# EXECUTIVE SECRETARIAT
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SUSPENSE _____ Date

Remarks

STAT

Executive Secretary

10 Dec '87

Date

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# Illinois Judges Association

5600 Old Orchard Road
Skokie, Illinois 60077
312/470-7200



December 1, 1987

Honorable William Webster, Director
Central Intelligence
Washington, D.C. 22025

Dear Judge Webster:

On behalf of the Illinois Judges Association I offer my appreciation for gracing the members of the bench and bar with your presence at the 16th Annual Convention.

Attendance figures at the luncheon were the highest thus far and can be attributed to your highlighting the occasion with your inspiring and thought-provoking words.

Continued success with your new challenge as Director of Intelligence and accept our best wishes for a Happy Holiday Season.

Sincerely,

Philip B. Benefiel

PHILIP B. BENEFIEL,
Chairman
Convention Planning
Committee

DAVID J. SHIELDS,
Vice Chairman

NORMAN N. EIGER,
Chairman Emeritus

TOBIAS BARRY,
President

P-309-1R

FA087-0127

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SCHEDULE/CONTACTS
Address the Illinois State Bar Association
and the
Illinois Judges Association
Convention
Chicago, Illinois
Friday, 13 November 1987

Thursday, 12 November

p.m. (Tentative) Depart, Washington, D.C.

p.m. Arrive, Chicago, Illinois

Friday, 13 November

Free Time

11:45 a.m. Meet with Judge Philip B. Benefiel
Holiday Inn-Mart Plaza Hotel
350 North Orleans Street
Day Room
Phone: (312) 836-5000
Contact: Maureen McClelland, IJA Executive Secretary

12:00 noon Luncheon, Sauganash East and West room (14th floor)

Remarks, The Honorable William G. Clark
Chief Justice, Supreme Court of Illinois

Introduction, Guest Speaker
The Honorable Philip B. Benefiel

1:15 p.m. Address, "Central Intelligence:
Its Role in a Free Society"
The Honorable William H. Webster

25X1 1:45 p.m. Adjournment

Free Time

Sunday, 8 November

25X1
25X1 p.m. Depart, Chicago

p.m. Arrive, Washington, D.C.

CONFIDENTIAL

DCI/PAO/WMB/ [redacted] 6Nov87

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6 November 1987

MEMORANDUM FOR: Director of Central Intelligence

FROM: William M. Baker
Director, Public Affairs Office

SUBJECT: Trip to Chicago to Address the
Illinois State Bar Association and the
Illinois Judges Association

1. This is background information for your trip to Chicago and address of the Illinois State Bar Association (ISBA) and the Illinois Judges Association (IJA) joint Convention luncheon on Friday, 13 November. The Convention will be held at the Holiday Inn-Mart Plaza Hotel, 350 North Orleans Street. Phone: (312) 836-5000 I will remain with you throughout the luncheon event.

2. Arrangements: You are requested to be in your hotel room of the Holiday Inn-Mart Plaza Hotel at 11:45 a.m. where Convention Chairman and a Director of the IJA Board Judge Philip B. Benefiel will meet you and escort you to the luncheon in the Sauganash East and West room on the 14th floor. The luncheon is scheduled for 12:00 noon and your address at approximately 1:15 p.m. The suggested format is 30 minutes of remarks. A question and answer period is not planned. You will be seated at the head table with Judge Benefiel on your right and President of IJA Justice Tobias "Toby" Barry on your left. (See Tab for head table seating and biographies.) Following lunch, Chief Justice of the Supreme Court of Illinois, William G. Clark, will give welcoming remarks. Tentatively, Harold Washington, Mayor of Chicago will greet the audience. Judge Benefiel will introduce you. A podium and microphone will be available in the middle area of the head speakers table. Security will tape your remarks for the Agency's historical records and Judge Benefiel plans to video tape your appearance for use by the Association. We have made arrangements to review any of your remarks which may be published in the IJA Quarterly, The Gavel or the Illinois Bar Journal. Adjournment is at approximately 1:45 p.m.

You can expect an audience of approximately 400 Illinois State judges, members of the bar and spouses. All seven Illinois Supreme Court Judges will be in attendance. Reporters from the CHICAGO TRIBUNE and SUN TIMES and local TV stations are expected to cover the event.

3. Background: Although the ISBA and IJA usually met separately, this year their meetings are combined in special recognition of the Bicentennial of the Constitution. The ISBA is a voluntary professional association of Illinois lawyers. With over 30,000 active members it is one of the largest state bar associations in the country. The elected officers and Board of Governors run the Association. Membership is open to all members of the Illinois bar and out-of-state lawyers with professional ties to the state. The ISBA sponsors numerous educational and professional programs, and holds two general meetings a year. Donald Schiller, President of ISBA, highlights the ISBA/IJA meeting in the October edition of the Illinois Bar Association. Also of note are two articles on "Merit Selection of Judges" a much-discussed topic in Illinois at this time. (See Journal in back pocket.) Supreme Court nominee Judge Douglas H. Ginsburg, a Chicago native, is a member of the ISBA. (See Tab for article.)

The IJA is also a voluntary professional association with a membership of approximately 800 Illinois State Judges. Convention Chairmen of the ISBA and the IJA Conference are Judge Philip Benefiel, Judge David Shields, Judge Norman Eiger, and Justice Tobias Barry. Speakers at past Conferences have been Archibald Cox, Louis Nizer, Fred Friendly, Richard Threlkeld of ABC News, F. Lee Bailey, and former Supreme Court Justice Arthur Goldberg.

You spoke to the IJA in 1981 on "Sensitive Investigative Techniques." As you remember this was the time of the Greylord investigation and subsequent convictions which had great impact on the judicial system in Illinois. Members of the ISBA and the IJA wish to recognize your significant contribution to the quality of the Illinois Court system. Judge Benefiel said that the Conference members continue to be interested in the Greylord operation and the uncovering of corruption in the Cook County Court System. (See Tab for articles.) At the Friday morning panel "Professionalism on the Bench" former U.S. Attorneys Dan Webb and Scott Turow, both Greylord prosecutors, will appear and Judge William Bauer will moderate. Mr. Turow is also the author of the current best seller Presumed Innocent. You are invited to attend any seminars listed in the program. (For Convention program see front pocket.)

4. Remarks: Attached in a separate folder are proposed remarks drawn, per your agreement, from your speech at Aspen ("Central Intelligence: Its Role in A Free Society") with a section on the Agency's legal activities substituted for the section covering our relations with the academic community.

25X1

William M. Baker

# FREEDOM OF INFORMATION ACT

[88 Stat. 1561, Pub. L. 93-502, November 21, 1974, 5 U.S.C.A. 552;
90 Stat. 1241, Pub. L. 94-409, September 13, 1976;
92 Stat. 1225, Pub. L. 95-454, October 13, 1978] [1]

**Section 552. Public information; agency rules,[2] opinions, orders, records, and proceedings**

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected

[1] The current Freedom of Information Act essentially is the 1974 Act (Pub. L. 93-502), which replaced the original statute, enacted in 1946.

[2] The published rules and regulations of CIA under the Act are in Code of Federal Regulations, Title 32, Chapter XIX (1983).

thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel

acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusal circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances"

means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; [1]

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as

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[1] See Part XI of the *Guide*.

to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigative, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of

the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determination made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section, and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

# FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

[92 Stat. 1783, P.L. 95-511, October 25, 1978, 50 U.S.C.A. 1801 *et seq.*, 18 U.S.C.A. 2511, 2518, 2519]

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TITLE I—ELECTRONIC SURVEILLANCE WITHIN THE UNITED STATES FOR FOREIGN INTELLIGENCE PURPOSES



## TITLE I—ELECTRONIC SURVEILLANCE WITHIN THE UNITED STATES FOR FOREIGN INTELLIGENCE PURPOSES

### DEFINITIONS

SEC. 101. As used in this title:

(a) "Foreign power" means—

(1) a foreign government or any component thereof, whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;



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TS 30

(5) a foreign-based political organization, not substantially composed of United States persons; or

(6) an entity that is directed and controlled by a foreign government or governments.

(b) "Agent of a foreign power" means—

(1) any person other than a United States person, who—

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4);

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(2) any person who—

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power; or

(D) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

(c) "International terrorism" means activities that—

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended -

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) "Sabotage" means activities that involve a violation of chapter 105 of title 18, United States Code, or that would involve such a violation if committed against the United States.

(e) "Foreign intelligence information" means—

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign afairs of the United States.

(f) "Electronic surveillance" means—

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required by law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required by law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

(g) "Attorney General" means the Attorney General of the United States (or Acting Attorney General) or the Deputy Attorney General.

(h) "Minimization procedures", with respect to electronic surveillance, means—

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e) (1), shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 102(a), procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or

retained for longer than twenty-four hours unless a court order under section 105 is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

(i) "United States person" means a citizen of the United States, an alien lawfullly admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation of an association which is a foreign power, as defined in subsection (a),(1), (2), or (3).

(j) "United States," when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

(k) "Aggrieved person" means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

(l) "Wire communication" means any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

(m) "Person" means any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.

(n) "Contents," when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

(o) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

AUTHORIZATION FOR ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE PURPOSES

SEC. 102. (a)(1) Notwithstanding any other law, the President, through the Attorney General, may authorize ' electronic surveillance without a court order under this title to acquire foreign intelligence

information for periods of up to one year if the Attorney General certifies in writing under oath that—

(A) the electronic surveillance is soley directed at—

(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 101(a) (1), (2), or (3); or

(ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 101(a)(1), (2), or (3);

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; and

(C) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 101(h); and

if the Attorney General reports such minimization procedures and any changes thereto to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence at least thirty days prior to their effective date, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

(2) An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the minimization procedures adopted by him. The Attorney General shall assess compliance with such procedures and shall report such assessments to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence under the provisions of section 108(a).

(3) The Attorney General shall immediately transmit under seal to the court established under section 103(a) a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of Central Intelligence, and shall remain sealed unless—

(A) an application for a court order with respect to the surveillance is made under sections 101(h)(4) and 104; or

(B) the certification is necessary to determine the legality of the surveillance under section 106(f).

(4) With respect to electronic surveillance authorized by this subsection, the Attorney General may direct a specified communication common carrier to—

(A) furnish all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier is providing its customers; and

(B) maintain under security procedures approved by the Attorney General and the Director of Central Intelligence any records concerning the surveillance or the aid furnished which such carrier wishes to retain.

The Government shall compensate, at the prevailing rate, such carrier for furnishing such aid.

(b) Applications for a court order under this title are authorized if the President has, by written authorization,[2] empowered the Attorney General to approve applications to the court having jurisdiction under section 103, and a judge to whom an application is made may, notwithstanding any other law, grant an order, in conformity with section 105, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information, except that the court shall not have jurisdiction to grant any order approving electronic surveillance directed solely as described in paragraph (1)(A) of subsection (a) unless such surveillance may involve the acquisition of communications of any United States person.

DESIGNATION OF JUDGES

SEC. 103. (a) The Chief Justice of the United States shall publicly designate seven district court judges from seven of the United States judicial circuits who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act, except that no judge designated under this subsection shall hear the same application for electronic surveillance under this Act which has been denied previously by another judge designated under this subsection. If any judge so designated denies an application for an order authorizing electronic surveillance under this Act, such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted, under seal, to the court of review established in subsection (b).

(b) The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this Act. If such court determines that the application was properly denied, the court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(c) Proceedings under this Act shall be conducted as expeditiously as possible. The record of proceedings under this Act, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence.'

(d) Each judge designated under this section shall so serve for a maximum of seven years and shall not be eligible for redesignation, except that the judges first designated under subsection (a) shall be designated for terms of from one to seven years so that one term expires each year, and that judges first designated under subsection (b) shall be designated for terms of three, five, and seven years.

APPLICATION FOR AN ORDER

SEC. 104. (a) Each application for an order approving electronic surveillance under this title shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 103. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this title. It shall include—

(1) the identity of the Federal officer making the application;

(2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;

(3) the identity, if known, or a description of the target of the electronic surveillance;

(4) a statement of the facts and circumstances relied upon by the applicant to justify his belief that—

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(5) a statement of the proposed minimization procedures;

(6) a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate—

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that the purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 101(e); and

(E) including a statement of the basis for the certification that—

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably be obtained by normal investigative techniques;

(8) a statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(9) a statement of the facts concerning all previous applications that have been made to any judge under this title involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application;

(10) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this title should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter; and

(11) whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices

involved and what minimization procedures apply to information acquired by each devise.

(b) Whenever the target of the electronic surveillance is a foreign power, as defined in section 101(a)(1), (2), or (3), and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power, the application need not contain the information required by paragraphs (6), (7)(E), (8), and (11) of subsection (a), but shall state whether physical entry is required to effect the surveillance and shall contain such information about the surveillance techniques and communications or other information concerning United States persons likely to be obtained as may be necessary to assess the proposed minimization procedures.

(c) The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(d) The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 105.

ISSUANCE OF AN ORDER

SEC. 105. (a) Upon an application made pursuant to section 104 the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that—

(1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;

(2) the application has been made by a Federal officer and approved by the Attorney General;

(3) on the basis of the facts submitted by the applicant there is probable cause to believe that—

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; *Provided*, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(4) the proposed minimization procedures meet the definition of minimization procedures under section 101(h); and

(5) the application which has been filed contains all statements and certifications required by section 104 and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section

104(a)(7)(E) and any other information furnished under section 104(d).

(b) An order approving an electronic surveillance under this section shall—

(1) specify—

(A) the identity, if known, or a description of the target of the electronic surveillance;

(B) the nature and location of each of the facilities or places at which the electronic surveillance will be directed;

(C) the type of information sought to be acquired and the type of communications or activities to be subjected to the surveillance;

(D) the means by which the electronic surveillance will be effected and whether physical entry will be used to effect the surveillance;

(E) the period of time during which the electronic surveillance is approved; and

(F) whenever more than one electronic, mechanical, or other surveillance device is to be used under the order, the authorized coverage of the devices involved and what minimization procedures shall apply to information subject to acquisition by each device; and

(2) direct—

(A) that the minimization procedures be followed;

(B) that, upon the request of the applicant, a specified communication or other common carrier, landlord, custodian, or other specified person furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier, landlord, custodian, or other person is providing that target of electronic surveillance;

(C) that such carrier, landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of Central Intelligence any records concerning the surveillance or the aid furnished that such person wishes to retain; and

(D) that the applicant compensate, at the prevailing rate, such carrier, landlord, custodian, or other person for furnishing such aid.

(c) Whenever the target of the electronic surveillance is a foreign power, as defined in section 101(a) (1), (2), or (3), and each of the facilities or places at which the surveillance is directed is owned, leased,

or exclusively used by that foreign power, the order need not contain the information required by subparagraphs (C), (D), and (F) of subsection (b)(1), but shall generally describe the information sought, the communications or activities to be subjected to the surveillance, and the type of electronic surveillance involved, including whether physical entry is required.

(d)(1) An order issued under this section may approve an electronic surveillance for the period necessary to achieve its purpose, or for ninety days, whichever is less, except that an order under this section shall approve an electronic surveillance targeted against a foreign power, as defined in section 101(a) (1), (2), or (3), for the period specified in the application or for one year, whichever is less.

(2) Extensions of an order issued under this title may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order, except that an extension of an order under this Act for a surveillance targeted against a foreign power, as defined in section 101(a) (5) or (6), or against a foreign power as defined in section 101(a)(4) that is not a United States person, may be for a period not to exceed one year if the judge finds probable cause to believe that no communication of any individual United States person will be acquired during the period.

(3) At or before the end of the period of time for which electronic surveillance is approved by an order or an extension, the judge may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.

(e) Notwithstanding any other provision of this title, when the Attorney General reasonably determines that—

(1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and

(2) the factual basis for issuance of an order under this title to approve such surveillance exists;

he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 103 is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this title is made to that judge as soon as practicable, but not more than twenty-four hours after the Attorney General authorizes such surveillance. If the attorney General authorized such emergency employment of electronic surveillance, he shall require that the minimization procedures required by

this title for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of twenty-four hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 103.

(f) Notwithstanding any other provision of this title, officers, employees, or agents of the United States are authorized in the normal course of their official duties to conduct electronic surveillance not targeted against the communications of any particular person or persons, under procedures approved by the Attorney General, solely to—

(1) test the capability of electronic equipment, if—

(A) it is not reasonable to obtain the consent of the persons incidentally subjected to the surveillance;

(B) the test is limited in extent and duration to that necessary to determine the capability of the equipment;

(C) the contents of any communication acquired are retained and used only for the purpose of determining the capability of the equipment, are disclosed only to test personnel, and are destroyed before or immediately upon completion of the test; and:

(D) *Provided*, That the test may exceed ninety days only with the prior approval of the Attorney General;

(2) determine the existence and capability of electronic surveillance equipment being used by persons not authorized to conduct electronic surveillance, if—

(A) it is not reasonable to obtain the consent of persons incidentally subjected to the surveillance;

(B) such electronic surveillance is limited in extent and duration to that necessary to determine the existence and capability of such equipment; and

(C) any information acquired by such surveillance is used only to enforce chapter 119 of title 18, United States Code, or section 605 of the Communications Act of 1934, or to protect information from unauthorized surveillance; or

(3) train intelligence personnel in the use of electronic surveillance equipment, if—

(A) it is not reasonable to—

(i) obtain the consent of the persons incidentally subjected to the surveillance;

(ii) train persons in the course of surveillances otherwise authorized by this title; or

(iii) train persons in the use of such equipment without engaging in electronic surveillance;

(B) such electronic surveillance is limited in extent and duration to that necessary to train the personnel in the use of the equipment; and

(C) no contents of any communication acquired are retained or disseminated for any purpose, but are destroyed as soon as reasonably possible.

(g) Certifications made by the Attorney General pursuant to section 102(a) and applications made and orders granted under this title shall be retained for a period of at least ten years from the date of the certification or application.

USE OF INFORMATION

SEC. 106. (a) Information acquired from an electronic surveillance conducted pursuant to this title concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this title. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this title shall lose its privileged character. No information acquired from an electronic surveillance pursuant to this title may be used or disclosed by Federal officers or employees except for lawful purposes.

