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Essay
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ANATOMY OF A PUBLIC INTEREST CASE AGAINST THE CIA[a]

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FOREWORD

Our courts serve us best when the law advances the public interest. Occasionally this happens in suits brought solely to protect a private party's personal interest, but more often progress is made through a test case brought and designed to further both public and private goals. Our decade long fight to secure redress for the Canadian victims of CIA brainwashing experiments, *Orlikow v. United States,*[1] is an example of such a public interest litigation.

But this case involving the CIA goes far beyond the typical public interest litigation precisely because it addresses an area of lawbreaking where normal political and legal remedies are not available. As the late Senator Frank Church concluded, after leading the congressional investigation of the CIA's improper activities, in the 1950's and 1960's that agency was "a rogue elephant" operating outside the law and protected by a shroud of secrecy. This is an account of that rogue elephant's reckless experimentation ***309** upon unwitting Canadian citizens, as well as the story of a public interest litigation against an opponent of immense power and dubious purpose.

The forty years since 1950 have been an unprecedented period of national security hysteria fueled by the likes of the Dulles brothers, Joseph McCarthy, J. Edgar Hoover and Richard Helms, and implemented through repressive measures enacted by the state and federal legislatures. In the course of this hysteria, individual liberties have too often been sacrificed in the name of national security. During this period, federal court decisions have occasionally restored liberties and protected traditional constitutional values, but these judicial successes have hardly been able to stem the tide of repression. The clash between liberty and national security has never been more stark than in the inhumane and illegal sponsorship of the Canadian brainwashing experiments by our most powerful national intelligence agency -- an institution that was created to protect and to preserve the very freedoms that were so devastated in those irresponsible experiments. After years of effort, vindication was won through the payment of nearly a million dollars to the CIA's victims by the governments of the United States and Canada in response to the federal suit.

This review of the CIA's actions in the United States and Canada demonstrates how completely unprincipled was the Agency's original brainwashing program, as well as its course of legal maneuvers years later when it was required to answer for its misconduct. The story of the brainwashing suit and the barriers that were overcome before the CIA's victims were finally compensated, illustrates both the formidable hurdles to be overcome and the unique satisfactions to be gleaned in a public interest law suit.

I. HOW A PUBLIC INTEREST CASE BEGINS

There is a pattern to the genesis of public interest lawsuits. A great wrong has been or is being done that involves a violation of an important principle. A potential client comes to you with a plea, often nonsense, that "You're the only one who can or will fight to right this wrong." Indeed, this is the pattern that was followed in the initiation of our litigation against the CIA on behalf of the nine victims of brainwashing experiments at a Montreal psychiatric hospital in the late 1950's and early 1960's.

Early in 1979 Canadian Member of Parliament David Orlikow called our office with a horror story that bordered on the incredible. It seemed that some twenty years earlier, David's wife, Val Orlikow, had suffered a bout of depression following the birth of their daughter and had sought help at the leading psychiatric hospital in Canada -- the Allan Memorial Institute at McGill University in Montreal. Under the "care" of the Director of the Institute, Dr. D. Ewen Cameron, Val was subjected to a number of unorthodox procedures in lieu of generally accepted psychotherapy. In ***310** particular, she was given injections of LSD and was exposed to what Dr. Cameron called "psychic driving" -- a procedure used nowhere else in which tape-recorded messages were played hundreds of thousands of times. Not surprisingly, these bizarre procedures did not help Val, but made her condition worse.

It was only in the late seventies that David and Val learned for the first time, from a *New York Times* story, that Cameron's work had been subsidized by the United States Central Intelligence Agency as part of a secret program to study techniques of brainwashing. The Orlikows wanted to sue the CIA for its part in experiments performed on Val by the now deceased Cameron; they insisted that there was no one else who would take their case and help them right this wrong.

Getting the full story from a potential client is always important, but it is paramount in a public interest litigation, because the suit is brought to advance a principle as well as to vindicate an individual's rights. Concealed pitfalls, half-truths or distortions will inevitably sabotage both objectives. A lesson learned time and again during the McCarthy period is that a public interest lawyer must insist on the whole story, warts and all. McCarthy's victims had to be induced to tell their whole story despite their fears of confiding in anyone, even their own lawyers. We insisted on all the facts in this case before agreeing to represent the Orlikows and other victims of the CIA's Canadian fiasco. From the beginning and throughout the long fight for justice our clients told us the truth. Without this confidence we would not and could not have properly represented them.

II. INVESTIGATION OF THE LAW

Having established the rough contours of the wrong done to the Orlikows and convinced of their credibility, the next step was to determine whether there is some legal basis for liability on the part of the CIA. Clearly Val and David Orlikow had been victims of some specie of tort, but when the government is involved, the courts have historically been reluctant to drain the public treasury to compensate for the misdeeds of government employees. This judicial reluctance is embodied in the doctrine of sovereign immunity, which excuses governmental liability for such torts. Recognizing the unjustness of this broad immunity imported from English common law, Congress in 1946 enacted the Federal Tort Claims Act providing a limited waiver of sovereign immunity for negligent acts of government employees.[2] This was our legal basis for suit.

But the Tort Claims Act is a sharply limited basis for liability; the Act ***311** does not provide liability for intentional torts, foreign torts, torts by "independent contractors" and torts committed by government employees executing discretionary functions.[3] Of these, the foreign torts exception was the most immediately troublesome legal point, because so much of what occurred happened in Montreal, outside the United States.[4]

When the Orlikows came to us, the law of foreign torts was rather unsettled; there had been no definitive interpretation by the Supreme Court and only a few federal court rulings had construed this limitation in the Tort Claims Act. Fortunately, a case was then pending in the District of Columbia Circuit that raised exactly this issue, *Sami v. United States*.[5] We obtained the appellate brief filed by the plaintiff's counsel in the *Sami* case and agreed with the legal view he argued -- that under the Tort Claims Act it was the place *where the governmental negligence occurred* that mattered, not the site where that negligence had its operative impact. After reviewing the *Sami* brief, we were fairly confident that the D.C. Circuit would eventually construe the Tort Claims Act as covering cases like our's where the negligent acts occurred in the United States but had their damaging impact abroad.[6]

A second potential problem was that intentional torts are excluded from the Tort Claims Act waiver of sovereign immunity -- we had to plead and to demonstrate negligence for a recovery. Negligence is, of course, largely a question of fact -- what happened, who was careless, who was reckless, who was injured. To make out a *prima facie* case of negligence, however, one must have an identifiable standard of care that was violated. As a matter of general tort law, a person is required to exercise the prudence of a reasonable person in like circumstances. What that standard means thus depends upon the particular circumstances present in a case.

***312** In our case, a detailed articulation of the duties and responsibilities of those involved in conducting human subject experiments, which was of tremendous public relations value over the course of the suit, was handed to us on a silver platter in the form of the Nuremberg Code. The Nazis' notorious medical experimentation had not only led to the execution of German experimenters after the War Crime Trials at Nuremberg, but resulted in a comprehensive articulation of ethical standards for medical experimentation. These standards explained in great detail the requirements that medical researchers take appropriate measures to protect the health and well-being of their patients who volunteer to undergo experimental procedures. Most importantly, the Nuremberg Code required that the "informed consent" of the patient must be obtained before any experimentation.[7] This was our key legal standard for negligence in the failure to secure consent.

Val and David Orlikow were adamant that no one had ever told them of any experiment, much less obtained their consent. This seemed to be the clearest possible violation of the standard of care articulated in the Nuremberg Code. The use of LSD and the brainwashing tapes that Val described were a far cry from any accepted psychiatric therapy and their dangers were certainly well-known to the CIA. Knowingly financing such hazardous experimentation without requiring that Cameron take precautions to protect his patients seemed to be another clear violation of standard of the Nuremberg Code. But the detailed statement of these violations would require more facts than the Orlikows could provide.

III. INVESTIGATION OF THE FACTS

In some respects, we were lucky in developing the facts needed to make out a case, because much of the legwork had already been done by journalists and Congressional investigations. In 1975 the Rockefeller Commission and the United States Senate Intelligence Committee had investigated the CIA's domestic abuses and issued detailed reports on them. Most importantly, in 1977 an enterprising author, John Marks, had forced public disclosure under the Freedom of Information Act of thousands of ***313** pages of CIA documents that had not been available to the earlier investigations. These documents, which consisted largely of financial records that had been missed in 1973 when the vast bulk of such materials were destroyed, provided an overview of a top secret CIA program of behavior control and brainwashing experiments code-named MKULTRA.[8]

With the assistance of a brilliant young researcher, Jay Peterzell, and the Center for National Security Studies, Marks interviewed CIA-funded researchers, former CIA officers, and victims of the MKULTRA Program, to piece together the remarkable story of the CIA experiments in the United States and Canada. Marks' award-winning book[9] was the culmination of this effort. Marks agreed to give us free access to his files and Peterzell agreed to work with us in developing the facts. Both resources were invaluable.

In others respects, we faced tremendous obstacles. The trail was over twenty years old. Potential witnesses had died, memories had faded and the surviving victims' health had deteriorated. Despite Marks' success under the Freedom of Information Act, the vast majority of MKULTRA documents had been destroyed. And the defendant was an agency trained in misdirection and steeped in deception. Nonetheless from Congressional hearings and reports, the surviving CIA documents, and the Marks files, we were able to substantiate the following basic facts about the case.

A. Genesis of the MKULTRA Program and the CIA's Negligence in the Death of Dr. Frank Olson.

In the early 1950's the CIA reaction to the unprecedented confessions of U.S. POW's in Korea was one of panic that the Communists had discovered an effective method of "brainwashing" our soldiers. The response was an intensive research and development program code-named "MKULTRA." It was in April of 1953 that Richard Helms, then the head of the CIA's Operations Directorate, recommended that the Agency explore covert brainwashing techniques for offensive and defensive use, to counter the suspected Soviet and Chinese efforts in that area. CIA Director Allen Dulles promptly approved the MKULTRA Program which was to operate outside the usual CIA administrative channels without "the usual contractual arrangements," and to be highly "compartmented." Dulles also ordered that "exacting control will be maintained over the Project by TSS."[10]

***314** Proving negligence was essential to our Tort Claims Act case, and our starting point was the story of the CIA's role in the death of Dr. Frank Olson in an early MKULTRA drug experiment. The Olson tragedy is relevant because it occurred three years prior to the CIA funding of the experiments in Montreal and involved the two key Agency officers who approved that funding -- Sidney Gottlieb and Robert Lashbrook.

In November of 1953, Gottlieb and Lashbrook were directly responsible for an LSD test that preceded the death of Dr. Olson, an Army chemical and biological warfare expert, who had no forewarning that he was to be made an experimental subject. After receiving LSD surreptitiously administered in a glass of cointreau, Dr. Olson suffered a severe depression, was taken by Lashbrook to New York City for consultations with an allergist named Harold Abramson, who had been testing LSD for the CIA as an MKULTRA researcher. Without ever being taken to see a psychiatrist or, indeed, any physician who was independent of the CIA, Dr. Olson fell to his death from the window of a tenth story room he shared with Lashbrook at the New York Statler Hotel.

Although the CIA was able to cover up its responsibility for the Olson death, Dulles ordered an investigation by his General Counsel, Lawrence Houston, who concluded that there had been "culpable negligence" by the CIA officials in charge of MKULTRA and "a death occurred which might have been prevented."[11] CIA Inspector General Lyman Kirkpatrick, who also reviewed the Olson tragedy at Dulles' request, recommended that there "should immediately be established a high-level intra-Agency board which should review all TSS experiments and give approval in advance to any in which human beings are involved." Kirkpatrick also recommended that the CIA employees involved in the Olson death should be reprimanded.

Despite these conclusions and recommendations, Gottlieb and Lashbrook continued their activities unreprimanded and

unsupervised. Indeed, there was further evidence of the CIA's negligence in the subsequent findings of its CIA Inspector General in 1957 that some of the MKULTRA ***315** activities "are considered to be professionally unethical and in some instances border on the illegal" and "are not only unorthodox but unethical and sometimes illegal."[12] The CIA's failure to take appropriate measures to curb Gottlieb and Lashbrook despite these repeated findings is precisely the kind of negligent omission contemplated by the Tort Claims Act, and seemed to be one sound ground for liability.

B. CIA Negligence in the Funding of the Montreal Experiments

Early in 1957, Dr. D. Ewen Cameron, Director of the Allan Memorial Institute in Montreal, submitted a formal grant application to the "Society for the Investigation of Human Ecology" a CIA front operating at the Cornell University Medical School in New York City. That application proposed to extend brainwashing experimentation which Cameron described as follows:

> i. The breaking down of ongoing patterns of the patient's behavior by means of particularly intensive electroshocks (depatterning).
>
> ii. The intensive repetition (16 hours a day for 6 or 7 days) of the prearranged verbal signal.
>
> iii. During this period of intensive repetition the patient is kept in partial sensory isolation.
>
> iv. Repression of the driving period is carried out by putting the patient, after the conclusion of the period, into continuous sleep for 7-10 days.

Cameron also proposed to test drugs such as "LSD 25 and other similar agents" in "depatterning" his patients and to experiment with new methods of "inactivating" the patient during the repetition of verbal signals with other drugs including curare, a drug used in surgery to temporarily paralyze a patients involuntary muscles.

Cameron's application for funds was dated January 21, 1957 and on February 26, 1957 Gottlieb and other CIA officials approved the application in a Memorandum that simply repeats, without reasoning or explanation, the application virtually *in haec verba.* Shortly thereafter, Gottlieb's deputy, Lashbrook, approved the first payment to Cameron. Despite the CIA General Counsel's explicit criticism of the "culpable negligence" in the Olson death on the part of Gottlieb and Lashbrook, they called the shots at the Agency on the Cameron application, which was not even reviewed by the CIA's own Medical Staff.[13]

***316** In all, the CIA provided some $60,000 over four years for the experiments described in the Cameron application. At no point in any of the surviving CIA documents is the slightest concern expressed for the rights or protecting the well-being of the subjects of these CIA-funded experiments. The casual indifference to Cameron's patients exhibited throughout the CIA's documentary record, particularly after the disastrous Olson LSD experiment, simply reeked negligence.

C. CIA Negligent Funding of Experiments on Unwitting Subjects

The unambiguous standards for medical experimentation formalized at Nuremberg nearly a decade before the CIA subsidies to Cameron specifically required that "informed consent" be obtained from subjects in medical experimentation. Val and David Orlikow swore that they had never consented to any experimentation at the Allan Memorial Institute and, indeed, the Institute's medical records contained only a telegram from David authorizing Val's admission "for treatment."

The documentary evidence from the CIA contained no mention whatsoever of using volunteers, and it was clear from the application Cameron had submitted that experimental subjects would be drawn from the patient population of the Allan

Memorial Institute. Finally, the use of non-volunteers was the *modus operandi* of the MKULTRA program and its two chief operatives, Gottlieb and Lashbrook; this practice was strongly criticized by two CIA Inspectors General during the late 1950's and early 1960's.[14] ***317** This strong circumstantial evidence corroborated the Orlikows' story, strengthened the third aspect of the CIA's negligence in funding the experiments in Montreal.

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Thus each of these three perspectives -- leaving those responsible for Dr. Olson's death in charge of MKULTRA, financing extraordinarily dangerous experiments without taking any precautions, and experimenting upon unwitting, non-volunteer subjects -- it appeared to be a sound prima facie case. But there was one question that we could not answer: Did Cameron know he was working for the CIA? On the one hand there was an express notation in an MKULTRA file that Cameron and his staff were to remain unwitting of their CIA sponsorship.[15] On the other hand there was Cameron's personal history as a trusted consultant to the U.S. Government who had evaluated Rudolf Hess' competence to stand trial at the end of World War II, and Cameron's peculiar application for funding to the CIA front, which seemed to have less to do with recognized psychiatric therapy than with brainwashing experimentation.

