

REVIEW ARTICLE

"UNDERGROUND EMPIRE": INTELLIGENCE AGENCIES AND THE
RULE OF LAW

GEOFFREY DE Q WALKER*

national Security: Surveillance and Accountability in a Democratic Society by PETER HANKS, JOHN D MCCAMUS (editors). (Editions Yvon Blais, Cowansville, Quebec 1989), pp 269. (ISBN: 2890737098).

Way of Deception by VICTOR OSTROVSKY AND CLAIRE HOY, (Stoddart, Toronto, 1990), pp 371. (ISBN: 0773724605).

GB: The Inside Story of its Foreign Operations from Lenin to Gorbachev by CHRISTOPHER ANDREW AND OLEG GORDIEVSKY, (Harper Collins, New York 1990), pp 776. (ISBN: 2890737098).

Three very different books published in close succession combine to highlight and dramatise the unresolved issues presented by the need that all governments feel to engage in security and intelligence activities within with in borders.

For most of the twentieth century, this Earth has been the arena for a titanic confrontation between democracy and tyranny, between free debate and the great restraints, between the rule of law and the tendency of people to disappear from the streets. The votaries of democracy, freedom and the rule of law have not always been possessed of absolute virtue and have at times been forced, or have chosen, to adopt some of the methods of their adversaries. One of these is the practice of exercising surveillance over persons or activities that are judged to constitute a threat to national security. These threats are normally classified in three categories: terrorism, espionage and subversion.

Surveillance is obviously a fundamental means of social control, and as such is neither inherently good nor bad. As Westin puts it: "[p]arents watch their children ... Policemen watch the streets and other public places, and government agencies watch the citizen's performance of various legal obligations Without such surveillance, society could not enforce its norms or protect its citizens".¹ A central element of the history of liberal democracy has been the struggle to set limits on the power of government and other bodies to place individuals and private groups under surveillance against their will.² The rules built up by common law courts over the centuries protecting the citizen against unlawful searches and seizures, the prohibitions of general warrants, the protection of the individual's property rights in personal documents and the abolition of the quartering of troops in private homes gradually restrained the ancient surveillance claims of the Crown.

The conflicts and confrontations of the twentieth century overwhelmed these additional safeguards. With the sharp increase in international covert activity it began around 1914, specialist intelligence agencies were established in many

LLB(Syd), LLM, SJD(Penn); Professor of Law, University of Queensland.
A F Westin, *Privacy and Freedom* (1967), 57.

Id.

countries that had not previously had them. These developed and multiplied such an extent that for some years now it has been commonplace to speak of "intelligence community". The ethos of surveillance has spread from the intelligence agencies to bureaucracy and government at large, and has come to be sought after for its own sake. We saw this at the time of the attempted introduction to compulsory identity cards in Australia,³ and in the later efforts to introduce a de facto identity numbering system in the guise of the extended file number.

In a century during which much of the world has been in a state of war or near-war, tensions have inevitably arisen between the demands of national security surveillance and the need for life in civil society to continue as nearly as possible on a normal basis. Liberal democracies are more or less committed to pluralism, to the idea that the development and dissemination of ideas which challenge current institutions and beliefs is not to be treated as a threat to the security of the nation. It is this very tolerance of challenging ideas that distinguishes civic societies from authoritarian regimes, under which a challenge to political and social structures and their supporting ideologies is seen as a threat to the state.⁴

National Security: Surveillance and Accountability in a Democratic State, the book edited by Peter Hanks of Monash Law School, and John McCamus of the Osgoode Hall Law School at York University, brings together a number of essays dealing with the search for a balance between defence against terrorism, espionage and subversion on the one hand, and the tolerance of dissent, protest and whistleblowing on the other. The focus is on Canadian and Australian conditions, and the contributors include academics, public servants, journalists, the heads of Canada's security agencies and the heads of the Canadian bodies established for the purpose of supervising those agencies. All the contributors agree on the need to find a balance between domestic security and liberal values. In general, however, the differences between the papers turn on where to locate the fulcrum between the two sets of values, a judgment which in turn seems to depend on the author's assessment of the gravity of the external threat.