(b) No information acquired pursuant to this title shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

(c) Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this title, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

(d) Whenever any State or political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision thereof, against an aggrieved person any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this title, the State or political subdivision thereof shall notify the aggrieved person, the court or other authority in which the information is to be disclosed or used, and the Attorney General that the State or political subdivision thereof intends to so disclose or so use such information.

(e) Any person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that—

(1) the information was unlawfully acquired; or

(2) the surveillance was not made in conformity with an order of authorization or approval.

Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(f) Whenever a court or other authority is notified pursuant to subsection (c) or (d), or whenever a motion is made pursuant to subsection (e), or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or

suppress evidence or information obtained or derived from electronic surveillance under this Act, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

(g) If the United States district court pursuant to subsection (f) determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

(h) Orders granting motions or requests under subsection (g), decisions under this section that electronic surveillance was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of applications, orders, or other materials relating to a surveillance shall be final orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.

(i) In circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person.

(j) If an emergency employment of electronic surveillance is authorized under section 105(e) and a subsequent order approving the

surveillance is not obtained, the judge shall cause to be served on any United States person named in the application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice of—

(1) the fact of the application;

(2) the period of the surveillance; and

(3) the fact that during the period information was or was not obtained.

On an ex parte showing of good cause to the judge the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

REPORT OF ELECTRONIC SURVEILLANCE

SEC. 107. In April of each year, the Attorney General shall transmit to the Administrative Office of the United States Court and to Congress a report setting forth with respect to the preceding calendar year—

(a) the total number of applications made for orders and extensions of orders approving electronic surveillance under this title; and

(b) the total number of such orders and extensions either granted, modified, or denied.

CONGRESSIONAL OVERSIGHT

SEC. 108. (a) On a semiannual basis the Attorney General shall fully inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence concerning all electronic surveillance under this title. Nothing in this title shall be deemed to limit the authority and responsibility of the appropriate committees of each House of Congress to obtain such information as they may need to carry out their respective functions and duties.

(b) On or before one year after the effective date of this Act and on the same day each year for four years thereafter, the Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence shall report respectively to the House of Representatives and the Senate, concerning the implementation of this Act. Said reports shall include but not be limited to an analysis and recommendations concerning whether this Act should be (1) amended, (2) repealed, or (3) permitted to continue in effect without amendment.

PENALTIES

SEC. 109. (a) OFFENSE.—A person is guilty of an offense if he intentionally—

(1) engages in electronic surveillance under color of law except as authorized by statute; or

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

(b) DEFENSE.—It is a defense to a prosecution under subsection (1) that the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction.

(c) PENALTY.—An offense described in this section is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both.

(d) JURISDICTION.—There is Federal jurisdiction over an offense under this section if the person committing the offense was an officer or employee of the United States at the time the offense was committed.

CIVIL LIABILITY

SEC. 110. CIVIL ACTION.—An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 101 (a) or (b)(1)(A), respectively, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 109 shall have a cause of action against any person who committed such violation and shall be entitled to recover—

(a) actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater;

(b) punitive damages; and

(c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

AUTHORIZATION DURING TIME OF WAR

SEC. 111. Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.

amendments to

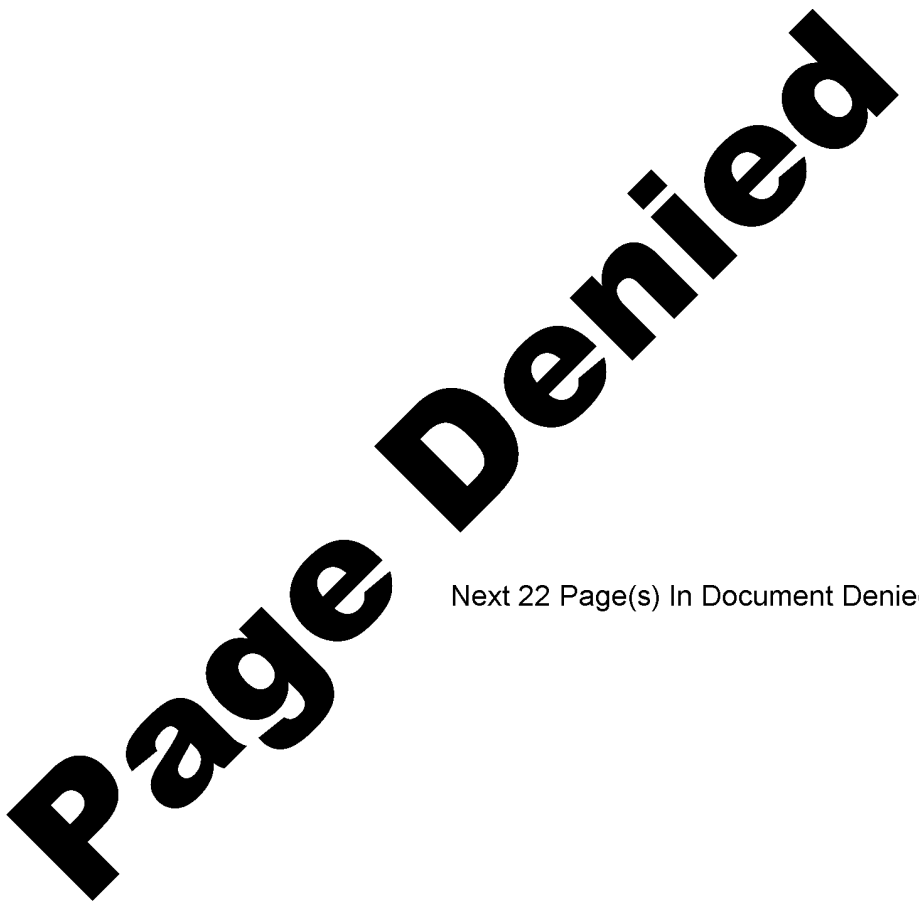
## FOREIGN ASSISTANCE ACT OF 1961

### (Hughes-Ryan Amendment)

[88 Stat. 1795 Pub. L. 93-559, December 30, 1974, 22 U.S.C.A. 2422;
94 Stat. 1981, Pub. L. 96-450, October 14, 1980]

**§ 2422. Intelligence activities**

No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 413 of Title 50.

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**to alter, amend, or repeal**

or repeal this Act is expressly reserved

**Historical Note**

rred to 70, 84 Stat. 1397, known as the "Interstate Agreement on Detainers Act".

**Library References**

on the ninetieth day after the date of its

**Historical Note**

rred to 70, 84 Agree- The date of its enactment, referred to in text, means Dec. 9, 1970.

**Library References**

C.J.S. Statutes §§ 405, 407.



## CLASSIFIED INFORMATION PROCEDURES ACT

Pub.L. 96–456, Oct. 15, 1980, 94 Stat. 2025

Sec.



### § 1. Definitions

(a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

**Historical Note**

**References in Text.** This Act, referred to in text, is Pub.L. 96–456, Oct. 15, 1980, 94 Stat. 2025, known as the "Classified Information Procedures Act".

**Notes of Decisions**



**1. Constitutionality**

Definitions of terms "classified information" and "national security" as contained in this section were not void for vagueness. U. S. v. Wilson, D.C.N.Y.1983, 571 F.Supp. 1422.

§ 1

Terms "classified information" and "national security," as defined in this section, adequately informed defendant of the conduct required under this Act, and, thus, the terms were not unconstitutionally vague. U.S. v. Jolliff, D.C.Md.1981, 548 F.Supp. 229.

2. Purpose

This Act was designed to establish procedures to harmonize defendant's right to obtain and present exculpatory material upon his trial and government's right to protect classified material in the national interest. U. S. v. Wilson, D.C.N.Y.1983, 571 F.Supp. 1422.

3. Admissibility of evidence

This Act does not undertake to create new substantive law governing admissibility of evidence. U. S. v. Wilson, C.A.Tex.1984, 732 F.2d 404, rehearing denied 736 F.2d 1526, certiorari denied 105 S.Ct. 609.

## § 2. Pretrial conference

At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any matters which relate to classified information or which may promote a fair and expeditious trial. No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

### West's Federal Forms

Pretrial conference, see § 7411 et seq.

### Library References

Criminal Law ⇐632(5).
C.J.S. Criminal Law § 929.

## § 3. Protective orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

### Library References

Criminal Law ⇐627.6(1).
C.J.S. Criminal Law § 955(1) et seq.

## § 4. Discovery of classified information by defendants

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such

his trial and government's right to protect classified material in the national interest. U S v. Wilson, D.C.N.Y.1983, 571 F.Supp 1422.

**3. Admissibility of evidence**

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classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

**Library References**

Criminal Law ⇐627.5(1).
C.J.S. Criminal Law § 955(1) et seq.

**Notes of Decisions**



**1. Constitutionality**

This section and section 6 of this Act, authorizing a court to limit the defendant's discovery rights following an ex parte, in camera proceeding, did not violate U.S.C.A. Const. Amend. 6. U.S. v. Jolliff, D.C.Md. 1981, 548 F.Supp. 229.

**2. Relevancy of information**

In prosecution charging violations of firearm export laws, defendant was not denied an opportunity to establish his good faith defense by pretrial exclusion of certain classified information from evidence pursuant to this section where district court specifically determined that none of classified information defendant sought was relevant or material, district court allowed defendant to present defense that he was working for the United States in an undercover capacity in Libya, and to call witnesses to corroborate that claim, so long as none of classified information determined to be irrelevant would be disclosed. U. S. v. Wilson, C.A.Va.1983, 721 F.2d 967.

## § 5. Notice of defendant's intention to disclose classified information

**(a) Notice by defendant**

If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

(b) Failure to comply

If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

Library References

Criminal Law ⇐627.6(1).
C.J.S. Criminal Law § 955(1) et seq.

Notes of Decisions

Constitutionality 1
Description of information 2

1. Constitutionality

Actions taken by the district court to insure compliance with this section and the security procedures promulgated thereunder for protection against unauthorized disclosure of classified information in the custody of federal courts did not interfere with defendant's right to counsel under U.S.C.A. Const. Amend. 6. U.S. v. Jolliff, D.C.Md.1981, 548 F.Supp. 232.

Notice requirements of this section did not violate defendant's right against compulsory self-incrimination under U.S.C.A. Const. Amend. 5. U.S. v. Jolliff, D.C.Md.1981, 548 F.Supp. 229.

2. Description of information

In prosecution of defendant, a retired Air Force General officer, on charges alleging misuse of money belonging to United States and its Air Force, defendant's notice of his intention to disclose classified information in his defense was not sufficient under this section and insufficiency of the notice fatally permeated those procedures which followed so that district court's order upon them was invalid. U. S. v. Collins, C.A.Fla.1983, 720 F.2d 1195.

Notice rules of which defendant complained required only that "brief description of the classified information" be provided, and nothing required him to produce his entire actual defense prior to trial. U. S. v. Wilson, D.C.N.Y.1983, 571 F.Supp. 1422.

## § 6. Procedure for cases involving classified information

(a) Motion for hearing

Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice

(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United

States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a), the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

**(c) Alternative procedure for disclosure of classified information**

(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

**(d) Sealing of records of in camera hearings**

If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

**(e) Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure**

(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified



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with the requirements of subsection (a) f any classified information not made the ibit the examination by the defendant of h information.

References

f Decisions

2. Description of information

In prosecution of defendant, a retired Air Force General officer, on charges alleging misuse of money belonging to United States and its Air Force, defendant's notice of his intention to disclose classified information in his defense was not sufficient under this section and insufficiency of the notice fatally permeated those procedures which followed so that district court's order upon them was invalid. U. S. v. Collins, C.A.Fla.1983, 720 F.2d 1195.

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urt for the filing of a motion under this est the court to conduct a hearing to the use, relevance, or admissibility of therwise be made during the trial or equest, the court shall conduct such a t to this subsection (or any portion of of the Attorney General) shall be held rtifies to the court in such petition that he disclosure of classified information. ion, the court shall set forth in writing re the United States' motion under this or pretrial proceeding, the court shall the relevant proceeding.

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d pursuant to a request by the United ted States shall provide the defendant ion that is at issue. Such notice shall ation at issue whenever that informalable to the defendant by the United 24

information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

**(f) Reciprocity**

Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

**Historical Note**

**References in Text.** This Act, referred to in subsec. (d), is Pub.L. 96-456, Oct. 15, 1980, 94 Stat. 2025, known as the "Classified Information Procedures Act".

**Library References**

Criminal Law ⇐627.8(1).
C.J.S. Criminal Law § 955(1) et seq.

## § 7. Interlocutory appeal

(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be

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taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

**Library References**

Criminal Law ⇐627.8(5).
C.J.S. Criminal Law § 955(1) et seq.

**Notes of Decisions**

**1. Ripeness**

Issue whether this section granting the government the right to a unilateral appeal was fundamentally unfair was not ripe for review, where the government had not yet taken an appeal. U.S. v. Jolliff, D.C.Md. 1981, 548 F.Supp. 229.

## § 8. Introduction of classified information

**(a) Classification status**

Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

**(b) Precautions by court**

The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.

**(c) Taking of testimony**

During the examination of a witness in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the United States to provide the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

**Library References**

Criminal Law ⇐663, 667(1).
C.J.S. Criminal Law §§ 1033, 1035 et seq.

## § 9. Security procedures

(a) Within one hundred and twenty days of the date of the enactment of this Act, the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

(b) Until such time as rules under subsection (a) first become effective, the Federal courts shall in each case involving classified information adopt procedures to protect against the unauthorized disclosure of such information.

**Historical Note**

**References in Text.** The date of the enactment of this Act, referred to in subsec. (a), means Oct. 15, 1980.

SECURITY PROCEDURES ESTABLISHED PURSUANT TO PUB.L. 96-456, 94 STAT. 2025, BY THE CHIEF JUSTICE OF THE UNITED STATES FOR THE PROTECTION OF CLASSIFIED INFORMATION

**1. Purpose.** The purpose of these procedures is to meet the requirements of Section 9(a) of the Classified Information Procedures Act of 1980, Pub.L. 96-456, 94 Stat. 2025, which in pertinent part provides that:

> ". . . [T]he Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court . . ."

These procedures apply in all proceedings in criminal cases involving classified information, and appeals therefrom, before the United States district courts, the courts of appeal and the Supreme Court.

**2. Court Security Officer.** In any proceeding in a criminal case or appeal therefrom in which classified information is within, or reasonably expected to be within, the custody of the court, the court shall designate a court security officer. The Attorney General or the Department of Justice Security Officer, with the concurrence of the head of the agency or agencies from which the classified information originates, or their representatives, shall recommend to the court persons qualified to serve as court security officer. The court security officer shall be selected from among those persons so recommended.

The court security officer shall be an individual with demonstrated competence in security matters, and shall, prior to designation, have been certified to the court in writing by the Department of Justice Security Officer as cleared for the level and category of classified information that will be involved. The court security officer may be an employee of the Executive Branch of the Government detailed to the court for this purpose. One or more alternate court security officers, who have been recommended and cleared in the manner specified above, may be designated by the court as required.

The court security officer shall be responsible to the court for document, physical, personnel and communications security, and shall take measures reasonably necessary to fulfill these responsibilities. The court security officer shall notify the court and the Department of Justice Security Officer of any actual, attempted, or potential violation of security procedures.

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The court security officer shall be an individual with demonstrated competence in security matters, and shall, prior to designation, have been certified to the court in writing by the Department of Justice Security Officer as cleared for the level and category of classified information that will be involved. The court security officer may be an employee of the Executive Branch of the Government detailed to the court for this purpose. One or more alternate court security officers, who have been recommended and cleared in the manner specified above, may be designated by the court as required

The court security officer shall be responsible to the court for document, physical, personnel and communications security, and shall take measures reasonably necessary to fulfill these responsibilities. The court security officer shall notify the court and the Department of Justice Security Officer of any actual, attempted, or potential violation of security procedures.





3. **Secure Quarters.** Any *in camera* proceeding—including a pretrial conference, motion hearing, or appellate hearing—concerning the use, relevance, or admissibility of classified information, shall be held in secure quarters recommended by the court security officer and approved by the court.

The secure quarters shall be located within the Federal courthouse, unless it is determined that none of the quarters available in the courthouse meets, or can reasonably be made equivalent to, security requirements of the Executive Branch applicable to the level and category of classified information involved. In that event, the court shall designate the facilities of another United States Government agency, recommended by the court security officer, which is located within the vicinity of the courthouse, as the site of the proceedings

The court security officer shall make necessary arrangements to ensure that the applicable Executive Branch standards are met and shall conduct or arrange for such inspection of the quarters as may be necessary. The court security officer shall, in consultation with the United States Marshal, arrange for the installation of security devices and take such other measures as may be necessary to protect against any unauthorized access to classified information. All of the aforementioned activity shall be conducted in a manner which does not interfere with the orderly proceedings of the court. Prior to any hearing or other proceeding, the court security officer shall certify in writing to the court that the quarters are secure.

4. **Personnel Security—Court Personnel.** No person appointed by the court or designated for service therein shall be given access to any classified information in the custody of the court, unless such person has received a security clearance as provided herein and unless access to such information is necessary for the performance of an official function. A security clearance for justices and judges is not required, but such clearance shall be provided upon the request of any judicial officer who desires to be cleared.

The court shall inform the court security officer or the attorney for the government of the names of court personnel who may require access to classified information. That person shall then notify the Department of Justice Security Officer, who shall promptly make arrangements to obtain any necessary security clearances and shall approve such clearances under standards of the Executive Branch applicable to the level and category of classified information involved. The Department of Justice Security Officer shall advise the court in writing when the necessary security clearances have been obtained

If security clearances cannot be obtained promptly, personnel in the Executive Branch having the necessary clearances may be temporarily assigned to assist the court. If a proceeding is required to be recorded and an official court reporter having the necessary security clearance is unavailable, the court may request the court security officer or the attorney for the government to have a cleared reporter from the Executive Branch designated to act as reporter in the proceedings. The reporter so designated shall take the oath of office as prescribed by 28 U.S.C. § 753(a).

Justices, judges and cleared court personnel shall not disclose classified information to anyone who does not have a security clearance and who does not require the information in the discharge of an official function However, nothing contained in these procedures shall preclude a judge from discharging his official duties, including giving appropriate instructions to the jury.

Any problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action.

5. **Persons Acting for the Defendant.** The government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense and may bring such information to the attention of the court for the court's consideration in framing an appropriate protective order pursuant to Section 3 of the Act.

