutional provisions of the Fourth Amendment regarding search and seizure, but most courts had previously opined that provided there was indeed a legitimate foreign intelligence purpose, then the president did have the constitutional power to conduct such surveillance.

The Director of NSA and his General Counsel did consistently assert, including during the one public hearing that was held, that the collection activities in question did meet the test of foreign intelligence and that the existing court case law supported that view. The events leading up to the day of the public hearing on NSA were naturally subject to somewhat different perceptions depending on one's vantage point. There were times before the involvement of the House Government Information and Individual Rights Subcommittee in the SHAMROCK matter that I thought we had succeeded in convincing a majority of the Senate committee members that a public hearing and the ensuing disclosure of classified information was not in the nation's best interest. There appeared to be no other "smoking guns" concerning allegations of misdeeds on the part of NSA. Indeed, most were minor administrative issues of little general interest. Only the watch list and SHAMROCK stood out to some as having some "meat." Of the several categories identified on the watch

list, only the antiwar focus of some of the reports seemed to suggest some possibility of being over the legal line. With SHAMROCK, it appeared to be the question of ambiguous legal authority coupled with concern that the NSA and DoD had not been completely forthcoming on the matter of documents and other records. So long as SHAMROCK was contained within the Senate committee, there were sound reasons for keeping the hearing closed. The Director, the Secretary of Defense, and the NSC staff all seemed supportive of continuing efforts to persuade Chairman Church not to hold a public hearing. It was clear that Senator Mondale, who was Senator Church's "point person" for the committee, and many of the staff strongly supported a public hearing. The Republican minority members and their staff clearly opposed a public hearing. Apart from the damage that would result from the disclosure of classified information, there also was a reasonable legal basis for the Republican and Agency position. The Senate committee had asked the Legal Division of the Congressional Research Service to provide a legal analysis on the question of whether the statutory protections for classified cryptologic information applied to the Congress. The Legal Division, in a pleasant surprise to NSA, issued a lengthy analysis, concluding that application of the law to the Congress was ambiguous! It concluded the authorities could be viewed as applying to the hearing in question if it was conducted without presidential authorization. Senator Church did not take a formal vote

of the full committee and basically ignored this conclusion. He consulted the Senate Parliamentarian, who provided an oral opinion, which was cited by Senator Church as indicating that a public hearing could be held.

The public hearing might still not have been held but for two events. The first involved an incident in which a couple of Senate staff committee members probably leaked information about SHAMROCK to Bella Abzug's House subcommittee staff, an event that apparently happened just before the second one, after these and other staff members apparently thought that Senator Church was going to drop the public hearing. The second was a last-minute effort by General Allen, with the blessing of the White House staff, to meet with the committee and request that the public hearing not be held. Secretary of Defense Schlesinger was to be enlisted in this effort. Unfortunately, the timing of this request was bad. First, the leak and Chairwoman Abzug's intent to hold a public hearing were already known to the committee. Second, the Secretary of Defense's plane, returning from Europe, was somewhat late, and he was obviously tired from the trip and the return flight. Chairman Church framed the question in such a way that the Secretary may or may not have actually grasped its full import. When he responded equivocally, Chairman Church said, "That's all I need to know—you are obviously tired from your trip, and we won't keep you." Secretary Schlesinger left, and General Allen tried to continue, but the game was

over and the public hearing was on.

The day of the hearing was a major event. The press in large numbers and the national television media were present. General Allen, Deputy Director Benson K. Buffham, and General Counsel Roy Banner took the witness table. After an initial exchange between the majority and minority concerning the need for a public session, General Allen read his prepared statement. The Senators asked questions limited to matters each side had agreed were unclassified or reluctantly agreed to as now declassified.

The only departure from the agreed guidelines was Senator Mondale's question to General Allen on whether the reports constituted foreign intelligence and were legal. The General responded that they did reflect foreign influence and that there were court cases that supported their legality. This was followed by Senator Mondale's question to the General Counsel on the issue of legality and Mondale's statement of disagreement. "He still thinks they are legal!" in response to the General Counsel's citation of case law reflecting, in his view, their legality. This comment reflected Senator Mondale's view of the holding of the previously mentioned Keith case and its applicability to the reports in question. NSA's view, supported by the administration, was that the other cases cited by the counsel were the controlling authority. I sometimes thought that most of the committee members shared that view rather than Senator Mondale's.