We asked our first expert, Dr. Leon Salzman, an eminent psychiatrist who has practiced and taught in Washington and New York since the 1940's, to review the Cameron application and Val Orlikow's medical records and to discuss them with us. Dr. Salzman was direct and emphatic, in his expert opinion the application proposed experiments clearly tailored to explore techniques of "brainwashing," and the bizarre combination of procedures offered little if any hope of helping Cameron's patients. Indeed Dr. Salzman's insight was confirmed by a public admission of Cameron's technical assistant, Leonard Rubenstein. In an August 2, 1977 *New York Times* interview Rubenstein stated that the work Cameron did with CIA funds "was directly related to brainwashing. Rubenstein explained:

> They had investigated brainwashing among soldiers who had been in Korea. We in Montreal started . . . brainwashing patients instead of using drugs.

Unfortunately all of this was circumstantial. Because Cameron was dead, a definitive answer to the question "what he knew and when he knew it" vis-à-vis his CIA subsidies was likely impossible.

***318** But did it matter whether Cameron knew that the CIA was paying him? Focusing on Cameron's knowledge was looking through the wrong end of the telescope. For purposes of suing the CIA, what mattered was *what the CIA knew.* On that score, the record couldn't be clearer. Cameron's application set out the experiments in detail and the CIA authorized subsidies for that experimentation. Finally, as Val Orlikow's hospital records made clear, the CIA got what it paid for. Whether Cameron was a witting accomplice or a unknowing dupe was beside the point.

IV. DECIDING TO TAKE A PUBLIC INTEREST CASE

Deciding whether to proceed with a public interest case requires a lawyer to answer four questions. Will the suit advance a public interest? Is that interest an important one? Can you afford to take the case? And, can you win? Our answer to each of these questions in the CIA brainwashing case was, rather obviously, "yes," but the considerations that led us to those conclusions illustrate the unique nature of a public interest litigation.

A. Defining a "Public Interest"

There are probably as many different definitions of the "public interest" as there are people who think about the concept. We certainly make no claim of being able to define any single position that is *the* public interest, and do not believe that there is any objective standard for doing so. But the absence of an objective standard does not relieve the ethical lawyer from a professional responsibility to advance the public interest -- as he or she sees it. For example, there are those who honestly believe abortion is murder, while others are adamant that a woman has an absolute right to control her own body and to end an unwanted pregnancy. According to their own view, each side is fighting for the public interest. Just because other people may argue with your conclusion about where the public interest lies does not mean that you are excused from thinking and acting to promote the public interest as *you* see it.

Here, at least employing our own subjective standard, the public interest seemed clear: "the CIA is not above the law." The rule of law is a cornerstone to our democratic system of government; holding the executive branch legally accountable in the courts is a key means of protecting our civil freedom. Vindicating this principle and extending it to the most secret and deceptive part of the federal government would be a significant stride in advancing the public interest. We concluded that the *Orlikow* case presented an ideal vehicle for reasserting this important principle.[16]

319** ***B. Assessing the Importance of a Public Interest

The importance of securing judicial accountability for the CIA was demonstrated time and again, both before and during the litigation. In the words of the late Senator Frank Church, who led the congressional investigation of the CIA's improper and unlawful actions, the agency was "a rogue elephant" in the 1950's and 1960's operating above the law and out of control as it plotted assassinations, illegally spied on thousands of Americans, and even drugged our own citizens in its effort to develop new weapons for its covert arsenal. When those actions were exposed by the congressional committees in the 1970's, the CIA showed some disposition for reform, but those reforms were embodied in internal CIA regulations and Executive Orders, and were thus subject to change whenever a new administration entered office or a new CIA Director took over. We believed that using the Tort Claims Act to secure compensation in a court of law for the CIA's victims would not only complete the public repudiation of these abuses, but would also extend the rule of law to the CIA and serve as a concrete deterrent to future abuses.

Moreover, in the Canadians' case, instead of admitting its wrongdoing and accepting responsibility, the CIA chose simply to ignore the plight of its victims. The importance to all Americans of curbing this continued arrogance by a secret agency of our government could hardly be overstated. We felt that judicial accountability for these past abuses could help to do so.

Finally while the suit was underway, there was a return to business as usual at the CIA. The reforms of the 1970's became dead letters in the 1980's as new Executive Orders and attitudes allowed the CIA to veil more of its activities in a cloak of secrecy, and as CIA Director William Casey adopted an "anything goes" attitude. This had a predictable impact on the Agency, which no longer felt the restraints of the 1970's and returned to the days of the rogue elephant, advising Central American guerrillas that assassinations are appropriate, sponsoring covert wars throughout the world, and hiding illegal activities behind claims of national security. In short, the CIA was again operating outside the law. Throughout the court fight, these continuing examples of CIA lawlessness reinforced our conclusion that judicial redress was an important means of forcing some restraint upon this Agency's threat to the rights of human beings at home and abroad.

C. "Winability"

The question of whether a public interest case can be won is particularly important because a loss is not only a defeat for the plaintiff but also for the principle. With the documents obtained by John Marks as support, ***320** there seemed little question that factually we were on firm ground. As to the law, one should not be faint-hearted. We thought that the pending *Sami* case offered a way around the foreign country exception, and indeed as the suit unfolded, that most difficult potential legal problem evaporated. More important legally was the Nuremberg Code which provided a codified ethical standard that the CIA could scarcely shrug off. All together it looked like a winner.

In addition, David Orlikow's stature as a respected Member of the Canadian Parliament gave us reason to expect the support of the Canadian Government in the fight. This was an important consideration. We expected that the Canadians would resent an ally who used their citizens as unwitting guinea pigs in brainwashing experiments, and that Canada's support for its citizens would strengthen our hand in seeking prompt recompense by the CIA. These expectations, sadly, were never realized.

D. Affordability

The decision to take a public interest case brings with it a commitment to see the matter through to its conclusion. Neither the Orlikows nor any of the other Canadian victims were in a position to pay us to bring the suit, so a contingency fee under the limitations of the Tort Claims Act was the only option. Although this would mean a long wait for legal fees, if any, we were sufficiently convinced of the importance of this case and its winability to take the case on this basis. In addition, discovery costs would be large, but we were prepared to advance some of those costs from our firm's funds and to seek support from

foundations to pay the remainder.[17] For better or worse, we decided to go forward.

V. EFFORT TO SETTLE BEFORE SUIT

Before any lawsuit can be filed under the Tort Claims Act, an administrative claim must be presented to the federal agency that was negligent, which gives the government a chance to settle the case. During 1979, we submitted administrative claims on behalf of Val Orlikow and two other Canadian victims -- Jean Charles Pagé and Robert Logie -- and were somewhat encouraged by the response of CIA General Counsel Daniel B. Silver. On October 11, 1979, Silver wrote us that "the policy of CIA is not to shirk responsibility for the unfortunate acts that occurred in the course of the MKULTRA program," and that he found the experimental research conducted by Dr. Cameron "repugnant."

Nonetheless, when we sought to settle our clients' claims prior to suit, ***321** the CIA refused to negotiate on the ground that Cameron's application for funds was "unsolicited." This claim, even if true, seemed legally irrelevant to us. After all, the CIA knew what the experiments would involve and voluntarily provided funds for them. Whether the CIA or Cameron initiated the contacts did not seem to us to have any bearing on the CIA's liability.

But as it turned out, the CIA General Counsel's version of what had happened was untrue -- CIA representatives had gone to Cameron and solicited the application. As we detail below, this falsehood, which was even repeated in defendant's formal Answer to our Complaint, was exploded in discovery when retired CIA officer John W. Gittinger told the truth at his deposition -- that he and the CIA had initiated the contacts with Cameron. Despite the fact that Gittinger was well-known within the CIA as having been involved in MKULTRA and was identified in Agency documents as the "Project Monitor" for the Montreal experiments, the CIA lawyers didn't even bother to check their facts with him before asserting this groundless defense.

In any event the CIA refused to negotiate settlement, which raised a new legal problem. Our correspondence with the General Counsel contained valuable admissions by the CIA. Could we use these settlement documents in our case? Although Federal Rule of Evidence 408 precludes the admission in court of "[e]vidence of conduct or statements made in compromise negotiations," there is no legal bar upon using such admissions in public debate. Moreover, where the government has relied upon patently spurious grounds for refusing to settle a claim, it is entirely proper to disclose its erroneous position when presenting the evidence that disproves it. In addition, the Tort Claims Act requires claimants to exhaust administrative remedies by presenting their claims to the Agency involved. Because of this requirement, we were able to include in court documents both the General Counsel's admissions and the false basis for refusing to discuss settlement. In this way, normally excluded evidence played a role in the factual development of the *Orlikow* case.

VI. PREPARATION OF COMPLAINT

At the same time we were engaged in our pre-litigation effort to settle with the CIA, we were also working hard on the eventual complaint in the case. These two jobs were complementary, since information obtained in the negotiations, such as they were, contributed to the factual development of our case, and the disciplined articulation of legal theories in a formal document aided in our presentation of our clients' claims to the CIA. By the time that we had received the final denial of our clients' claims -- a prerequisite for suit under the Tort Claims Act -- we had nearly completed a detailed complaint.

***322** *A. Pleading Facts Consistent with Coverage of the Tort Claims Act*

As we have noted, the Tort Claims Act only waives sovereign immunity for torts sounding in negligence. Intentional torts such as assault and battery are not bases for liability under that statute. This limitation posed a potentially significant problem for us, because torts based on medical malpractice, particularly those involving a failure to secure consent, had originally evolved from assault. There was an important distinction in our case, however -- we were seeking recovery from the CIA, not an incompetent physician. Throughout our development of the case we continually tried to keep the focus of debate on the Agency and its recklessness, a strategy that was happily consistent both with our clients' private interests in financial recompense and the public interest in forcing judicial accountability upon the CIA.

Our investigation of the facts already on the public record had provided a wealth of evidence of the CIA's negligence. Now, aided immeasurably by the unique conceptual insights of our partner, John Silard, we formulated our clients' claims in three categories:

i. Negligent failure to supervise -- the Olson count;

ii. Negligent funding of extra-hazardous experimentation -- the brainwashing count; and

iii. Negligent funding of experimentation on patients who had not volunteered to be experimental subjects -- the Nuremberg count.

The final complaint set out these three negligence counts and, with John's brilliant drafting, skillfully avoided the intentional tort exception. Indeed by articulating the wrong in this fashion, an intentional tort defense was practically untenable -- the CIA was in no political position to insist that its torts against our clients were intentional, not negligent.

B. Developing Factual Evidence Corroborating Plaintiffs' Claims

Because the case was so unusual and the underlying facts were so complex, our complaint contained a wealth of detailed allegations concerning the MKULTRA program and the CIA.[18] In addition to the facts concerning the MKULTRA program that we have summarized above, we provided details concerning the three Canadian victims who we then represented. Using facts gleaned from their Allan Memorial Institute medical records we were able to confirm that our clients had indeed been subjected to experimentation as described in the Cameron application to the CIA "front."

These records showed that Val Orlikow, who sought treatment for depression, ***323** instead had been subjected to many months of "psychic driving" and 16 LSD trips. Jean-Charles Pagé, who entered the Allan Memorial Institute for treatment of alcoholism, was "depatterned" with and became addicted to powerful barbiturates, and was placed in "continuous sleep" for thirty-six days. Robert Logie, who came to the hospital for treatment of leg pains that were incorrectly diagnosed as psycho-somatic, was depatterned with intensive electroshocks and LSD, and subjected to drug-in-duced sleep for a period of twenty-three days.[19]

Other victims came forward and joined the suit over the next two years until there were nine in all. The Allan medical records confirmed that the six additional patients we came to represent had also been victims of the brainwashing experimentation during the period of CIA funding. Jeanine Huard, who also sought treatment for depression, was depatterned with intensive electroshocks and drugs, and subjected to psychic driving. Lyvia Stadler, another patient suffering from depression, was subjected to depatterning, psychic driving and prolonged drug-induced sleep. Dr. Mary Morrow, an intern who was admitted to the Allan Memorial after being told by Cameron that she needed "rest," was depatterned with intensive electroshocks and barbiturates. Rita Zimmerman, who sought treatment for alcoholism, was depatterned with 30 electroshock sessions until in Cameron's words she was "incontinent of stool on occasion." Mrs. Zimmerman was also subjected to over a month of psychic driving and some 56 days of drug-induced sleep. Florence Langleben, who sought treatment for anxiety attacks, was depatterned with LSD and intensive electroshocks, and subjected to over a month of psychic driving and some 43 days of drug-induced sleep.

The story of the last of the nine plaintiffs, Louis Weinstein, is perhaps the most stark example of the devastating impact these brainwashing experiments had upon the innocent Canadian victims. At the hospital he was subjected to depatterning with intensive electroshock and LSD, months of psychic driving (sometimes in "sensory isolation" where all he could perceive was the taped messages), and prolonged drug-induced sleep. A successful and prosperous Montreal businessman when he entered the Allan Memorial Institute for treatment of anxiety, Mr. Weinstein lost his business and was unable ever again to support his family.[20]

***324** In addition, the nine victims, most of whom were by then elderly and frail, never consented to participate in any form of experimentation. David Orlikow sent a telegram authorizing his wife's admission "for *treatment.*" Jeanine Huard, Mary Morrow, Rita Zimmerman, and Louis Weinstein signed standard hospital admission forms entitled "consent for examinations and *treatments.*" The medical records of the other victims did not contain even such a consent for treatment. The nine and their families could not remember ever being told that they were the subjects of experiments for research or any other

purpose, and they were sure that none of them had ever volunteered to be subjects in any experiments or research.

On December 11, 1980 we filed our Complaint against the CIA under the Tort Claims Act.

VII. DILEMMA WITH A JUDGE WHO WON'T DECIDE

The CIA's first response to the suit by the Canadians was a harbinger of the Agency's entire litigation strategy: use delay and attrition to wear down the elderly plaintiffs and their 70 year old lead attorney, Joseph Rauh. Unfortunately this strategy was aided by the Judge assigned to the *Orlikow* case who took months to rule on routine motions, and the litigation ground to a halt time after time.

Thus, instead of investigating and answering the detailed factual allegations of our complaint, the government filed a motion seeking dismissal of the suit on the basis of a group of "boilerplate" defenses -- most prominently, the foreign torts and discretionary function exceptions to the Tort Claims Act, discussed above, and the statute of limitations. Simultaneously, the Agency sought a protective order precluding written interrogatories, oral depositions, document requests and other discovery by the plaintiffs until the court had ruled on the motion to dismiss the suit.

At this early stage in the litigation -- consideration of a motion to dismiss -- the court must assume that all factual allegations of the complaint are true and can only dismiss a suit on legal grounds. After our research in preparing the complaint, we were confident that none of the boilerplate defenses asserted by the CIA presented a serious threat. Nonetheless, month after month went by and the Judge failed to rule on the CIA's dilatory request for dismissal. During this protracted delay, our initial written interrogatories remained unanswered and oral depositions could not be scheduled. In short, the case was frozen.

How do you get a dilatory Judge to rule? There is no safe way. Among the alternatives are a letter to the Judge (copy, of course, to opposing counsel); a letter to the Judge's superiors (again with a copy to opposing counsel); a letter to the Administrative Office of the Federal Courts (again with the requisite copy), where it will be forwarded to the Chief Judge of the District Court; or seeking a rarely issued writ of mandamus ***325** from the court of appeals to compel a ruling. All of these alternatives carry terrible risks of alienating the person who will ultimately decide the case.

After waiting nearly a year for what should have been a simple and obvious ruling in our favor, it was clear that some action had to be taken despite the risks. We decided that the best course was a letter to the Administrator of the Federal Courts pointing out the advanced age of the plaintiffs and the likelihood that this continuing delay would deny them their day in court. The Administrator forwarded our letter to the Chief Judge of the District Court, and the CIA's Motion to Dismiss was denied within a week. Now we could finally begin discovery.