6. **Jury.** Nothing contained in these procedures shall be construed to require an investigation or security clearance of the members of the jury or interfere with the functions of a jury, including access to classified information introduced as evidence in the trial of a case

After a verdict has been rendered by a jury, the trial judge should consider a government request for a cautionary instruction to jurors regarding the release or disclosure of classified information contained in documents they have reviewed during the trial

7. **Custody and Storage of Classified Materials.**

a. **Materials Covered.** These security procedures apply to all papers, documents, motions, pleadings, briefs, notes, records of statements involving classified information, notes relating to classified information taken during *in camera* proceedings, orders, affidavits, transcripts, untranscribed notes of a

court reporter, magnetic recordings, or any other submissions or records which contain classified information as the term is defined in Section 1(a) of the Act, and which are in the custody of the court. This includes, but is not limited to (1) any motion made in connection with a pretrial conference held pursuant to Section 2 of the Act, (2) written statements submitted by the United States pursuant to Section 4 of the Act, (3) any written statement or written notice submitted to the court by the defendant pursuant to Section 5(a) of the Act, (4) any petition or written motion made pursuant to Section 6 of the Act, (5) any description of, or reference to, classified information contained in papers filed in an appeal, pursuant to Section 7 of the Act and (6) any written statement provided by the Untied States or by the defendant pursuant to Section 8(c) of the Act.

**b. Safekeeping.** Classified information submitted to the court shall be placed in the custody of the court security officer who shall be responsible for its safekeeping. When not in use, the court security officer shall store all classified materials in a safe or safe-type steel file container with built-in, dial-type, three position, changeable combinations which conform to the General Services Administration standards for security containers. Classified information shall be segregated from other information unrelated to the case at hand by securing it in a separate security container. If the court does not possess a storage container which meets the required standards, the necessary storage container or containers are to be supplied to the court on a temporary basis by the appropriate Executive Branch agency as determined by the Department of Justice Security Officer. Only the court security officer and alternate court security officer(s) shall have access to the combination and the contents of the container unless the court, after consultation with the security officer, determines that a cleared person other than the court security officer may also have access.

For other than temporary storage (e.g., brief court recess), the court security officer shall insure that the storage area in which these containers shall be located meets Executive Branch standards applicable to the level and category of classified information involved. The secure storage area may be located within either the Federal courthouse or the facilities of another United States Government agency.

**c. Transmittal of Classified Information.** During the pendency of a trial or appeal, classified materials stored in the facilities of another United States Government agency shall be transmitted in the manner prescribed by the Executive Branch security regulations applicable to the level and category of classified information involved. A trust receipt shall accompany all classified materials transmitted and shall be signed by the recipient and returned to the court security officer.

**8. Operating Routine.**

**a. Access to Court Records.** Court personnel shall have access to court records only as authorized. Access to classified information by court personnel shall be limited to the minimum number of cleared persons necessary for operating purposes. Access includes presence at an *in camera* hearing or any other proceeding during which classified information may be disclosed. Arrangements for access to classified information in the custody of the court by court personnel and persons acting for the defense shall be approved in advance by the court, which may issue a protective order concerning such access.

Except as otherwise authorized by a protective order, persons acting for the defendant will not be given custody of classified information provided by the government. They may, at the discretion of the court, be afforded access to classified information provided by the government in secure quarters which have been approved in accordance with § 3 of these procedures, but such classified information shall remain in the control of the court security officer.

**b. Telephone Security.** Classified information shall not be discussed over standard commercial telephone instruments or office intercommunication systems.

**c. Disposal of Classified Material.** The court security officer shall be responsible for the secure disposal of all classified materials which are not otherwise required to be retained.

**9. Records Security.**

**a. Classification Markings.** The court security officer, after consultation with the attorney for the government, shall be responsible for the marking of all court documents containing classified information with the appropriate level of classification and for indicating thereon any special access controls that also appear on the face of the document from which the classified information was obtained or that are otherwise applicable.

Every document filed by the defendant in the case shall be filed under seal and promptly turned over to the court security officer. The court security officer shall promptly examine the document and, in consultation with

shall be transmitted in the manner prescribed by the Executive Branch security regulations applicable to the level and category of classified information involved. A trust receipt shall accompany all classified materials transmitted and shall be signed by the recipient and returned to the court security officer.

**8. Operating Routine.**

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Except as otherwise authorized by a protective order, persons acting for the defendant will not be given custody of classified information provided by the government. They may, at the discretion of the court, be afforded access to classified information provided by the government in secure quarters which have been approved in accordance with § 3 of these procedures, but such classified information shall remain in the control of the court security officer.

**b. Telephone Security.** Classified information shall not be discussed over standard commercial telephone instruments or office intercommunication systems.

**c. Disposal of Classified Material.** The court security officer shall be responsible for the secure disposal of all classified materials which are not otherwise required to be retained.

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Every document filed by the defendant in the case shall be filed under seal and promptly turned over to the court security officer. The court security officer shall promptly examine the document and, in consultation with the attorney for the government or representative of the appropriate agency, determine whether it contains classified information. If it is determined that the document does contain classified information, the court security officer shall ensure that it is marked with the appropriate classification marking. If it is determined that the document does not contain classified information, it shall be unsealed and placed in the public record. Upon the request of the government, the court may direct that any document containing classified information shall thereafter be protected in accordance with § 7 of these procedures.

**b. Accountability System.** The court security officer shall be responsible for the establishment and maintenance of a control and accountability system for all classified information received by or transmitted from the court.

**10. Transmittal of the Record on Appeal.** The record on appeal, or any portion thereof, which contains classified information shall be transmitted to the court of appeals or to the Supreme Court in the manner specified in § 7(c) of these procedures.

**11. Final Disposition.** Within a reasonable time after all proceedings in the case have been concluded, including appeals, the court shall release to the court security officer all materials containing classified information. The court security officer shall then transmit them to the Department of Justice Security Officer who shall consult with the originating agency to determine the appropriate disposition of such materials. Upon the motion of the government, the court may order the return of the classified documents and materials to the department or agency which originated them. The materials shall be transmitted in the manner specified in § 7(c) of these procedures and shall be accompanied by the appropriate accountability records required by § 9(b) of these procedures.

**12. Expenses.** Expenses of the United States Government which arise in connection with the implementation of these procedures shall be borne by the Department of Justice or other appropriate Executive Branch agency.

**13. Interpretation.** Any question concerning the interpretation of any security requirement contained in these procedures shall be resolved by the court in consultation with the Department of Justice Security Officer and the appropriate Executive Branch agency security officer.

**14. Term.** These procedures shall remain in effect until modified in writing by The Chief Justice after consultation with the Attorney General of the United States, the Director of Central Intelligence, and the Secretary of Defense.

**15. Effective Date.** These procedures shall become effective forty-five days after the date of submission to the appropriate Congressional Committees, as required by the Act.

Issued this 12th day of February, 1981, after taking into account the views of the Attorney General of the United States, the Director of Central Intelligence, and the Secretary of Defense, as required by law.

/s/WARREN E. BURGER
*Chief Justice of the United States*

**Library References**

Criminal Law ⇐633(1).
C.J.S. Criminal Law § 961.

## § 10. Identification of information related to national defense

In any prosecution in which the United States must establish that material relates to the national defense or constitutes classified information, the United States shall notify the defendant, within the time before trial specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense.

**Library References**

Criminal Law ⇐627.6(1).
C.J.S. Criminal Law § 955(1) et seq.

## § 11. Amendments to Act

Sections 1 through 10 of this Act may be amended as provided in section 2076, Title 28, United States Code.

### Historical Note

**References in Text.** This Act, referred to in catchline, is Pub.L. 96-456, Oct. 15, 1980, 94 Stat. 2025, known as the "Classified Information Procedures Act".

### Library References

Statutes ⇐129.
C.J.S. Statutes §§ 150, 243.

## § 12. Attorney General guidelines

(a) Within one hundred and eighty days of enactment of this Act, the Attorney General shall issue guidelines specifying the factors to be used by the Department of Justice in rendering a decision whether to prosecute a violation of Federal law in which, in the judgment of the Attorney General, there is a possibility that classified information will be revealed. Such guidelines shall be transmitted to the appropriate committees of Congress.

(b) When the Department of Justice decides not to prosecute a violation of Federal law pursuant to subsection (a), an appropriate official of the Department of Justice shall prepare written findings detailing the reasons for the decision not to prosecute. The findings shall include—

(1) the intelligence information which the Department of Justice officials believe might be disclosed,

(2) the purpose for which the information might be disclosed,

(3) the probability that the information would be disclosed, and

(4) the possible consequences such disclosure would have on the national security.

### Historical Note

**References in Text.** The enactment of this Act, referred to in subsec. (a), means Oct. 15, 1980.

### Library References

Attorney General ⇐7.
C.J.S. Attorney General §§ 8, 10 to 14.

## § 13. Reports to Congress

(a) Consistent with applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches, the Attorney General shall report orally or in writing semiannually to the Permanent Select Committee on Intelligence of the United States House of Representatives, the Select Committee on Intelligence of the United States

Senate, and the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and House of Representatives on all cases where a decision not to prosecute a violation of Federal law pursuant to section 12(a) has been made.

(b) The Attorney General shall deliver to the appropriate committees of Congress a report concerning the operation and effectiveness of this Act and including suggested amendments to this Act. For the first three years this Act is in effect, there shall be a report each year. After three years, such reports shall be delivered as necessary.

### Historical Note

**References in Text.** This Act, referred to in subsec. (b), is Pub.L. 96-456, Oct. 15, 1980, 94 Stat. 2025, known as the "Classified Information Procedures Act".

### Library References

Attorney General ⇐6, 7.
C.J.S. Attorney General §§ 7 to 15.

## § 14. Functions of Attorney General exercised by Deputy Attorney General or designated Assistant Attorney General

The functions and duties of the Attorney General under this Act may be exercised by the Deputy Attorney General or by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official.

### Historical Note

**References in Text.** This Act, referred to in text, is Pub.L. 96-456, Oct. 15, 1980, 94 Stat. 2025, known as the "Classified Information Procedures Act".

### Library References

Attorney General ⇐6.
C.J.S. Attorney General §§ 7 to 15.

## § 15. Effective date

The provisions of this Act shall become effective upon the date of the enactment of this Act, but shall not apply to any prosecution in which an indictment or information was filed before such date.

### Historical Note

**References in Text.** This Act, referred to in text, is Pub.L. 96-456, Oct. 15, 1980, 94 Stat. 2025, known as the "Classified Information Procedures Act".

The date of the enactment of this Act, referred to in text, means Oct. 15, 1980.

### Library References

Statutes ⇐255.
C.J.S. Statutes §§ 405, 407.

Upon receipt of proper request for disposition under Article III of this section which prescribes procedure by which prisoner against whom detainer has been lodged may demand a speedy disposition of outstanding charges, receiving state must bring prisoner to trial within 180 days. State v. Reynolds, 1984, 355 N.W.2d 93, 218 Neb. 753.

**66. Dismissal of indictment—Generally**

Fact that defendant was housed overnight in local jail facility near federal courthouse following his appearance in federal court, rather than returned to his original place of incarceration, was a violation of this section, but that violation did not mandate dismissal of indictment. U.S. v. Roy, D.C.Conn.1984, 597 F.Supp. 1210.

**72. Waiver**

Where defendant was informed of his right to remain in custody of United States until trial, but, apparently desiring to return to state custody to continue serving his state sentence, defendant explicitly waived his rights to remain in federal custody, defendant waived any defense he had that United States had violated Article III of the Interstate Agreement on Detainers Act [18 U.S.C.A.App.] by returning him to the custody of the state after a detainer had been filed and temporary custody secured, but before trial on federal charges. U.S. v. Rossetti, C.A.1 (Mass.) 1985, 768 F.2d 12.

Defendant waived his right to assert alleged violation of Interstate Agreement on Detainers where he failed to raise issue of violation at time of his plea or at time of his sentence. People v. Crossen, N.Y.Sup.1985, 485 N.Y.S.2d 189.

# CLASSIFIED INFORMATION PROCEDURES ACT

Pub.L. 96-456, Oct. 15, 1980, 94 Stat. 2025

## § 3. Protective orders

**Notes of Decisions**

**1. Constitutionality**

Classified information which defendants sought to discover was not relevant to determination of guilt or innocence of defendants, was not helpful to defense and was not essential to fair determination of the cause, and, therefore, the defendants' due process rights were not violated when district court granted protective order against discovery of classified information. U.S. v. Pringle, C.A.Mass. 1984, 751 F.2d 419, on remand 607 F.Supp. 105.

## § 5. Notice of defendant's intention to disclose classified information

**Notes of Decisions**

**Admissibility of evidence 3**

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**1. Constitutionality**

Pretrial notification requirements of this section, by which a defendant who intends to disclose classified information is required to give written notice of his intention to the court and the United States attorney before trial with a brief description of information involved, is not constitutionally infirm. U.S. v. Wilson, C.A.N.Y.1984, 750 F.2d 7.

**2. Description of information**

U.S. v. Collins, 720 F.2d 1195 [main volume] on remand 603 F.Supp. 301.

**3. Admissibility of evidence**

District court conducting hearing under Classified Information Procedures Act to determine use, relevance, or admissibility of classified information is not empowered by either the Act or judicial precedent to exclude classified evidence that is relevant to accused's defense on ground that prevention of harm to national security outweighs accused's need since the Act protects right of accused to introduce relevant classified information in his defense where no effective alternative is available and leaves to the executive the ultimate decision whether to expose classified material subject to sanctions the Act mandates. U.S. v. Smith, C.A.Va.1984, 750 F.2d 1215.

## § 6. Procedure for cases involving classified information

**Notes of Decisions**

**Constitutionality 1**
**Disclosure 3**
**Relevancy of evidence 2**

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**1. Constitutionality**

On equal protection attack, provision of Classified Information Procedures Act authorizing substitution of an admission or summary in lieu of specific classified information sought to be introduced by defendant was tested under the rational relation, rather than the strict-scrutiny, test, and Congress' desire to curb use of classified information as a tool for "greymail" was legitimate governmental interest, precluding finding of equal protection violation. U.S. v. Collins, D.C.Fla. 1985, 603 F.Supp. 301.

**2. Relevancy of evidence**

In determining that classified information was relevant to defense of charges of violating Espionage Act, district court did not err in applying traditional relevancy test. U.S. v. Smith, C.A.Va. 1984, 750 F.2d 1215.

**3. Disclosure**

In prosecution for attempted murder, criminal solicitation, obstruction of justice, tampering with witnesses, and retaliating against witnesses, defendant was properly precluded from proving in detail his alleged participation in certain classified intelligence and counterintelligence activities of the United States following district court's conduct of in camera hearing at government's request pursuant to this section. U.S. v. Wilson, C.A.N.Y.1984, 750 F.2d 7.

# INDEX

## CONSULT GENERAL INDEX

*Conclusion*

The government has carried its burden here. Assuming, as we have, that there was such a remark as "I'd hang him", we conclude that it was not made with any intention of influencing juror Baker and that it did not in any way influence his vote to convict the defendant. The court is convinced, beyond a reasonable doubt, that Superintendent Roussel's remark had no influence on juror Baker and caused no prejudice whatsoever to the defendant, Michael O'Keefe.

Since we find the prejudicial effect of the remark to be nil, we have no occasion to reconsider our earlier denial of defendant's motion for new trial on grounds of prejudice which would have been avoided by a change of venue.

Defendant's motion for new trial must be denied.

So ordered.


**UNITED STATES of America,**

**v.**

**Edwin P. WILSON, Defendant.**

**No. S 83 Cr. 69.**

United States District Court,
S.D. New York.

Oct. 4, 1983.

Released for Publication May 15, 1984.

In prosecution under an 18-count indictment arising from defendant's alleged plots to assassinate witnesses, potential witnesses, prosecutors and others involved in pending and concluded prosecutions against defendant, Government moved for a ruling, in advance of trial, that various matters which defendant intended to disclose upon trial were inadmissible as not relevant evidence. The District Court, Edward Weinfeld, J., held that classified information pertaining to defendant's intelligence activities and his relationship to alleged assassination target was not relevant or material to issues of intent and motivation arising under indictment; thus, information was not admissible.

Order in accordance with opinion.

See also, D.C., 571 F.Supp. 1417, 1422, D.C., 565 F.Supp. 1416.

**1. Records ⇐31**

Under Classified Information Procedures Act, court is to disregard the fact that certain material may be classified when ruling on its admissibility; Act does not alter existing standards for determining relevance or admissibility and both documentary and testimonial evidence containing classified matter may be admitted if in conformity with Federal Rules of Evidence. Classified Information Procedures Act, § 1 et seq., 18 U.S.C.A.App.; Fed.Rules Evid. Rule 101 et seq., 28 U.S.C.A.

**2. Records ⇐31**

If specific classified information is admissible, court may consider an alternative under the Classified Information Procedures Act the substitution of such classified information of a statement admitting the relevant facts that the specific classified information would prove, or a summary of specific classified information, consistent with preserving accused's right to make a full defense; if no alternative suffices, court may dismiss the indictment or take other measures. Classified Information Procedures Act, § 1 et seq., 18 U.S.C.A.App.

**3. Records ⇐31**

Classified information pertaining to defendant's intelligence activities and his relationship to alleged assassination target was not relevant or material to issues of intent and motivation arising under indictment on 18 counts arising from defendant's alleged plots to assassinate witnesses, potential witnesses, prosecutors, and others involved in pending and concluded prosecutions against defendant; thus, the informa-

tion was not admissible. Classified Information Procedures Act, § 1 et seq., 18 U.S.C.A.App.

4. Criminal Law ⇐338(7)

Even assuming that classified information pertaining to defendant's intelligence activities and his relationship to alleged assassination target was relevant to issue of intent arising under indictment on 18 counts arising from defendant's alleged plots to assassinate witnesses, potential witnesses, prosecutors and others involved in pending and concluded prosecutions against defendant, such evidence would not be admissible for reason that the probative value of such evidence was outweighed by danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence and therefore such proof was not admissible pursuant to Classified Information Procedures Act. Classified Information Procedures Act, § 1 et seq., 18 U.S.C.A.App.; Fed.Rules Evid.Rule 403, 28 U.S.C.A.

