Secret Justice

When National Security Trumps Citizen Rights

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> *"The proceedings were not only kept secret from the general public, but from the accused as well. . . . For even the accused had no access to the Court records, and to guess from the course of an interrogation what documents the Court had up its sleeve was very difficult."*
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> —Franz Kafka's description of Joseph K.'s ordeal in *The Trial*

CIA agent Aldrich Ames, accused of selling top-secret intelligence to the Russians, has made an ominous threat. According to his lawyer, Plato Cacheris, Ames's defense will try to force the government to divulge even more sensitive intelligence during a potential trial. Something of the same gambit was tried by Oliver North in the Iran-contra affair.

This tension between the right of the accused to a fair trial and the state's need to protect legitimate secrets is all too real. Yet there is a troubling pattern in a series of recent civil cases that suggests an opposite abuse: in more obscure cases, government is often able to hide behind a national security cloak and deny a fair, public trial to ordinary citizens who are abused by the national security apparatus. Apparently, the big fish like Oliver North and Aldrich Ames, who know big secrets, are often able to escape accountability by threatening to tear down major chunks of the national security edifice. Meanwhile, smaller fry, who have fewer beans to spill, get the star chamber treatment.

Just ask Daniel Molerio. Molerio wanted to be an FBI agent and was well on his way to becoming one in 1980. As a criminal investigator for the Immigration and Naturalization Service, this son of Cuban immigrants had already proven himself in the field and had earned the unit's "secret" security clearance. When Molerio scored high on the FBI's entrance exam and interviews, the bureau ranked him fifth in a list of 785 applicants tentatively selected to be secret agents. All that remained was the background check. The FBI told Molerio they would be in touch.

But the next call from the FBI was not a congratulatory one. Agents had found "something in New York having to do with [his] family." They interviewed him again, this time asking questions about his father's involvement with a pro-Castro group many years before. On November 20 the FBI told Molerio he would not be hired. The bureau would not give a reason, but Molerio had a hunch: he was being discriminated against because of his father's past political association.

Maybe the FBI had a valid reason not to hire Molerio. Maybe Molerio was correct in his suspicions. Who knows? Molerio, like

Joseph K. in *The Trial*, never got a chance to find out. In 1982, when Molerio sued for violation of his rights under the Civil Rights Act and the First Amendment, a federal trial court dismissed the case after receiving secret testimony from the bureau. When Molerio took his case to a federal court of appeals, citing his due process right to confront testimony delivered against him, Judge Antonin Scalia sided with the lower court. To let the jury rule on this case would be a "mockery of justice," Scalia huffed. It would have forced the government to either compromise national security or lose a case for which it had a perfectly good defense, Scalia said.

Federal courts had previously upheld the government's right to withhold classified information during hearings, albeit in very limited circumstances. But Scalia's willingness to decide the merits of a case based on secret testimony was unprecedented. The *Molerio* decision flew in the face of a constitutional tradition that revered both the right to a jury trial and the right of litigants to contest hostile evidence in an adversary proceeding. The fact that other judges have since followed Scalia's example is a reminder that 12 years of conservative court-packing has bequeathed us a judiciary dangerously cavalier about our most fundamental rights.

National security need not be sacrificed in the name civil liberties. Instead, when the government claims evidence relevant to a litigant's case is classified, it should be required, by law, to make a choice between divulging the information at a closed hearing or doing without the evidence, even at the cost of accepting a judgment for the litigant. Given the government's proclivity for overclassification and the potential for abuse inherent in any suspension of due process, that would be a better, if admittedly imperfect, means of protecting both national security and the rights of citizens.

Case Dismissed

Since the Molerio case, there have been at least four more federal court decisions aborting lawsuits for the sake of government secrets.

Todd Patterson was a precocious 11-year-old when he began to compile a world encyclopedia by writing foreign governments for information. The next year, the FBI visited his house to learn why he was corresponding with communist countries. In 1988, when Patterson was 15, and the FBI refused to let his parents see what kind of records it was maintaining about Todd, the family sued to expunge Todd's files under the Federal Privacy Act. The Privacy Act forbids the FBI from maintaining files detailing how an individual exercises rights protected by the First Amendment, such as writing letters, unless pursuant to an authorized investigation.

The trial judge initially agreed that on the basis of the public record the FBI could not justify maintaining records on a curious teenager. However, after the FBI submitted a secret affidavit to the court, the judge dismissed the case. He said that for reasons that had to be concealed from Todd and his lawyer, he was satisfied that the FBI was acting within its authority. The judge assured Todd and his family that they had nothing to worry about. Nothing the FBI had told him reflected badly on Todd.

Wabun-Inini left some film for processing at a one-hour photo store. A few minutes later, an FBI agent entered the store and told the clerk he wanted to buy a set of the photographs. The clerk consulted the night manager, who finally agreed to sell the agent copies of the prints for 19 cents a piece. Wabun-Inini sued, claiming an illegal seizure of his property as well as an invasion of his political privacy. As in Todd Patterson's case, the court decided on the basis of a secret FBI affidavit that the FBI had proper cause for obtaining copies of the plaintiff's photographs. Only the FBI and the judges know what those reasons were.