But in important ways the damage had already been done. Our clients had lived another year uncompensated and during that time we were unable to advance their case. Most significantly, a key witness, who was to be our first deponent, had died during the delay in ruling on the motion to dismiss. During the late 1950's, James Monroe, a retired Air Force Colonel who had studied brainwashed U.S. POW's in Korea, was the Executive Director of the Society for the Investigation of Human Ecology, the CIA front in New York which served as the conduit for Agency funding of the Montreal brainwashing experiments. Now we would never know what Monroe could tell us as the middleman in the CIA's dealings with McGill University and Dr. Cameron.

VIII. DISCOVERY AGAINST THE CIA

Unlike other litigants, the CIA has an almost unlimited capacity to conceal probative evidence and to assert privileges against disclosure with little judicial intervention. In the Canadian brainwashing case, getting the truth about what happened was all the more difficult because two decades of concealment were continued into the 1980's with unwarranted claims of national security privilege. Nonetheless, the discovery and trial preparation process did yield new evidence further demonstrating the CIA's negligence in the MKULTRA program in general and in the Montreal experiments in particular.

A. CIA Concealment of the Facts

Five means of concealing the truth hindered our investigation of the CIA's negligence -- documentary evidence about MKULTRA was destroyed, the details of the MKULTRA Program were restricted to a handful of CIA employees, witnesses

who did know about MKULTRA were prevented from testifying, witnesses who did testify told as little as possible, and "national security" claims were groundlessly invoked to prevent disclosure of information embarrassing to the CIA.

Oliver North was not the Government's first shredder; most of the ***326** documentary evidence about the Montreal experiments had been destroyed in 1973. At that time, CIA Director Richard Helms and Sidney Gottlieb, who were both planning to leave the Agency, joined in ordering the destruction of all MKULTRA files.[21] This loss was particularly significant because it denied us a documentary basis for cross-examining Mr. Helms, whose lack of credibility had been established when he committed perjury in testimony before Congress in the mid-1970's.

In the early 1970's, Helms categorically denied under oath before the Senate Foreign Relations Committee that the CIA was trying to overthrow the Marxist Allende Government in Chile, when he had, in fact, directed massive covert efforts to do just that.[22] Moreover, Helms went out of his way to lie, for the false testimony came not at some Senate hearing where he was defending the CIA's reputation, but at a hearing where he was personally seeking confirmation as Ambassador to Iran. The honorable course would have been to refuse to discuss the Chilean incident with the Committee and to take his chance of losing the ambassadorship. It was not any secrecy oath that Helms had with the CIA that was at stake, it was his nomination as Ambassador to Iran. Faced with the alternatives, Helms lied.

Although this was clearly perjury, when angry Senators forced a prosecution, the Washington establishment rallied around Helms, who was allowed to escape justice by pleading to a single violation of 2 U.S.C. section 192, a statute that requires witnesses to answer questions before Congress. This was the sweetheart deal Helms got.

In order to relieve Mr. Helms of pleading to a felony charge of perjury, the Justice Department created a special misdemeanor to which he was permitted to plead "no contest." The Department of Justice charged ***327** Helms with, Helms pleaded to, and the Judge sentenced him for, a crime that does not exist. The Department of Justice was so anxious to strike a bargain with the defense that it manufactured a "crime" for the occasion.

Mr. Helms was charged with the misdemeanor of failing to testify "fully, completely and accurately" before a Senate Committee. There is no such crime. There is a felony statute of perjury before Congress and a misdemeanor statute of contempt of Congress for a "refusal to answer." Helms was charged under the latter statute. But he did the exact opposite. He did not refuse to answer; he answered and did so falsely. This is not a crime under the "refusal to answer" contempt misdemeanor statute.

Yielding to the Government's intense pressure to accept the "no jail" plea bargain, Judge Barrington Parker assessed only a $2,000 fine. A group of 400 retired CIA intelligence officers immediately donated funds to pay Helm's fine at an impromptu victory party at the Kenwood Country Club following his sentencing.[23] As Joseph Rauh wrote in the November 9, 1977 edition of the *Washington Post,* "The CIA now knows that the law is only peripherally for them."

The problem that Helms presented was typical of those we would face with the covert operators at the CIA. Here was a man who had lied to Congress and gotten away with it. Was there any reason to expect him to do less in a private litigation? The 1973 destruction of MKULTRA documents virtually guaranteed that Helms would have free rein to concoct any story at all when we questioned him.

As the Helms perjury incident demonstrates, senior CIA officials can seemingly lie with impunity, and documentary evidence is therefore all the more critical in getting the truth. The lost documents would also have been a great aid in questioning Sidney Gottlieb, who had earlier demanded immunity from prosecution before testifying about his role in CIA assassination plots (including one in which he had personally carried anthrax toxins to the Congo in an abortive effort to eliminate Patrice Lumumba). Without documents to force their testimony, Helms and Gottlieb would be free to forget and thus to evade whatever they wished.[24]

To conceal further its role in brainwashing experimentation, in the early 1950's the CIA established a front organization, "the Society for the Investigation of Human Ecology" (sometimes abbreviated SIHE), at the ***328** Cornell University Medical School in New York City. As CIA officer John Gittinger confirmed, the Society served "as a 'conduit for brainwashing research." Since the program operated under cover, people outside the CIA were prevented from knowing anything about MKULTRA -- there would be no witnesses outside the Agency.

The MKULTRA Program also operated outside the normal CIA administrative channels without "the usual contractual arrangements," and was concealed even inside the CIA under a practice called "compartmentation." As former CIA Director,

Stansfield Turner, explained at his deposition, in MKULTRA CIA employees "used compartmentation to so narrow who knows a thing," that there was "virtually no check or very little check on their activities." Compartmentation thus ensured that there would be no witnesses aside from Helms, Gottlieb and their assistants.[25]

When former CIA employees were subpoenaed and did testify, lawyers for the Agency prevented full answers to our questions. This practice took the form of rather blatant intimidation -- for example, at a meeting to prepare his testimony one day prior to deposition, John Gittinger was told by counsel for the CIA that he "would be liable for prosecution if [he] began to talk about some of that." Furthermore, although the CIA counsel present at the deposition did not represent Gittinger and would have had a conflict of interest had he done so, he nonetheless directed Gittinger not to answer a number of questions (a practice authorized neither by statute nor rule of the court). In subsequent depositions CIA lawyers simply ignored their conflicts of interest, and claimed to represent both the CIA and its former employees when they decided that a question should not be answered. In this way, even a former employee who wanted to tell all could be prevented from doing so.

The testimony that we did obtain from former CIA officials was often less than candid. A central axiom of clandestine activities, such as the MKULTRA Program, is that CIA must maintain "plausible deniablity." This means that layer upon layer of cover stories are available to conceal Agency involvement, and that Agency operatives are schooled in telling half-truths or out-right lies to minimize disclosures. There were many examples of this practice in the revelations of MKULTRA. CIA agent James Monroe erroneously told the *New York Times* that the Society for the Investigation of Human Ecology, which he ran, received "only 25 to 30 percent" of its budget from the CIA with the bulk coming from other foundations and private donors. The truth is that over 95% of the Society's funds came from the CIA. When that cover story failed and the Canadian victims presented their claims, efforts to minimize CIA responsibility included the ***329** completely inaccurate claim to the Canadian Government and plaintiffs' counsel that Dr. Cameron applied for funds "unsolicited."[26] Against this backdrop of institutionalized lying, we were never sure that we had gotten everything that a witness knew.

Finally, throughout the litigation, the CIA repeated *ad nauseam* its claim of secret intelligence "sources and methods" to keep us from uncovering the full facts. While it is difficult to understand how information concerning a program that ended some twenty or more years ago could threaten our national security, it is easy to see how the broad sources and methods privilege ratified by the Supreme Court in *CIA v. Sims,*[27] could be exploited to hide evidence of CIA wrongdoing. The pernicious *Sims* doctrine is particularly damaging, because the vast majority of secret material is classified not to protect our security, but to prevent official embarrassment. And, even where there was some legitimate security concern in the beginning, the privilege continues to be asserted many years later when there is no need for secrecy.

The prevalence of the assertion of national security privileges to avoid political embarrassment by the intelligence community was documented in a column by former Solicitor General Erwin Griswold.[28] As Dean Griswold recounts from his experience when representing the Nixon administration during its unsuccessful effort to prevent publication of the Pentagon Papers:[29]

> It quickly becomes apparent to any person who has considerable experience with classified material that there is massive over classification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. There may be some basis for classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, 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.

Under this fallacious national security rubric, as expanded and ratified by the Supreme Court's *Sims* decision, identities of key witnesses were concealed from us, documents were withheld, and on one occasion we were personally threatened with prosecution under the Espionage Act if we did not agree to excise information from the deposition of Richard Helms.[30] ***330** Most importantly, as we detail below, even though the two CIA Station Chiefs in Canada in August 1977, Stacey B. Hulse and John Kenneth Knaus, had been publicly identified as such, we were prevented from obtaining their deposition testimony concerning their briefings by the CIA on the Cameron experiments and what they told the Canadian Government on the Agency's behalf when the story broke in Canada.

B. Additional Facts from Discovery and Trial Preparation Underscore CIA Negligence

Despite the unique problems in conducting discovery against the CIA, we were able to obtain important new evidence of the Agency's negligence in each of the three facets of the case. The story of the Olson death, and the CIA's eventual acceptance of responsibility in 1975 was even more compelling when recounted by his widow, who we eventually hoped to use as our first witness at trial. The CIA's negligence in funding Cameron, a reckless loose cannon, was confirmed by his contemporaries in Montreal. The CIA's negligence in failing to ensure the safety and consent of Cameron's patients was admitted in deposition testimony by CIA officers. A group of psychiatrists who evaluated our clients' experiences under Cameron's care confirmed the bizarre and injurious nature of the CIA-funded brainwashing experiments. Finally, during discovery we had obtained important admissions of culpability on the part of the CIA and the U.S. Government.

1. New Evidence About the Olson Death

One of the most courageous people to join in this fight was the widow of Dr. Frank Olson, Alice W. Olson. Despite the pain and anguish caused to her by recounting the details of the tragic CIA experiment upon her husband, Mrs. Olson agreed to appear as a witness for the plaintiffs and was prepared to offer testimony concerning her husband's death. As Mrs. Olson explained in her affidavit to the court:

> In 1953 my husband was a distinguished biochemist working as a ***331** civilian employee of the United States Army at Camp Detrick, Maryland. My husband and three of his colleagues were given LSD, without warning, by CIA officials Sidney Gottlieb, Chief of CIA's TSS Chemical Division and his Deputy, Robert Lashbrook, as part of the CIA experimental brainwashing program designated as MKULTRA and operating under the direction of Richard Helms, Chief of Staff of CIA's Clandestine Services. Gottlieb and Lashbrook fed the LSD to my husband and the others in their after-dinner liqueur without telling them that there was LSD in the cointreau glass, nor that they were the subject of CIA experiments.

Mrs. Olson next describes the negligent and reckless behavior of Gottlieb and Lashbrook after the injurious effects of that LSD experiment became apparent:

> When Frank came home on the Saturday following the CIA experiment, he was uncharacteristically moody and depressed. He was in great distress and in obvious need of help. But, instead of being taken to a psychiatrist in Washington or Maryland, Gottlieb and Lashbrook took him to an allergist in New York City, Dr. Harold Abramson, who was working with the CIA on its LSD experiments. Frank had two sessions with Abramson. After the first session he returned to this area, but when he got as far as Bethesda, he told me on the telephone that he was afraid to return home because he might do something wrong in front of the children. So he and Lashbrook returned to New York for a second session with Abramson. That night he jumped from a window of a tenth story hotel room in New York in which he was staying with Lashbrook.

Finally, Mrs. Olson explains the direct link between the LSD and her husband's death:

> My husband was a remarkably stable man. He had never had *any* psychiatric problems before he was fed the LSD in 1953. As President Ford put it when he signed legislation in 1975 providing $750,000 recompense to our family, the CIA's drug experiments were "the proximate cause of his death." There is no doubt that CIA-administered LSD is what caused Frank's death.

Mrs. Olson's personal recollections of the tragedy would not only underscore the magnitude of the negligence and incompetence of CIA officers Gottlieb and Lashbrook, but would also show the Court that the government had *already* accepted responsibility for their misdeeds. There were even public admissions of responsibility from the highest levels of our government that Mrs. Olson could describe in Court.

***332** When the Olson story finally became known despite the CIA's efforts at concealment, President Gerald Ford met with Mrs. Olson and her children on July 21, 1975 and, according to a White House Press Release, "expressed the sympathy of the American people and apologized on behalf of the U.S. Government for the circumstances of Dr. Frank Olson's death in

November 1953." And in a July 24, 1975 letter to Mrs. Olson, then CIA Director William E. Colby apologized for the CIA:

> I wish to join with President Ford in expressing my deepest personal sympathy and hope that you and your family will also accept my sincere apologies on behalf of the Central Intelligence Agency for the suffering you and your family have endured as a result of the untimely loss of your husband in 1953. The uniform reaction of the employees of the Agency to this disclosure has been dismay and regret that this could have occurred. I can find no explanation for why you were not fully informed of the circumstances at the time and apologize equally for that omission . . .

On October 12, 1976 President Ford signed legislation providing $750,000 recompense to the survivors of Dr. Olson and, after stating that the LSD "would appear to have been the proximate cause of his death," went on:

> The approval of this bill underscores the basic principle that an individual citizen of this Nation should be protected from unreasonable transgressions into his personal activities. There should be no doubt that my administration is opposed to the use of drugs, chemicals, or other substances without the prior knowledge and consent of the individual affected. At the request of the family of Dr. Olson, I take this opportunity to highlight this continuing policy.

These contrite apologies from the highest level of our government made it clear that there had once been a decision that those injured in MKULTRA should be compensated.

In addition, we now had obtained additional CIA documents demonstrating that in the wake of the Olson death, CIA Director Dulles ordered that a Review Board be created to oversee and control TSS research and experiments. But the Dulles order was not carried out and no other steps were taken to ensure that there would be no repetition of the reckless and negligent conduct in the Olson death. Despite the Dulles order, Gottlieb and Lashbrook were left in charge of MKULTRA without even a reprimand.[31] In that capacity they approved the funds for brainwashing experiments ***333** performed by Dr. Cameron without the review and oversight of the special Review Board ordered by Director Dulles and with the same recklessness they had exhibited in the Olson death.

2. New Evidence of CIA Negligence in its Relation to Cameron

One of Gottlieb and Lashbrook's assistants was John Gittinger, who learned of the work of Dr. Cameron in the brainwashing field by reading an article appearing in the *American Journal of Psychiatry* in January of 1956. In preparing our case we consulted Dr. Robert Jay Lifton, an internationally recognized expert on brainwashing who had conducted one of the seminal studies on Chinese Communist practices during the Korean War. Dr. Lifton agreed to review the 1956 Cameron article and to testify in court concerning the similarities between Cameron's techniques and the brainwashing procedures of the Communist Chinese.

