



The spies who never came in from the cold: Opinion

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By Frank Askin

PART 1

In 1972, the FBI sent an agent from its Newark office to Morris County to investigate why a person name Paton was communicating with the Socialist Workers Party at its New York headquarters.

The information had come from a “mail cover” on the SWP’s headquarters. Under the existing U.S. Postal Service regulations, a mail cover was authorized whenever a law enforcement agency certified such action was necessary to protect the national security. No judicial approval was required. The mail cover allowed the FBI to photograph the outside of any envelope directed to the addressee, including postmarks and return addresses.

In that instance, the subject of the investigation was a 15-year-old high school student who had been doing her homework. The FBI agent tracked her down at West Morris-Mendham High School. The school principal and the political science teacher explained that the student was enrolled in a course called “Left to Right,” which explored the programs and workings of fringe political movements.

The agent thanked school officials for the information and left.

But the principal also notified the student’s parents of the incident, and the parents contacted the American Civil Liberties Union office in Newark, which referred the matter to the Constitutional Litigation Clinic at Rutgers Law School in Newark.

When the FBI initially denied that it was investigating the student and declined to respond to a request for any copies of any documents generated as a result, a lawsuit that was to go on for seven years ensued.

The smoking gun that was to conclude the litigation occurred when plaintiffs were finally allowed to take the deposition of L. Patrick Gray, the acting director of the FBI who had requested the mail cover. Gray testified that the application he signed said the mail cover was necessary because the Socialist Workers Party was organizing protests against the war in Vietnam.

Federal District Judge Lawrence Whipple had heard enough. He recalled the mischief that had been done in the name of “national security” during the era of Sen. Joseph McCarthy, and stated that “national security” is too ambiguous and broad a term where rights of free speech were involved. He ruled as follows:

National security as a basis for the mail cover is unconstitutionally vague and overbroad. Without any qualification or explanation of what is meant by national security, an investigation can be initiated on the assertions of an overzealous public official with the unorthodox, yet constitutionally protected political views of a group or person. It allows officials to pursue their personal predilections.

He left untouched other types of mail covers such as investigation of mail fraud or the search for fugitives.

Whipple issued an injunction forbidding future national security mail covers pending a revision of the mail cover regulation to cure the constitutional defects.

The defendants did not appeal Whipple’s order, apparently deciding to comply by rewriting the regulation.

PART 2

On July 3 of this year, the *New York Times* ran a story under the headline “U.S. Postal Service Logging All Mail for Law Enforcement.”

The article recounted the recent experience of one Leslie James Pickering, the owner of a bookstore in Buffalo.

The article explained: Mr. Pickering “noticed something odd in his mail: a handwritten card, apparently delivered by mistake, with instructions to postal workers to pay special attention to letters and packages sent to his home.” It continued: “Show all mail to supv. For copying prior to going out on the street.”

Pickering told the reporter that more than a decade before he had been the spokesman for the Earth Liberation Front, “a radical environmental group labeled eco-terrorists by the Federal Bureau of Investigation.” The article reported that postal officials had confirmed they were indeed tracking Pickering’s mail, but told him nothing else.

The *Times* article then explained that “at the request of law enforcement officials, postal workers record information from the outside of letters and parcels before they are delivered.”

The *Times*’ revelation led me to investigate the government’s compliance with Judge Whipple’s order to revise the mail cover regulation in accordance with his opinion. Its latest iteration authorizes mail cover to obtain information in order to: 1) Protect national security; 2) Locate a fugitive; 3) Obtain evidence of commission or attempted commission of a crime; 4) Obtain evidence of violation or attempted violation of a postal statute; or 5) Assist in the identification of property, proceeds of assets forfeitable under the law.”

The operative language then authorizes the chief postal inspector or his designee to order mail covers to “protect the national security ... when a written request is received from any law enforcement agency in which the requesting authority specifies the reasonable grounds to demonstrate the mail cover is necessary to protect the national security.”

It seems reasonably apparent that any mail cover on Pickering’s mail was pursuant to the “national security” provision. How many other such covers are carried out every year by the Postal Service and FBI is anyone’s guess.

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The question is: Are they constitutional? It is hard to see how the current regulation cures the defects in the former one. The only relevant change in the procedure is that the agency is now supposed to specify the reasonable grounds for the cover. But there is no instruction to the Postal Service as to how to evaluate those grounds. And Postal Service employees are not judicial officers schooled in the meaning of the First Amendment.

Gray, the FBI director, and the Postal Service thought it was sufficient to put a mail cover on the SWP because it was organizing protests against the war in Vietnam. Is there any reason to suspect the result would not be the same if the FBI specified the target was advocating bombing (or not bombing) Syria? The regulation is still overbroad and vague, just as it was 34 years ago.

But it is probably an open question if a federal judge would be as courageous as the late Judge Whipple in the post-9/11 era.

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