5. Criminal Law ⇐385

By executing an agreement under which defendant promised never to divulge at any trial or court proceeding any of the past history of alleged assassination target or to divulge nature of any assistance given by alleged target, defendant waived right to introduce evidence pertaining to defendant's relationship to alleged assassination target in prosecution under indictment arising from defendant's alleged plots to assassinate witnesses, potential witnesses, prosecutors, and others involved in pending or concluded prosecutions against defendant.

* This opinion, which was filed under seal on October 4, 1983, at the request of the United States because of references to classified and otherwise sensitive material within the opinion, has been released for publication upon the consent of the parties. The sensitive matter has been deleted from the opinion, where deletions have been made the Court so indicates by specially marked brackets, e.g., "[* *]." The Court's original opinion shall remain under seal.

Rudolph W. Giuliani, U.S. Atty., S.D. N.Y., New York City, for United States of America; Eugene Neal Kaplan, Kenneth I. Schacter, Theodore S. Greenberg, Asst. U.S. Attys., of counsel.

Michael G. Dowd, Kew Gardens, N.Y., for defendant; Barry Scheck, David Lewis, William Mogulescu, of counsel.

## OPINION *

EDWARD WEINFELD, District Judge.

Edwin P. Wilson is under indictment on eighteen counts arising from Wilson's alleged plots to assassinate witnesses, potential witnesses, Assistant United States Attorneys, and others involved in prosecutions pending or concluded in United States District Courts located in Texas, Virginia, and Washington, D.C., as well as in the prosecution pending in this Court.[1] Before the Court is a motion by the United States for a ruling, in advance of trial, that various matter the defendant intends to disclose upon the trial is inadmissible as not relevant evidence.

The Court's disposition of this motion is required by the Classified Information Procedures Act ("CIPA" or "Act").[2] Pursuant to the Act,[3] defendant has made a submission briefly describing classified information he intends to disclose upon the trial. By petition of the Attorney General, the United States moved for, and this Court held, an in camera hearing for the purpose of making "all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial . . . ."[4] Based on this hearing, consideration of the papers

1. Also among those allegedly targeted by Wilson is Barbara Wilson, the defendant's former wife.

2. The full provisions of CIPA are set forth at 18 U.S.C.A. app. at 408 (West Supp.1983). *See also* Act of Oct. 15, 1980, Pub.L. No. 96-456, 94 Stat. 2025.

3. CIPA § 5(a).

4. CIPA § 6(a).

submitted by the parties, and counsel's arguments in support of their respective positions, the Court makes the determination indicated hereafter and the basis therefor.

I.

[1, 2] Under CIPA, in making its rulings on admissibility, the Court is to disregard the fact that certain material may be classified. The Act "does not alter the existing standards for determining relevance or admissibility." [5] Both documentary [6] and testimonial [7] evidence containing classified matter may be admitted if in conformity with the Federal Rules of Evidence. If specific classified information is admissible, the Court may consider an alternative—the substitution for such classified information of a statement admitting the relevant facts that the specific classified information would prove, or a summary of the specific classified information, consistent with preserving the accused's right to make a full defense; if no alternative suffices, the Court may dismiss the indictment or take other measures.[8] If information the defendant intends to disclose at trial is found inadmissible, however, that is the end of the matter as far as CIPA is concerned. The defendant is in no worse position than if a proffer of evidence were rejected upon the trial.

II.

Defendant's CIPA submission, insofar as it may be described without disclosing specific classified information, encompasses twenty-seven items.[9] Ten of the items describe specific projects Wilson allegedly worked on while employed or associated with the United States intelligence community.[10] One concerns Wilson's general activities in the period 1961–70 while employed at the Central Intelligence Agency ("CIA") and before his employment with Naval Intelligence during the period 1971–76.[11] Fourteen items relate to the activities of Rafael Quintero, a witness in other prosecutions against Wilson and an alleged target in the plot for which Wilson is now on trial.[12] A few of these last items involve Wilson's relationship to Quintero.[13] At least two also involve one [* John Doe *], and Wilson's and Quintero's alleged connection to him.[14] One relates to Barbara Wilson, the defendant's former wife, who, like Quintero, is alleged to have been a target of Wilson's assassination efforts.[15] One item concerns Jerome Brower, a witness for the government in Wilson's trial in Texas and another alleged target of Wilson's alleged plot.[16] According to the government, most of the information described in defendant's submission is classified; most of the classified material is designated secret; some is classified top secret; some information is not classified. The status of other matters, according to the government, cannot be resolved without further information. As noted above, however, the admissibility of the matters described in the CIPA submission in no way depends on their classification status.

Defendant offers a number of theories by which the submitted information is admissible upon the trial.

III.

[3] The underlying premise of defendant's CIPA submission is that the informa-

5. 126 Cong.Rec. H9308 (daily ed. Sept. 22, 1980) (statement of Rep. Mazzoli).

6. CIPA § 8(a).

7. *See id.* § 8(c).

8. *Id.* §§ 6(c), (d).

9. The designation of a portion of defendant's submission as an "item" was made by the government in its response papers. To avoid confusion and disclosure of classified matter, the Court will use the government's designations of matter identified in defendant's submissions.

10. *See* items A, C, D, E, F, H, I, J, K, N.

11. *See* item B.

12. *See* items L, N, O, P(1), P(2), Q, R, S, T, U, V, W, X, Y.

13. *See* items L, N, P, R, W, Y.

14. *See* items N, Y.

15. *See* item G.

16. *See* September 26 submission

tion contained therein is relevant to showing that Wilson "lacked the intent to solicit the assassination of witnesses and prosecutors connected with his pending cases, that he lacked any motive to do so, and that he, in fact, had a strong motive to make sure many of his alleged victims remained alive."

The thrust of Wilson's principal argument is that he believed that prosecutorial efforts mounted against him for his acts abroad were not serious; that the government would reward him for his patriotic work in American intelligence; and that in any event the acts for which he was prosecuted in other courts were authorized by the United States and thus lawful; hence, notwithstanding any conviction in a federal trial court, he would be exonerated upon appeal. Of strong belief that he would soon be a free man, Wilson contends he had no motive to plot the killing of witnesses and officials. In short, Wilson claims that the details of his work for American intelligence, including "the history and nature of the relationship between Edwin Wilson and Rafael Quintero," his "foxhole buddy" of many years, would tend to negate that he had the required intent to commit the crimes charged or a motive to do so.

Relevant evidence is that which tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." [17] However, evidence cannot be considered, for purposes of relevance, in the abstract.[18] In assessing the relevance of Wilson's intelligence activities to the charges here—that he plotted to assassinate witnesses and prosecutors in trials in other districts and in this district—the following additional facts are also to be considered.

First, the prosecutorial efforts against Wilson were, over an extended period, extremely vigorous. Wilson was wanted for arrest by federal officials as early as 1980,[19] when he was indicted in the District of Columbia while a fugitive in Libya.[20] Indeed, Wilson claimed in this very Court that "he was forcibly brought back to the United States against his consent, without proper authorization and in violation of his constitutional rights." [21]

Second, after Wilson was arrested and brought to the United States, there was no diminution in the government's prosecutorial efforts. He was indicted in three districts. The government's concern that he be present and face trial on the charges was such that on its application bail was fixed in the sum of $20,000,000, which defendant did not meet.[22] The defendant was convicted in the Eastern District of Virginia in late fall of 1982;[23] he was convicted in the Southern District of Texas in February 1983.[24] In both instances Wilson had relied on the so-called CIA defense, by which he attempted to show that his acts abroad were authorized and lawful. The charges in those districts, relating to the export of munitions, were entirely different from those in the instant indictment. The charges here are simple but serious, based on an alleged plot to murder witnesses and others connected with the various prosecutions against him.

Third, Wilson knew as early as 1981 that Quintero was a key witness against him in the prosecutions in other District Courts. Before Wilson even returned to the United

17. Fed.R.Evid. 401.

18. *See* Fed.R.Evid. 104(b).

19. *See United States v. Wilson*, 565 F.Supp. 1416, 1421 (S.D.N.Y.1983).

20. *Id.*

21. *Id.* at 1422.

22. *Id.* at 1439.

23. *United States v. Wilson*, No. 82-212-A (E.D.Va. judgment entered Dec. 20, 1982). Wilson was sentenced to a total of 15 years imprisonment and commanded to pay a $200,000 fine.

24. *United States v. Wilson*, No. H82-139 (S.D. Tex. judgment entered Feb. 24, 1983), *appeal docketed*, No. 83-2125 (5th Cir. Mar. 7, 1983). Wilson was sentenced to a total of 17 years imprisonment and commanded to pay a $145,000 fine.

States, he had allegedly, through his lawyer, made threats to disclose information that would expose Quintero to mortal danger.[25]

Fourth, Jerome Brower, who was indicted along with Wilson in Washington, D.C., pled guilty in December 1980. The following February, long before the acts alleged to have occurred here took place, Brower was sentenced to twenty months to five years imprisonment, all but four months of which were suspended.[26] Brower was not indicted in the Texas prosecution, but he did testify for the government "as one of the key witnesses against Wilson" in the trial that led to Wilson's conviction for shipping explosives to Libya.[27]

Fifth, central proof in the government's case in this prosecution relates to the period from December 20, 1982, through January 19, 1983.[28] After December 20, Wilson commenced service of the sentence imposed upon him following his conviction in the Virginia trial. Defendant's memorandum accompanying his CIPA submission plays heavily upon tapes indicating Wilson's state of mind on November 2, 1982. But nothing, other than the words of Wilson's lawyers, suggests Wilson's abiding belief in the merits of the "CIA defense."

In light of these facts, it borders on the absurd that detailed testimony about Wilson's activities during his service in the CIA and other intelligence agencies is probative of a lack of motive to seek the deaths of witnesses and prosecutors in his then pending and concluded trials. Proof of Wilson's classified activities, and the minutiae of details of his relationship to others engaged in covert intelligence in different countries of the world, to establish the lack of motive to murder those whose testimony in part was relied upon to obtain his conviction is utterly unrealistic and flies in the face of common sense.[29]

Defendant also argues that classified information concerning Quintero's undercover activities is relevant insofar as "Wilson had no motive to arrange an assassination of Quintero because he could have disclosed information at any time which, the government concedes, would result in Quintero's death." In effect, Wilson argues that if he ever had a purpose to assassinate Quintero he could readily have achieved it by exposing Quintero's intelligence activities, which would have in turn made him the object of assassination attempts by foreign agents. Even if exposing Quintero were lawful,[30] Wilson's failure to do so has no bearing on the issues raised by the indictment in this District.

Finally, Wilson contends that he must be able to show, through the disclosure of classified information, the circumstances surrounding his alleged close and longstanding "foxhole buddy" relationship with Quintero, as well as his relationship to his former wife, Barbara Wilson. The nature of these relationships, Wilson contends, would negate any claim that he ever harbored the intent to solicit the assassinations of Quintero or Barbara Wilson. In the event the defendant decides to testify as a witness in his own behalf, he may, of course, testify to lack of a subjective intent with respect to the crimes charged and to an alleged lack of motive to solicit the murders of witnesses, prosecutors, and others. He may testify to his relationships to Quintero and Barbara Wilson that devel-

25. *See* Government's Supplemental Motion In Limine *ex rel. Rafael Quintero v. Edwin P. Wilson*, No. 80-200 (D.D.C. Feb. 28, 1983).

26. *See* Response of the United States v. Defendant's Supplemental CIPA Submission dated September 26, 1983 at 3.

27. *Id.*

28. *See* Affidavit of Assistant United States Attorney Eugene Neal Kaplan, *United States v. Wilson*, No. 83-69 (S.D.N.Y. Aug. 26, 1983).

29. *United States v. Dobbs*, 506 F.2d 445, 447 (5th Cir.1975); *see United States v. Jordan*, 627 F.2d 683, 686 (5th Cir.1980); *Bromberg v. United States*, 389 F.2d 618 (9th Cir.1968); *United States v. Hickey*, 360 F.2d 127, 140 (7th Cir.), *cert. denied*, 385 U.S. 928, 87 S.Ct. 284, 17 L.Ed.2d 210 (1966).

30. *But see* Act of June 23, 1982, Pub.L. No. 97-200, 96 Stat. 122 (to be codified at 50 U.S.C. § 421(a)).

oped during Wilson's and Quintero's assignments while employed in American intelligence. And if those witnesses testify in the government's direct case, he may question them, if he so desires, on the subject of the nature of those relationships. However, the details of their intelligence activities and the assignments these individuals were engaged in may not be referred to; they are not relevant or material to issues arising under the pending indictment.

IV.

[4] Even assuming, contrary to the foregoing, that Wilson's intelligence-related activities and his knowledge of Quintero's relationship to the American intelligence community are relevant on the subject of intent and motivation with respect to the charges in this Court, other compelling reasons counsel their rejection as admissible evidence. Under the Federal Rules of Evidence, this Court has the authority, if not the duty, to weigh the probative value of relevant evidence against "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[31] Each of these countervailing factors are strongly present in this case.

As our Court of Appeals has noted, the government as well as the defendant has an interest in a trial focused solely on the acts at issue. "[E]vidence having a strong emotional or inflammatory impact . . . 'permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what evidence in the case shows actually happened.' "[32] Whatever the defendant's purpose, the introduction of evidence detailing classified activities will have the tendency to focus attention on what cannot be doubted is the controversial character of foreign covert intelligence and counter-intelligence operations. These have been a matter of public notice, editorial expressions of differing views by the news media, public debates and congressional investigations. Appeals to the attitudes of jurors by evidence of the alleged unseemly character of American covert activities would divert their attention from the basic issues in this case—charges centered about alleged plots to kill witnesses connected to prosecutions in the United States District Courts. Wilson is the defendant on trial, not the CIA.[33] The introduction of evidence of the nature referred to in defendant's submission on this motion covers details of extensive activities in many countries throughout the world and its presentation would be time-consuming. But even more important, it would bring before the jury matters utterly irrelevant to the basic charge in this case and serve to divert the jury's attention from those basic issues. Assuming arguendo that evidence of covert activities, here and abroad, has some minimal probative value in this case, such proof should be excluded on the ground that it would unduly delay the trial.

Defendant has stated an intention to introduce evidence of certain character traits, and such proof is allowed by the Rules of Evidence.[34] Those rules, however, do not permit evidence of specific acts to be admitted to prove character traits as part of an affirmative defense.[35] Proof will be ac-

31. Fed.R.Evid. 403; *see Brink's Inc. v. City of New York*, 539 F.Supp. 1139, 1141 (S.D.N.Y. 1982), *aff'd*, 717 F.2d 700 (2d Cir.1983).

32. *United States v. Robinson*, 560 F.2d 507, 514 (2d Cir.1977), *cert. denied*, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978).

33. *United States v. Sampol*, 636 F.2d 621, 663 n. 31 (D.C.Cir.1980).

34. Fed.R.Evid. 404(a)(1). Evidence of general "good character" alone is not admissible. *See United States v. Angelini*, 678 F.2d 380, 381–82 (1st Cir.1982). The evidence must be of a "pertinent character trait." *See id.*

35. *See United States v. Davis*, 546 F.2d 583, 592–93 & n. 22 (5th Cir.) (defendant accused of willfully escaping from prison not permitted to introduce "prison records showing . . . a favorable work record and . . . progress toward rehabilitation" as evidence "to negate the likelihood of willful escape"), *cert. denied*, 431 U.S. 906, 97 S.Ct. 1701, 52 L.Ed.2d 391 (1977).

cepted within the limits of the Rules.[36] Defendant's right to testify in his own behalf, if he so decides, will not be compromised by such compliance.[37] On direct testimony the defendant, if so advised, will be free to testify to the fact of his employment with various agencies in the United States intelligence community and to the fact that he was involved in covert operations. The details of these matters, however, will be excluded for the reasons set forth above.

V.

[5] There is one further item that merits discussion. In July, 1981, after the return of the indictment in Washington, D.C., the defendant executed an agreement to the effect that "in return for the assistance of Raphael Quintero in ... [* ... *], Ed Wilson promises never to divulge at any trial or court proceeding any of the past history of Quintero or to divulge the nature of any assistance given by Quintero." The government alleges, and defendant does not contest, that this agreement was signed in the presence of his counsel. No reason has been advanced why this waiver should not be given effect.[38] Defendant's waiver is a further, independent ground for the Court's rulings detailed above.

VI.

Upon consideration of the defendant's submissions and briefs, the government's responses, and the arguments of counsel, the Court is persuaded that the details of intelligence and counter-intelligence activities specified in defendant's CIPA submission are without probative weight for the purposes stated by defendant with respect to the charges pending in this District. Further, the Court concludes that even assuming, contrary to the foregoing finding, that such information is of probative value, it is to be excluded because that probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or diverting its attention from the basic issues in the case.

Therefore, except as specified herein, and in the order to be entered herein, the information contained in defendant's CIPA submission is held to be inadmissible upon his trial on charges arising from his alleged efforts to assassinate witnesses, government officials, and others. The Court's protective order shall remain in effect except insofar as it is superseded by further orders of this Court.

So ordered.


36. *See United States v. Benedetto*, 571 F.2d 1246, 1250 & n. 5 (2d Cir.1978) (Federal Rules of Evidence continue "the general prohibition against direct testimony about specific acts."). As the Supreme Court noted in *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), the prohibition on testimony to specific acts for the purposes of showing character

> is said to be justified by "overwhelming considerations of practical convenience" in avoiding innumerable collateral issues which, if it were attempted to prove character by direct testimony, would complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation.

335 U.S. at 478, 69 S.Ct. at 219 (citations omitted). Under Fed.R.Evid. 405(b), specific acts may be used to prove character only when character is an "essential element of a charge, claim, or defense." No such character trait is present here. *See United States v. Pantone*, 609 F.2d 675, 681 (3d Cir.1979); *Christy v. United States*, 68 F.R.D. 375, 378 (N.D.Tex.1975); McCormick on Evidence § 187 (2d ed. 1972).

37. As our Court of Appeals noted in construing a defendant's right to testify in his own defense:

> A defendant's right to present a full defense, including the right to testify in his own behalf, is not without limits. In responding to the charges against him, an accused must comply with the established rules of procedure and evidence, as must the prosecution, in order to insure a fair trial. A criminal defendant's right to present a full defense and to receive a fair trial does not entitle him to place before the jury evidence normally inadmissible.

