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Feature

## 'The Leak Was Me'

By Patrick Radden Keefe

1.

On the afternoon of January 31, 2003, as pressure for war intensified in Washington and London, a twenty-eight-year-old woman named Katharine Gun tucked a memo into her handbag before leaving work as a translator of Mandarin Chinese at Government Communications Headquarters (GCHQ), the United Kingdom's eavesdropping agency, on the outskirts of the Cotswold town of Cheltenham. By removing a classified document from the high-tech complex, Gun was seriously breaching the rules. If the risk she assumed was high, so too, she believed, were the stakes: Katharine Gun's plan, however idealistic or naive, was to prevent the United States and the United Kingdom from going to war in Iraq.

Gun believed the contents of the document, an e-mail memo, were so shocking that if she leaked them to the public, the ensuing furor might expose the reckless haste with which the "Coalition of the Willing" was advancing its plans for an invasion of Iraq. She gave the memo to a friend who had connections in the press. A month later, on the morning of March 2, Gun was picking up the Sunday papers in her local shop, when her eyes fell on the reprinted memo on the front page of the London *Observer*, under the headline "Revealed: US Dirty Tricks to Win Vote on Iraq War."

The memo described an operation by the American National Security Agency (NSA), GCHQ's counterpart, to bug the telephones of certain UN diplomats in New York. It was dated January 31, 2003, and was sent by a man named Frank Koza, whose title was Chief of Staff for "Regional Targets" at the NSA:

As you've likely heard by now, the Agency is mounting a surge particularly directed at the UN Security Council (UNSC) members (minus US and GBR of course) for insights as to how to [*sic*] membership is reacting to the ongoing debate RE: Iraq, plans to vote on any related resolutions, what related policies/negotiating positions they may be considering, alliances/dependencies, etc—the whole gamut of information that could give US policymakers an edge in obtaining results favorable to US goals or to head off surprises.

The memo went on to explain that this meant a "surge" of eavesdropping activity on diplomats from the so-called "middle six" countries—the delegations on the Security Council whose votes on the upcoming resolution authorizing an invasion of Iraq were undecided: Angola, Cameroon, Chile, Mexico, Guinea, and Pakistan. The memo also requested coverage of "existing non-UNSC member UN-related and domestic comms for anything useful related to the UNSC deliberations/debates/ votes," and said that the spying would peak—"at least for this specific focus"—the following week, after Colin Powell's presentation to the Security Council on February 5, 2003.

Communications intelligence, as the surreptitious interception of electronic communications is known, has traditionally occupied an obscure corner of American consciousness. The NSA is larger than the CIA and the FBI combined, has some thirty thousand employees scattered at high-tech "listening stations" around the world, and enjoys an annual budget of over \$4 billion.<sup>[1]</sup> Yet since its founding in 1952, the agency has largely evaded scrutiny by the press. Eavesdropping only works if the target doesn't know he is being listened to, and press coverage can jeopardize sensitive operations. When *The Washington Post* reported in 1998 that the NSA could listen in on Osama bin Laden's satellite telephone, bin Laden abruptly stopped using the phone. In light of such cautionary tales and the reflexive secrecy of the eavesdroppers themselves, the American press is extremely deferential to the agency, and it's a beltway cliché that NSA stands for No Such Agency.<sup>[2]</sup> Thus while the March 2 article in the *Observer* prompted angry editorials in newspapers around the world, few American newspapers covered the incident. Even though the "surge" outlined in the memo was directed at offices and residences in Manhattan, *The New York Times* ignored the story.

Nevertheless, in the days following the publication of the memo, the *Observer* confirmed that Frank Koza was an NSA employee. The Chilean president, Ricardo Lagos, telephoned Tony Blair and demanded an explanation. And the British police arrested Katharine Gun on suspicion of having violated the Official Secrets Act.

The moment the story broke, GCHQ had launched an internal investigation, and when Gun arrived at work on Monday morning, she was informed that everyone who received Koza's e-mailed memo would be questioned by "vetting officers," as those in charge of internal security are known. When Gun met with a vetting officer on Tuesday she denied responsibility. But she was sick with worry, and the next day she tracked down her "line manager" and they went to a quiet room. "She could see I was extremely agitated," Gun told me recently. "And I said, 'The leak was me.'"