In both countries, intelligence arrangements were extensively restructured during the 1980s - in Canada as a result of complaints against the Security Service of the Royal Canadian Mounted Police (RCMP), which led to the McDonald Commission inquiry, and in Australia, not by reason of any specific set of major complaints, but following the reports of the two House of Commissions.⁵

The McDonald Commission prompted the enactment by the Canadian parliament of legislation establishing a new "civilianized", free-standing security agency, the Canadian Security Intelligence Service (CSIS), to take over the functions performed by the Security Service of the RCMP - though according to some contributors to this book, most of the personnel remained the same. CSIS was to be supervised in accordance with a number of principles enunciated in the McDonald Commission, foremost among which was that the rule of law

³ G de Q Walker, "Information as Power: Constitutional Implications of the Identity Numbering and ID Card Proposal" (1986) 16 *Queensland Law Society Journal* 153.

⁴ P Hanks, J D McCamus (eds), *National Security: Surveillance and Accountability in a Democratic Society* (1989), 2.

⁵ *Royal Commission on Intelligence and Security, Fourth Report* (1977); Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Australian Security Intelligence Organization* (1985).

ould at all times be paramount. Other principles were that the means of vestigation must be proportionate to the gravity of the threat and the obability of its realisation, that the need for particular investigative techniques ould be weighed against the damage they might do to freedom and privacy, id that the more intrusive the technique, the higher the authority that must be quired to approve its use.⁶

The contributions by McCamus and Professor Franks analyse the new pperisory structure, which is essentially fourfold. The head of CSIS is placed nder the direction of the responsible minister, who can issue written structions for the conduct of the service. There is an autonomous Inspector- eneral who monitors compliance by CSIS with its own operational policies id reviews its operations. The Inspector-General reports to the Minister and has ide powers of access to information in the hands of CSIS. There is judicial nrol over the use by CSIS of intrusive techniques such as mail interception id electronic surveillance. Finally, there is a parliamentary committee, the ecurity Intelligence Review Committee, which oversees the performance by SIS of its duties and functions, and adjudicates upon refusals of security arances and on public complaints about actions of the service.

Peter Hanks argues that the corresponding Australian machinery compares unfavourably with the Canadian model. He concedes that the office of Inspector- eneral of Intelligence and Security created by statute in 1986 creates a locus of ternal review with wide powers of investigation in relations to ASIO, ASIS, SD, JIO and ONA. The Inspector-General may inquire into a variety of matters cluding legality and propriety of agency activities, claimed infringements of man rights and agency employee grievances. Investigations can be launched at e behest of the Minister or on the Inspector-General's own motion. Hanks gues however that the other elements of the supervisory structure merely serve maintain tight government control over agency accountability while creating illusion of open political control. The second Hope Commission opted for the inisterial responsibility approach in preference to direct oversight by a rliamentary committee. This, in Hanks's view, made the joint parliamentary mmittee on ASIO little more than a token gesture to critics of ASIO, for it has o his mind) very little by way of effective powers of review and is placed mly under the government control as to its membership, agenda and vestigative powers. Hanks's conclusion appears, however, not to give adequate ight to the role of the Security Appeals Tribunal (SAT), which has the thority to review "an adverse or qualified assessment" - that is, advice given r ASIO to a government authority or a minister in relation to employment, migration or citizenship. SAT's finding after review supersedes the original IO assessment. Although the original ASIO assessment is not mandatory and ed not be acted upon by the relevant government authority, once a negative IO assessment has been overturned by SAT, there is no basis on which the overnment agency can deny the applicant access to secret information or herwise act against his or her interests. This power goes far beyond that of the anadian review committee and may be unique.