In Dr. Lifton's expert opinion, the 1956 Cameron article "described non-therapeutic and potentially dangerous techniques of repetition and isolation which were extensions of the totalistic methods of 'thought reform' or 'brainwashing' used in China and elsewhere." Lifton's view was subsequently corroborated by Cameron himself. In pre-1956 papers Cameron had admitted that he conducted experiments with "sleeplessness, disinhibiting agents and hypnosis" in an attempt to exploit the methods used to achieve "the extraordinary political conversions which we have seen, particularly in the iron curtain countries."[32]

We also asked Doctors Lifton and Salzman to study the Cameron application and to be prepared to testify about their opinions of it. They were in complete agreement that the Cameron application showed on its face that CIA funds would be used to conduct extremely dangerous brainwashing experiments. As Dr. Lifton concluded in his affidavit to the Court, "it is clear from the Cameron application, itself, that these procedures were experimental and deviated from standard and customary psychiatric therapies in use during the 1950's"; the procedures in the Cameron application "closely parallel the techniques of 'thought reform' or 'brainwashing' used in Chinese prisons and elsewhere, and represent a mechanized extension of those 'brainwashing' methods." In short, "the Cameron application was a transparent proposal to conduct experiments with 'thought reform' or 'brainwashing' procedures extrapolated from methods documented in the academic

literature, and would have been seen as such by anyone reviewing it during the 1950's."

Dr. Salzman likewise concluded in his affidavit:

> ***334** The Cameron application proposed a mind control research project with no safeguards, no discussion of risks, dangers and potential destructiveness. . . . This is clearly *outrageous;* callous insensitive, inhuman pursuit of an idea with no concern for possible destructive effects. It would be beyond any reasonable doubt that a foundation which supported such a project could not have had therapeutic expectations from the grant application.

These conclusions were important parts of our case because the dangerous brainwashing experimentation described in Cameron's application clearly required some investigation of Cameron's competence and some provision for safeguards to protect the experimental subjects. As subsequent discovery confirmed, the CIA made no investigation of Cameron or his experimental procedures before making the grant, despite the obvious dangers to the human beings who were to be experimented upon with CIA funds. This is a prime example of the negligent failures to exercise reasonable care in the MKULTRA program that formed the basis for our second cause of action.

We had found, moreover, dramatic evidence of the ease with which such an investigation could have been made. From 1947 through 1956, the CIA was in close touch with Dr. Omond M. Solandt, Chairman of the Canadian Defence Research Board during that time period. We contacted Dr. Solandt who provided us with an affidavit confirming that CIA had never bothered to contact him for his opinion "about Cameron's competence, the depatterning and other experimental procedures used by Cameron, or whether it was appropriate to fund the experimental procedures used by Cameron."

Dr. Solandt agreed to appear and to testify concerning the fact that he had disapproved of Cameron's destructive experiments and made his views known. Again, his affidavit summarized these views:

> I knew of the experimental depatterning procedures used by D. Ewen Cameron. In the early 1950's, the wife of one of my associates sought medical treatment from Cameron at the Allan Memorial Institute. She was depatterned and after seeing her I knew that this kind of work was something the Defence Research Board would have no part in. It was my view at the time and continues to be that Cameron was not possessed of the necessary sense of humanity to be regarded as a good doctor. My views of Cameron and the depatterning procedures were known to him, and I let it be known through Dr. Morton that I would not look favorably upon any application by Cameron to the Defence Research Board for psychiatric research. Cameron never applied for Defence Research Board grants to fund psychiatric research and would never have received such support had he applied.

***335** In addition, Dr. Solandt was prepared to testify that there was a close relationship between himself and the CIA:

> During the 1950's, the United States Central Intelligence Agency had a resident representative at the United States Embassy in Ottawa who was publicly introduced as such. The CIA representative was liaison with the Royal Canadian Mounted Police and was free to attend Defence Research Board staff and committee meetings where defence research programs were discussed. Formal information exchanges with the CIA were made by the RCMP, and the CIA and Canada exchanged all research information of mutual interest during this time. The security clearances issued by the Canadian Defence Department during the 1950's were accepted by any United States agency working in Canada, including the Central Intelligence Agency.

Dr. Solandt also noted in his affidavit to the Court that there was another knowledgeable expert, Dr. Donald O. Hebb, who had been readily available to the CIA in 1956 and early 1957 when Cameron's application was being solicited and approved. Dr. Hebb, the highly respected Chairman of the Psychology Department of McGill University during the 1950's, had worked closely with Canadian and U.S. intelligence,[33] and had an equally discrediting opinion of Cameron's brainwashing experiments.

Unfortunately Hebb had died before we could take his deposition. Because Dr. Hebb's testimony bore on Cameron's reputation, however, we were able to offer sworn statements of others about what Hebb had said without violating the hearsay rule. These statements relating to Hebb's opinions were not offered as evidence of the truth of what Hebb had said, but as evidence that he *had* said it and would have warned the CIA to stay away from Cameron or at least make a full investigation of him and his work. In this way we could avoid the potential bar of the hearsay rule to introduce the following sworn statement by Solandt concerning Hebb's "very low opinion" of Cameron and his "prudence" in dealing with subjects:

> I knew by my discussions both directly with Dr. Hebb and indirectly through Dr. Morton that during the 1950's, Dr. Hebb had a very low opinion of the depatterning and other experimental procedures used by Cameron and of Cameron's prudence in dealing with research subjects.

Further evidence of Hebb's low opinion of Cameron's competence and prudence was provided to us by Ronald Blumer, a documentary film writer and producer who interviewed Hebb shortly before his death. In ***336** their interview, Dr. Hebb stressed to Blumer that Cameron was "irresponsible" and "criminally stupid":

> Cameron's experiments were done without the patient's consent. Cameron was irresponsible -- criminally stupid, in that there was no reason to expect that he would get any results from the experiments. Anyone with any appreciation of the complexity of the human mind would not expect that you could erase an adult mind and then add things back with this stupid psychic driving. He wanted to make a name for himself - so he threw his cap over the windmill. . .

> Cameron stuck to the conventional experiments and paper writing for most of his life but then he wanted that breakthrough. That was Cameron's fatal flaw - he wasn't so much driven with wanting to know - he was driven with wanting to be important - to make that breakthrough - it made him a bad scientist. He was criminally stupid.

Blumer summarized Hebb's statements about Cameron as "completely scathing," with Dr. Hebb referring to Cameron and his methods several times as "criminally stupid."

Final corroboration of Hebb's view of Cameron came from Jay Peterzell, the research associate with the Center for National Security Studies, who working with John Marks had made an exhaustive review of the CIA's MKULTRA program. Peterzell interviewed Hebb in the summer of 1978 and provided us with an affidavit based on his detailed notes of that interview:

> Dr. Hebb: Look, Cameron was no good as a researcher. He was terrible. He did not have the faintest notion of how to go about doing experiments or doing research. But he thought he did.

> Dr. Hebb: He was eminent on the basis of politics, psychiatric politics and university politics. But not on the basis of research.

> Dr. Hebb: Well, that was an awful set of ideas that Cameron was working with. It had no intellectual demand, it called for no intellectual respect. If you actually look at what he was doing, and what he wrote, his proposals, it would make you laugh, that is what I meant being awful, if I had a graduate student who talked like that I'd throw him out.

If Hebb felt this strongly in talking to strangers, we argued, it is clear what he would have said to the CIA if they had not treated this matter too casually to warrant interviewing him or anyone else. Indeed the CIA formally admitted in court papers that, despite its close ties with Dr. Hebb, the Agency never bothered to ask him about Cameron. Moreover, since Solandt and

Hebb were both working with the CIA in the 1950's, there ***337** could be no suggestion of secrecy reasons for not inquiring of them, only reckless and negligent indifference to the safety of the subjects of experimentation.

In addition we developed evidence that even casual inquiries of those in Montreal who knew of the controversial experiments being performed by Cameron would have revealed to the CIA the risks of injury and averted the tragic events subsidized by that agency. Dr. Paul E. Termansen, a Vancouver psychiatrist who was treating plaintiff Logie, had been at McGill in the early 1960's and provided us with a sworn statement that during his time at McGill there had been considerable controversy about Cameron's experimental activities, which were promptly terminated by his successor Robert A. Cleghorn. Dr. Solandt also confirmed that "[d]uring the 1950's, there was considerable controversy in the Montreal and Canadian psychiatric and academic communities about the depatterning and other experimental procedures used by Cameron at the Allan Memorial Institute." As these affidavits made clear, there was tremendous controversy surrounding Cameron and the experiments he performed, which would have alerted the CIA to the dangers of funding human experimentation at Allan Memorial.

The CIA's lack of care in failing to make any investigation whatsoever of Cameron was equalled only by its callous failure to ensure safety and consent of the subjects--victims of the subsidized experiments.

3. New Evidence of CIA Negligence in Failing to Ensure Safety and Consent of Subjects

From documentary discovery we had found no provision at the time of the approval of the grant or later to ensure that the experimentation was safe or that only consenting volunteers were used as experimental subjects. We confirmed that no precautions of any sort had been taken through the deposition testimony of John Gittinger, the CIA Project Monitor for the Montreal experiments; Sidney Gottlieb, the Director for the MKULTRA Program and Gittinger's supervisor; and Robert Lashbrook, Gottlieb's deputy.

All three of these major actors in the funding of Cameron testified on deposition that the CIA took no steps whatsoever to ensure that experimental subjects would not be injured or that the CIA-funded experiments would be conducted in an ethical fashion. Gittinger admitted that he "never really thought very much about his [Cameron's] actions anytime because I wasn't interested" and that he "was really not interested in his [Cameron's] patients." Gittinger continued:

> Q. You didn't have the slightest interest in Cameron?
>
> A. That is absolutely true, sir.

* * * * *

> ***338** Q. You didn't feel responsibility to find out what Cameron did to the subjects of the CIA funded experiments?
>
> A. No sir.

Sidney Gottlieb likewise admitted that he had not evaluated the experimental protocols for the research Cameron would conduct with CIA funding; that he had not determined whether the procedures would injure experimental subjects; and that he didn't even know whether anyone at the CIA had done so. Robert Lashbrook was equally uninterested in the safety of the subjects of the experiments he was helping to fund:

> Q. Did you at any time make any suggestions on any projects on how to safeguard the experimentees?

A. . . . it wasn't felt necessary really to go into a lot of detail as to exactly how they were handling the subjects. . . . In general patients would be of low interest.

Gottlieb, Lashbrook and Gittinger each also admitted that no effort was made to ensure that Cameron's patients would be told that they were undergoing experimental procedures. Gottlieb failed to determine whether Cameron was going to tell patients and their families that the experiments were new and untested and that other accepted therapeutic procedures were available for mental illness; and he had no recollection of instructing Gittinger concerning the CIA-funded experiments. Gittinger admitted that patients in a psychiatric hospital often exercise impaired judgment and that it was particularly important that they be told that they were participating in experiments. Yet he too felt no obligation to protect the psychiatric patients who would be used in the Montreal experiments and, indeed, failed even to instruct Colonel Monroe to obtain reports on the condition of those patients after the experimental procedures.

In short, Gottlieb's deposition testimony was:

Q. It is correct, is it not, that Cameron had complete discretion as to what he would tell the patients in the experiments that were funded by the CIA?

(Witness and counsel confer)

A. That is correct.

At his deposition Gittinger, too, displayed a total lack of interest in the subjects of the Montreal experiments:

Q. Did you ever make a check on whether Doctor Cameron was doing it unwittingly?

A. I certainly did not, because I had absolutely no interest in that area, as far as he was concerned.

Q. You weren't interested a Canadian citizen might be unwittingly given LSD, with USA money?

A. I was not.

***339** Lashbrook was equally unconcerned:

Q. Did you ever at any time hear a conversation at the CIA concerning the question whether the persons who were experimented on must be told that they were being experimented on?

A. Not that I recall.

Indeed, Lashbrook admitted he had not heard "one single thing" about Cameron's operation after he, Lashbrook, "directed

the sending of the money to them."

After CIA funds were forwarded to Cameron, the CIA officers failed to supervise Cameron's experimentation in any way. Gittinger admitted that he never saw a report from Cameron; that he never visited Cameron in Montreal; and that he never asked Monroe to report to him on what Cameron was doing. Yet, despite his ignorance concerning Cameron's CIA-funded experiments, Gittinger nonetheless certified as Project Monitor that Cameron's progress was "satisfactory" on the basis that "we just were given word that they were having no problems."

Gottlieb admitted that he "did not know anything about" the experiments Cameron performed with CIA funds, that he didn't know what experimental subjects were told about the CIA-funded research at McGill, and that he had no recollection of anyone at the CIA telling him the details about Cameron's experiments with intensive electroshock, LSD, sensory deprivation, depatterning, psychic driving, or prolonged drug induced sleep.

The significance of these admissions by the key CIA officers involved in the Montreal experiments was driven home by the affidavit of David J. Rothman, Ph.D., an eminent social historian at Columbia University's College of Physicians and Surgeons. Dr. Rothman was prepared to provide testimony at trial detailing the history of consent from the Hippocratic Oath through the Nuremberg Code and its aftermath. As detailed in his affidavit to the Court, Dr. Rothman's conclusions left no doubt that the conduct of Gottlieb, Lashbrook, Gittinger and, ultimately Cameron, was unethical:

> during the 1950's there was a recognized obligation on the part of entities financing, sponsoring or conducting medical experimentation to adopt ethical standards reflecting the principles set out in the Nuremberg Code, particularly the informed consent requirement; and to make inquiry and to ascertain the competence and prudence in dealing with research subjects of those conducting medical experimentation on their behalf . . . by the 1950's it was clearly irresponsible for a physician to conduct experiments upon patients without obtaining their voluntary consent to be research subjects.

***340** As the deposition testimony of Gottlieb, Lashbrook and Gittinger made clear, these ethical principles were mocked by the CIA's conduct in the MKULTRA program, and the Agency's subsidies to the experimentation performed upon our clients.

4. New Evidence -- Expert Evaluations of the Damaging Effects of Cameron's Experimentation Upon Plaintiffs

In addition to Leon Salzman and Robert Jay Lifton, four other psychiatrists agreed to appear as expert witnesses for our clients -- Paul Termansen, David Joseph, Brian Doyle and Harvey Weinstein. After reviewing the medical records, and later interviewing the former Cameron patients, each of these experts provided compelling testimony of the damaging impact of the CIA-funded experiments.[34]

Concerning plaintiff Robert Logie, Dr. Termansen provided that following assessment in his sworn affidavit to the court:

> Instead of standard treatment, Mr. Logie underwent a series of experimental, highly controversial, procedures. . . . Mr. Logie was not a suitable subject for any one of the experimental procedures he was subjected to, if, indeed, anyone would be suited for such procedures. Most certainly, no one would be suitable to the type of experimental procedures used at Allan Memorial Institute at that time, unless they had volunteered to undergo those experimental procedures.

As Dr. Termansen explained, after the experiments Mr. Logie's "existence could best be termed marginal . . . he managed to function, work, and exist, but barely." And the injurious effects continue to this day; "It may be there is some basic disturbance of his sleep mechanism, or it appears more likely that, after the very traumatic treatments he experienced while asleep, he has an unconscious resistance to sleep."

Concerning plaintiff Lyvia Stadler, Dr. Joseph concluded that "the 'depatterning' with intensive electroshock, 'psychic driving,' prolonged drug induced sleep, and the administration of nitrous oxide that Mrs. Stadler underwent were not accepted forms of treatment, then or now, but were clearly experimental" and that those procedures "would have resulted in significant disorganization, confusion and psychological impairment. . . . " Dr. Joseph also concluded that plaintiff Janine

Huard was exposed to non-standard experimental procedures, and that "the combination of experimental procedures that Mrs. Huard was exposed to at the Allan Memorial Institute would have resulted in significant disorganization, confusion and psychological impairment. . . . " And, as to both plaintiffs ***341** Huard and Stadler, Dr. Joseph concluded it "was clearly irresponsible and unethical, both then and now, to use procedures . . . without obtaining a separate voluntary consent to undergo experimental procedures."

Dr. Doyle concluded concerning plaintiff Jean-Charles Pagé, that "[n]othing in Mr. Pagé's medical records indicates that he was a candidate for any of these procedures" which were "not accepted forms of treatment but were clearly experimental procedures. . . . " Dr. Doyle continued in his affidavit, "the harsh physical procedures, high doses of drugs and the experimental techniques used on Mr. Pagé would inevitably cause injury to his mental and physical health."

