Intelligence Gathering

CJ 4610/ PA 5315
Professor James J. Drylie
Defining Ethics

- First we need to define *morals*.
  - What is judged to be good conduct.
  - A person is moral when they have the capacity to make value judgments and discern right from wrong.

- Ethics is the study and analysis of what constitutes good or bad conduct.

(Pollack, 2007: p. 10)
Branches of Ethics

- **Meta-ethics** is the highly technical discipline investigating the meaning of ethical terms including a critical study of how ethical statements can be verified.

- **Normative ethics** determines what people ought to do and defines moral duties.

- **Applied ethics** is the application of ethical principles to specific issues.

- **Professional ethics** is an even more specific type of applied ethics.
Ethical dilemmas

- What to do?
- Is it right?
- By stopping, to pause, to think, am I any more ethical?
- Dilemmas arise when there is an individual, or group, struggle with decision making.
- When we must choose between two or more choices of behavior.

(Pollack, 2008: p. 24)
What, Me Worry?
Ethics in the Intelligence Function

- Can the Intelligence Function be considered an ethical process?
  - Is spying ethical?
    - If ethics is based on what is right, and what is wrong, who determines what is ethical?

- Is the juxtaposition of ethics and intelligence a contradiction?

- If intelligence is grounded in determining the truth, then the intelligence function is ethical.

- The Intelligence Function is expected to be an approximation of the truth.
Problems

- The problem arises when the process subverts the truth.
- The way the truth is determined, the means by which information is collected, poses ethical dilemmas.
- Knowledge is power.
  - The key to power is gaining knowledge.
  - How you obtain the knowledge is the issue.
Ethical standards

- Intelligence staff, foreign and domestic, are usually cognizant of the ethical standards associated with the process.

- What happens when these standards are lowered or ignored.
  - Does we justify the lowering of constitutional standards to gather timely and actionable intelligence?
The FBI maintained a culture that is described as “amoral” in regards to COINTELPRO. (Godfrey, 376)

The mantra in this and similar operations was “don’t get caught.”
The source

- In gathering intelligence often times the information begins with a source — human.
  - HUMINT
  - How the agency handles the source is considered the art craft of the intelligence profession.
  - Agencies attempt to “control” the source by maintaining a psychological edge over the source.
  - The means-end justifications in this regard may border on the unethical.
Oversight

- Judicial oversight of the intelligence function in the United States is a recent development.

- Courts will provide yet another check on the abuses associated with the intelligence process.

- Oversight in this regard refers to the review of the actions of the executive authority tasked with the IF by an independent group.
  - This may in fact occur in advance of intelligence actions.
The past

- Prior to the 1970s the judiciary was not generally involved in intelligence matters.

- One primary reason was the international flavor of the IF and it’s relation to foreign affairs.
  - This speaks to *jurisdiction*.
  - The *political question doctrine* was the driving judicial anchor point.
    - The resolution of national security disputes were relegated to two branches of government; executive and legislative.
Another critical factor affecting the oversight of the intelligence function was the lack of an internal review mechanism.

- There was little self-critical analysis.
- Commonly referred to today as an Inspector General.

The post-Watergate era saw changes in this regard.

Several federal committees made recommendations to improve internal review.
Criminal Law

- National security issues will clash with conventional US trial procedures.
  - A major issue will revolve around discovery and to what level items or people need to be protected.
  - Judges routinely would use personal judgment to deal with this issue.
  - The Classified Information Protection Act (1980) was passed to avoid this ad hoc approach.
Surveillance

- To what level is surveillance violative of the Fourth Amendment?
- Surveillance and intelligence collection are reviewed under the standards applied to search warrants.
- Today, concerns regarding electronic surveillance introduces new variables.
- FISA – Foreign Intelligence Surveillance Act (1978) was passed to establish a secure forum to obtain search warrants for the purpose of conducting ES.