The crew of the U.S.S. *Stark* ran into a related problem. Thirty-seven members of the crew were killed in 1987 when the ship was hit by two Iraqi missiles in the Persian Gulf. Survivors of the dead sailors at-

tempted to sue General Dynamics and several other defense contractors, alleging that production defects in the *Stark*'s defense system had led to the deaths and injuries. Like Molerio, Todd Patterson, and Wabun-Inini, they were denied trials on the grounds that public hearings would disclose state secrets.

Robert J. Maxwell had the most bizarre experience of all. He sued the First National Bank of Maryland for constructive discharge after he refused to assist an illegal arms transaction by a bank customer whom he determined to be a CIA front. Maxwell claimed he was so threatened by the CIA for his resistance that he became ill and had to leave his job. A federal judge in Maryland not only prohibited Maxwell from questioning his bank employers about the CIA relationship but indicated that Maxwell could not testify as to his own personal knowledge of the customer's status and the events surrounding the loss of his job.

Even if the government ultimately deserved to prevail in these cases, the fact that these citizens never got trials represents an injustice all its own. If we don't allow citizens with grievances to pursue remedies in the courtroom, how do we ensure those who are wronged will receive justice? As Chief Justice John Marshall declared in *Marbury v. Madison,* citing common law tradition and Blackstone's *Commentaries,* the entire legal system could crumble "if laws furnish no remedy for the violation of a vested legal right." Preserving the right to a trial is particularly crucial when the government is a party to legal action, for if there is one fear the framers of the nation's legal system shared, it was a fear of despotism.

Granted, were national security truly at stake, these transgressions might be understandable, if not forgivable. History suggests, however, that when an administration or government agency invokes the cause of secrecy, it often does so to protect its political interests or reputation—not national security. That was the lesson of the *New York Times Co. v. United States,* the so-called Pentagon Papers case in which the government sought to suppress publication by the *Times* of confidential Rand Corporation documents on the Vietnam War. The government, represented by Solicitor General Erwin Griswold, had said publication of the papers would seriously jeopardize national security. When the *Times* prevailed and published the documents, government integrity proved to be the only casualty. Years later, Griswold conceded the purported risk never existed:

> It quickly became apparent to anyone who has considerable experience with classified materials that there is a massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. . . . There is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.

I once litigated a case in which the FBI had been tracking all the mail to and from a fringe socialist organization. My client, another high school student, had written to the organization as part of a civics assignment for class. When the FBI intercepted one of her letters and conducted a field investigation on her, she sued, claiming an unlawful invasion of privacy and infringement on her First Amendment rights. The FBI claimed that its investigation of the organization—and thus its investigation of my client—was justified on national security grounds but refused to divulge the basis for it.

For five years, a federal judge upheld the FBI's claim that the document authorizing the mail cover was privileged and that making it public would harm national security. The case languished. Finally, it was serendipitously transferred to a new judge who ordered disclosure of the document.

That disclosure revealed that the only reason for the mail cover was that the organization was involved in protests against the Vietnam War. The judge ruled the FBI's mail cover unconstitutional.

In an ideal world, some impartial arbiter could determine on a case-by-case basis whether government secrets warranted suspending due process. But this is not an ideal world, and there is no such thing as an impartial arbiter—that is why the Constitution commands due process of law. In Molerio's case, Scalia said society must simply trust judges to do the right thing. But judges, as Justice William Brennan once observed, "are human beings whose judgment necessarily reflects the press of human events."

Americans learned this lesson firsthand after decades of arbitrary British colonial rule. While common law guaranteed jury trials to British subjects, it did not apply to the colonies. That is why the Founders wrote the jury trial guarantee into the Bill of Rights. As Justice Byron White, a man known as neither a great liberal nor an enemy of the political establishment, noted some two centuries later:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against. . . judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. . . . The jury trial provisions of the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or to a group of judges.

Unprecedented Violations

The primary precedent for *Molerio* and the other decisions was a 1953 high court ruling, which involved the deaths of three civilians in the crash of a military airplane that was testing secret electronic equipment. When the government refused to turn over to the plaintiffs a report of its investigation of the accident, the district court ordered that the facts on the negligence issue be considered established in the plaintiff's favor. In *United States v. Reynolds*, the Supreme Court reversed by a six-to-three vote and created an "official secrets" privilege that precluded the discovery of confidential government information by parties to a civil lawsuit. However, the decision did not prohibit the plaintiffs from pursuing their case if they could produce unclassified evidence to support their claim.

Some judges have also cited a Civil War lawsuit, in which a Union spy named William A. Lloyd sued the government, claiming he never received compensation. The Supreme Court threw out Lloyd's suit because of the secret nature of the agreement. Because of the publicity it would generate, the Court said, the suit would constitute a breach of the espionage contract.

The crux of *Lloyd* was an assertion that "as a general principle, public policy forbids the maintenance of any suit . . . which would inevitably lead to the disclosure of matters which the law itself regards as confidential." The Court likened the forced disclosure of a spy agreement to breaches of lawyer-client or doctor-patient confidentiality, which are generally prohibited.