## 2.

Britain's Official Secrets Act has had a tortured history. First passed at a time of great national insecurity, in 1911, the act was a blanket provision preventing civil servants from revealing almost any government information. Officials reportedly used to joke that even the menu in the Civil Service canteen was secret, a joke made slightly less entertaining for being, strictly speaking, true. Even in its amended form, the Official Secrets Act of 1989 is a broad provision preventing members of the intelligence services

from talking about any aspect of their work, from the most sensitive to the most banal. Yet while spy agencies traditionally prize discretion, prosecutions for disclosures are an inevitably public process, and nowhere more so than in England, where a gift for rhetoric and a penchant for scandal often elevate a criminal trial to theatrical spectacle. As such, the act has tended to be an ineffective weapon for the government to wield. Prosecutions under the act have seldom been successful, and even successful convictions have often followed trials that were so sensational they ended up revealing far more secrets than the initial offending leak.

The very fact that GCHQ existed was an official secret until Margaret Thatcher was forced, in the wake of the 1983 Official Secrets Act prosecution of a GCHQ employee, Geoffrey Prime, for selling secrets to the Soviets, to acknowledge that it did. Prime was convicted, but at the price of GCHQ's invisibility. In 1985 a British judge advised a jury to convict Clive Ponting, a former Ministry of Defense employee, of violating the act by leaking a classified document regarding the British sinking of the Argentine cruiser *General Belgrano*, which resulted in the deaths of 323 people. The jury disregarded the judge's advice, however, and acquitted Ponting. In 1987 a former MI5 officer named Peter Wright published the memoir *Spycatcher* in the US and Australia. Wright was living in Australia, and Thatcher's government tried, in a high-profile case, to extradite him. They failed. More recently, in 2002 a judge sentenced the former MI5 agent David Shayler to six months in prison for leaking classified information about MI5 intelligence failures to *The Mail on Sunday*. His sentence was much shorter than the government had hoped for, however, and was accompanied by such a storm of negative publicity that the victory was decidedly pyrrhic.

This history of failures may explain the bizarre developments that followed Gun's arrest. After she had spent a night at the police station in Cheltenham, Gun was released on bail. Liberty, the London-based human rights organization that had defended David Shayler, took on her case. But the government did not bring charges. Gun returned home, unemployed now, and waited. Months passed, and still the government did not charge her, and few expected it would.

But on Thursday, November 13, 2003, Gun was officially charged by the Metropolitan police special branch with having violated section 1(1) of the Official Secrets Act, which holds that "a person who is or has been...a member of the security and intelligence services...is guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence...."

**W**hile the disclosure of any secret would have been adequate to warrant charges, it may have been the particular nature of the secrets in Koza's memo that raised Whitehall's ire. The informal language of the memo illustrated the extraordinarily close and secret cooperation on communications intelligence between the United States and the United Kingdom. Gun was particularly goaded by the offhand manner in which Koza suggested that the eavesdropping would not include "US and GBR of course." But this has been standard protocol since the Second World War, when the US and Great Britain became symbiotic partners in the interception and decryption of communications. The document

governing this relationship, known as the UKUSA agreement, dates from the postwar period, and binds the US, the UK, Canada, Australia, and New Zealand on matters of communications intelligence.

Today an extensive global infrastructure for the interception of communications, born of that agreement, spans the planet. The communications intelligence agencies of these five countries operate listening bases on remote islands, in secluded valleys, and in barren deserts the world over. They run a fleet of sophisticated eavesdropping satellites that hover miles above the earth's surface, intercepting signals. And "the take"—the millions of conversations, faxes, telexes, and e-mails that are intercepted by this apparatus every day—is distributed by automated methods among the allies. Gun told me it was not unusual for her to receive an e-mail from one of the other security agencies among the five countries. Yet the UKUSA agreement itself remains classified. Its existence has been confirmed in the memoirs of former spies and is taken for granted in standard histories of Anglo-American intelligence, but no sitting government official in any of the five countries has acknowledged that a document of that name exists.<sup>[3]</sup>

When the Koza memo was first published, several of the middle six delegations to the UN announced that they were conducting investigations of their premises. This quaint formulation brought to mind embassy functionaries sliding their fingertips along the undersides of tables or examining the bases of lamps. While physical bugs still occasionally appear in diplomatic offices, they present too high a risk of exposure—a risk that is perhaps unacceptable in light of more remote alternatives available to agencies with access to contemporary interception technologies. If you want to hear a conversation in a room today, you can take up a position in a building across the way and play a laser over the outside of the window of the room in which the conversation is taking place. The laser reads the imperceptible vibrations that the voices inside make on the glass, and may be able to convert those vibrations back into speech.<sup>[4]</sup>

### 3.

If the prosecution could demonstrate that Gun leaked the memo, her defense could hardly argue that she hadn't violated Section 1(1). So Gun's lawyers went on the offensive, remembering that a jury would determine her fate, and capitalized on popular opposition to the war. One of the objections raised by David Shayler's defense had been that there are no loopholes in the Official Secrets Act whereby intelligence agents might be acquitted on the grounds of public policy—no whistleblower exception. While Shayler's various defenses failed, Lord Woolf, the chief justice in the Court of Appeal, did allow that in principle a defense of "necessity" might be read into the act. Under this defense, the accused might be acquitted if the crime was committed "to avoid an imminent peril of danger to life or serious injury to himself or towards somebody for whom he reasonably regarded himself as being responsible."