Dr. Doyle also reviewed the case of plaintiff Rita Zimmerman, who was "depatterned" through a total of 30 electroshocks; underwent 56 days of prolonged drug-induced sleep, received 14 days of negative "psychic driving," and 18 days of positive "psychic driving." He concluded that:

> Mrs. Zimmerman was not a candidate for electroshock therapy, much less the intensive "depatterning" procedures that were so disruptive as to leave her incontinent as to bladder and bowel . . . the intensive electro-shocks that were used to "depattern" Mrs. Zimmerman were clearly experimental, as was the entire "depatterning" procedure that was carried to an extreme in her case. The nearly two months of drug-induced sleep and over one month of "psychic driving" Mrs. Zimmerman underwent were equally extreme applications of clearly experimental procedures . . . the experimental "depatterning," prolonged drug induced sleep and "psychic driving" procedures used on Mrs. Zimmerman would inevitably cause injury to her mental and physical health.

As to plaintiff Florence Langleben, who was "depatterned" with intensive electroshocks and LSD, underwent 43 days of prolonged drug-induced sleep, and received 32 days of negative "psychic driving" and 11 days of positive "psychic driving," Dr. Doyle reached similar conclusions:

> Mrs. Langleben was not a candidate for electroshock therapy, much less the intensive "depatterning" procedures . . . the intensive electroshocks that were used to "depattern" Mrs. Langleben were clearly experimental, as was the entire "depatterning" procedure. The six weeks of drug-induced sleep and six weeks of "psychic driving" Mrs. Langleben underwent were equally extreme applications of clearly experimental procedures . . . the experimental "depatterning," prolonged drug induced sleep and "psychic driving" procedures used on Mrs. Langleben would inevitably cause injury to her mental and physical health.

Finally, as to plaintiffs Pagé, Langleben and Zimmerman, Dr. Doyle concluded that "[i]t was clearly irresponsible and unethical, both then and ***342** now, to use experimental procedures . . . without obtaining a separate voluntary consent to undergo experimental procedures."

In Dr. Salzman's opinion, the standard treatment alternatives in the 1950's for the depression that plaintiff Val Orlikow suffered were verbal psychotherapy and the possible use of low doses of tranquilizing drugs. The use of LSD and the "psychic driving" that Mrs. Orlikow underwent were not accepted forms of treatment, and in Dr. Salzman's opinion, the combination of those experimental procedures "would cause her to suffer significant and continuing psychological impairment."

Concerning plaintiff Mary Morrow, Dr. Salzman found no basis for Cameron's diagnosis of schizophrenia, and concluded that even "had that diagnosis been correct, standard treatment alternatives at that time would have included low to moderate doses of anti-psychotic medications, verbal psychotherapy, and the possible use of electroshock in limited therapeutic dosage if other means of treatment were not successful." Dr. Salzman continued in his sworn affidavit:

> The use of prolonged drug-induced sleep and the "depatterning" with intensive electroshocks that Dr. Morrow underwent were not accepted forms of treatment, then or now. The use of such extreme measures reflects an experimental orientation derived from "brainwashing" through "depatterning" or "wiping the mind clear" to be followed by "repatterning" or indoctrination . . . the combination of experimental procedures that Dr. Morrow

> was exposed to at the Allan Memorial Institute would cause her to suffer significant and continuing psychological impairment, as well as likely causing continuing memory deficits and cognitive impairments. . . .

Finally, in Salzman's opinion as to both Mrs. Orlikow and Dr. Morrow, "[i]t was clearly irresponsible and unethical as well as callous and inhumane, both then and now, to use experimental procedures . . . without obtaining a separate voluntary consent to undergo experimental procedures."

Possibly the most distressing story of all was that of plaintiff Louis Weinstein as told by his son, psychiatrist Harvey M. Weinstein. After his father's experiences at the Allan Memorial Institute, Harvey entered medical school and studied psychiatry in part to try to understand what had happened to his father. More than anyone else, Harvey understood the magnitude of his father's loss. Using the full barrage of brainwashing procedures, including intensive electroshock and LSD, Cameron had "depatterned" Louis Weinstein and then attempted to "reprogram" his behavior with psychic driving messages. These intrusive physical procedures caused an organic brain syndrome in Louis Weinstein, from which he would never recover.

***343** Drawing on his observations as a son and, because his father no longer trusted psychiatrists, as a treating physician, Harvey Weinstein was prepared to provide trial testimony of minor psychiatric ailments being exacerbated and compounded by the CIA's experiments. Dr. Weinstein's sworn affidavit to the court bore witness to the harrowing experiments and their tragic aftermath, which converted a life of success, happiness and family warmth into so much human wreckage. Foreseeing an effort to exclude Dr. Weinstein's testimony on grounds of bias, we asked Doctors Joseph and Doyle to review his findings, which they were able to corroborate wholeheartedly.

* * * * *

Toward the end of the CIA funding, Dr. Cameron wrote a letter to the Agency front, the Society for the Investigation of Human Ecology, acknowledging his "great indebtedness" to the Society, describing the assistance rendered by the Society as "invaluable", and expressing a "considerable sense of indebtedness" for the funding he had received. Four years later Dr. Cameron left the Allan Memorial Institute and his successor, Dr. Robert A. Cleghorn, immediately terminated the experimentation Cameron had conducted. At Cleghorn's request Dr. Termansen and a colleague conducted a scientific study of the results of Cameron's depatterning experiments. Dr. Termansen was now prepared to testify about his study at trial, in particular the following conclusions:

> After interviewing and testing patients selected from a sample of 79 persons who had undergone the "depatterning" procedure, we concluded that the incidence of memory loss attributable to the intensive electroshock was higher than that encountered with standard therapeutic electroshock, and that the "depatterning" procedure, therefore, was *not* an *acceptable form of therapy.* We found that frequent electroshock as used in "depatterning" was associated with poor clinical outcome, and that the shorter the interval between electroshocks, the greater was the current memory impairment as seen on the Wechsler Memory Scale. "Depatterning" is no longer used because of its damaging effects on cognitive functioning and because it would appear to have little to offer in terms of improvement over conventional therapeutic electroshock.

5. New Evidence -- CIA Admissions of Culpability

Even before our clients' suit was filed there had been admissions by the CIA in Congressional testimony that there was a responsibility on the part of the Agency toward the MKULTRA victims. Thus, at an August 3, 1977 hearing, Senate Intelligence Committee Chairman Inouye asked CIA ***344** Director Turner, to "report back to this Committee in 3 months on what the Agency has done to notify these individuals and institutions, and furthermore, to notify us as to what steps have been taken to identify victims, and if identified, what you have done to help them, monetarily or otherwise." Admiral Turner responded, "All right, sir, I will be happy to." At that same August 3, 1977 hearing, Senator Kennedy asked CIA Director Turner, "It is your intention to notify the individuals who have been the subject of the research, is that right, Admiral Turner? Do you intend to notify those individuals?" To which, Admiral Turner replied, "Yes."

During the course of documentary discovery we uncovered new admissions made during the late 1970's by the CIA and the Justice Department. A July 17, 1978 Memorandum prepared by the Office of Legal Counsel at the Justice Department was important because it concluded that the CIA had a legal duty to find and notify persons used as unwitting experimental subjects in MKULTRA:

> The first question we have addressed is whether there is a legal duty to notify those MKULTRA subjects who can be reasonably determined to have a continuing risk of adverse effects on their health as a consequence of their earlier involvement. While there is no legal authority specifically addressing this question, we believe that, under the best view of general legal principles and analogous case law, a duty to notify such individuals exists in this instance. As a general matter of tort law, the courts and other legal authorities have found a duty to exist where one party puts another in danger; even if the former party's conduct is without fault, he is under a duty to give assistance and to prevent further harm. . . . As applied here, this principle would appear to require the CIA, having created the harm or risk thereof, to notify the individuals as an effort directed at rendering assistance and preventing further harm.

Despite Admiral Turner's earlier promise and the just quoted authoritative Justice Department legal opinion, the CIA failed to notify *any* of our clients of their unwitting participation in the CIA-funded experiments at Allan Memorial.

An even more important set of admissions was also secured in documentary discovery -- an October 31, 1978 memorandum by Assistant CIA General Counsel William Allard, which specifically assessed the Agency's involvement in the Montreal experiment and concluded:

> . . . the substantial funds flowing from this Agency to McGill in support of the project subsequent to 1956 would appear to preclude the determination that this Agency was minimally involved within the meaning of the Department of Justice guidance on this point. The use of the drugs identified and "particularly intensive ***345** electroshocks" as part of the methodology suggests that long-term after-effects may have been involved. Also, because the patients selected "were almost entirely those suffering from extremely long-term and intractable psychoneurotic conditions" it is doubtful that any meaningful form of consent is involved in this case.

But even more productive were oral depositions. Thus, on January 19, 1983 John Gittinger testified concerning the CIA involvement with Cameron as follows: "Now that was a foolish mistake. We shouldn't have done it . . . as I said, I'm sorry we did it. Because it turned out to be a terrible mistake." Gittinger concluded that if he had it to do over again, "I would refuse to support him or be interested in him."

Similarly, at his December 13, 1983 deposition, Stansfield Turner, who was the CIA Director at the time of the first revelations of the Agency's Montreal experiments, recounted his "dismay at discovering" the MKULTRA activity, which "seems entirely bizarre." Admiral Turner continued that the program was "one of the kinds of errors that we must be sure to find a way to prevent recurring," and that the MKULTRA experiments on unwitting individuals were unethical and left him "*aghast*" when he learned of those activities. In addition, Admiral Turner offered the view at his deposition that the MKULTRA program was the product of excessive "compartmentation." Finally, in a key admission for purposes of our allegation that there was a negligent failure to supervise Gottlieb and Lashbrook, Admiral Turner attributed their excesses to "inadequate supervision." As he stated it in the original manuscript for his book, *Secrecy and Democracy: The CIA in Transition:*

> How could this have happened? I believe compartmentation was responsible. *Because of compartmentation there was inadequate supervision of those who, with good intent, concocted this absurd scheme.* The unit conducting the experiment simply had such autonomy that not many outsiders could look in and ask what was going on. In all walks of life people get too close to their work and need someone with a somewhat detached viewpoint to take an occasional look at where they are going. In this case the system just could not provide that kind of detached critical review and a few well-intentioned, but terribly misguided, individuals badly abused the CIA's privilege of keeping secret so much of what it does.

The most significant admissions, however, were the apologies the CIA tendered to the Canadian Government. At the time of the initial public disclosure in August of 1977 that the CIA had financed Cameron's experiments in Montreal, opposition Member of Parliament Andrew Brewin asked questions about this American interference in the internal affairs of ***346** Canada.[35] As a result of these inquiries, official protests by Canada were lodged with the United States Embassy in Ottawa and the CIA Chiefs of Station resident there. While we were working on the court fight in Washington, we asked David Orlikow, the M.P. husband of plaintiff Val Orlikow, to pursue these protests and the U.S. response in Ottawa. In reply to David's inquiries, the Canadian Government stated that as a result of its protests, unnamed U.S. representatives had "expressed regret" for the CIA funding of Cameron and had offered assurances that such activities would not occur again.

These apologies could potentially break the case wide open. As official statements by diplomatic representatives of the United States, they were clearly authoritative admissions that could be used in court. Politically, the apologies also put the CIA in an untenable situation in Canada. How could the U.S. contrition expressed in the apologies be reconciled with the CIA's refusal to aid its Canadian victims when they later came forward? Additionally, the information that David Orlikow had secured was clearly only part of the story of the apologies. The U.S. representatives in Ottawa had obviously been briefed on the MKULTRA Program and told what to say. Both sides doubtless had notes, correspondence and memoranda concerning their discussions. All of these were potential sources of additional, detailed admissions that could bring the case to a rapid conclusion.

Faced with further damaging admissions, the CIA response was to suppress the additional documentation of the apologies by asserting that disclosure would damage U.S. national security, and to fight disclosure of Canadian documents through diplomatic channels. The few sanitized U.S. State Department documents we obtained in discovery and those of the Canadian Government that David Orlikow helped us secure through the Canadian Access to Information Act confirmed that from 1977 to 1979 there had been a series of discussions between Canada and the United States in which the apologies were made.[36] It was also increasingly clear that the unnamed U.S. representatives in Ottawa who had apologized included the CIA Chiefs of Station at our Embassy there. This made the apologies even more valuable coming as they did from the CIA itself.

Jay Peterzell, soon provided us with public identifications of these CIA officers in Canada. Published press articles had years ago revealed that ***347** Stacey B. Hulse was the CIA's Ottawa Chief of Station in 1977 and that he had been succeeded by John Kenneth Knaus in 1978. Both men had since returned to the Washington area. We contacted both Hulse and Knaus, told them about the suit by the Canadian victims of MKULTRA, and asked them to schedule a deposition. Neither man objected to appearing and testifying, although the now retired Hulse, whose deposition we wanted to take first, stated that he was undergoing an oral biopsy in the next few days, and asked if he could contact us in a few weeks to schedule the deposition after he had recovered and had received the results of his medical tests. We agreed to this request, and about two weeks later Hulse called to schedule the deposition, volunteering that he was willing to appear as soon as the next day. It looked like the whole story about the apologies was within reach.

The CIA's desperate scramble to prevent this deposition was a monumental confirmation of the renewed arrogance of the Agency. Upon receiving the notice for the agreed upon deposition, the CIA intervened, forced its representation upon Hulse and, in violation of normal court rules, instructed him that he was not to appear. The result was the same when we subpoenaed Knaus. Over the succeeding months we unsuccessfully sought a court order compelling the testimony of these publicly identified CIA Officials. Refusing even to confirm or deny the published facts that Hulse and Knaus had worked for the Agency, the CIA asserted that there was *no* question that we could ask either man that was not shielded by the national security privilege. With the CIA offering *in camera ex parte* affidavits that we were not allowed to see, much less to rebut, our effort to obtain this potentially critical testimony failed.[37]

Despite the refusal of the Agency to allow depositions of the officials who delivered the apologies, after questions were raised in Parliament by our allies, Prime Minister Brian Mulroney agreed that we would be allowed to take the testimony of the Canadian official who received the apologies. John G. Hadwen, Director General of the Canadian Bureau of Security and Intelligence Liaison, testified that on September 26, 1977, he received an apology for the Agency's actions. But, when the CIA lawyers in attendance objected to our further questions, the Canadian Justice Department attorney for Hadwen instructed him not to confirm that Stacey Hulse had made the apologies or provide any information of any sort.

This Canadian government acquiescence in the CIA's cover-up of the apologies produced a farcical deposition transcript that was of limited evidentiary ***348** value. At one point in response to our questions, Hadwen was reduced to reading statements made by his Minister in the Canadian House of Commons. After hours of questioning, Hadwen testified that "Mr. Anonymous," had "expressed regret that this should have happened without the knowledge of the Canadian government" and

"he expressed regret at the nature of the program." No matter what we asked, that was all Hadwen was permitted to say. The Canadian Government allowed pressure from the CIA to outweigh the interests of its own citizens, even a Member of Parliament.

IX. EFFORTS AT SETTLEMENT WHILE DISCOVERY PLODS ON

Simultaneous with our pretrial efforts to document our case, we continued to seek resolution of the suit short of trial through a settlement. An obvious potential ally was the Canadian government. After all, our clients were Canadian citizens and there had been some expressions of displeasure in Ottawa when the story of the CIA involvement in Montreal first emerged in the late 1970's. Since then, even after we had commenced legal action for the victims, there had been nothing in the way of Canadian Government support for its citizens.