*United States v. Bifield*, 702 F.2d 342, 350 (2d Cir.1983).

38. *See Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

tor Thurmond] with his failure to be selected for the JAGC."

Contrary to the district court, we find that the very presence of the letter in the application file raises an inference that it might have been a factor in the selection board's decision. Major Rosenblatt's explanation of the letter as providing "additional insight into an applicant's writing style and written expression" is not very convincing. One must wonder what kind of writing sample is used by the selection board for applicants who have not written a Congressman. Nor do we understand why it is "routine practice to include Congressional correspondence in the application folders." Surely, the selection board for JAGC applicants does not also have the responsibility of replying to congressional inquiries.

The inference of retaliation raised by the presence of the letter in Tremblay's JAGC application file is heightened by the Army's failure on three separate occasions to include it in the application folders sent to Tremblay. After Tremblay's first and second rejections, he received what purported to be his complete application files. Senator Thurmond's letter was in neither one. In December, 1982, Tremblay made a request for his complete application folder under the Freedom of Information Act. The file he received did not contain the Senator's letter. Not until Major Rosenblatt's declaration was filed in court did the Army reveal that Senator Thurmond's letter was among the materials available for consideration by the JAGC selection board. The letter itself, however, was not included in the submissions to the court.

Another item not included in the file sent to Tremblay or in the court submissions was the response to Senator Thurmond by Major Rosenblatt and the Administrative Law Division of the JAGC. This response as well as Tremblay's letter was included in his application folder. Although Major Rosenblatt's declaration does not specifically state that there was an inquiry by Senator Thurmond, we can only assume that the "response" was prompted by an inquiry of some sort. The nature of the inquiry would be revealed by the missing response.

The affidavits and submissions by Tremblay, the presence of Tremblay's letter to Senator Thurmond and the JAGC's response to the Senator's inquiry in the material available to the selection board, and the failure of the JAGC to submit the letter and the response to the court evince, in light of the undisputed findings as to irreparable harm, the balance of hardships and the lack of adverse effect on the public interest, a sufficiently substantial likelihood of success on the merits of the first amendment retaliation claim. *See, e.g., Roth v. Bank of the Commonwealth*, 583 F.2d 527, 536–38 (6th Cir.1978); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir.1953); *generally*, C. Wright & A. Miller, *Federal Practice and Procedure* § 2948, at 450–55 (1973).

*Affirmed in part, reversed in part. Remanded.*

The defendant is restrained from ordering plaintiff to active duty pending a hearing on the merits of the first amendment claim.

Costs to appellant.


**UNITED STATES of America, Appellee,**

v.

**Edwin P. WILSON, Defendant-Appellant.**

**Cal. No. 1733, Docket 83–1413.**

United States Court of Appeals, Second Circuit.

Argued Aug. 10, 1984.

Decided Nov. 28, 1984.

Defendant was convicted before the United States District Court for Southern

District of New York, Edward Weinfeld, J, of attempted murder, criminal solicitation, obstruction of justice, tampering with witnesses and retaliating against witnesses and he appealed. The Court of Appeals, Van Graafeiland, Circuit Judge, held that defendant was properly precluded from proving in detail his alleged participation in certain classified intelligence and counterintelligence activities of the United States following District Court's conduct of in camera hearing at Government's request pursuant to the Classified Information Act.

Affirmed.

1. Criminal Law ⇐338(1)

In prosecution for attempted murder, criminal solicitation, obstruction of justice, tampering with witnesses, and retaliating against witnesses, defendant was properly precluded from proving in detail his alleged participation in certain classified intelligence and counterintelligence activities of the United States following district court's conduct of in camera hearing at Government's request pursuant to the Classified Information Act. Classified Information Procedures Act, §§ 1 et seq., 5, 6, 18 U.S.C. A.App.

2. Criminal Law ⇐338(7), 380

It is a proper exercise of a district court's discretion to exclude evidence that is prejudicial, confusing, or misleading, and to exclude evidence of specific acts intended to demonstrate character traits not at issue.

3. Records ⇐31

Pretrial notification requirements of Classified Information Act, by which a defendant who intends to disclose classified information is required to give written notice of his intention to the court and the United States attorney before trial with a brief description of information involved, is not constitutionally infirm. Classified Information Procedures Act, §§ 1 et seq., 5, 6, 18 U.S.C.A.App.

Barry C. Scheck, New York City (Lawrence A. Vogelman, New York City, Michael G. Dowd and Manton, Pennisi & Dowd, Kew Gardens, N.Y., of counsel), for defendant-appellant.

Eugene Neal Kaplan, Asst. U.S. Atty., New York City (Rudolph W. Giuliani, U.S. Atty. for the Southern District of New York, Kenneth I. Schacter and Barry A. Bohrer, Asst. U.S. Attys., New York City, of counsel), for appellee.

Before VAN GRAAFEILAND and WINTER, Circuit Judges, and COFFRIN, Chief District Judge *.

VAN GRAAFEILAND, Circuit Judge:

Edwin P. Wilson appeals from a judgment of the United States District Court for the Southern District of New York convicting him after a jury trial before Judge Weinfeld of attempted murder, criminal solicitation, obstruction of justice, tampering with witnesses, and retaliating against witnesses. Appellant's sole contention in this Court is that the district court erred in precluding him from proving in detail his alleged participation in certain classified intelligence and counterintelligence activities of the United States. Finding no merit in this contention, we affirm.

In 1980, appellant was indicted by a Washington, D.C. grand jury for a number of alleged felonies, including the shipment of explosives and other war materials to Libya. For the next several years, appellant was a fugitive from justice in Libya. In 1982, while appellant was attempting to enter the Dominican Republic on a false passport, he was denied admittance and placed on a flight to New York City where he was arrested. *See United States v. Wilson*, 732 F.2d 404, 411 (5th Cir.1984). Thereafter, appellant was indicted on additional charges in Texas and Virginia.

The charges against appellant in the instant case involved plots concocted by him while in prison to have prosecutors and Government witnesses in the several trials

* Of the United States District Court for the District of Vermont, sitting by designation.

threatened or assassinated. Although appellant did not take the witness stand, he contends that he would have testified, had he been permitted, about certain covert activities of the United States in which he claims to have participated during the years in which his alleged felonies took place. He contends that his participation in these activities on behalf of the United States warranted a belief on his part that he would not be sentenced and imprisoned by federal authorities and this belief negated his alleged motive for tampering with witnesses. He also contends that the evidence would have showed the existence of certain character traits and personal relationships that would have tended to disprove the charges being made against him.

This is the kind of situation that Congress had in mind when it enacted the Classified Information Procedures Act (CIPA), Pub.L. 96-456, 94 Stat. 2025, *reprinted in* 18 U.S.C.App. at 549-54 (1982). *See United States v. Collins*, 720 F.2d 1195, 1196-97 (11th Cir.1983). Section 5 of CIPA requires a defendant who intends to disclose classified information to give written notice of his intention to the court and the United States attorney before trial with a brief description of the information involved. Section 6 provides for an *in camera* hearing at the Government's request concerning the "use, relevance, or admissibility" of the proposed information. Such a hearing was held in the instant case. *See United States v. Wilson*, 586 F.Supp. 1011 (S.D.N.Y.1983).

The district court held that appellant would be permitted to testify "to the fact of his employment with various agencies in the United States intelligence community and to the fact that he was involved in covert operations." *Id.* at 1017. However, after discussing and weighing "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence", in accordance with Fed.R.Evid. 403, the court stated that it would not permit appellant to describe the details of the operations. *Id.* at 1016-17. Citing *United States v. Davis*, 546 F.2d 583, 592-93 & n. 22 (5th Cir.), *cert. denied*, 431 U.S. 906, 97 S.Ct. 1701, 52 L.Ed.2d 391 (1977), the district court also held that appellant could not introduce evidence of specific acts for the purpose of proving his alleged character traits. *Id.* at 1016 and n. 35.

[1, 2] As the Fifth Circuit did in *United States v. Wilson*, *supra*, 732 F.2d 404, we have reviewed the classified material at issue, and we similarly conclude that the district court did not err in rejecting the material under generally applicable evidentiary rules of admissibility. *See id.* at 412. It is a proper exercise of a district court's discretion to exclude evidence that is prejudicial, confusing, or misleading. *Hamling v. United States*, 418 U.S. 87, 124-25, 94 S.Ct. 2887, 2911-12, 41 L.Ed.2d 590 (1974), *United States v. Jordan*, 627 F.2d 683, 686 (5th Cir.1980), and to exclude evidence of specific acts intended to demonstrate character traits not at issue. *United States v. Benedetto*, 571 F.2d 1246, 1249-50 & n. 5 (2d Cir.1978).

[3] We see no constitutional infirmity in the pretrial notification requirements of section 5. Appellant's claim of unconstitutionality was rejected by the district court. *United States v. Wilson*, 571 F.Supp. 1422, 1426-27 (S.D.N.Y.1983). Other courts are in accord. *United States v. Wilson*, 721 F.2d 967, 976 (4th Cir.1983); *United States v. Collins*, *supra*, 720 F.2d at 1200; *United States v. Jolliff*, 548 F.Supp. 229, 231 (D.Md.1981). We find the reasoning of these cases most persuasive. If there is any novelty in appellant's present argument that section 5 "requires disclosure of classified information that may or may not be useful to an accused's defense but would tend to incriminate a defendant on a different charged or uncharged crime", there clearly is no merit in it. The statute does not require a defendant to disclose information that "may or may not be useful"; it requires him to notify court and counsel of the classified information that "he reasonably expects to disclose." A defendant need not admit participating in

any incriminating conduct concerning which he has no intention of making evidentiary disclosure. *See Williams v. Florida*, 399 U.S. 78, 84, 90 S.Ct. 1893, 1897, 26 L.Ed.2d 446 (1970) (upholding constitutionality of rule requiring pretrial notice of alibi defense). Appellant's remaining arguments in support of his claim of unconstitutionality are not of sufficient substance to merit discussion.

The judgment of conviction is affirmed.


**Warren WEIL and Maria Galuppo, Plaintiffs-Appellants,**

**v.**

**RETIREMENT PLAN ADMINISTRATIVE COMMITTEE FOR the TERSON COMPANY, INC., The Terson Company, Inc., and The Northern Trust Company, as Trustees of the Terson Company, Inc., Salaried Retirement Plan, and Rollins Burdick Hunter of New York, Inc., Defendants-Appellees.**

**No. 1305, Docket 84-7109.**

United States Court of Appeals, Second Circuit.

Argued May 30, 1984.

Final Brief Received on Aug. 27, 1984.

Decided Dec. 3, 1984.

Terminated employees who were participants in employer's retirement plan brought action claiming entitlement to certain benefits from plan as a result of partial termination of plan as defined by plan and applicable Internal Revenue Service regulations. On parties' cross motions for summary judgment, the United States District Court for the Southern District of New York, Lloyd F. MacMahon, J., 577 F.Supp. 781, entered judgment, and terminated employees appealed. The Court of Appeals, Pierce, Circuit Judge, held that there was insufficient evidence to allow a determination as to whether defendants' actions in reorganizing former employer partially terminated employer's retirement plan thereby entitling terminated employees to vesting of certain benefits necessitating remand.

Reversed and remanded.

**1. Federal Courts ⇐937**

There was insufficient evidence to allow a determination as to whether defendants' action in reorganizing terminated employees' former employer partially terminated employer's retirement plan entitling terminated employees to the vesting of certain benefits necessitating remand.

**2. Master and Servant ⇐78.1(9)**

Even if partial termination of former employer's retirement plan occurred when former employer was purchased and reorganized, terminated employees were required to demonstrate funding of benefits they sought. 26 U.S.C.A. § 411(d)(3).

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John J. Braverman, New York City (Eagle & Fein, P.C., New York City, of counsel), for plaintiffs-appellants.

Logan T. Johnston, Phoenix, Ariz. (Winston & Strawn, Richard W. Cutler, New York City, of counsel), for defendants-appellees.

Glen L. Archer, Jr., Asst. Atty. Gen., Michael L. Paup, Richard Farber, Michael J. Roach, Attys., Tax Division, Dept. of Justice, Washington, D.C., Rudolph W. Giuliani, U.S. Atty., New York City, of counsel, for the United States of America as amicus curiae.

Before FEINBERG, KAUFMAN, and PIERCE, Circuit Judges.

PIERCE, Circuit Judge:

Appellants Maria Galuppo and Warren Weil challenge the district court's grant of summary judgment in favor of appellees

Next 60 Page(s) In Document Denied

Honolulu Star-Bulletin
A GANNETT NEWSPAPER

# Rewald Is Found Guilty; 480-Year Term Possible

## *Convicted of Fraud, Tax Evasion and Perjury*

By Charles Memminger
*Star-Bulletin Writer*

Ronald Rewald woke up in the Oahu Community Correctional Center this morning convicted of 94 counts of mail and securities fraud, tax evasion and perjury.

It took more than two years for the 43-year-old would-be investment counselor and self-appointed CIA agent to make his trip from fast cars, hot women and executive suites to the cellblock.

Rewald had combined the teachings of Charles Ponzi and the dreams of Walter Mitty to forge his own version of the American dream. He claimed that the CIA wanted him to live an extravagant lifestyle made up of polo, ranches, mansions and indoor waterfalls in order to rub elbows with international businessmen.

He took $22 million from 400 investors with lies and promises, not because he wanted to, but because of his CIA mission, Rewald claimed.

But at 2:15 p.m. yesterday, in a courtroom called "Aha Kupono," which means "justice," a federal court jury said it did not believe Rewald's grand claims. It took the jury only 2½ days, or about 15 hours of deliberation, to reach its verdict.

The dream was over.

REWALD DID NOT look at the jury or U.S. Judge Harold Fong as the verdict was read. He showed no emotion as Fong pronounced him guilty of 94 of 98 counts. The jury acquitted him of four of the more obscure counts relating to Rewald's assurances to four people that their investments were insured by the Federal Deposit Insurance Corporation.

There was no documentary evidence to go with those counts and the jurors couldn't remember the testimony related to the charges. In a trial that spanned 11 weeks and included some 140 witnesses, one juror said he "couldn't even remember if they (the four witnesses) showed up."

The jury found that Rewald had lied about the extent of his CIA connections, that he had deliberately stolen money from widows, a blind man, an invalid and others left destitute.

Rewald faces a maximum of some 480 years in prison and more than $1 million in fines when he is sentenced on Dec. 9. Federal Public Defender Michael Levine asked Fong to let Rewald remain free on bail pending the sentencing.

Fong declined.

HE SAID REWALD had taken part in a "systematic plan to take advantage of persons through his charm and ability to communicate with the aged and handicapped."

Fong said it will be up to Rewald's attorneys to prove that Rewald will not flee if allowed to be free pending sentencing or appeal. They also will have to show that Rewald is not a danger — including an economic one — to the community.

Fong told the jury he thought "there was more than sufficient evidence to sustain" the guilty verdict.

Assistant U.S. Attorney John Peyton said he would fight any attempt by Rewald to go free pending appeal. He told the judge that the government would produce evidence showing that Rewald convinced people to give him money even while awaiting trial.

"What we can say is that we are in possession of information that Mr. Rewald was able to come into possession of substantial sums of money while he was out on bond," Peyton said outside of court.

Reaction to the verdict was predictable. Government attorneys congratulated each other for the win. Rewald's attorneys vowed to continue to fight.

"MR. REWALD WAS the consummate con man who almost got away with it," Peyton told a gaggle of news reporters outside court.

He said the CIA should have

Turn to Page A-9, Col. 1

**CONVICTED**—Attorneys for Ronald Rewald say they appeal after a federal jury yesterday found him guilty counts of mail and securities fraud, tax evasion and —Star-Bulletin Photo by Ken Sakamoto.

Per Curiam

# SNEPP *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78–1871. Decided February 19, 1980*

*Held:* A former employee of the Central Intelligence Agency, who had agreed not to divulge classified information without authorization and not to publish any information relating to the Agency without prepublication clearance, breached a fiduciary obligation when he published a book about certain Agency activities without submitting his manuscript for prepublication review. The proceeds of his breach are impressed with a constructive trust for the benefit of the Government.

Certiorari granted; 595 F. 2d 926, reversed in part and remanded.

PER CURIAM.

In No. 78–1871, Frank W. Snepp III seeks review of a judgment enforcing an agreement that he signed when he accepted employment with the Central Intelligence Agency (CIA). He also contends that punitive damages are an inappropriate remedy for the breach of his promise to submit all writings about the Agency for prepublication review. In No. 79–265, the United States conditionally cross petitions from a judgment refusing to find that profits attributable to Snepp's breach are impressed with a constructive trust. We grant the petitions for certiorari in order to correct the judgment from which both parties seek relief.

## I

Based on his experiences as a CIA agent, Snepp published a book about certain CIA activities in South Vietnam. Snepp published the account without submitting it to the Agency for prepublication review. As an express condition of his employment with the CIA in 1968, however, Snepp had

*Together with No. 79–265, *United States* v. *Snepp*, also on petition for certiorari to the same court.

executed an agreement promising that he would "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency." App. to Pet. for Cert. in No. 78–1871, p. 59a. The promise was an integral part of Snepp's concurrent undertaking "not to disclose any classified information relating to the Agency without proper authorization." *Id.*, at 58a.[1] Thus, Snepp had pledged not to divulge *classified* information and not to publish *any* information without prepublication clearance. The Government brought this suit to enforce Snepp's agreement. It sought a declaration that Snepp had breached the contract, an injunction requiring Snepp to submit future writings for prepublication review, and an order imposing a constructive trust for the Government's benefit on all profits that Snepp might earn from publishing the book in violation of his fiduciary obligations to the Agency.[2]

The District Court found that Snepp had "willfully, deliberately and surreptitiously breached his position of trust with the CIA and the [1968] secrecy agreement" by publishing his book without submitting it for prepublication review. 456 F. Supp. 176, 179 (ED Va. 1978). The court also found that Snepp deliberately misled CIA officials into believing that he would submit the book for prepublication clearance. Finally, the court determined as a fact that publication of the book had "caused the United States irreparable harm and loss."

[1] Upon the eve of his departure from the Agency in 1976, Snepp also executed a "termination secrecy agreement." That document reaffirmed his obligation "never" to reveal "any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of the Director of Central Intelligence or his representative." App. to Pet. for Cert. in No. 78–1871, p. 61a.