The public session came to an end shortly thereafter, and all Agency representatives and attendees left the room. As a result, we did not witness the subsequent debacle concerning SHAMROCK, having already decided that no one would stay who could possibly be called to be questioned on the subject. For most, it was one of the sadder days in our careers as we all knew that damage had been done to our ability to collect and report critical foreign intelligence and the nation's security somewhat diminished. There was also some pride that our misdeeds had been found to be few and that the subsequent committee report would reflect reasonably favorably on our expertise and capabilities as well as our efforts to remain within appropriate bounds.

Such was not the case with the public hearings held by Chairwoman Abzug. There were no negotiations over the protection of sensitive intelligence sources and methods. There was no legitimate attempt by the subcommittee to clear the assigned staffer for access to classified information under some mutually agreed set of standards. Instead, the Chairwoman and the staffer simply threatened everyone with contempt of Congress citations and communicated only in an intimidating fashion. The Director was subjected to the same treatment despite his courteous and self-deprecating manner. Last-minute, late-night efforts to persuade the not-so-gentlewoman of the need to protect the national security were dismissed out of hand. The only concession obtained by the Director from

Chairman Jack Brooks of the full House Government Operations Committee, to whom he appealed in a last-ditch effort to keep the hearing from taking place, was that he doubted the full committee would vote to enforce any contempt citation that the subcommittee might issue.

The conditions faced by the company and government employers subpoenaed to testify by the subcommittee were both good and bad. The employees of the FBI and NSA, who were required to appear, were astounded to learn that they would not be represented by government counsel as that was specifically prohibited by statute. They were encouraged to acquire their own counsel if they saw a need to do so. On the other hand, through what now seems to have been an extraordinarily rapid response (we basically had only about 36 hours in which to act), the employees were armed with a letter from the Secretary of Defense or the Attorney General, in the case of the FBI agents, advising them that the executive branch was claiming executive privilege on all matters pertaining to the subject of the hearing, and that they could not testify on any of the matters under consideration. They could only give their name, their place of employment, and any other personal information not covered by the claim of executive privilege. The companies were advised that the federal government considered the matters to be currently and properly classified, and that their employees could not testify about such matters without possibly subjecting themselves to criminal

penalties under the current statutes protecting classified cryptologic information. They were also advised that the executive branch was claiming executive privilege and would not testify on the matters in question. The Attorney General agreed to provide an attorney to attend the hearing to explain the claim of executive privilege and its effect on the employees required to testify.

Again, no one directly involved in responding to congressional inquiries attended the subcommittee hearing for fear that they might be recognized and called to testify. Despite the bombastic nature of the inquisition and the intimidating threats of contempt of Congress citations, the NSA employee called to testify acquitted himself well. Most of the other government and company employees did so as well. One company employee responded to the questions asked of him. The DOJ attorney endured the abuse directed at him as he attempted to explain why the witnesses could not respond to the subcommittee's questions.

The chair declared virtually everyone in contempt and called for a vote on contempt citations. There was no quorum, but she did assert that the citations would be issued. They never were. The damage was done. She declared SHAMROCK violated the Privacy Act of 1974, among other things, and levied a requirement on the GAO to investigate the matter and report back to her subcommittee.

In the aftermath, the NSA employee left the Agency, citing the failure of

the Agency to protect him by providing legal counsel as his primary reason for leaving. The subcommittee released most of the information it had gathered, causing further damage. The GAO did conduct a fairly lengthy investigation on whether SHAMROCK and other Agency intelligence reporting practices violated the Privacy Act. It concluded that there were no violations of the Act and that recently adopted procedures would preclude any future violation.

This was not the end of the story of SHAMROCK and the watch list issue. A DOJ criminal investigation also addressed it. The conclusion there was that no employee had committed any criminal violation of existing law, and that ended the matter. The resultant publicity on the whole panoply of allegations of intelligence agency misdeeds resulted in a massive lawsuit against all the agencies, other entities, and some named individuals. The DOJ decided that it would not represent the agencies because some of the alleged misdeeds appeared to be unlawful and encouraged the agencies to obtain outside counsel to represent them. This was an almost unheard of position for DOJ to take, but it was a sign of the times. With the support of the Director and the General Counsel, I undertook to convince the DoD and the DOJ that an exception should be made in the case of NSA.