In an effort to enlist the aid of our clients' government, we contacted officials at the Canadian Embassy in Washington. But, after several months of talking, we were unable to force any kind of public support from the Government of Canadian Prime Minister Brian Mulroney. In Washington there was a quiet exchange of Notes which, we were told, is the way diplomats speak to one another. This exchange was secret and did nothing to help our case. There was no public support by Canada for its own citizens that might generate real pressure to compensate our clients.

When the Note route failed we asked, again through the proper diplomatic channels, that the subject of our clients' case against the CIA be included on the agenda of an upcoming meeting between Canadian Foreign Minister Joe Clark and U.S. Secretary of State George Schultz. We were assured that the matter would be raised forcefully. But once again, our clients' own government was too craven to do anything in public. Clark expressed his concerns in secret meetings and Schultz promised to look into the matter. Unwilling to make waves, Clark passively acquiesced to this brush-off.

Finally, we were surprised that the Canadian Ambassador in Washington, Alan Gotlieb, had not supported our case and used his offices to exert some pressure for settlement on the CIA through the U.S. Department of State. Before coming to Washington, Gotlieb had been a senior official in the Canadian Foreign Ministry and had written to David Orlikow assuring him of his Government's support in seeking redress for the CIA's Montreal experiments. And since coming to Washington, Gotlieb and his wife Sondra, ***349** who wrote a regular column for the *Washington Post,* had become the most visible and prominent members of the diplomatic corps. If there was any Canadian in Washington who should have been willing and able to help, it was Alan Gotlieb.

When our efforts to secure help through channels failed to produce anything, in 1986 we requested a personal meeting with Ambassador Gotlieb. At that time we delivered a carefully prepared briefing paper to the Ambassador, which described the case and expressed dissatisfaction on our clients' behalf at their government's silence. Gotlieb's response came as a complete surprise to us. He was openly hostile and expressed anger that we had the temerity to criticize his government's inaction or to ask him for anything. Although we had prepared a careful and detailed paper and had exercised the utmost restraint in discussing our clients' case and the lack of support by Canada, Gotlieb's emotional response did not address the plight of his citizens, but only attacked us for engaging in such a "confrontation" with him. By the time we were ushered out of the Embassy, it was clear that, for some reason, no support would be forthcoming from that quarter.

Felix Frankfurter had once admonished his law clerk, Joseph Rauh, that reading the society pages was the only way to really know what is going on in Washington, a city where social machinations are an integral part of political life. Sure enough, the reason for Gotlieb's hostility to his own countrymen's plight was revealed a few months later in the "Personalities" column of the *Washington Post* -- Gotlieb had entertained Richard Helms, the former CIA Director and the prime architect of MKULTRA, at the Canadian Embassy and had his staff release the guest list, including Helms' name, to the *Post.*[38] A clearer message could not have been sent. Canada was more concerned with cultivating Helms than it was with helping its own citizens.

We did, however, have one strong and able ally in the Canadian Embassy, Gotlieb's Political Officer, Jeremy Kinsman. Although the Ambassador was openly hostile to our case, Kinsman was very active in presenting our clients' case to the U.S. State Department and in attempting to secure some measure of cooperation and support from the Canadian bureaucracy in Ottawa. Sad to report, after some months Kinsman was removed from his office and sent back to Ottawa. Whether his support for the case was the reason, we have yet to learn.

The other potential source of pressure for a settlement was the public, ***350** and the only way to reach the public is through

the news media. There is a sneering disdain among lawyers who represent entrenched interests for their colleagues who "try their case in the press." In public interest cases generally, there are major justifications for seeking help from the media in publicizing the fight. Such cases by their very nature have public policy implications and the public should be aware of them. And in our case in particular the chief danger of publicity -- tainting the minds of all prospective jurors so that a fair trial is impossible -- was not even a factor. Under the Tort Claims Act the case is heard by a judge alone. In these circumstances, we believed that there was a positive obligation to seek help from the media.

In January of 1985, the Canadian Broadcasting Corporation's investigative journal, "The Fifth Estate," aired a lengthy segment on our case. The response in Canada was immediate and nationwide, as editorials from Toronto to Vancouver appeared chastising the Canadian Government for its weak-kneed acquiescence to the CIA's Montreal incursion. In response to heated questioning on the floor of Parliament a few days later, then Canadian Foreign Minister, Alan MacEachen, even threatened publicly to take the case to the International Court of Justice at the Hague, if a resolution was not forthcoming. Ambassador's Gotlieb's ties to Helms no doubt contributed to the demise of this suggestion.

Second in impact only to "The Fifth Estate" was the Washington correspondent for the Canadian Press wire service, Julie O'Neal. Because CP is a nationwide service in Canada that is affiliated with the Associated Press in the United States, O'Neal's continuing support for the Canadian's fight and the brilliant pieces she filed regularly as the case worked its way through the court proceedings sustained what public support we had won through the "Fifth Estate".

Julie O'Neal's last days in Washington were not happy ones. She had doubtless earned the antipathy of Gotlieb by her honest and forthright reporting on our case, but she was ostracized by the Ambassador and his staff, when she reported that in a fit of pique just before an Embassy function Gotlieb's wife had slapped the face of her Secretary (the incident, promptly dubbed "the slap flap," for a time threatened Gotlieb's continued career in Washington). Julie O'Neal was never invited to another official Embassy function -- an impossible situation for a correspondent assigned to cover Washington for a Canadian wire service. O'Neal returned to Ottawa while the case was still pending.

As successful as we were in obtaining coverage in Canada, it had no discernable effect on the Agency. Indeed, when "60 Minutes" aired a 1985 segment on the case, there was actually less reaction than "The Fifth Estate" program had generated. Part of the problem was a general lack of interest in the United States about Canada and Canadians. Time and ***351** again, we would hear, "but that was in Montreal, the CIA doesn't do those things in the U.S." It is difficult to marshall public support and bring pressure to bear in the face of such parochial indifference. Without broad support in the U.S. and pressure exerted on the home front we concluded that movement by the CIA was unlikely, for at bottom, the CIA simply was not too concerned about what Canadians thought of it.

In short, the Canadian Government would not try to budge the CIA and Canadian public opinion had no influence over the Agency. As we shall describe, there was entrenched opposition to any settlement by the Operations Directorate within the CIA. Unless we could find some way around the cloak-and-dagger crowd, settlement would remain a pipe dream.

X. GOVERNMENT STALLING TACTICS ABETTED BY A SLOW JUDGE

A key element to the CIA's strategy was delay and attrition -- not only in the expectation that the aged victims would die off, but also with the knowledge that their lead counsel, Joseph Rauh was in his 70's.[39] What made this scenario all the more difficult was the fact that the CIA's litigation by attrition strategy was effective in part because our case had been assigned to a notoriously slow Judge.[40] Aware of his reputation, the Agency missed no opportunity to file delaying motions or to resist our discovery efforts, such as the naked refusal to permit the depositions of Hulse and Knaus. By exploiting the sometimes glacial pace of the Court in deciding even the most routine of motions, the CIA was able to prolong the discovery period until instead of months, it had consumed years while our elderly clients became more and more frail and infirm.

In 1985, to finally obtain rulings on the pending discovery matters and to clear the way for final pretrial motions, we were forced once again to write a letter to the Administrator of the U.S. Courts, seeking the intervention by the Judge's superiors. All of the risks we had taken in writing the first time were more than doubled by this second recourse to the Administrator. ***352** Whatever the risks, we had no choice. Fortunately, the letter worked and rulings were once again issued by the Court.

But the CIA's attrition strategy worked all too well. Shortly after we completed our brief on the CIA's motion for summary judgment in the Fall of 1986, failing health forced the hospitalization and retirement of Joseph Rauh. While hospitalized in January of 1987, a near-fatal heart attack and other internal complications sidelined our most senior and seasoned counsel for

many months as Rauh made a slow and painful recovery.

XI. CIA PRESSURE ON THE CANADIAN GOVERNMENT

As bad as the delays were, the CIA's effectiveness in converting our potential ally, the Canadian Government, into an active and hostile opponent was even more damaging. Not only did the Agency prevent the disclosure of the evidence Canada had concerning the late 1970s CIA apologies in Ottawa, but joined by our State Department it also launched a public counterattack on the Canadian Government for having the gall to question the propriety of the CIA activities in Montreal. In press briefings, interviews and even in Court pleadings, the CIA began hammering away at one theme -- Canada funded Cameron, too.

Legally, this was irrelevant, for nothing Canada had done could excuse the CIA for financing brainwashing experiments in Montreal. But politically, it was devastating. As one U.S. Attorney told a Canadian reporter in Washington, "We're going to wrap the Canadian Government financing of Cameron right around their necks."

This steady counterattack left the Canadian Government completely cowed, apparently a fairly easy thing for the U.S. to accomplish. To turn off the public heat for supporting our case, the Mulroney Government commissioned an "independent study" of the matter by a former Tory M.P., John Cooper.[41] The result was neither independent nor a study, but was instead a several hundred page brief, which concluded not only that Canada was blameless, but that the CIA involvement with Cameron was "a red herring."[42]

Moreover, although this document was called the "Cooper Report," it had, in fact, been compiled and written by Canadian Justice Department ***353** lawyers -- whose job was to defend Canada against claims of liability based on *its* involvement with Cameron. A more clear conflict of interest is difficult to imagine, and one can only wonder why no Canadian Bar disciplinary committee has investigated the lawyers who did it.

The flaws with the "Cooper Report" did not end with bias, they extended to irresponsible assertions that Cameron had done nothing wrong. So eager were the Canadian Justice Department lawyers to foreclose suits against their Government that, without interviewing any of our clients or even reviewing the medical records which documented their injuries, their report announced that there was probably little if any lasting harm done to Cameron's victims. Finally, although the assignment given to Cooper was to evaluate Canadian Government responsibility, his report went much further, reproducing the CIA's principal defenses, now as the "independent" conclusions of an official Canadian Government investigation. The Canadian Government's "Cooper Report" was, in short, a complete whitewash.

What once had appeared to be our strongest potential ally, threatening even to take the U.S. to the International Court of Justice at the Hague, now sought to exonerate the CIA in every conceivable way possible. Indeed the Canadian Government did such a good job for the Agency that the "Cooper Report" became the principal exhibit in CIA's final effort to defeat our case through a motion for summary judgment. In addition, the same psychiatrists who the Canadian Government had retained to ratify the Cooper whitewash were promptly identified by the CIA as its expert witnesses in our case. Canada had completed the legwork that an associate in a good law firm usually does for a senior partner. The net impact of this was to delay further the trial date in our case by at least another year.

There was only one decent and honorable suggestion in the hundreds of pages that comprised the "Cooper Report," and that was buried in the last of over fifty appendices. Hidden there was a recommendation that an "*ex gratia*" payment of $100,000 be made to each of our clients by the Canadian Government. Because this recommendation was obscurely whispered in a non-public appendix, it was not until several months after the "Cooper Report" was released that we discovered this one humane and decent action proposed by Canada. Clearly such a sum of money, under whatever name, would help our clients survive until the trial and appeals were completed. But when we pursued the *ex gratia* recommendation, the same Canadian Justice Department lawyers who wrote the most damaging parts of the Cooper whitewash, waded in and vetoed any payment above $20,000 (which was exactly the amount the CIA had put on the table as an insulting "nuisance" offer that our clients had already refused).

We nonetheless pursued the $100,000 recommendation vigorously while the CIA's summary judgment motion was under consideration. In ***354** December of 1987, Mrs. Orlikow, Mr. Pagé, Mrs. Huard and Harvey Weinstein traveled to Ottawa with James Turner to press for an *ex gratia* payment of $100,000. An open letter was delivered to Prime Minister Mulroney, a press conference was held in the Parliament building, and public questions were once again asked in the House of Commons,

with our clients in the Gallery. In response, the Justice Minister stated on the floor that he had instructed his deputies to make the *ex gratia* payment. Apparently those instructions changed or the lawyers were free to ignore them. When the payments finally came, it was only after the court had denied the CIA's motion for summary judgment, and they were checks for $20,000.

XII. SUMMARY JUDGMENT DENIED -- TRIAL PLANS

On January 19, 1988, the Judge denied the CIA's effort to get our case thrown out of court.[43] In a strongly worded opinion, the court rejected the CIA's broad claim that its employees exercise unlimited discretion in pursuing national security interests, even when their actions are negligent. As to the CIA's involvement in unethical human experimentation and medical malpractice, the court concluded that our case alleged "extraordinary and malevolent acts which by their very nature are beyond any reasonable discretion that Congress might have envisioned when creating the discretionary exception" to the Tort Claims Act. In short, the CIA's negligent actions were not shielded by the discretionary function exception, the court held, for none of those actions were grounded in policy considerations.

The court likewise emphatically rejected the CIA's claim that negligent funding of human experimentation and medical malpractice were covered by the discretionary function exception, because "[w]hen a decision is made to conduct intelligence operations by methods which are unconstitutional or egregious, it is lacking in statutory or regulatory authority."[44] In addition, the court recognized that "if there is a standard by which [a government official's] action is measured, it is not within the exception."[45] The court's opinion was equally clear that "[n]egligent selection or supervision is unquestionably an area for the judiciary, because the "government is held responsible for 'any negligent execution of admittedly discretionary ***355** policy judgments where the decisions required for the execution did not themselves involve the balancing of public policy factors."[46] Mindful of the strong evidence we had of substandard conduct by government employees who did not abide by normal and reasonable standards, the court held that "[s] electing incompetent contractors or employees and supervising them in a careless manner are acts of negligence pure and simple," which we would have an opportunity to prove at trial.[47]

With one exception, we likewise prevailed on the other technical grounds urged by the CIA -- the statute of limitations, foreign country exception and the independent contractor argument. The last two arguments were, as we had thought, insubstantial in light of the *Sami* decision and the clear precedent that where the government "selects a third party to carry out its policy there is a duty to do so reasonably."[48] On the CIA's broad claim that newspaper stories in the late 1970's and early 1980's about the Montreal experiments put all of the plaintiffs on notice that they should sue, the court held that "[w]ithout actual notice or without having read the articles it would go too far to state that the statute of limitations began to run when the articles were published."[49]

Unfortunately, one of our clients, Dr. Mary Morrow, had learned of the CIA involvement in Montreal in the summer of 1977, but had not joined our suit until March of 1981. There was a lengthy record of her Canadian lawyer's unsuccessful efforts to uncover the truth by corresponding with the CIA, which the Judge conceded "may constitute concealment."[50] But the court concluded that Dr. Morrow "had knowledge of the 'who' and the 'what' of her cause of action" in the late 1970's, and that her "claim must therefore be dismissed."[51] Aside from this one setback, which we considered an incorrect application of the "due diligence discovery rule" to a situation in which there had been active concealment,[52] our case had emerged intact.

***356** *A. The CIA Effort to Prevent Trial*

With the issuance of the court's opinion, we immediately sought a hearing to schedule the completion of discovery and to set a trial date. At that February 2, 1988 hearing, we were astonished to learn that the CIA was still intent on pursuing its strategy of attrition, now by invoking a seldom used provision of the U.S. Code to seek court of appeals review of the district court decision *prior* to trial. To obtain such an "interlocutory appeal" under 28 U.S.C. section 1292(b), the trial Judge must in effect certify that he may be wrong and the court of appeals must agree to hear the case. Such appeals are extremely rare; no interlocutory appeals had been granted in the District of Columbia Circuit in the preceding two years although there had been thousands of court orders issued over that period.

At the February 2 hearing, the CIA sought a one week continuance to decide whether to seek section 1292(b) certification of the Agency's discretionary function defense, and resisted our requests for a final discovery schedule and a prompt trial date.

A trial date of June 7, 1988 was nonetheless set.