While Hanks is sceptical, even cynical, about the new supervisory machinery, e acknowledges that since the handling of the initial caseload, there has been a arp fall in the number of complaints concerning the agencies and security assifications. The new, activist Inspector-General, Mr Roger Holdich, believes

Hanks and McCamus, *supra* n 4, 5.

that compliance with statutory guidelines is aided by the fact that ASIO "generally a rather bureaucratic organization". According to his observations,

[p]roposals are developed carefully and pass through a number of hands within the organisation before they are put to the Attorney-General. The opportunity exists therefore, (and from my reading of ASIO's files is invariably taken) to inject cautionary views if a particular case may seem not to be well-founded. The upside is that while a case that reaches the Attorney-General may read somewhat like an inter-departmental committee report, those that I have seen have all been soundly argued".⁷

Moving ASIO's headquarters from Melbourne to Canberra has probably further encouraged its adoption of bureaucratic forms and attitudes (as it was no doubt intended to do). Prime ministerial control was underlined by a widely publicised early directive of the Hawke government to ASIO that the agency should give greater attention to counter-terrorism activities and downplay counter-subversion. That directive was, however, quietly revoked a few years later.

In sum, the combined efforts of the contributors and the editors of Hanks and McCamus's *National Security* have produced a book in which the reader can find reasoned expositions of the two opposing sides of the national security and intelligence debate. The work is as scholarly as one could reasonably expect it to be, given the paucity of case-law or other developed legal doctrine and the extent to which ultimate conclusions in this area are inevitably matters of opinion and judgment.

The other two books in the triad have been much more extensively publicised and are intended for a wider audience than that edited by Hanks and McCamus. Nevertheless, they fit neatly onto a consideration of the former work because they give dramatic emphasis to both sides of the debate, emphasising at the same time the need for proper supervision of intelligence agencies and the seriousness of the external threats that prompted their establishment in the first place.

By Way of Deception is an exposé of the Israeli intelligence service, Mossad, by a former agent named Victor Ostrovsky. The Israeli government made strenuous attempts to prevent the publication of the work, and despite the simultaneous efforts to discredit the author, there is good reason to believe that most of it can be accepted, with the usual reservations applicable to whistleblower accounts.

In a country that has been on a continuous war footing for almost half a century, it is only to be expected that the secret intelligence service will have achieved a high level of development and influence. Mossad's problem seems to have been that, following an impressive record of successes, it succumbed to hubris. According to Ostrovsky, Mossad now operates in a kind of "megalomania"; "[t]his feeling that you can do anything you want to whomever you want for as long as you want because you have the power".⁸ Everyone is regarded as a tool, a nice piece of equipment. Telling the truth became irrelevant if it was necessary to get people working for you.⁹ The habit of playing dirty tricks in the field fostered similar behaviour even towards one's own colleagues: cheating at basketball, habitually seducing the wives of officers away on dutiful pillow-talk confidences and their betrayal, and so on.

⁷ Inspector-General of Intelligence and Security, *Annual Report 1989-90*, (1990), 7.

⁸ V Ostrovsky, and C Hoy, *By Way of Deception* (1990), 335.

⁹ *Ibid* 83.

More serious was the growing corruption in the agency's own activities. Accountable only to the Prime Minister, the agency regularly forged his signature on documents. It engineered an elaborate fraud, supported by scholarly papers from friendly academics, to extract hundreds of dollars from the World Bank, ostensibly for a mammoth irrigation project in Sri Lanka, but in reality to enable the Sri Lankan government to buy arms. Mossad trained officers of the South African security service. At one stage, in the same large training camp, it was giving instruction both to the Sri Lankan security forces and to their deadly enemies, the Tamil Tigers. Loyal staff who criticised any of the agency's excesses, even though confidentially and in-house, were dismissed or at the very least passed over for promotion.

Worst of all, Mossad ran its own, militant, foreign policy which was at odds with that of the state of Israel. In 1980 it used its powers to prevent serious peace negotiations between Israel and Syria. In 1981, Mossad strove to get Israel involved in Lebanon to help the Christians, so that they could annihilate the Palestinians: "[t]he foreign office didn't know this but the Institute [Mossad] was trying to get the war started, at the same time that they [the foreign office] were busy trying to avoid it. The Palestinians were trying to find a lead to the Israeli diplomats, and the Mossad was trying to cut it off".¹⁰ Not only was the agency running its own agenda, but its actions were sometimes determined by internal rivalries rather than by an overall view even of its own interests. As Ostrovsky sums it up: "[a]n intelligence agency with no supervisory body is like a loose cannon, only with a difference. It's a loose cannon with malice forethought. It can be blinded by internal rivalries".¹¹

KGB: The Inside Story of its Foreign Operations from Lenin to Gorbachev is of interest partly as a study of an intelligence agency without proper supervision that became a threat to world peace, not only as a result of deliberate strategy, but also through eventually coming to see the entire world through the distorting filter of its own conspiratorial mind-set.¹² Its major interest, however, is an authoritative account of the international operations of an organisation whose activities were the reason for the establishment of a number of not uncontroversial western agencies, including ASIO and the CIA.

