ternational law, and virtually all our closest allies, take strong exception to granting a cause of action to people who were

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By not allowing lawsuits to commence on Nov. 1, the president in all likelihood has avoided, for the time being, a major trade war with our closest allies. He also has avoided enraging conservative Cuban-Americans, a matter of keen importance because of their large presence in the crucial electoral battlegrounds of New Jersey and Florida.

The president may have dodged a bullet for the moment, but repercussions will still ensue. The Canadians and Mexicans, partial, repeal of the act. Electing members of Congress who share these views is obviously important in achieving this end. We need lawmakers who are interested in promoting dialogue with Cuba, as well as obeying international law.

CIVIL LIBERTIES *By Harvey A. Silverglate*

Star Chamber Redux: Secret Court in America

According to a disclosure by Rep. David E. Skaggs, D-Colo., of the House Intelligence Committee, in the name of national security the federal government spends at least $5.6 billion annually to keep information classified. This figure is startling when one takes into account two factors: First, only 1 percent is directed to de-classifying obsolete documents, and second, the figure does not include the secret classification budget of the Central Intelligence Agency. This represents, announced the exasperated House member, "a document classification system stuck on autopilot, indiscriminately stamping 'Top Secret' on thousands of documents every year."

Representative Skaggs addresses only one aspect of the problem. There are parallel excesses in the way the system operates in the name of the national security state—some comic, some worrisome—that are equally worthy of the attention of civil libertarians and all citizens. For example, consider the advent of secret courtroom procedures for the protection of classified information.

Earlier this year, Congress passed, and the president signed, the Anti-Terrorism and Effective Death Penalty Act of 1996, establishing an Alien Removal Court to effect the expeditious deportation of "alien terrorists." The government starts deportation procedures against aliens suspected of involvement in terroristic activity. This is done by filing under seal a sworn application setting forth probable cause to believe that the target is an alien terrorist and that normal deportation procedures would risk a breach of national security.

After an in camera and ex parte review of this application, a public hearing commences. Because defendants are not privy to the contents of the application, however, they must base their defense solely on a nonconfidential summary drafted by the government and approved by the court.

This secret deportation court is not entirely without precedent. In 1978, Congress established the first secret court on U.S. soil, with the passage of the Foreign Intelligence Surveillance Act. Like the infamous Star Chamber court, which conducted secret trials in England from 1487 to 1641 (when it was abolished because of flagrant abuse), the Surveillance Act court conducts proceedings—which can result in loss of liberty—behind closed doors.

This American Star Chamber is empowered to authorize the surveillance of communications among people believed to be foreign agents, if the purpose is to further U.S. intelligence efforts. The surveillance need not be in accord with the Fourth Amendment, upon a sworn showing that there is probable cause to believe the target is a foreign agent.

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In Camera, Ex Parte

A judge specially appointed to the FISA court is required to issue an ex parte order authorizing surveillance. If the intelligence gathered as a result of this order is used for prosecution, the government may thwart the defendant's access to it: Even appellate review of its admissibility is ex parte and in camera.

The somewhat related 1980 Classified Information Procedures Act established no separate court, but it did set up security procedures for when it becomes apparent classified evidence will be introduced at trial. Hearings are in camera if the attorney general certifies a public proceeding would breach classification.

The government may move for permission to substitute for classified documents either a summary or a statement admitting facts the documents would prove. While there is a provision allowing a judge to dismiss an indictment if secrecy unduly hobbles the defense, in practice the defendant has to defend him- or herself at a considerable disadvantage.

Overclassification makes a defendant's task daunting, and it also produces absurd courtroom moments. My own initiation into the half-Kafka/half-Keystone Kops world of classification and espionage came in 1983, when my firm represented Alfred Zehe, an East German indicted for conspiracy to commit espionage.

The case arose when a U.S. Naval Intelligence undercover operative made repeated visits to Embassy Row in Washington, seeking an Eastern European embassy where someone would purchase outdated but still classified documents on submarine sonar-detection technology. The East Germans took the bait, and ultimately Prof. Zehe, a physicist who had been asked by his government to evaluate the documents, was arrested when he came to the United States to attend a scientific conference.

During discovery, prosecutors balked at the prospect of my firm having access to the classified documents and told the judge that we needed to be investigated and issued security clearances. I refused to submit to a clearance investigation and pointed out the absurd situation in which I found myself: The FBI and Naval Intelligence had selected obsolete documents as bait for the East Germans. The East Germans bought them. Yet I, a citizen and member of the bar with no record of criminality or disloyalty, was not allowed to see the documents without obtaining a security clearance!

Despite this absurd position, the government had the law on its side. The players operated as though they were dealing with a real espionage case involving legitimately classified information important to national security. I suspect I am not the only participant in this process who is tired of the charade.

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