This language formed the basis of Gun's case. The day she was charged, Gun released a statement saying that her disclosures were justified because "they exposed serious illegality and wrongdoing on the part of the US Government who attempted to subvert

our own security services"; and they could have helped "prevent wide-scale death and casualties among ordinary Iraqi people and UK forces in the course of an illegal war."

One shrewd tactic only invited another, however, and the prosecution answered with an ingenious legal ploy: because Gun's work at GCHQ was secret, she could not tell her lawyers anything that was not already in the public domain without applying to the government first for permission. This would effectively oblige the defense to disclose its case to the prosecution before the trial had even begun.

Gun's lawyers fought back, announcing that they wanted to see an opinion on the legality of the war that was provided to Tony Blair by Lord Peter Goldsmith, Britain's attorney general. The burden of proof seemed to shift, and in claiming their defense of necessity, Gun's lawyers dispensed with the matter of whether Gun had leaked the memo, and focused instead on whether the prosecution could prove that the war in Iraq was legal. Then on Tuesday, February 24, just hours after they had formally requested a copy of Goldsmith's opinion, Gun's team received word that the government was going to drop the case against her. It was widely rumored that Lord Goldsmith had initially advised the Blair government that the war would be illegal because of the lack of a second UN resolution, and that the decision to drop the case was an effort to prevent that advice from becoming public. The next day, Katharine Gun emerged from the Old Bailey to a throng of well-wishers and newspaper photographers. Gun's head lawyer, Shami Chakrabarti, publicly speculated that disclosure of Goldsmith's advice on the war "might have been a little too embarrassing."

Later that day, Clare Short, Tony Blair's former cabinet minister who had resigned in protest against the Iraq war, was asked about the case on BBC Radio. Quite unprompted, Short announced that in the months before the war the UK had spied on the secretary-general himself, and added, "I've seen transcripts of Kofi Annan's conversations." Short's revelations only added fuel to the Gun controversy, and on Thursday, February 26, Tony Blair refused to confirm or deny the allegations but called Short "completely irresponsible," and suggested that she had undermined "the essential security" of the country. When the BBC's Jeremy Paxman pointed out that in making these disclosures, Short had *herself* violated the Official Secrets Act, Short replied contemptuously, "Well I think if you say how many orders of toilet paper [MI6] makes, you'd probably break the Official Secrets Act."

On Friday, February 27, the Australian Broadcasting Company (ABC) reported that the UN's chief weapons inspector, Hans Blix, had been monitored by the UKUSA countries as well, saying intelligence sources confirmed that each time Blix entered Iraq his conversations were recorded and transcripts were made available to the five countries. The same day, Richard Butler told Australian radio that while he was chief weapons inspector from 1997 to 1999, "I was utterly confident that...I was being listened to by the Americans, the British, the French and the Russians."

#### 4.

The 1946 General Convention on the Privileges and Immunities of the United Nations, a multilateral treaty signed by the US and the UK, states in Article II, Section 3 that

the premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, ex-propriation and any other form of interference.

Likewise, the UN Headquarters Agreement provides in Article III, Section 9(a) that "the headquarters district shall be inviolable." There may be some room for textual interpretation here, but when questioned about Clare Short's allegations, Fred Eckhard, Kofi Annan's spokesman, argued that "even satellite interception of messages constitutes interference."

There is also a much more explicit legal prohibition against this kind of activity. The 1961 Vienna Convention on Diplomatic Relations, ratified by both the United States and Britain as well as many other countries, holds, in Article 27, Section 2, that "the official correspondence of the mission shall be inviolable." Article 30 holds that diplomatic residences shall enjoy the same inviolability as the missions themselves, and that individual diplomats' "papers and correspondence shall also be inviolable." These provisions are not merely symbolic. They could provide grounds for bringing the US or the UK to the International Court of Justice, were it possible to prove that illicit listening had taken place.