Fair enough. But the Civil War was an extraordinary time when the courts routinely tolerated suspension of civil liberties because the nation's very existence was in jeopardy. Even if the circumstances of the Cold War were analogous, it's questionable whether *Lloyd* should have such far-reaching implications. Neither *Lloyd* nor *Reynolds* ever suggested that lawsuits could be resolved on the basis of secret evidence.

Prior to Scalia's ruling in *Molerio*, government lawyers had unsuccessfully attempted on several occasions to introduce secret evidence in federal trials. In *Kinoy v. Mitchell*, a 1975 civil suit brought against

former Attorney General John Mitchell for wrongful wiretapping, the government asked to submit evidence it could not share with the plaintiff—evidence it said was vital to national security. A federal trial court would hear nothing of it, ruling that such a tact was a "wholly unacceptable" violation of due process. In *Allende v. Schultz*, a 1985 case, a federal court again prohibited the government from providing secret testimony to justify its denial of a visa to an allegedly undesirable alien, the widow of the martyred Chilean president, Salvador Allende. If the government wanted to submit relevant evidence, the court said flatly, the government had to make that evidence public. The government capitulated, and Hortensia Allende got her visa.

Interpretation of precedents can vary, of course, but that is precisely the point. Judges are human. They have biases. That is why our legal system does not place complete faith in the judge. It requires due process.

Overdue Process

Despite the entrenchment of conservatives in the judiciary, undoing this legacy need not be difficult. The Clinton administration has already taken the first step by pledging to declassify many of the billion-plus documents in the government's archives. The administration has also appointed several task forces on purging the vestigial accoutrements of the Cold War.

Yet even if the administration manages to tame the national security behemoth, classified information will remain. Bureaucrats will continue to claim that disclosures might compromise national security—particularly in suits against law enforcement agencies.

Congress, though, still makes the law, and it has already provided a mechanism, the Classified Information Procedures Act, for protecting government secrets while allowing litigation to proceed—at least in criminal cases. CIPA was adopted in 1980 to frustrate criminal defendants' efforts to "blackmail" prosecutors by threatening to reveal classified information in the course of their defense. Rather than compelling the government to dismiss charges in order to protect secrets, the legislation provides for judicial review of the material to determine whether the information is relevant to the defense and whether the defendant's rights can be protected without compromising legitimate government security interests. If the court determines disclosure of classified information is essential to the defense, the government then faces a choice: release the information or dismiss the charge.

This is the provision Aldrich Ames hopes to use. Of course, there is an important practical difference between cases subject to CIPA and civil litigation against the government. CIPA defendants are invariably government agents who are already privy to the allegedly sensitive information. They and their lawyers have access to the same information available to the prosecutors and can argue the merits of the government's claims and the sensitivity of the information on an equal footing. On the other hand, civil litigants faced with government claims that sensitive information trumps the plaintiff's rights are forced into a game of blind man's bluff.

In 1981, a federal judge took a CIPA-type approach to deal with secrets in civil cases. The family of a murdered civil rights worker, Violet Liuzzo, had sued the FBI, claiming an FBI informant had participated in the killing. The government claimed that a relevant FBI report was privileged and ought not be revealed. Since the judge, Charles Joiner, found that the plaintiffs had presented the court with "a case which is neither frivolous nor beyond belief," he would agree to suppress the report only on condition that a judgment of liability be entered against the government. As in the criminal context, the government was not permitted to protect its secrets at the expense of its adversary.

Although the Federal Advisory Committee on the Rules of Evidence endorsed this approach, no judges have followed

Judge Joiner's example. Congress, meanwhile, declined to adapt CIPA for civil cases when it adopted the Federal Rules of Evidence in 1975. The main objection to the remedy is that an undeserving litigant may occasionally walk away with a windfall. But that seems like an acceptable trade-off, particularly when so many government claims of national security turn out to be specious.

Besides, the remedy need not be so heavy-handed. For example, the courts could offer the government the option of a closed adversarial hearing rather than an open public trial. True, this would require sharing the classified information with the litigant's attorney, but such procedures are not unprecedented. Lawyers, as officers of the court, often receive confidential information under protective order forbidding disclosure to outside parties. Few lawyers would risk losing their licenses by violating such orders. Offering closed hearings might not be a perfect solution. It would require some litigants to waive the right to a jury trial, and it might even require some lawyers to withhold information from their clients (thus creating a messy conflict of interest). But it would certainly be better than no trial at all.

In the meantime, the Clinton administration could simply instruct its lawyers not to make such secrecy claims. Even when government lawyers feel compelled to assert privilege, they can negotiate settlements or agree to fair procedures. There is no report of a government lawyer having invoked the *Molerio* doctrine since Clinton came to power, and that is certainly a good sign—as is the appointment of committed civil libertarians to posts on the federal bench. Indeed, after three nearly uninterrupted decades of conservative court-packing and expansion of the national security state, the arrival of a liberal administration offers hope that the obsolete violations of due process born in the Cold War may finally be retired as relics.*