A week later, when the CIA still had not decided whether to seek section 1292(b) certification, the Judge stated from the bench that "I would hope that any decision" as to certification "is made in the next week"; and counsel for the CIA responded, "I anticipate that it will." A full final pretrial schedule was established in the Court's Order entered on that same day, which also confirmed the June 7, 1988 as the final trial date and established May 11, 1988 as discovery cutoff. At that same hearing, the Judge specifically stated, "I advise the parties that discovery is open, and it's in preparation of the case, and they should pursue discovery."

The Judge's instructions notwithstanding, the CIA continued its strategy of delay. On the morning of February 22, we had a letter hand-delivered to the CIA's lawyer seeking depositions of the CIA's expert witnesses.[53] Instead of making defendant's witnesses available as required by the Court's Order and the approved stipulation, on the following day, February 23, 1988, the CIA finally filed a motion for section 1292(b) certification (delivered to our offices after the close of business). Counsel for the CIA subsequently refused to set dates for depositions. Desperate to avoid and to delay trial at any costs, the CIA thus ignored both the Court's Order ***357** of February 9, 1988 and bench admonitions that discovery was underway.[54]

This eleventh hour effort to derail the Court's trial schedule so the CIA might re-litigate one of its rejected technical defenses was all the more remarkable because section 1292(b) is designed only for highly exceptional cases -- it is not a provision that allows an appeal whenever a summary judgment motion is denied. To secure such an interlocutory appeal the CIA would have to meet the extremely exacting burden of demonstrating that there is "a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation. . . ."[55] In view of the extremely high burden, which the CIA must have known it was unlikely to meet, it was clear to us that this was just another round in the same old game of delay, delay, delay.

Sadly, the delay game worked again. Although, no section 1292(b) appeal had been granted in the District of Columbia Circuit during the two preceding years, the CIA pressed forward, and the process of briefing and arguing its motion consumed the weeks that should have been spent on discovery. After briefing, the court denied the Agency's dilatory motion within a few weeks, and final discovery at long last began. There was, however, less than a month remaining before trial for deposing all the experts, on both sides, and the CIA immediately began seeking a delay in the trial on the ground that additional time was needed for discovery. This renewed effort to delay was successful and two weeks before June trial date, the Judge rescheduled the case for October 1988.

B. The CIA Retools its Case

As bad as this last delay was, what happened next was an even worse blow. Because one of the CIA's expert witnesses was injured in an automobile accident, the Agency had an excuse to designate a replacement. With ***358** the additional time bought by the section 1292(b) motion and the refusal to allow depositions during the winter and spring of 1988, the CIA had now located not one but *four* new experts to replace the injured psychiatrist. After another lengthy fight before the Judge, the Agency was allowed over our objections, to add three of the four.

At the same time, the CIA began a series of harassing psychiatric examinations of our clients. We had resisted the Agency's earlier request that the court conduct two separate trials -- one to establish liability and the second to establish the amount of monetary damages. We did so because with the experience of the section 1292(b) motion behind us, it was clear that the CIA would similarly abuse such "bifurcated" proceedings and seek an appeal after we prevailed in the first trial. But our refusal to agree to bifurcation opened the door for the examinations. Because money damages are based on the degree of injury suffered by each plaintiff, the CIA was able to secure a Court Order compelling our clients to undergo involuntary psychiatric evaluations by the Agency's experts. These examinations were tremendously traumatic for our clients who were forced to relive their most painful experience in tape recorded interviews by adverse psychiatrists, some of whom were former associates of Dr. Cameron. All apart from the months of delay brought by the CIA's section 1292(b) motion, it is quite unlikely that such intrusive evaluations would have been conducted had the original June trial date held.

C. The Final Case of the CIA's Canadian Victims

In the face of this major retooling by the CIA, our basic case changed very little. With trial approaching, Dr. Olson's widow, Alice W. Olson, agreed to appear as our first witness and gave several hours of moving deposition testimony about the tragic

death of her husband and the CIA's concealment of its involvement from even his family. We planned to contrast the less than forthcoming testimony we expected from our second witness, former CIA Director Richard Helms, with the honesty and decency of both Mrs. Olson, and our third witness, brainwashing expert Robert Jay Lifton.

With the tone set by Mrs. Olson on the first day, the remainder of our case would proceed through the testimony of the plaintiffs and their families, our psychiatric experts, who had now personally examined each plaintiff, and our other experts who knew of Cameron and the damaging effects of the experiments he conducted with CIA money. In addition, over the course of pointed cross-examination during depositions, our newly designated trial co-counsel Leonard Rubenstein of the Mental Health Law Project had elicited a series of concessions from even the new CIA experts, which further confirmed that Cameron's CIA-funded experimentation was highly controversial and of dubious therapeutic value.

***359** As the last depositions were being completed, and we began our final preparations, it was increasingly clear that the same evidence that had defeated the CIA's summary judgment motion would make a compelling case at trial. Although many of our clients expressed misgivings and fears at the prospect of a public trial where they and their lives would be subjected to hostile cross-examination, each plaintiff was prepared to undergo such an ordeal, if it meant finally seeing justice done after all the years of waiting.

XIII. CONFRONTING A PUBLIC INTEREST DILEMMA -- TRIAL OR SETTLEMENT

When trial is so near, a case is so strong and one's clients are so frail, an inevitable conflict arises between public and private interests. There was an undeniable public interest in spreading the CIA's actions on the public record and, with a case as strong as our's, a trial laying out the details of the Agency's wrongdoing would serve the common good by educating both Americans and Canadians to the hazards and excesses of clandestine governmental activities. But there is also a potentially conflicting private interest in securing justice for the victims of those excesses.

In our case, we concluded that the private interest in justice had to override the additional marginal public interest objective that would be secured by carrying the case through to trial. There were a number of factors that tipped the scales in favor of settlement. First, after a successful trial, we were certain that there would be a predictable delay in obtaining a favorable ruling from a Judge who had been so slow to act in the past, and whose delays in rendering a judgment after trial were legendary. Nor was that the end of the likely delay, particularly in light of Agency's performance in pursuing the extraordinary section 1292(b) appeal, we believed that the CIA was certain to appeal a judgment in our clients' favor, both to the District of Columbia Circuit Court of Appeals and United States Supreme Court. In all, this could mean another six to eight years of litigation before final resolution of the case. It was too much to ask of our clients -- one plaintiff had died during the pendency of the litigation, others were in their 70's and 80's, and many were in extreme financial need.

In addition, over the course of our case there had been a movement of the Supreme Court further and further to the right as Ronald Reagan appointed three new Justices who marched in lockstep with the two conservatives already sitting on the Court. These changes in the composition of the Supreme Court in our estimation reduced the chances of successfully defending against a CIA appeal to that level.

We believed that a trial would undeniably serve as a powerful educational vehicle, but a settlement could achieve many of the same ends if the public became aware of it. We hoped that we could get the word out broadly enough that, on balance, a settlement would fulfill the same educational ***360** function that a trial would further, and decided to take one last shot at initiating genuine settlement negotiations with the CIA.

The CIA is not a monolithic institution and, like anywhere else in the government, there are differing perspectives and agendas in various parts of the Agency. In view of the strength of our legal and factual case, there was something irrational in the entrenched resistance to our efforts on behalf of the Canadian victims. We raised this question with a former CIA General Counsel, who had demonstrated some sensitivity to civil liberties concerns in his professional career, and he confirmed that the resistance to settlement was voiced by the operations people at the CIA. Those who were involved in current clandestine activities, due to concerns about protecting the secrecy of their own operations, out of loyalty to their predecessors, Helms and Gottlieb, or out of fear of a rash of litigation, were unalterably opposed to settlement of any kind. No matter how strongly the current CIA lawyers felt that settlement was appropriate, there would be a deadlock with the operations officials, and the case would grind on until our clients were dead or beyond benefit.[56] The only way we saw to break the deadlock was go over their heads.

Thus, in a renewed effort to move forward to settlement, we decided that a final pretrial appeal to the head of the CIA was our best shot at securing recompense for our Canadian clients. William Webster had served as a distinguished Federal Judge in Missouri for many years, before coming to Washington as the FBI Director under President Carter. With the death of CIA Director William Casey in 1987, Webster had been appointed to succeed him. We hoped that, with his experience as a judge and sensitivity to human rights issues, Director Webster would take a fresh look at the CIA's resistance to settlement and the years of stonewalling our clients had endured.

Joseph Rauh had met William Webster as a judge and later became acquainted with Webster when he came to Washington. They shared a mutual respect for one another. After obtaining the permission of U.S. Attorney Jay Stephens, who was officially representing the CIA in our case, we sent a personal letter from Rauh directly to CIA Director William Webster in July of 1988. It got through.

The letter opened with our belief "that once you are made aware of the facts concerning the CIA funding of brainwashing experiments at a psychiatric hospital in Montreal as part of its MKULTRA program, your own sense of fairness will bring a prompt resolution of this nine-year-old ***361** matter." Because it seemed likely that, as new CIA Director, Webster probably knew little if anything about the case, we set out the equivalent of a briefing memorandum describing the beginning of the case and the history of the CIA's MKULTRA Program. We then recounted our early efforts to settle the matter prior to filing suit with then CIA General Counsel Daniel Silver, only to be rebuffed on the incorrect ground that Cameron had applied for the funds without any prompting from the CIA.

Because we hoped that Webster would take a fresh look at the CIA's conduct of this whole affair, we described in some detail the protracted delays caused by the Agency's resistance at every step of discovery, and the difficulties we encountered in piecing together the truth caused by the 1973 document destruction ordered by Richard Helms and Sidney Gottlieb. In addition, we thought that the story of the Agency's desperate effort to prevent disclosure of the details of the U.S. apology to Canada in the late 1970's was the kind of admission through action that Judge Webster would find unacceptable.

There were also the admissions by former CIA Director Stansfield Turner that he "was aghast that the CIA had done something like this," that "it was unethical research and it was bad." It was our hope that Admiral Turner's acknowledgement of wrongdoing, along with former CIA General Counsel Silver's statement that what happened was "repugnant" and CIA Assistant General Counsel Allard's admission that "it is doubtful that any meaningful form of consent is involved in this case," would persuade Webster that the CIA's position was untenable.

Finally, we pointed out that "the CIA's funding of Dr. Cameron was negligence pure and simple," because Gottlieb and Lashbrook had demonstrated that they were wholly unfit to be left in charge of a program of human experimentation by their "culpable negligence" in the death of Dr. Olson. We counted on all of this to persuade Webster to reverse the CIA's inexplicable refusal even to consider realistic compensation for its Canadian victims.

The letter closed with the following appeal from "a civil libertarian who loves his country and deeply believes it will stand taller at home and throughout the world if it admits past mistakes":

> [W]ouldn't the Agency be a stronger organization by some recognition of error and some recompense therefor? Is it in our nation's interest or tradition to compound the old wrong by continuing the struggle endlessly until many or most of the plaintiffs leave this earth with broken lives and without recognition or recompense? A compassionate people can only give one answer.

This letter had the hoped for impact. Once Webster became personally interested in the case, things promptly changed; he directed the CIA General Counsel to meet with us and the U.S Attorney's Office, and genuine ***362** negotiations began for the first time. Indeed, as we had suspected, the CIA General Counsel and the U.S. Attorney's Office generally favored settlement of the case and it had been the CIA Operations officials who had shunted aside our earlier efforts toward settlement.

The process was one of negotiations, however. From our first discussions until the ultimate resolution of the case, on the day before the trial was to have begun, there were six rounds of offers and counter-offers. Throughout this process, we were aware that by Justice Department regulation, there was a $750,000 ceiling on any settlement we could achieve without the personal involvement of the Attorney General. In our estimation, the difficulties, uncertainties, and delays of securing such approval from even the post-Meese Justice Department meant that as a practical matter, 3/4 of a million dollars was the best we could do short of trial. On October 2, 1988, the U.S. Attorney's Office agreed to the payment of a settlement of 3/4

million dollars to plaintiffs. With the *ex gratia* payment by the Canadian Government, we had recovered a million dollars for our clients.

To our knowledge this represents the largest payment made by the CIA in litigation arising out of the MKULTRA program. In dollar terms the amount was not huge, but it was a significant lump sum payment that would make an important difference in the quality of life enjoyed by those of our clients who were impoverished or living on pensions. Equally important to us and to the Canadian victims as well, the dollar amount was enough to convey the symbolic message of U.S. Government contrition. Regardless of boilerplate denials, everyone knows that the CIA acknowledged its past wrongdoing -- no one pays 3/4 of a million dollars unless they did something wrong.

The settlement, along with the details of our case and the massive wrong that was done to these innocent Canadians, was reported on major television networks, newspapers, and magazines in both Canada and the United States. In some respects, the impact of such focused attention on this one event -- an extraordinary admission of responsibility and contrition by the CIA, may have more widely disseminated the story of the Agency's abuse of our clients than would routine reports from a trial lasting many weeks. In retrospect, there is little question that settlement had been the right course in this case.

The final confirmation came in a chance meeting with CIA Director Webster at a Justice Department reception. When we thanked him for breaking the deadlock, the Director expressed his gratitude for having learned of the case and stated "Sometimes you see the right thing to do, and you do it."

***363 AN AFTERWORD**

A public interest litigation is a special kind of struggle, where plaintiffs' lawyers represent both their clients and a larger principle that they seek to vindicate. The burdens of serving both are heavy, but the satisfactions of success are even greater. And, as the story of the *Orlikow* case illustrates, the fight itself is nothing if not engrossing and challenging. Where else can a lawyer interrogate a former CIA Director one day and draft questions for a Member of Parliament the next? To us it seems that public interest lawyers enjoy the lion's share of the satisfactions in our profession.

It is easy for lawyers to lead a schizophrenic existence -- voicing socially responsible views in private, but representing anyone who can pay regardless of the damage to the public their clients and their cases will cause. An integrated life where one's professional activities are an extension of the same ethical and moral principles that shape one's private relations is a boon too often ignored or dismissed as unattainable in the "real world." We don't know of anyone who can work harder or enjoy greater satisfactions in the practice of law than a lawyer whose cases are an extension of personal principles and commitments.

With all its frustrations, the *Orlikow* case was highly satisfying -- a lesson in the capacity of an enlightened legal system to do justice even when the most powerful agencies and interests are arrayed against it. May we call it one ray of hope in troubled times?

Footnotes	
a	Copyright (c) 1990 HAMLINE JOURNAL OF PUBLIC LAW AND POLICY; Joseph L. Rauh, Jr. and James C. Turner. The views expressed herein are those of the authors, who write solely in their personal capacity, not on behalf of any private or public entity.
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1	682 F. Supp. 77 (D.D.C. 1988) (Civ. No. 80-3163).
2	28 U.S.C. section 1346 grants U.S. District Courts "exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent act or wrongful act or omission of any employee of the Government . . . " 28 U.S.C. § 1346(b) (1988).
3	Virtually all intentional torts are exempted from Tort Claims Act coverage by 28 U.S.C. section 2680, which excludes "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h) (1988). 28 U.S.C. section 2680 excludes "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k) (1988). 28 U.S.C. section 2680 excludes "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1988).
4	During the 1950's, the CIA's offices where the Agency's negligence had occurred were located in the District of Columbia, so jurisdiction and venue properly lay in that district. *See* 28 U.S.C. §§ 1346, 1402 (1988) (section 1346 grants district courts original jurisdiction when the United States is a defendant) (section 1402 provides where proper venue is when the United States is a defendant).
5	617 F.2d 755 (D.C. Cir. 1979).
6	Things worked out as we had hoped. About two weeks after we filed our complaint in the *Orlikow* case, the D.C. Circuit handed down its decision in Sami v. United States. In that decision, our Court of Appeals ruled that it was the place where the governmental negligence occurred, not the place of the injury, that was controlling. *Sami,* 617 F.2d 761-63. We could now rely on the *Sami* decision and its gloss on the foreign country exception as the controlling precedent in our case.
7	The voluntary consent of the human subject is absolutely essential. This means that the person involved should have the legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the subject matter involved as to enable him to make an understanding and enlightened decision. . . . The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs, or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity. United States v. Brandt (The Medical Case), II TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 181-82 (1949).
8	We later learned when deposing former CIA officer Robert Lashbrook that each of these financial documents were "deliberately written so it would reveal a minimum." Only 56 pages of even these highly sanitized financial records concerning the Montreal project were provided to us by the CIA in discovery.
9	J. MARKS, THE SEARCH FOR THE "MANCHURIAN CANDIDATE": THE CIA AND MIND CONTROL (1977).
10	"TSS" is the abbreviation for Technical Services Section, the CIA component responsible for MKULTRA, which a few years later became the Technical Services Division or TSD. The "MK" in "MKULTRA" denotes that the program was conducted by the Technical Services Division.