The rationale was that the matters complained of by the plaintiffs, as they regarded NSA, represented matters that were legal under current law and for Justice not to

defend them would be a possible admission that they were no longer considered thus, thereby representing a threat to the whole basis of the conduct of signals intelligence. The DoD was reluctant to support this effort at first because both DIA and the Army were also defendants, and they were being required to seek private counsel. The matter was finally resolved, however, with the Director convincing the Secretary of Defense. I already knew that DOJ would be receptive as I was working with a number of individuals on limitations on collection activities who agreed with the position NSA was taking. Calls from the Director and the Secretary of Defense were sufficient to get the DOJ position on private counsel reversed for NSA. NSA was the only agency to be represented by DOJ during the case.

The road for SHAMROCK and the other activities was not easy. An in-camera hearing on the case at the District Court level did not go as well as we would have liked and resulted in a modest setback. Most of the NSA activities complained of by the plaintiffs were found to be legal. One reasonably important exception which involved SHAMROCK was not. Justice agreed to take the matter up on appeal. A new NSA General Counsel, a respected trial attorney from an outside firm was now on board. DOJ, in another departure from its normal procedure, agreed to permit him to argue the case on appeal. He did, and the Circuit Court overturned the District Court ruling on the one matter we had lost at that level. In the end, all the NSA matters subject to

congressional and other assertions of illegality were found by the courts to pass constitutional muster.

Congress, however, decided as a matter of policy that the primary issues reviewed during the investigations should be subject to a special warrant procedure that would both protect citizens from improper surveillance and protect sensitive sources and methods. The new Senate Select Committee on Intelligence would craft, along with the administration, a new Foreign Intelligence Surveillance Act that would establish procedures to be used to obtain a judicially approved warrant or, in limited circumstances, an authorization from the Attorney General, when, among other things, the specific target of an electronic surveillance for foreign intelligence purposes is a US person. That law was passed by the Congress and signed by the president in 1978. It now governs the activities that were the subject of these investigations some 25 years ago and would include an activity such as a SHAMROCK operation, should one be undertaken. A special three-member classified federal court approves such warrants and oversees their execution. In addition, the two intelligence committees conduct extensive and, using words from the earlier article, “intrusive oversight” into the

Agency’s use of those authorities as well as adherence to other limitations established initially pursuant to Executive Order 11905, United States Foreign Intelligence Activities, and Agency implementing regulations.

A subsequent review by the President’s Foreign Intelligence Advisory Board of the resulting limitations on intelligence collection found some troubling issues related to gaps and timeliness of responses to crisis. Others have expressed some concerns along the same lines. On balance, however, most objective officials would tend to agree that the procedures put into place and those authorized by the Foreign Intelligence Surveillance Act of 1978 have removed the ambiguity long troubling responsible officials over the last century. The rights and privacy of US persons are being protected even as technology changes because the primary focus is on the protection of the US person and only secondarily on the technology. That is perhaps the most significant contribution coming out of the long and difficult period during the investigations and the lawsuits and inquiries conducted after the committees and other investigating entities published their reports.

The controversy has not totally ended. There are those today who do not know or chose to ignore this history and the existence of the Executive Orders and the Foreign Intelligence Surveillance Act of 1978. Through the Internet and other media, they assert the existence of new technology and allegations that they perceive violate the rights of US persons. They ignore the important point noted above, which is that the focus of the law and Executive Orders is on the protection of the rights and privacy of the person, not on specific types of technology.

In his article, Britt Snider concludes “that NSA has been especially scrupulous” in abiding by the restrictions and requirements of law. I can readily support that conclusion. A strong and healthy General Counsel’s office, usually headed by an experienced General Counsel drawn from practice outside of the Agency, provides daily guidance on intelligence collection operations. The NSA Signals Intelligence efforts are reviewed by the DOJ for compliance with the procedures and warrants, by the classified federal court for warrant compliance, and by the congressional committees for oversight purposes. In addition, as required by Executive Order, the NSA Inspector General continually

COMMENTARY

reviews all operations organizations for compliance. Likewise, a special office within the DoD also conducts oversight reviews as do the inspectors general of the respective military services. There are few other outside activities in either the public or private sector

that receive this level of continuing, detailed review. NSA employees and their military associates involved in Signals Intelligence operations are provided training and are required to be knowledgeable on all aspects of the procedures regardless of their grade

or responsibility. The focus, when I retired, was on the protection of rights and privacy of the US person, as I am sure it remains today.