[2] At the time of suit, Snepp already had received about $60,000 in advance payments. His contract with his publisher provides for royalties and other potential profits. 456 F. Supp. 176, 179 (ED Va. 1978).

*Id.*, at 180. The District Court therefore enjoined future breaches of Snepp's agreement and imposed a constructive trust on Snepp's profits.

The Court of Appeals accepted the findings of the District Court and agreed that Snepp had breached a valid contract.[3] It specifically affirmed the finding that Snepp's failure to submit his manuscript for prepublication review had inflicted "irreparable harm" on intelligence activities vital to our national security. 595 F. 2d 926, 935 (CA4 1979). Thus, the court upheld the injunction against future violations of Snepp's prepublication obligation. The court, however, concluded that the record did not support imposition of a constructive trust. The conclusion rested on the court's percep-

[3] The Court of Appeals and the District Court rejected each of Snepp's defenses to the enforcement of his contract. 595 F. 2d 926, 931–934 (CA4 1979); 456 F. Supp., at 180–181. In his petition for certiorari, Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech.

When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. Indeed, he voluntarily reaffirmed his obligation when he left the Agency. We agree with the Court of Appeals that Snepp's agreement is an "entirely appropriate" exercise of the CIA Director's statutory mandate to "protec[t] intelligence sources and methods from unauthorized disclosure." 50 U. S. C. § 403 (d)(3). 595 F. 2d, at 932. Moreover, this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. *CSC* v. *Letter Carriers*, 413 U. S. 548, 565 (1973); see *Brown* v. *Glines*, *ante*, p. 348; *Buckley* v. *Valeo*, 424 U. S. 1, 25–28 (1976); *Greer* v. *Spock*, 424 U. S. 828 (1976); *id.*, at 844–848 (POWELL, J., concurring); *Cole* v. *Richardson*, 405 U. S. 676 (1972). The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. See *infra*, at 511–512. The agreement that Snepp signed is a reasonable means for protecting this vital interest.

tion that Snepp had a First Amendment right to publish unclassified information and the Government's concession—for the purposes of this litigation—that Snepp's book divulged no classified intelligence. *Id.*, at 935–936.[4] In other words, the court thought that Snepp's fiduciary obligation extended only to preserving the confidentiality of classified material. It therefore limited recovery to nominal damages and to the possibility of punitive damages if the Government—in a jury trial—could prove tortious conduct.

Judge Hoffman, sitting by designation, dissented from the refusal to find a constructive trust. The 1968 agreement, he wrote, "was no ordinary contract; it gave life to a fiduciary relationship and invested in Snepp the trust of the CIA." *Id.*, at 938. Prepublication clearance was part of Snepp's undertaking to protect confidences associated with his trust. Punitive damages, Judge Hoffman argued, were both a speculative and inappropriate remedy for Snepp's breach. We agree with Judge Hoffman that Snepp breached a fiduciary obligation and that the proceeds of his breach are impressed with a constructive trust.

II

Snepp's employment with the CIA involved an extremely high degree of trust. In the opening sentence of the agreement that he signed, Snepp explicitly recognized that he was entering a trust relationship.[5] The trust agreement specifi-

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[4] The Government's concession distinguished this litigation from *United States* v. *Marchetti*, 466 F. 2d 1309 (CA4), cert. denied, 409 U. S. 1063 (1972). There, the Government claimed that a former CIA employee intended to violate his agreement not to publish any *classified* information. 466 F. 2d, at 1313. *Marchetti* therefore did not consider the appropriate remedy for the breach of an agreement to submit *all* material for prepublication review. By relying on *Marchetti* in this litigation, the Court of Appeals overlooked the difference between Snepp's breach and the violation at issue in *Marchetti*.

[5] The first sentence of the 1968 agreement read: "I, Frank W. Snepp, III, understand that upon entering duty with the Central Intelligence

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cally imposed the obligation not to publish *any* information relating to the Agency without submitting the information for clearance. Snepp stipulated at trial that—after undertaking this obligation—he had been "assigned to various positions of trust" and that he had been granted "frequent access to classified information, including information regarding intelligence sources and methods." 456 F. Supp., at 178.[6] Snepp published his book about CIA activities on the basis of this background and exposure. He deliberately and surreptitiously violated his obligation to submit all material for prepublication review. Thus, he exposed the classified information with which he had been entrusted to the risk of disclosure.

Whether Snepp violated his trust does not depend upon whether his book actually contained classified information. The Government does not deny—as a general principle—Snepp's right to publish unclassified information. Nor does it contend—at this stage of the litigation—that Snepp's book contains classified material. The Government simply claims that, in light of the special trust reposed in him and the agreement that he signed, Snepp should have given the CIA an opportunity to determine whether the material he proposed to publish would compromise classified information or sources. Neither of the Government's concessions undercuts its claim that Snepp's failure to submit to prepublication review was a breach of his trust.

Both the District Court and the Court of Appeals found that a former intelligence agent's publication of unreviewed material relating to intelligence activities can be detrimental

Agency I am undertaking a position of trust in that Agency of the Government. . . ." App. to Pet. for Cert. in No. 78-1871, p. 58a.

[6] Quite apart from the plain language of the agreement, the nature of Snepp's duties and his conceded access to confidential sources and materials could establish a trust relationship. See 595 F. 2d, at 939 (Hoffman, J., concurring in part and dissenting in part). Few types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties.

to vital national interests even if the published information is unclassified. When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful. In addition to receiving intelligence from domestically based or controlled sources, the CIA obtains information from the intelligence services of friendly nations[7] and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents.

Undisputed evidence in this case shows that a CIA agent's violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA's ability to perform its statutory duties. Admiral Turner, Director of the CIA, testified without contradiction that Snepp's book and others like it have seriously impaired the effectiveness of American intelligence operations. He said:

> "Over the last six to nine months, we have had a number of sources discontinue work with us. We have had more sources tell us that they are very nervous about continuing work with us. We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether they should continue exchanging information with us, for fear it will not remain secret. I cannot esti-

[7] Every major nation in the world has an intelligence service. Whatever fairly may be said about some of its past activities, the CIA (or its predecessor the Office of Strategic Services) is an agency thought by every President since Franklin D. Roosevelt to be essential to the security of the United States and—in a sense—the free world. It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence. See generally T. Powers, The Man Who Kept the Secrets (1979).

> mate to you how many potential sources or liaison arrangements have never germinated because people were unwilling to enter into business with us." 456 F. Supp., at 179–180.[8]

In view of this and other evidence in the record, both the District Court and the Court of Appeals recognized that Snepp's breach of his explicit obligation to submit his material—classified or not—for prepublication clearance has irreparably harmed the United States Government. 595 F. 2d, at 935; 456 F. Supp., at 180.[9]

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[8] In questioning the force of Admiral Turner's testimony, MR. JUSTICE STEVENS' dissenting opinion suggests that the concern of foreign intelligence services may not be occasioned by the hazards of allowing an agent like Snepp to publish whatever he pleases, but by the release of classified information or simply the disagreement of foreign agencies with our Government's classification policy. *Post*, at 522–523. MR. JUSTICE STEVENS' views in this respect not only find no support in the record, but they also reflect a misapprehension of the concern reflected by Admiral Turner's testimony. If in fact information is unclassified or in the public domain, neither the CIA nor foreign agencies would be concerned. The problem is to ensure *in advance*, and by proper procedures, that information detrimental to national interest is not published. Without a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world.

The dissent argues that the Court is allowing the CIA to "censor" its employees' publications. *Post*, at 522. Snepp's contract, however, requires no more than a clearance procedure subject to judicial review. If Snepp, in compliance with his contract, had submitted his manuscript for review and the Agency had found it to contain sensitive material, presumably—if one accepts Snepp's present assertion of good intentions—an effort would have been made to eliminate harmful disclosures. Absent agreement in this respect, the Agency would have borne the burden of seeking an injunction against publication. See *Alfred A. Knopf, Inc.* v. *Colby*, 509 F. 2d 1362 (CA4), cert. denied, 421 U. S. 992 (1975); *United States* v. *Marchetti*, 466 F. 2d 1309 (CA4), cert. denied, 409 U. S. 1063 (1972).

[9] Although both the District Court and the Court of Appeals expressly found otherwise, MR. JUSTICE STEVENS says that "the interest in con-

## III

The decision of the Court of Appeals denies the Government the most appropriate remedy for Snepp's acknowledged wrong. Indeed, as a practical matter, the decision may well leave the Government with no reliable deterrent against similar breaches of security. No one disputes that the actual damages attributable to a publication such as Snepp's generally are unquantifiable. Nominal damages are a hollow alternative, certain to deter no one. The punitive damages recoverable after a jury trial are speculative and unusual. Even if recovered, they may bear no relation to either the Government's irreparable loss or Snepp's unjust gain.

The Government could not pursue the only remedy that the Court of Appeals left it [10] without losing the benefit of the bargain it seeks to enforce. Proof of the tortious conduct necessary to sustain an award of punitive damages might force the Government to disclose some of the very confidences that Snepp promised to protect. The trial of such a suit, before a jury if the defendant so elects, would subject the CIA and its

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fidentiality that Snepp's contract was designed to protect has not been compromised." *Post*, at 516–517. Thus, on the basis of a premise wholly at odds with the record, the dissent bifurcates Snepp's 1968 agreement and treats its interdependent provisions as if they imposed unrelated obligations. MR. JUSTICE STEVENS then analogizes Snepp's prepublication review agreement with the Government to a private employee's covenant not to compete with his employer. *Post*, at 518–520. A body of private law intended to preserve competition, however, simply has no bearing on a contract made by the Director of the CIA in conformity with his statutory obligation to "protec[t] intelligence sources and methods from unauthorized disclosure." 50 U. S. C. § 403 (d)(3).

[10] Judge Hoffman's dissent suggests that even this remedy may be unavailable if the Government must bring suit in a State that allows punitive damages only upon proof of compensatory damages. 595 F. 2d., at 940. The Court of Appeals majority, however, held as a matter of *federal* law that the nominal damages recoverable for any breach of a trust agreement will support an exemplary award. See *id.*, at 936, and n. 10, 937–938.

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officials to probing discovery into the Agency's highly confidential affairs. Rarely would the Government run this risk. In a letter introduced at Snepp's trial, former CIA Director Colby noted the analogous problem in criminal cases. Existing law, he stated, "requires the revelation in open court of confirming or additional information of such a nature that the potential damage to the national security precludes prosecution." App. to Pet. for Cert. in No. 78–1871, p. 68a. When the Government cannot secure its remedy without unacceptable risks, it has no remedy at all.

A constructive trust, on the other hand, protects both the Government and the former agent from unwarranted risks. This remedy is the natural and customary consequence of a breach of trust.[11] It deals fairly with both parties by conforming relief to the dimensions of the wrong. If the agent secures prepublication clearance, he can publish with no fear of liability. If the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk. And since the remedy reaches only funds attributable to the

[11] See *id.*, at 939 (Hoffman, J., concurring in part and dissenting in part).

MR. JUSTICE STEVENS concedes that, even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment. *Post*, at 518. He also concedes that all personal profits gained from the exploitation of such information are impressed with a constructive trust in favor of the employer. *Post*, at 521. In this case, he seems to think that the common law would not treat information as "confidential" unless it were "classified." See, *e. g.*, *post*, at 518. We have thought that the common-law obligation was considerably more expansive. See, *e. g.*, Restatement (Second) of Agency §§ 396 (c), 400 and Comment *c*, 404 and Comments *b*, *d* (1958); 5 A. Scott, Trusts § 505 (3d ed. 1967). But since this case involves the breach of a trust agreement that specifically required the prepublication review of all information about the employer, we need not look to the common law to determine the scope of Snepp's fiduciary obligation.

breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain. The decision of the Court of Appeals would deprive the Government of this equitable and effective means of protecting intelligence that may contribute to national security. We therefore reverse the judgment of the Court of Appeals insofar as it refused to impose a constructive trust on Snepp's profits, and we remand the cases to the Court of Appeals for reinstatement of the full judgment of the District Court.

*So ordered.*

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

In 1968, Frank W. Snepp signed an employment agreement with the CIA in which he agreed to submit to the Agency any information he intended to publish about it for prepublication review.[1] The purpose of such an agreement, as the Fourth Circuit held, is not to give the CIA the power to censor its employees' critical speech, but rather to ensure that classified, nonpublic information is not disclosed without the Agency's permission. 595 F. 2d 926, 932 (1979); see also *United States* v. *Marchetti*, 466 F. 2d 1309, 1317 (CA4 1972), cert. denied, 409 U. S. 1063.

In this case Snepp admittedly breached his duty to submit the manuscript of his book, Decent Interval, to the CIA for prepublication review. However, the Government has conceded that the book contains no classified, nonpublic material.[2] Thus, by definition, the interest in confidentiality

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[1] Snepp also signed a termination agreement in 1976 in which he made substantially the same commitment.

[2] In response to an interrogatory asking whether it contended that "*Decent Interval* contains classified information or any information concerning intelligence or CIA that has not been made public by CIA," the Government stated that "[f]or the purpose of this action, plaintiff does not so contend." Record Item No. 24, p. 14. Because of this concession, the District Judge sustained the Government's objections to defense efforts

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that Snepp's contract was designed to protect has not been compromised. Nevertheless, the Court today grants the Government unprecedented and drastic relief in the form of a constructive trust over the profits derived by Snepp from the sale of the book. Because that remedy is not authorized by any applicable law and because it is most inappropriate for the Court to dispose of this novel issue summarily on the Government's conditional cross-petition for certiorari, I respectfully dissent.

I

The rule of law the Court announces today is not supported by statute, by the contract, or by the common law. Although Congress has enacted a number of criminal statutes punishing the unauthorized dissemination of certain types of classified information,[3] it has not seen fit to authorize the constructive trust remedy the Court creates today. Nor does either of the contracts Snepp signed with the Agency provide for any such remedy in the event of a breach.[4] The Court's *per curiam*

to determine whether Decent Interval in fact contains information that the Government considers classified. See, *e. g.*, the testimony of Admiral Stansfield Turner, Director of the CIA, Tr. 135; and of Herbert Hetu, the CIA's Director of Public Affairs, Tr. 153.

[3] See, *e. g.*, 18 U. S. C. § 798, which imposes a prison term of 10 years and a $10,000 fine for knowingly and willfully publishing certain types of classified information; 18 U. S. C. § 794, which makes it a criminal offense punishable by life in prison to communicate national defense information to a foreign government; and 5 U. S. C. § 8312, which withdraws the right to Government retirement benefits from a person convicted of violating these statutes. See also Exec. Order No. 12065, 3 CFR 190 (1979), note following 50 U. S. C. § 401 (1976 ed., Supp. II), which provides administrative sanctions, including discharge, against employees who publish classified information. Thus, even in the absence of a constructive trust remedy, an agent like Snepp would hardly be free, as the majority suggests, "to publish whatever he pleases." *Ante*, at 513, n. 8.

[4] In both his original employment agreement and the termination agreement Snepp acknowledged the criminal penalties that might attach to any publication of classified information. In his employment agreement he also agreed that a breach of the agreement would be cause for termina-

opinion seems to suggest that its result is supported by a blend of the law of trusts and the law of contracts.[5] But neither of these branches of the common law supports the imposition of a constructive trust under the circumstances of this case.

Plainly this is not a typical trust situation in which a settlor has conveyed legal title to certain assets to a trustee for the use and benefit of designated beneficiaries. Rather, it is an employment relationship in which the employee possesses fiduciary obligations arising out of his duty of loyalty to his employer. One of those obligations, long recognized by the common law even in the absence of a written employment agreement, is the duty to protect confidential or "classified" information. If Snepp had breached that obligation, the common law would support the implication of a constructive trust upon the benefits derived from his misuse of confidential information.[6]

But Snepp did not breach his duty to protect confidential information. Rather, he breached a contractual duty, imposed in aid of the basic duty to maintain confidentiality, to

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tion of his employment. No other remedies were mentioned in either agreement.

[5] In a footnote, see *ante*, at 515, n. 11, the Court suggests that it need not look to the common law to support its holding because the case involves a written contract. But, inasmuch as the contract itself does not state what remedy is to be applied in the event of a breach, the common law is the only source of law to which we can look to determine what constitutes an appropriate remedy.

[6] See, *e. g.*, *Sperry Rand Corp.* v. *A–T–O, Inc.*, 447 F. 2d 1387, 1392 (CA4 1971) (Virginia law), cert. denied, 405 U. S. 1017; *Tlapek* v. *Chevron Oil Co.*, 407 F. 2d 1129 (CA8 1969) (Arkansas law); *Structural Dynamics Research Corp.* v. *Engineering Mechanics Research Corp.*, 401 F. Supp. 1102, 1120 (ED Mich. 1975) (Michigan law); Restatement (Second) of Agency § 396 (c) (1958) ("Unless otherwise agreed, after the termination of the agency, the agent: . . . (c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal . . .").

obtain prepublication clearance. In order to justify the imposition of a constructive trust, the majority attempts to equate this contractual duty with Snepp's duty not to disclose, labeling them both as "fiduciary." I find nothing in the common law to support such an approach.

Employment agreements often contain covenants designed to ensure in various ways that an employee fully complies with his duty not to disclose or misuse confidential information. One of the most common is a covenant not to compete. Contrary to the majority's approach in this case, the courts have not construed such covenants broadly simply because they support a basic fiduciary duty; nor have they granted sweeping remedies to enforce them. On the contrary, because such covenants are agreements in restraint of an individual's freedom of trade, they are enforceable only if they can survive scrutiny under the "rule of reason." That rule, originally laid down in the seminal case of *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711), requires that the covenant be reasonably necessary to protect a legitimate interest of the employer (such as an interest in confidentiality), that the employer's interest not be outweighed by the public interest,[7] and that the covenant not be of any longer duration or wider geographical scope than necessary to protect the employer's interest.[8]

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[7] As the court held in *Herbert Morris, Ltd.* v. *Saxelby*, [1916] A. C. 688, 704, the employer's interest in protecting trade secrets does not outweigh the public interest in keeping the employee in the work force:

"[A]n employer can[not] prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction. The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to any one else . . ."