11	Houston's detailed conclusions were particularly damning: I am not happy with what seems to me a very casual attitude on the part of TSS representatives to the way this experiment was conducted and to their remarks that this is just one of the risks running with scientific experimentation. I do not eliminate the need for taking risks, but I do believe, especially when human health or life is at stake, that at least the prudent reasonable measures which can be taken to minimize risk must be taken and failure to do so is culpable negligence. The actions of the various individuals concerned when the effects of the experiment on Dr. Olson became manifest also revealed the failure to observe normal and reasonable precautions. . . . As a result a death occurred which might have been prevented . . . .
12	FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. No. 94-755S. REP. No. 94-755, 94th Cong., 2nd Sess. Book I, at 394, 410 (1976).
13	The former Chief of the CIA's Medical Staff, Dr. Edward Gunn, testified in 1975 Senate Hearings: DR. GUNN: From 1955 to approximately 1959 or 1960, there was at least once a year a meeting that was held with the head of that office. But we never saw more than some very general outline that there was such a research program. We never saw the direct material for a program. We had offered to assist TSD by providing medical support and guidance, but it was always "thank you very much." SENATOR KENNEDY: Were you satisfied that Dr. Gottlieb's group was adequately protecting its subjects? DR. GUNN: From the standpoint of the Office of Medical Services, we could not, no, because we did not know what they were doing. *Biomedical and Behavior Research: Joint Hearings before the Subcomm. on Health, of the Senate Comm. on Labor and Public Welfare and Subcomm. on Administration Practice and Procedure of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 259 (1975).
14	Similar concerns were voiced during the mid-1970's, with key CIA officials, such as the Deputy Director for Science and Technology Carl E. Duckett admitting at U.S. Senate hearings that the CIA unwitting drug tests were "wrong" and with the Senate Intelligence Committee concluding that compartmentation was used in the MKULTRA Program to conceal the "unethical and illicit activities" by the CIA. As the Senate Intelligence Committee stated: Few people, even within the agencies, knew of the programs and there is no evidence that either the executive branch or Congress were ever informed of them. The highly compartmented nature of these programs may be explained in part by an observation made by the CIA Inspector General that, "the knowledge that the Agency is engaging in unethical and illicit activities would have serious repercussions. . . . " FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. No. 94-755S. REP. No. 94-755, 94th Cong., 2nd Sess. Book I, at 385-86 (1976).
15	In view of the CIA's overwhelming desire to protect MKULTRA researchers from embarrassment when the Agency's role became public -- indeed the CIA successfully fought a Freedom of Information Act all the way to the Supreme Court to prevent even the names of some MKULTRA researchers from being made public, Central Intelligence Agency v. Sims, 471 U.S. 181 (1985) -- we did not view this notation as particularly credible. Such a covering of the trail would be entirely consistent with protecting Cameron rather than reflecting what actually happened and who knew what.
16	The recent spectacle of Colonel Oliver North's covert actions and the Reagan Administration's widespread disdain for this critical principle underscored the need to bring some measure of accountability to those engaged in clandestine activities.
17	In addition to our own funds, litigation costs, which eventually exceeded $60,000, were defrayed by two grants of $20,000 awarded by the J. Roderick MacArthur Foundation through the American Civil Liberties Union, funds raised by David Orlikow and other concerned Canadians, and support provided by the Mental Health Law Project.
18	Of these hundreds of detailed allegations, only one was not confirmed in subsequent discovery and that allegation had been made on "information and belief"; we had guessed wrong about a name excised from a CIA document released to Marks.
19	The intensive electroshocks used in these experiments are not the same form of ECT used routinely in the treatment of patients suffering from depression. Both the voltage and the number of shocks administered were greatly increased. Instead of stopping after the procedure had induced one grand mal seizure, subjects were shocked again and again until no further seizures could be elicited. There is no question that this was a profoundly intrusive and destructive form of electroshock, which was far different in kind from that which was conventionally used for therapeutic purposes.

20	The story of the tragic disruption of a family's life is movingly recounted by Louis Weinstein's psychiatrist son, Harvey, in H. WEINSTEIN, A FATHER, A SON AND THE CIA (1988).
21	That the MKULTRA records were destroyed to conceal the wrongdoing of Helms and Gottlieb was confirmed by the fact the others in the Agency -- Gottlieb's deputy and the Chief of the CIA Records Center -- had tried unsuccessfully to prevent the destruction. Our efforts to learn the identities of these individuals and to obtain their testimony were defeated by the CIA's refusal to allow depositions on spurious national security grounds.
22	At a February 7, 1973 hearing Helms was a sworn witness and gave the following testimony: SENATOR SYMINGTON: Did you try in the Central Intelligence Agency to overthrow the government of Chile? MR. HELMS: No, sir. SENATOR SYMINGTON: Did you have money passed to the opponents of Allende? MR. HELMS: No, sir. SENATOR SYMINGTON: So the stories you were involved in that war are wrong? MR. HELMS: Yes, sir. I said to Senator Fulbright many months ago that if the Agency had really gotten in behind the other candidates and spent a lot of money and so forth the election might have come out differently. *Nomination of Richard Helms to Ambassador to Iran and CIA International and Domestic Activities: Hearings Before the Senate Comm. on Foreign Relations,* 93rd Cong., 1st Sess. 49 (1973). Allende was shot to death in the coup d'etat that installed the murderous Pinochet military dictatorship.
23	This celebration, where Helms was greeted with a standing ovation, is recounted in Thomas Powers's comprehensive, although unauthorized, biography of Richard Helms. T. POWERS, THE MAN WHO KEPT THE SECRETS: RICHARD HELMS & THE CIA 304-06 (1979).
24	Others outside the CIA completed the destruction of documents. For example, when we deposed attorney Duncan Cameron, he admitted destroying certain files which his father had taken when leaving Allan Memorial, even though lawsuits were pending against Dr. Cameron's estate at that time. Our research likewise detected no trace of Cameron's CIA connection in the records of the Allen Memorial Institute or the Archives of the Cornell University Medical Center (which provided cover for the front organization that served as a conduit for the Agency's funding of the experimentation at the Allan Memorial Institute).
25	Concealment was so total even inside the CIA that Gottlieb's assistant John Gittinger swore at his deposition that he was not informed of the Olson death, and therefore was not in a position to warn Cameron of the dangers inherent in experimenting with LSD.
26	The U.S. Embassy in Ottawa was similarly deceived by the CIA, which stated in a February 1979 cable that there was "no evidence the SIHE [the Society] or Agency officers gave any hint to McGill or Cameron that a request for funds would be met with a favorable response." The truth, of course, was the exact opposite.
27	471 U.S. 181 (1985).
28	Griswold, *Secrets Not Worth Keeping,* Washington Post, Feb. 15, 1989.
29	New York Times v. United States, 403 U.S. 713 (1971).
30	At his deposition, Helms committed a "slip" and disclosed the location of an unacknowledged CIA facility on the record. Although there were four CIA lawyers in the room at the time, not one of them objected, called the "slip" to our attention or sought to mark the record. Instead, weeks later when the written transcript of Helms' deposition was ready for filing in Court, the CIA insisted that this information be excised from his testimony. When we objected to the obliteration of anything in Helms testimony on the public record, a letter was delivered to our office late one night "directing" us to return our copies of the Helms "slip" to the CIA and threatening both of us with prosecution under the Espionage Act if we failed to do so. We of course refused to be intimidated and informed the Agency that we didn't take any orders from it. The CIA promptly seized upon this as a means to attempt to influence the Judge hearing our case and, after a lengthy series of briefs in which we were portrayed as irresponsible for having asked Helms questions that led to his "slip", succeeded in securing a Court Order protecting this sensitive and vital "secret." We later learned that this same "secret" information had been published in the *Washington Post* several years earlier.

31	CIA documents showed that Gottlieb received a letter from Dulles saying he had used "poor judgment," which Helms was instructed to hand carry to Gottlieb and to tell him the letter was "*not* a reprimand and no personnel file notation was being made." Lashbrook did not even receive this slap on the wrist.
32	This admission, which was truly a "smoking gun" that directly tied Cameron's experimentation to Communist "brainwashing" methods, was unearthed by Dr. Harvey Weinstein, the son of plaintiff Louis Weinstein, while reviewing Cameron's papers at the Archives of the American Psychiatric Association.
33	We corroborated Hebb's close relationship with the CIA by obtaining in discovery a special CIA security clearance issued to him in the early 1960's.
34	We were very impressed by the willingness of these prominent psychiatrists to assist largely without payment.
35	In the Canadian Parliamentary system there is a daily "question period" during which Members from all parties can query Cabinet Ministers of the Government. The Ministers must answer. Over the years, this mechanism (especially when employed by New Democratic Party Leader Ed Broadbent and his colleague from Vancouver, Svend Robinson) proved to be one of the few means of exposing Ottawa's failure to support the CIA's Canadian victims.
36	We also had evidence, through an affidavit provided to us by the Canadian Secretary of State for External Affairs, that additional apologies were subsequently tendered by U.S. representatives.
37	That the CIA's assertion that some secrecy concern required the concealment of Mr. Hulse's identity as a retired CIA officer was completely ludicrous was confirmed when he died several years later. His lengthy and prominent January 26, 1988 *Washington Post* obituary began by repeating the common knowledge that had been published years earlier; Stacey Hulse had been the CIA Chief of Station in Ottawa in the late 1970's.
38	The event was a reception for former Reagan White House Chief of Staff Michael Deaver, who was being hired to represent Canada as a Washington lobbyist. Deaver was later convicted of influence peddling in connection with his lobbying activities. Ambassador Gotlieb and the Canadian Embassy invoked diplomatic immunity and refused to cooperate with the Special Prosecutor who investigated Deaver's misconduct.
39	One plaintiff, Florence Langleben, died in January of 1986 in the midst of the CIA's stalling. Her widower, Moe Langleben, was substituted as a plaintiff.
40	Lawyers are reluctant to criticize publicly a sitting Judge because they may jeopardize their clients' cases before him. Not only was our Judge's slowness common knowledge among members of the bar, but his dilatory conduct was so egregious that it was even reported in a featured *Washington Post* article. Recounting delays of four years and more in prisoner rights and discrimination cases, the *Post* reported at length on "what has become a vexing problem for the federal court in the District of Columbia," our Judge's "mounting backlog of cases and the years-long delays that mark his handling of civil cases." In addition, the *Post* publicly confirmed that he "consistently has the worst record for moving cases forward" and "regularly lists more than a dozen cases that have been awaiting a decision for longer than six months" in quarterly reports to the Administrative office of the U.S. Courts, while about half of the 15 active federal district judges in Washington usually reported no such old cases and no other judge reported more than six. *D.C. Judge's Mounting Backlog Poses Court Problem,* Washington Post, Jan. 3, 1988, at D1, D4.
41	As a former M.P. who maintained close ties with the Tory machine through his politically well-connected law firm, Cooper's perspective and motivation were a far cry from "independent."
42	This "red herring" characterization was lifted directly from the lips of the CIA's lawyers in meetings with Cooper's aides. After being duly reported to Cooper, the CIA position was reprinted now with the imprimatur of the Canadian Government. The CIA then quoted this "independent" conclusion by Cooper in court papers, without disclosing that it had been originated by the Agency itself. While some may believe that such manufacturing of evidence is an ethical practice for a government attorney, we have never thought that this kind of conduct had any place in our legal system.
43	Orlikow v. United States, 682 F. Supp. 77 (D.D.C. 1988).

44	*Id.* at 81 (citing Socialist Workers Party v. Attorney General of United States, 642 F. Supp. 1357, 1417 (S.D.N.Y. 1986)).
45	*Id.* at 82 (citing Barton v. United States, 609 F.2d 997, 999 (10th Cir. 1979)). The standard, of course, was the Nuremburg Code, which had been recognized as binding upon the United States in a February 26, 1953 Secretary of the Defense directive and which the CIA had admitted "contains principles which are generally recognized to apply to medical experiments on human subjects." Indeed, the CIA had conceded that the Agency's "failure to adhere to established medical and scientific standards isn't discretionary." The court's memorandum opinion sent a clear message that the CIA's argument that there were no standards in the 1950s was a loser.
46	*Orlikow,* 682 F. Supp. at 82 (citing Sami v. United States, 617 F.2d 755, 766 (D.C. Cir. 1979).
47	*Id.* Because there were factual questions that surrounded the conduct of the CIA and its negligence in failing to control Gottlieb and Lashbrook, the court specifically stated that the "issue of whether defendant delegated funding authority to persons unreasonably unfit to exercise it is one that must be left for trial." *Id.*
48	*Id.* at 87.
49	*Id.* at 85.
50	*Id.* at 86.
51	*Id.*
52	Dr. Morrow's Canadian lawyer had put the CIA on notice of her claim and was seeking additional information in an effort to settle without a formal claim and suit. There was no prejudice to the CIA and it seemed manifestly unfair to allow the Agency to manufacture a statute of limitations defense by dint of stonewalling such legitimate efforts to learn the truth. It was difficult to imagine any person exercising greater diligence than had Dr. Morrow and we believed that it was a mistaken interpretation of the law to allow a claim of repose to be based on continuing concealment. We therefore eventually filed a notice of appeal to secure review of this portion of the decision.
53	This discovery procedure had previously been agreed to by counsel for the Agency and was included in a Stipulation of the Parties approved by the court on July 23, 1986, providing (¶ 4): The parties, to the extent possible, will make available for deposition without the need for subpoenas or formal process those witnesses identified as possible trial witnesses who have not yet been deposed. Where one party requests the deposition of a witness designated by the other party and where that witness is not made available for deposition upon that request, such witness may not be called as a witness at trial."
54	It is doubtful that any other litigant would have simply ignored both its earlier agreements and the directions of a Judge. Under the stipulation, absent a stay of discovery we were entirely within our rights to bar from testifying at trial all of the CIA's expert witnesses who were not made available for deposition. Undeterred by this risk and likely needing time to prepare its witnesses, the CIA simply continued the stall.
55	28 U.S.C. § 1292(b) (1988). In addition, the Supreme Court has ruled that "even if the district judge certifies the order under § 1292(b), the appellant still 'has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978) (quoting Fisons, Ltd. v. United States, 458 F.2d 1241, 1248 (7th Cir. 1972)). And, far from encouraging such appeals before final judgment, in the District of Columbia Circuit "[s] ection 1292(b) 'is meant to be applied in relatively few situations and should not be read as a significant incursion on the traditional federal policy against piecemeal appeals." Tolson v. United States, 732 F.2d 998, 1002 (D.C. Cir. 1984) (quoting 10 C. WRIGHT, A. MILLER AND M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2658.2 at 80 (2d ed. 1983).
56	The effectiveness of the Operations people in stymieing settlement was confirmed after the case was resolved, when we learned that then CIA General Counsel, now U.S. District Judge, Stanley Sporkin, after a meeting with us had written a detailed memorandum endorsing settlement. Although Sporkin had long-standing ties with then CIA Director William Casey, even his personal intervention failed in the face of the opposition from the Operations Directorate.

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