Colonel Oleg Gordievsky defected at the time when he was a KGB "resident" (head of station) in London. A senior and well-informed officer, his massive book, written in collaboration with the Cambridge historian Christopher Andrew, provides detailed information on the activities and internal operation of the KGB as far back as its foundation (as *Cheka*) by Felix Dzerzhinsky. The central focus is on the First Chief Directorate, the department of the KGB's Moscow Centre that is responsible for foreign operations. Four main types of operations are described: terrorism, covert espionage, influence and disinformation (the two last-mentioned being generally referred to as "active measures"). Its own resources were supplemented by the secret services of the ten satellite states, the Czech StB and the Cuban DGI being particularly

Ibid 252.

Ibid 215.

Gordievsky's account of the bizarre episode in the early 1980s when the KGB became alarmed by a non-existent NATO plan for a nuclear first strike, and placed such pressure on its overseas posts to uncover evidence of it that they eventually started telling Moscow Centre what it wanted to hear, has already been widely publicised in the media. It is dealt with in detail in chapter 13 C Andrew and O Gordievsky, *KGB: The Inside Story of its Foreign Operations from Lenin to Gorbachev* (1990).

effective, as foreigners were less on guard against them than against Soviets and East Germans.

Terrorism came into its own on the international scene in the 1970s, and counter-terrorist work by the western security agencies has been the least controversial part of their mission. Yet here the role of the KGB has been more ambivalent than has often been supposed in the West. While the KGB undoubtedly funded and trained terrorists, including Carlos the Jackal, it has never given them completely free rein because of the Kremlin's fear that it might itself become a terrorist target.¹³ It withdrew its support from Colonel Qaddafi's terrorist offensive after the killing of a British policewoman outside the Libyan Embassy in London in 1984. It rejected overtures from the IRA, though partly because of what it regarded as the near-impossibility of keeping secrets in the Irish Republic. Ireland was, however, used as a training ground for "illegal" (spies lacking diplomatic immunity) to be introduced into Britain.

Conventional espionage has always been a major KGB function, but one in which it shares with the much larger but lesser-known military intelligence agency, the GRU.¹⁴ One contributor to Hanks and McCamus's book argues that western governments and populations generally underestimate the threat posed by such activities.

The danger, while not as self-evident as that posed by terrorism, is significantly more real in the strategic sense with tremendous ramifications for the economic vitality and social stability of western countries.... A single undetected act of espionage has the potential for shifting the strategic balance of power ... instantly nullifying scientific and technological advances won at tremendous cost over years or even decades of research and development.¹⁵

Included under the heading of espionage were what KGB staff termed "western affairs", or assassinations, the responsibility of Department V. In each western capital, officers were ordered to select and monitor the movement of key figures who could be assassinated in times of crisis.¹⁶

Gordievsky reports that Australia became an espionage target as soon as the first Soviet diplomatic mission was established in Canberra in 1943. The Department of External Affairs was rapidly penetrated and became an important source for British as well as Australian classified documents.¹⁷

The book is particularly illuminating on the use of agents of influence and disinformation in connection with the active measures program. In the countries of Eastern Europe, this took the form of staging provocations to justify military intervention¹⁸ and the rigging of plebiscites such as the referendum in Poland on union with the USSR.¹⁹ Elsewhere, the KGB sought to place agents of influence, conscious or unconscious, in positions of power. Several of these have left lasting marks on the history of this century. Leaving aside fully recruited agents such as Philby, Maclean and Burgess, one of its greatest coups was its use of Urho Kekkonen, who was President of Finland for 25 years. Moscow Centre

¹³ *Ibid* 632-635.

¹⁴ Although it has a smaller personnel establishment than the KGB, the GRU is said to have budget several tens of times larger: V Suvorov, *Inside Soviet Military Intelligence* (1984), 4.