[8] See, *e. g.*, *Briggs* v. *R. R. Donnelley & Sons Co.*, 589 F. 2d 39, 41 (CA1

The Court has not persuaded me that a rule of reason analysis should not be applied to Snepp's covenant to submit to prepublication review. Like an ordinary employer, the CIA has a vital interest in protecting certain types of information; at the same time, the CIA employee has a countervailing interest in preserving a wide range of work opportunities (including work as an author) and in protecting his First Amendment rights. The public interest lies in a proper accommodation that will preserve the intelligence mission of the Agency while not abridging the free flow of unclassified information. When the Government seeks to enforce a harsh restriction on the employee's freedom,[9] despite its admission that the interest the agreement was designed to protect—the confidentiality of classified information—has not been compromised, an equity court might well be persuaded that the case is not one in which the covenant should be enforced.[10]

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1978) (Illinois law); *American Hot Rod Assn., Inc.* v. *Carrier*, 500 F. 2d 1269, 1277 (CA4 1974) (North Carolina law); *Alston Studios, Inc.* v. *Lloyd V. Gress & Associates*, 492 F. 2d 279, 282 (CA4 1974) (Virginia law); *Mixing Equipment Co.* v. *Philadelphia Gear, Inc.*, 436 F. 2d 1308, 1312 (CA3 1971) (New York law); *Water Services, Inc.* v. *Tesco Chemicals, Inc.*, 410 F. 2d 163, 167 (CA5 1969) (Georgia law); Restatement (Second) of Contracts § 330 (Tent. Draft No. 12, Mar. 1, 1977).

[9] The covenant imposes a serious prior restraint on Snepp's ability to speak freely, see n. 17, *infra*, and is of indefinite duration and scope—factors that would make most similar covenants unenforceable. See, *e. g.*, *Alston Studios, Inc.* v. *Lloyd V. Gress & Associates*, *supra*, at 283 (holding void under Virginia law a covenant with no geographical limitation); *American Hot Rod Assn., Inc.* v. *Carrier*, *supra*, at 1279 (holding void under North Carolina law a covenant with no durational or geographical limitation); *E. L. Conwell & Co.* v. *Gutberlet*, 429 F. 2d 527, 528 (CA4 1970) (holding void under Maryland law a covenant with no durational or geographical limitation).

[10] The Court correctly points out that the Government may regulate certain activities of its employees that would be protected by the First Amendment in other contexts. *Ante*, at 509, n. 3. But none of the cases it cites involved a requirement that an employee submit all proposed public statements for prerelease censorship or approval. The Court has not pre-

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But even assuming that Snepp's covenant to submit to prepublication review should be enforced, the constructive trust imposed by the Court is not an appropriate remedy. If an employee has used his employer's confidential information for his own personal profit, a constructive trust over those profits is obviously an appropriate remedy because the profits are the direct result of the breach. But Snepp admittedly did not use confidential information in his book; nor were the profits from his book in any sense a product of his failure to submit the book for prepublication review. For, even if Snepp had submitted the book to the Agency for prepublication review, the Government's censorship authority would surely have been limited to the excision of classified material. In this case, then, it would have been obliged to clear the book for publication in precisely the same form as it now stands.[11] Thus, Snepp has not gained any profits as a result of his breach; the Government, rather than Snepp, will be unjustly enriched if he is required to disgorge profits attributable entirely to his own legitimate activity.

Despite the fact that Snepp has not caused the Government the type of harm that would ordinarily be remedied by

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viously considered the enforceability of this kind of prior restraint or the remedy that should be imposed in the event of a breach.

[11] If he had submitted the book to the Agency and the Agency had refused to consent to the publication of certain material in it, Snepp could have obtained judicial review to determine whether the Agency was correct in considering the material classified. See *United States* v. *Marchetti*, 466 F. 2d 1309, 1317 (CA4 1972), cert. denied, 409 U. S. 1063. It is noteworthy that the Court does not disagree with the Fourth Circuit's view in *Marchetti*, reiterated in *Snepp*, that a CIA employee has a First Amendment right to publish unclassified information. Thus, despite its reference in footnote 3 of its opinion to the Government's so-called compelling interest in protecting "the appearance of confidentiality," *ante*, at 509, n. 3, and despite some ambiguity in the Court's reference to "detrimental" and "harmful" as opposed to "classified" information, *ante*, at 511–512, I do not understand the Court to imply that the Government could obtain an injunction against the publication of unclassified information.

the imposition of a constructive trust, the Court attempts to justify a constructive trust remedy on the ground that the Government has suffered *some* harm. The Court states that publication of "unreviewed material" by a former CIA agent "can be detrimental to vital national interests even if the published information is unclassified." *Ante*, at 511–512. It then seems to suggest that the injury in such cases stems from the Agency's inability to catch "harmful" but unclassified information before it is published. I do not believe, however, that the Agency has any authority to censor its employees' publication of unclassified information on the basis of its opinion that publication may be "detrimental to vital national interests" or otherwise "identified as harmful." *Ibid.* The CIA never attempted to assert such power over Snepp in either of the contracts he signed; rather, the Agency itself limited its censorship power to preventing the disclosure of "classified" information. Moreover, even if such a wide-ranging prior restraint would be good national security policy, I would have great difficulty reconciling it with the demands of the First Amendment.

The Court also relies to some extent on the Government's theory at trial that Snepp caused it harm by flouting his prepublication review obligation and thus making it appear that the CIA was powerless to prevent its agents from publishing any information they chose to publish, whether classified or not. The Government theorized that this appearance of weakness would discourage foreign governments from cooperating with the CIA because of a fear that their secrets might also be compromised. In support of its position that Snepp's book had in fact had such an impact, the Government introduced testimony by the Director of the CIA, Admiral Stansfield Turner, stating that Snepp's book and others like it had jeopardized the CIA's relationship with foreign intelligence services by making them unsure of the Agency's ability to maintain confidentiality. Admiral Turner's truncated testimony does not explain, however, whether these unidentified

"other" books actually contained classified information.[12] If so, it is difficult to believe that the publication of a book like Snepp's, which does not reveal classified information, has significantly weakened the Agency's position. Nor does it explain whether the unidentified foreign agencies who have stopped cooperating with the CIA have done so because of a legitimate fear that secrets will be revealed or because they merely disagree with our Government's classification policies.[13]

In any event, to the extent that the Government seeks to punish Snepp for the generalized harm he has caused by failing to submit to prepublication review and to deter others from following in his footsteps, punitive damages is, as the Court of Appeals held, clearly the preferable remedy "since a constructive trust depends on the concept of unjust enrichment rather than deterrence and punishment. *See* D. Dobbs, Law of Remedies § 3.9 at 205 and § 4.3 at 246 (1973)." 595 F. 2d, at 937.[14]

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[12] The District Judge sustained the Government's objections to questions concerning the identity of other agents who had published the unauthorized works to which Admiral Turner referred. Tr. 136. However, Admiral Turner did testify that the harmful materials involved "[p]rimarily the appearance in the United States media of identification of sources and methods of collecting intelligence. . . ." *Id.*, at 143. This type of information is certainly classified and is specifically the type of information that Snepp has maintained he did *not* reveal in Decent Interval. See, *e. g.*, Snepp's December 7, 1977, interview on the Tomorrow show, in which he stated: "I have made a very determined effort not to expose sources or methods. . . ." Government's Requests for Admissions, Record Item 19, Exhibit I, p. 5.

[13] Snepp's attorneys were foreclosed from asking Admiral Turner whether particular foreign sources had stopped cooperating with United States' authorities as a direct result of the publication of Decent Interval. Tr. 138. Thus, it is unclear whether or why foreign sources may have reacted unfavorably to its publication. However, William E. Colby, the CIA's former Director, did indicate in his testimony that foreign nations generally have a stricter secrecy code than does the United States. *Id.*, at 175–176.

[14] One of the Court's justifications for its constructive trust remedy is that "it cannot saddle the former agent with exemplary damages out of all

## II

The Court's decision to dispose of this case summarily on the Government's conditional cross-petition for certiorari is just as unprecedented as its disposition of the merits.

Snepp filed a petition for certiorari challenging the Fourth Circuit's decision insofar as it affirmed the entry of an injunction requiring him to submit all future manuscripts for prepublication review and remanded for a determination of whether punitive damages would be appropriate for his failure to submit Decent Interval to the Agency prior to its publication. The Government filed a brief in opposition as well as a cross-petition for certiorari; the Government specifically stated, however, that it was cross petitioning only to bring the entire case before the Court in the event that the Court should decide to grant Snepp's petition. The Government explained that "[b]ecause the contract remedy provided by the court of appeals appears to be sufficient in this case to protect the Agency's interest, the government has not independently sought review in this Court." In its concluding paragraph the Government stated: "If this Court grants [Snepp's] . . . petition for a writ of certiorari in No. 78–1871, it should also grant this cross-petition. If the petition in No. 78–1871 is denied, this petition should also be denied." Pet. for Cert. in No. 79–265, p. 5.

Given the Government's position, it would be highly inappropriate, and perhaps even beyond this Court's jurisdiction, to grant the Government's petition while denying Snepp's. Yet that is in essence what has been done.[15] The majority obviously does not believe that Snepp's claims merit this Court's consideration, for they are summarily dismissed in a

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proportion to his gain." *Ante*, at 516. This solicitude for Snepp's welfare is rather ironic in view of the Draconian nature of the remedy imposed by the Court today.

[15] I have been unable to discover any previous case in which the Court has acted as it does today, reaching the merits of a conditional cross-petition despite its belief that the petition does not merit granting certiorari.

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footnote. *Ante*, at 509, n. 3. It is clear that Snepp's petition would not have been granted on its own merits.

The Court's opinion is a good demonstration of why this Court should not reach out to decide a question not necessarily presented to it, as it has done in this case. Despite the fact that the Government has specifically stated that the punitive damages remedy is "sufficient" to protect its interests, the Court forges ahead and summarily rejects that remedy on the grounds that (a) it is too speculative and thus would not provide the Government with a "reliable deterrent against similar breaches of security," *ante*, at 514, and (b) it might require the Government to reveal confidential information in court, the Government might forgo damages rather than make such disclosures, and the Government might thus be left with "no remedy at all," *ante*, at 515. It seems to me that the Court is foreclosed from relying upon either ground by the Government's acquiescence in the punitive damages remedy. Moreover, the second rationale[16] is entirely speculative and, in this case at least, almost certainly wrong. The Court states that

> "[p]roof of the tortious conduct necessary to sustain an award of punitive damages might force the Government to disclose some of the very confidences that Snepp promised to protect." *Ante*, at 514.

Yet under the Court of Appeals' opinion the Government would be entitled to punitive damages simply by proving that Snepp deceived it into believing that he was going to comply with his duty to submit the manuscript for prepublication review and that the Government relied on these misrepresentations to its detriment. I fail to see how such a showing would require the Government to reveal any confidential information or to expose itself to "probing discovery into the Agency's highly confidential affairs." *Ante*, at 515.

[16] Which, it should be noted, does not appear anywhere in the Government's 5-page cross-petition.

## III

The uninhibited character of today's exercise in lawmaking is highlighted by the Court's disregard of two venerable principles that favor a more conservative approach to this case.

First, for centuries the English-speaking judiciary refused to grant equitable relief unless the plaintiff could show that his remedy at law was inadequate. Without waiting for an opportunity to appraise the adequacy of the punitive damages remedy in this case, the Court has jumped to the conclusion that equitable relief is necessary.

Second, and of greater importance, the Court seems unaware of the fact that its drastic new remedy has been fashioned to enforce a species of prior restraint on a citizen's right to criticize his government.[17] Inherent in this prior restraint is the risk that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy. The character of the covenant as a prior restraint on free speech surely imposes an especially heavy burden on the censor to justify the remedy it seeks. It would take more than the Court has written to persuade me that that burden has been met.

I respectfully dissent.

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[17] The mere fact that the Agency has the authority to review the text of a critical book in search of classified information before it is published is bound to have an inhibiting effect on the author's writing. Moreover, the right to delay publication until the review is completed is itself a form of prior restraint that would not be tolerated in other contexts. See, *e. g., New York Times Co.* v. *United States*, 403 U. S. 713; *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539. In view of the national interest in maintaining an effective intelligence service, I am not prepared to say that the restraint is necessarily intolerable in this context. I am, however, prepared to say that, certiorari having been granted, the issue surely should not be resolved in the absence of full briefing and argument.

**UNITED STATES of America, Appellee,**

**v.**

**Victor L. MARCHETTI, Appellant, (two cases).**

**Nos. 72-1586, 72-1589.**

United States Court of Appeals, Fourth Circuit.

Argued May 31, 1972.

Decided Sept. 11, 1972.

Certiorari Denied Dec. 11, 1972. See 93 S.Ct. 553.

Action by United States against former employee of Central Intelligence Agency to enjoin the former employee from publishing a proposed book in violation of secrecy agreement and secrecy oath. The United States District Court for the Eastern District of Virginia, at Alexandria, Albert V. Bryan, Jr., J., granted preliminary injunction and the former employee appealed. The Court of Appeals, Haynsworth, Chief Judge, held that secrecy agreement executed by employee at commencement of his employment was not in derogation of his constitutional rights and its provision for submission of material to the agency for approval prior to publication was enforceable, provided the agency acted promptly upon such submissions and withheld approval of publication only of classified information which had not been placed in public domain by prior disclosure.

Affirmed and remanded.

Craven, Circuit Judge, concurred and filed opinion.

**1. Courts ⇐302**

By virtue of the presence of the United States as a party, federal court had jurisdiction of United States' suit against former Central Intelligence Agency employee to enforce a secrecy agreement which prohibits the publication of any article or book about the agency without the agency's prior written authorization. U.S.C.A.Const. Amend. 1; 28 U.S.C.A. § 1345.

**2. United States ⇐124**

The government's interest in protecting the national security gave it standing to bring action against former employee of Central Intelligence Agency to enforce secrecy agreement to prohibit the publication of articles or books about the agency without the agency's prior consent. U.S.C.A.Const. Amend. 1; 28 U.S.C.A. § 1345.

**3. Constitutional Law ⇐90**

The First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce requirements with system of prior censorship. U.S.C.A.Const. Amend. 1.

**4. Constitutional Law ⇐90**

The First Amendment precludes secrecy agreements calling for prior censorship with respect to information in possession of government employee which is unclassified or officially disclosed. U.S.C.A.Const. Amend. 1.

**5. Constitutional Law ⇐90**

Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights. U.S.C.A.Const. Amend. 1.

**6. Constitutional Law ⇐90**

The unconditional phrasing of the First Amendment was not intended to protect every utterance and does not bring either libel or obscenity within the protection intended for speech and press. U.S.C.A.Const. Amend. 1.

**7. Constitutional Law ⇐90**

Threats and bribes are not protected by the First Amendment simply because they are written or spoken and extortion is a crime although it is verbal. U.S.C.A.Const. Amend. 1.

**8. United States ⇐33**

Gathering intelligence information and the other activities of the Central Intelligence Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the na-

tion as the Chief Executive and as Commander in Chief. U.S.C.A.Const. art. 2, § 2.

**9. Constitutional Law ⇐90**

Although citizens have the right to criticize the conduct of our foreign affairs, the government also has the right and duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest. U.S.C.A. Const. art. 2, § 2; Amend. 1.

**10. Constitutional Law ⇐90**

Although the First Amendment protects criticism of the government, nothing in the Constitution requires the government to divulge information. U.S.C.A.Const. Amend. 1.

**11. United States ⇐36**

Secrecy agreements with employees provided reasonable means for Central Intelligence Agency to protect intelligence sources and methods. 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

**12. United States ⇐41**

The government's need for secrecy in the area of intelligence sources and methods justified system of prior restraint against disclosures by employees and former employees of Central Intelligence Agency concerning classified information obtained during the course of employment. 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

**13. Constitutional Law ⇐90**

Employee, by accepting employment with Central Intelligence Agency and by signing a secrecy agreement, did not surrender his right of free speech. U.S.C.A.Const. Amend. 1.

**14. United States ⇐126**

Secrecy oath signed by Central Intelligence Agency employee at the time he left the employment would not be enforced to the extent that it purported to prevent disclosure of unclassified information. U.S.C.A.Const. Amend. 1; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

**15. United States ⇐66**

Oath of secrecy which Central Intelligence Agency employee signed at the termination of his employment was unenforceable where there was no consideration for the oath. 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

**16. United States ⇐41**

Former employee of Central Intelligence Agency retained right to speak and write about the agency and its operation and to criticize it as any other citizen might, but he was not entitled to disclose classified information obtained by him during the course of his employment which was not already in the public domain.

**17. Injunction ⇐205**

Under injunction which required former employee of Central Intelligence Agency to submit manuscript to the Agency to examine for classified information, the maximum period in which the agency must respond after former employee submitted manuscript for approval should not exceed 30 days. U.S.C.A.Const. Amend. 1; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

**18. United States ⇐40**

Former employee of Central Intelligence Agency would be entitled to judicial review of any action by the agency in disapproving publication of material submitted by former employee in advance of publication. U.S.C.A.Const. Amend. 1; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

**19. Constitutional Law ⇐72**

The operations of the Central Intelligence Agency, generally, are an executive function beyond control of the judicial power. U.S.C.A.Const. art. 2, § 2.

20. Constitutional Law ⇐72

If, in the conduct of Central Intelligence Agency operations, the need for secrecy requires system of classification of documents and information, the process of classification is part of the executive function beyond scope of judicial review. U.S.C.A.Const. art. 2, § 2; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

21. Constitutional Law ⇐90

If information, though classified, has been publicly disclosed, former employee of Central Intelligence Agency would have as much right as anyone else to republish it. U.S.C.A.Const. Amend. 1; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

22. United States ⇐40

Issue upon judicial review of agency disapproval of materials submitted to it by former employee for approval prior to publication is limited to whether the information was classified and, if so, whether, by prior disclosure, it had come into the public domain. U.S.C.A.Const. Amend. 1; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

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Melvin L. Wulf, New York City (Sanford Jay Rosen, John Shattuck, New York City, American Civil Liberties Union Foundation, and Philip J. Hirschkop, Alexandria, Va., on brief), for appellant.

Irwin Goldbloom, Atty., Dept. of Justice, (Harlington Wood, Jr., Asst. Atty. Gen., Walter H. Fleischer, and Daniel J. McAuliffe, Attys., Dept. of Justice, on brief), for appellee.