But while it is clearly illegal, eavesdropping on diplomats is so common a practice that many UN delegates regard complaining about it on legal grounds as equivalent to making a citizen's arrest for jaywalking. The history of the United Nations has, since its very inception, involved the practice of intercepting diplomatic communications. Throughout the very planning of the UN, at an organizational conference in San Francisco in the spring of 1945, Edward Stettinius, Harry Truman's secretary of state, was receiving intercepts from the US Army's Signal Security Agency, the predecessor to the NSA, of the diplomatic cable traffic of forty-three of the forty-five nations in attendance. (It is not clear whether US intelligence was able to intercept Russian communications, and then, as now, Great Britain was exempt.)<sup>[5]</sup>

This history has led to a resigned view among diplomats that eavesdropping is an unpleasant inevitability. When *The Washington Post* asked a UN delegate whether he believed his calls were being monitored, he replied, "Let's ask the guy who's listening to us." Former UN Secretary-General Boutros Boutros-Ghali told the BBC, "It is a tradition that member states that have the technical capacity to bug will do so without hesitation." Diplomats told members of the press that when they want to have a private conversation, they routinely take a walk in Central Park, conjuring an image of a park overrun by diplomats taking morning constitutionals, all trying to conduct a little business in peace. Queried about eavesdropping, Stefan Tafrov, Bulgaria's representative to the UN, told CBS News that there is actually a "prestige factor" in being listened to, as one's

maneuverings must be of some consequence to attract such attention, and added, "It's almost an insult if they *don't* listen."

**B**ut if this state of affairs is so readily acknowledged by diplomats, it raises the question: How could an employee of an eavesdropping agency that conducts these operations be shocked or indignant to learn that the US and the UK were listening in on the middle six? The whistleblower is not always free of a certain unsettling sanctimony, and through all the press coverage of Gun's ordeal, a paradox emerged: If it is widely known that diplomatic communications are a big part of what these agencies listen in on, and if Gun was a Mandarin translator who presumably spent the prior two years translating intercepted Chinese diplomatic communications, how could she be shocked by Koza's memo?

Gun replied that she was not shocked by the fact of the listening, but by the stakes in this particular instance of diplomatic manipulation. "It wasn't just the fact that they were listening, it was what they were going to do with the information," she told me. "If anything was going to shed light on what the Bush–Blair coalition was trying to do, that could be it."

Gun's decision betrayed a certain innocent faith in the United Nations' ability to stop the war—a naiveté that seems all the more poignant in view of subsequent events. She leaked the memo with the quixotic hope that revealing the tactics employed by Washington and Whitehall might be enough to prevent an impending calamity. "The memo had the potential to create a situation where people would stop and think before they acted," Gun told me. "And the more I thought about it, the more I believed I couldn't let that go."

## Notes

<sup>[1]</sup> The exact figure is highly classified. Prior to September 11, 2001, conservative estimates held that the budget was \$3 billion–\$4 billion, but it is likely that that number has been considerably augmented since. In his most recent book, *Plan of Attack*, Bob Woodward claims the figure is as high as \$6 billion.

<sup>[2]</sup> For notable exceptions to this prevailing trend, see the work of James Bamford, *The Puzzle Palace* (Houghton Mifflin, 1982) and *Body of Secrets* (Doubleday, 2001); and Seymour Hersh, *The Target Is Destroyed* (Random House, 1986).

<sup>[3]</sup> See Jeffrey T. Richelson and Desmond Ball, *The Ties That Bind: Intelligence Cooperation Between the UKUSA Countries* (Unwin Hyman, 1990); and Nicky Hager, *Secret Power* (Nelson, New Zealand: Craig Potton, 1996).

<sup>[4]</sup> This process is known as interferometry, and is based on the idea that sound is simply vibration, so if the vibrations on the window pane are read and amplified, and background noise is reduced, it is possible to resolve the vibration pattern into speech. When Fred Eckhard, spokesman for Kofi Annan, was asked by the press on February 27, 2004, "What about reading the vibrations on the window or whatever they do? Do you have any countermeasures that can put some stuff on the window to stop that from happening?" he replied, "I think the only stuff we put on the windows is the anti-shatter film that we put in just in the last month or so."

<sup>[5]</sup> The Signal Security Agency had access to the cables because Western Union and other commercial telegraph companies were still turning over copies of all foreign cables, under wartime censorship laws, to the government. Some of the smaller countries represented at the meetings did not use the commercial cable companies. In these cases, the US Army Communications Service was only too happy to make available its own radio and wire facilities. See Stephen C. Schlesinger, *Act of Creation: The Founding of the United Nations* (Westview, 2003), pp. 93–94.

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