¹⁵ T Finn, "Domestic Security and the Canadian Security Intelligence Service", in Hanks and McCamus, *supra* n 4, 261, 262.

¹⁶ Andrew and Gordievsky, *supra* n 12, 523.

¹⁷ *Ibid* 374.

¹⁸ *Ibid* 429, 486.

¹⁹ *Ibid* 248.

most important Norwegian agent, Arne Treholt, helped to organise the successful campaign conducted in 1972 against Norwegian membership of the European Community. In the United States during World War II, the KGB's most important (unconscious) agent was Harry Hopkins, the closest and most trusted adviser to President Roosevelt, who had frequent contacts with a KGB resident for discussions of high policy. In carrying out his instructions to rid the US Administration of anti-communist officials and otherwise advance Stalin's interests, Hopkins apparently thought he was doing no more than fostering good relations and understanding between the two countries. Gordievsky's revelations at this point may mean that the history of the postwar division of Europe, in which Hopkins played a key role, will have to be re-written.

Of all the KGB's active measures strategies, disinformation was, and perhaps remains, the most difficult to counter by any methods that are consistent with the rule of law. One commonly-used disinformation method consists of planting forged documents in the western and Third World media and bureaucracies; another is the converse device of claiming that genuine documents intercepted by western intelligence are forged.²⁰

Disinformation has also involved such measures as gaining control over the selection of topics and speakers on wartime BBC talks programs and the preparation of books and articles by apparently impartial writers with a view to influencing western opinion. One of these works portrayed the horrific workings of the gulag as an idealistic experiment in social reform. Readers were given a picture of the reformed ruffians of the gulag constructing convict colonies which, aided by the idealism of the KGB, might one day become as free and prosperous as Australia, which had similar penal origins.²¹

Gordievsky was in charge of active measures in London at the time when the KGB was planting stories among western journalists portraying Brezhnev's successor, Yuri Andropov, as a "closet liberal" who "speaks English well", "collects big-band records and relaxes with American novels", and "sought friendly discussions with dissident protesters". In fact, Andropov had played a key role in suppressing the 1956 Hungarian revolt and the 1968 Prague Spring. As head of the KGB, he had introduced the infamous practices of psychiatric imprisonment and torture and had authorised the wider use of conventional torture against dissidents.²² Nevertheless, the planted story was run uncritically in almost all the western media and was never corrected. It helped to place the western democracies at a negotiating disadvantage for the rest of Andropov's term of office. The operation may even have been a little too successful. The fact that the story appeared in almost identical words throughout the media at the same time aroused the suspicions of even some of the uninitiated in the West.

Other disinformation efforts included the circulation of material designed to discredit Egypt's President Sadat by portraying him as a former Nazi, the planting of forged letters suggesting secret contacts between Jeane Kirkpatrick and the South African government, and the preparation of false media stories signed to thwart the re-election prospects of Margaret Thatcher and Ronald Reagan.²³ The KGB fabricated the Soviet account of the circumstances surrounding the shooting down by Soviet fighters of Korean Airlines Flight 007

Ibid 51, 92. See generally R Schultz and R Godson, *Dezinformatsiya: Active Measures in Soviet Strategy* (1984).

Andrew and Gordievsky, *supra* n 12, 326.

Ibid 489; J Barron, *KGB: The Secret Work of Soviet Secret Agents* (1974), Ch 4.

Andrew and Gordievsky, *supra* n 12, 591.

in 1983. This account, which claimed that the airliner had entered Soviet airspace while on a CIA spy mission, gained general acceptance in the Western media even though many KGB officers themselves regarded it as laughable.²⁴

Probably the most successful active measure during the early years of the Gorbachev era was the attempt to blame AIDS on American biological warfare research. This story was launched in an Indian newspaper in the summer of 1983. Although it was the subject of an unprecedented and unconditional retraction by Moscow in 1987,²⁵ it gained widespread currency and still appears in the Australian media from time to time.

While Gordievsky's material enables us to close the file on some disputed cases such as Flight 007 and the famous "poisoned umbrella" episode (which was a KGB operation, it seems), it leaves some other important ones open. Gordievsky has no direct knowledge of the facts behind the attempt on the life of Pope John Paul II, and reports that opinions within Moscow Centre itself were divided on whether the organization had in fact been involved in the attempt. About half of those to whom Gordievsky spoke thought it was unlikely the KGB had been implicated, while the other half thought it was in fact a KGB "wet affairs" operation and named the section which they said had arranged the attack.²⁶ The book is silent, however, on what would, if true, be one of the most remarkable intelligence stories of the century, namely the question whether Britain's Prime Minister Harold Wilson was a KGB agent of influence (conscious or unconscious), who had been manoeuvred into power through the KGB's assassination of Hugh Gaitskell.²⁷ Gordievsky's silence on this point is all the more remarkable in view of his posting in London and his naming of four other British MPs as agents (one of them a paid agent). Although Wilson has claimed he was the victim of an MI5 conspiracy, he has never, unlike the other alleged agents named during the British mole hunts of the 1960s and 1970s, sued those who have published the allegation, nor offered an explanation of the circumstances that gave rise to the inference, nor confessed.

One would naturally think that in the era of perestroika, all this would have become mere history, but here again Gordievsky is somewhat ambivalent. The KGB regarded Gorbachev's appointment as Party Chairman as a great coup for them. In his earlier years, the new leader boosted the agency's resources, expressing the conviction that a dynamic foreign policy required a dynamic intelligence service. KGB activity in Australia and New Zealand was accordingly strengthened during the 1980s, partly because the number of KGB illegals in the region was considered inadequate, partly in connexion with New Zealand's anti-nuclear ship policy, and partly with a view to gaining information about China through Australia's large Chinese emigre community.²⁸ Given that the crisis in the Russian economy has compelled a decline in aid to developing countries, Gordievsky considers that intelligence takes on an enhanced importance as a means of preserving Russia's declining influence in the outside world.²⁹

This view was perhaps reflected by the People's Deputy and Russian sports hero Yuri Vlasov in a 1989 address to the Congress of People's Deputies: "The

²⁴ *Ibid* 595.

²⁵ *Ibid* 630-631.

²⁶ *Ibid* 639.

²⁷ P Wright, *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer* (1987) ch 23.

²⁸ Andrew and Gordievsky, *supra* n 12, 611.

²⁹ *Ibid* 621.

The KGB is not a service but a real underground empire which has not yielded its secrets, except for opening up the graves".³⁰ And while the head of the KGB was replaced after the defeat of the KGB-army coup in August 1991 and there are moves to dismantle the domestic side of the agency's operations, the First Chief Directorate, which conducts the KGB's foreign operations, was specifically reserved.³¹ It was later reorganised as a new and separate Russian agency called, ironically enough, the Central Intelligence Service (CIS), and was placed under the directorship of Yevgeniy Primakov, an old-style ideological strategist, expert in active measures, with close links to the PLO, and who served over two decades as the key architect of Soviet support for Saddam Hussein. The CIS is believed to have the dual mission of obtaining Western scientific and technological information needed for the survival of some kind of centralised system in Russia, and the penetration and neutralisation of Western intelligence services.³² The Western agencies have so far detected no marked decrease in espionage against the West by the new CIS.³³ The "new world order" may thus have to reckon with Dzerzhinsky's successors along with the Saddam Husseins, Madaffis and Khomeinis that the planet is heir to.

So it seems that world conditions are not yet about to free us from the dilemma of national security in a free society, any more than they will allow us to dispense with that other costly and regrettable necessity of the twentieth century, the standing army. Liberty and the rule of law will need to be protected by agencies that are continually tempted to carry out their tasks in ways that may infringe those very ideals. For the objective reader of these three books, there is no obvious escape from the conclusion that both intelligence agencies, and the bodies that are needed to supervise them, will be with us for many years to come.

¹ *Ibid* 642.

The Australian August 26, 1991, 3. There has also been no suggestion that the GRU, which has vast operations in the West, has been in any way scaled down.

A Campbell, "The New Soviet Central Intelligence Service", *Australia and World Affairs*, No 11, Summer 1991, 5.

E Sciolino, "CIA Casting About for New Missions", *New York Times*, February 4, 1992, A1, A4.