(Irwin Karp and Osmond K. Fraenkel, New York City, on brief), for The Authors League of America, Inc., amicus curiae.

(Edward C. Wallace, Marshall C. Berger, Heather Grant Florence, and Weil, Gotshal & Manges, New York City, on brief), for Association of American Publishers, Inc., amicus curiae.

Before HAYNSWORTH, Chief Judge, and WINTER and CRAVEN, Circuit Judges.

HAYNSWORTH, Chief Judge:

The question for decision is the enforceability of a secrecy agreement exacted by the government, in its capacity as employer, from an employee of the Central Intelligence Agency. Marchetti contends that his First Amendment rights foreclose any prior restraint upon him in carrying out his purpose to write and publish what he pleases about the Agency and its operations. Relying on a secrecy agreement signed by Marchetti when he became an employee of the Agency and on a secrecy oath signed by Marchetti when he resigned from the Agency, the District Court ordered Marchetti to submit to the Agency thirty days in advance of release to any person or corporation, any writing, fictional or non-fictional, relating to the Agency or to intelligence and ordering him not to release any writing relating to the Agency or to intelligence without prior authorization from the Director of Central Intelligence or from his designated representative. Marchetti was also ordered to return any writing or other property of the United States he had acquired while employed by the Agency.

We affirm the substance of the decision below, limiting the order, however to the language of the secrecy agreement Marchetti signed when he joined the Agency. We find the contract constitutional and otherwise reasonable and lawful.

This action was initiated on April 18, 1972, when the United States was granted an ex parte temporary restraining order against Marchetti by the District Court. A hearing was set for April 28, 1972, on the Government's motion for a preliminary injunction. On April 21, 1972, Marchetti moved to have the District Court dissolve the temporary restraining order. After that motion had been denied, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) was sought in this court. After oral argument, this

panel denied the request for an interlocutory appeal and for writs of mandamus and prohibition, but directed the United States not to interfere with prospective witnesses for Marchetti. Counsel for Marchetti subsequently sought a postponement until May 14, 1972 of the hearing on the preliminary injunction. In granting this postponement, the District Court ordered the trial on the merits consolidated with the hearing on the motion for the preliminary injunction. The trial, held on May 15, was followed on May 19, 1972 by the District Court's Memorandum Opinion and Order granting the injunction sought by the United States.

Marchetti was an employee of the Central Intelligence Agency from October 3, 1955 until he resigned effective September 5, 1969. The positions he held included the post of Executive Assistant to the Deputy Director. When he joined the Agency, he signed a secrecy agreement promising not to divulge in any way any classified information, intelligence or knowledge, except in the performance of his official duties, unless specifically authorized in writing by the Director or his authorized representative.[1] Marchetti also signed a secrecy oath when he resigned from the Agency in 1969.[2]

1. The relevant provisions of the agreement are:

"SECRECY AGREEMENT

1. I, Victor L. Marchetti, understand that by virtue of my duties in the Central Intelligence Agency, I may be or have been the recipient of information and intelligence which concerns the present and future security of the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards set by the United States Government. I have read and understand the provisions of the espionage laws, Act of June 25, 1948, as amended, concerning the disclosure of information relating to the National Defense and I am familiar with the penalties provided for violation thereof.

2. I acknowledge, that I do not now, nor shall I ever possess any right, interest, title or claim, in or to any of the information or intelligence or any method of collecting or handling it, which has come or shall come to my attention by virtue of my connection with the Central Intelligence Agency, but shall always recognize the property right of the United States of America, in and to such matters.

"3. I do solemnly swear that I will never divulge, publish or reveal either by word, conduct, or by any other means, any classified information, intelligence or knowledge except in the performance of my official duties and in accordance with the laws of the United States, unless specifically authorized in writing, in each case, by the Director of Central Intelligence or his authorized representatives. * * *"

2. The relevant provisions of the oath are:

"SECRECY OATH

I, _____, am about to terminate my association with the Central Intelligence Agency. I realize that, by virtue of my duties with that Agency, I have been the recipient of information and intelligence which concerns the present and future security of the United States of America. I am aware that the unauthorized disclosure of such information is prohibited by the Espionage Laws (18 USC secs. 793 and 794), and by the National Security Act of 1947 which specifically requires the protection of intelligence sources and methods from unauthorized disclosure. Accordingly, I SOLEMNLY SWEAR, WITHOUT MENTAL RESERVATION OR PURPOSE OF EVASION, AND IN THE ABSENCE OF DURESS, AS FOLLOWS:

1. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise, any information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods and operations, and specifically Central Intelligence Agency operations, sources, methods, personnel, fiscal data, or security measures to anyone, including but not limited to, any future governmental or private employer, private citizen, or other Government employee or official without the express written consent of the Director of Central Intelligence or his authorized representative.

* * * * *

3. I do not have any documents or materials in my possession, classified or unclassified, which are the property of, or in custodial responsibility of the

After his resignation, Marchetti published a novel, entitled *The Rope Dancer* concerning an agency called the "National Intelligence Agency." Marchetti has also published an article in the April 3, 1972 issue of the magazine, The Nation. Entitled "CIA: The President's Loyal Tool," the article criticized some policies and practices of the Agency. In March, 1972, Marchetti submitted to Esquire magazine and to six other publishers an article in which he reports some of his experiences as an agent. According to the United States, this article contains classified information concerning intelligence sources, methods and operations. Marchetti has appeared on television and radio shows and has given interviews to the press. He has submitted to a publishing house an outline of a book he proposes to write about his intelligence experiences.

I

*Jurisdiction*

[1, 2] Jurisdiction arises from the presence of the United States as a party. 28 U.S.C. § 1345. "The government can sue even if there is no statutory jurisdiction. In such cases, however, it must have some interest to be vindicated sufficient to give it standing." C. A. Wright, Federal Courts 68 (2d ed. 1970), ch. 3, § 22. Standing arises from the government's interest in protecting the national security.[3]

II

*The Freedom of Speech and of the Press are not Absolute*

Marchetti claims that the present injunction is barred by the Supreme Court decision in the Pentagon Papers case because the Government has failed to meet the very heavy burden against any system of prior restraints on expression. New York Times Co. v. United States, 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822.

[3, 4] We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified or officially disclosed, but we are here concerned with secret information touching upon the national defense and the conduct of foreign affairs, acquired by Marchetti while in a position of trust and confidence and contractually bound to respect it.

In order to protect freedom of speech and of the press, the First Amendment has been applied beyond its express terms, which were directed solely to Congress:

> "The first amendment provides that 'Congress shall make no law * * * abridging the freedom * * * of the press,' and there has been common disposition to apply the amendment to the Executive and the courts as well. [Citing: Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143 [-144, 71 S.Ct. 624, 95 L.Ed. 817] (Black, J., concurring), 199 [, 71 S.Ct. 624] (Reed, J., dissenting) (1951); Watkins v. United States, 354 U.S. 178, 188 [, 77 S.Ct. 1173, 1 L.Ed.2d 1273] (1957); West Virginia [State] Bd. of Educ. v. Barnette, 319 U.S.

Central Intelligence Agency, having come into my possession as a result of my duties with the Central Intelligence Agency, or otherwise, * * *."

3. Cf. In re Debs, 158 U.S. 564, 584, 15 S.Ct. 900, 905, 39 L.Ed. 1092, 1102:
"Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

624, 642 [, 63 S.Ct. 1178, 87 L.Ed. 1628] (1943). *See also* Beauharnais v. Illinois, 343 U.S. 250, 386 [, 72 S. Ct. 725, 96 L.Ed. 919] (Douglas, J., dissenting) (1952); Reid v. Covert, 354 U.S. 1, 17 [, 77 S.Ct. 1222, 1 L. Ed.2d 1148] (1957).] But the import of the first amendment is as uncertain and undefined in regard to the freedom of the Press as to the other rights and freedoms that it protects, and, indeed, the courts have had far fewer occasions to define the freedom of the Press, than, say, freedom of speech." Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U.Pa.L. Rev. 271, 277 (1971).

[5, 6] Nonetheless, "[f]ree speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights." Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (Frankfurter, J., dissenting).[4] In applying the First Amendment to actions taken by the judicial and executive branches, the Supreme Court has followed a flexible approach. As Mr. Justice Brennan wrote in Roth v. United States, 354 U.S. 476, 483, 77 S. Ct. 1304, 1308, 1 L.Ed.2d 1498, 1506:

> "[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. Beauharnais v. Ill., 343 U.S. 250, 266, 72 S.Ct. 725, 735, 96 L.Ed. 919. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."

[7] Threats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal. The Supreme Court has also upheld the Labor Board's attempt to protect employees from spoken coercion by employers. NLRB v. Gissel Packing Co., 395 U.S. 575, 616–619, 89 S.Ct. 1918, 23 L.Ed.2d 547. The "government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Near v. Minnesota, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357, 1367. Cf. Pennsylvania v. Nelson, 350 U.S. 497, 76 S. Ct. 477, 100 L.Ed. 640. This flexible approach toward the executive and judicial branch is warranted not only because they are omitted from the express language of the First Amendment, but also because they lack legislative capacity to establish a pervasive system of censorship. This case itself illustrates the point that the executive and judicial branches proceed on a case by case basis, the executive branch being dependent on the judiciary to restrict unwarranted disclosures.

An earlier case upholding a government request to enjoin publication involved the Valachi papers, written while Valachi was in prison. The United States brought an action to obtain a permanent injunction requiring Maas, the editor of Valachi's manuscript, to comply with a "Memorandum of Understanding" which required the approval

4. "Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined. By a doctrinaire overstatement of its scope and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society." Bridges v. California, 314 U.S. 252, 293, 62 S.Ct. 190, 268, 86 L.Ed. 192, 219 (Frankfurter, J., dissenting). *See also* Near v. Minnesota, 283 U.S. 697, 708, 51 S.Ct. 625, 628, 75 L.Ed. 1357, 1363, "Liberty of speech, and of the press, is * * * not an absolute right, and the state may punish its abuse."

of the manuscript by the Department of Justice prior to publication or dissemination. The parties entered this agreement because the Attorney General had promulgated, pursuant to 18 U.S.C. §§ 4001, 4042, a regulation that no manuscript prepared by a federal prisoner should be approved for publication "if it deals with the life history or the criminal career of the writer." Valachi and his attorney had signed the Memorandum, but Maas had not, signing instead another agreement to which the Department of Justice was not a party. The District Court granted the United States a preliminary injunction which was upheld by the Court of Appeals based on the broad discretion of the District Court in considering preliminary injunctions. Maas v. United States, 125 U.S. App.D.C. 251, 371 F.2d 348.

This Court recently granted the government declaratory relief against a newspaper publisher who had published a racially discriminatory advertisement for the rental of a room in a private house, in violation of the 1968 Civil Rights Act. The Court denied the defendant's claim that freedom of the press was being abridged, concluding that the act affected the press only in a commercial context and not in the dissemination of ideas. United States v. Hunter, 4 Cir., 459 F.2d 205, 211-213.

## III

*The Government has a Right to Secrecy*

[8, 9] Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces. Const., art. II, § 2. Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest.

The Supreme Court recognized the need for secrecy in government in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320, 57 S.Ct. 216, 221, 81 L.Ed. 255, 263 where it said that the President

> "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."

A similar view was expressed in Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 436, 92 L.Ed. 568, 576:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."

In another case the government was granted an injunction to enforce an agreement with a private contractor who claimed the right to divulge the details of a torpedo to other potential customers. In E. W. Bliss Co. v. United States, 248 U.S. 37, 46, 39 S.Ct. 42, 45, 63 L.Ed. 112, 118, the Supreme Court quoted with approval from the opinion of the Second Circuit in that case:

> "'The nature of the services rendered was such that secrecy might almost be implied. It is difficult to imagine a nation giving to one of its citizens contracts to manufacture implements necessary to the national defense and permitting that citizen to disclose the construction of such implement or sell it to another nation. The very nature of the service makes the construction urged by the defendant untenable.'"

[10] Although the First Amendment protects criticism of the government,

nothing in the Constitution requires the government to divulge information:

> "From our national beginnings, the Government of the United States has asserted the right to conceal and, therefore, in practical effect not to let the people know. Secrecy governed the deliberations in Philadelphia in 1787. Some need for secrecy was expressly recognized in the Constitution: in providing for publication of a journal of each House of Congress, it excepted 'such parts as may in their judgment require secrecy.' The occasional need for secrecy underlay some of the dispositions of the Constitution: the power to conduct foreign relations was given to the Executive rather than to Congress, and a part in making treaties to the less numerous Senate rather than to the House. Presidents from Washington to Nixon have asserted 'executive privilege' to withhold information from Congress. And Congresses and congressional committees have recognized the 'right,' the propriety, the need for some executive nondisclosure, even to them: since 1791 Congress, in requesting reports from Executive Departments, has asked the State Department to report only what in the President's judgment was 'not incompatible with the public interest.' Modern Congresses have recognized the Executive's classification system and provided for its enforcement, to some extent by criminal penalties. The Supreme Court, too, has repeatedly recognized the need for some secrecy in executive activities. For its own part, Congress has often claimed the need to conceal: the Senate in particular (especially in executive session), and committees and subcommittees of both Houses, have often maintained secrecy. The courts, too, often insist on the confidentiality of deliberations in the jury room or in judicial chambers. The most confidential proceeding in all of government is probably the conference of the Justices of the Supreme Court." Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U.Pa.L.Rev. 271, 273–74 (1971).[5]

## IV

### *Secrecy Agreements with Employees Provide a Reasonable Means for Government Agencies to Protect Internal Secrets*

[11] Congress has imposed on the Director of Central Intelligence the responsibility for protecting intelligence sources and methods. 50 U.S.C. § 403(d)(3). In attempting to comply with this duty, the Agency requires its employees as a condition of employment to sign a secrecy agreement, and such agreements are entirely appropriate to a program in implementation of the congressional direction of secrecy. Marchetti, of course, could have refused to sign, but then he would not have been employed, and he would not have been given access to the classified information he may now want to broadcast.

Confidentiality inheres in the situation and the relationship of the parties. Since information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably imply a secrecy agreement had there been no formally expressed agreement, but it certainly lends a high degree of reasonableness to the contract in its protection of classified information from unauthorized disclosure.

[12] Moreover, the Government's need for secrecy in this area lends justi-

5. *Cf.* 5 U.S.C. § 552(b)(1) exempting from mandatory disclosure under the Freedom of Information Act "matters * * * specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy * * *." Executive Order 10501 has established a system of classifying documents as "Top Secret", "Secret" or "Classified" depending on the effect of disclosure on the national defense and the conduct of the nation's affairs.

fication to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment. One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted. Some prior restraints in some circumstances are approvable of course. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649.

## V

### *Marchetti's Rights*

[13–15] As we have said, however, Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights. We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights.[6]

[16] Thus Marchetti retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.

[17] Because we are dealing with a prior restraint upon speech, we think that the CIA must act promptly to approve or disapprove any material which may be submitted to it by Marchetti. Undue delay would impair the reasonableness of the restraint, and that reasonableness is to be maintained if the restraint is to be enforced. We should think that, in all events, the maximum period for responding after the submission of material for approval should not exceed thirty days.

[18] Furthermore, since First Amendment rights are involved, we think Marchetti would be entitled to judicial review of any action by the CIA disapproving publication of the material. Some such review would seem essential to the enforcement of the prior restraint imposed upon Marchetti and other former employees. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649. Because of the sensitivity of the area and confidentiality of the relationship in which the information was obtained, however, we find no reason to impose the burden of obtaining judicial review upon the CIA. It ought to be on Marchetti.

Indeed, in most instances, there ought to be no practical reason for judicial review since, because of its limited nature, there would be only narrow areas for possible disagreement.

[19, 20] The Constitution in Article II § 2 confers broad powers upon the President in the conduct of relations with foreign states and in the conduct of the national defense. The CIA is one of the executive agencies whose activities are closely related to the conduct of foreign affairs and to the national defense. Its operations, generally, are an executive function beyond the control of the judicial power. If in the conduct of its operations the need for secrecy requires a system of classification of documents and information, the process of classification is part of the executive function beyond the scope of judicial review. See Oetjen v. Central Leather Co., 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726; United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134; Zemel

6. There was no apparent consideration for the secrecy oath, so that it would be, generally, unenforceable on that ground. The oath has the support of the moral force underlying solemn oaths, but it added nothing to the Government's arsenal of legal rights in the context of this proceeding.

v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L. Ed.2d 179.

There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

[21] Information, though classified, may have been publicly disclosed. If it has been, Marchetti should have as much right as anyone else to republish it. Rumor and speculation are not the equivalent of prior disclosure, however, and the presence of that kind of surmise should be no reason for avoidance of restraints upon confirmation from one in a position to know officially.

[22] The issues upon judicial review would seem to be simply whether or not the information was classified and, if so, whether or not, by prior disclosure, it had come into the public domain.

## VI

### *Conclusion*

For the stated reasons, our conclusion is that the secrecy agreement executed by Marchetti at the commencement of his employment was not in derogation of Marchetti's constitutional rights. Its provision for submission of material to the CIA for approval prior to publication is enforceable, provided the CIA acts promptly upon such submissions and withholds approval of publication only of information which is classified and which has not been placed in the public domain by prior disclosure.

Generally, therefore, we approve the injunctive order issued by the District Court. The case will be remanded, however, for the purpose of revising the order to limit its reach to classified information and for the conduct of such further proceedings as may be necessary if Marchetti contends that the CIA wrongfully withheld approval of the publication of any information under the standards we have laid down.

Affirmed and remanded.

CRAVEN, Circuit Judge (concurring):

I agree that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Oetjen v. Central Leather Co., 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 726, 732 (1917).

I concur in the opinion of the court except for the statement that the classification of documents and information by the executive is not subject to judicial review. Because the national security may be involved and because of the expertise of the executive, I would resolve any doubt about the reasonableness of a classification in favor of the government. If the burden were put upon one who assails the classification, and surely it ought to be, much of the difficulty envisioned in the court's opinion would presumably disappear. Indeed, I would not object to a presumption of reasonableness, and a requirement that the assailant demonstrate by clear and convincing evidence that a classification is arbitrary and capricious before it may be invalidated.

But however difficult the adjudication of the reasonableness of a secrecy classification, I cannot subscribe to a flat rule that it may never be attempted. The "right to know" is in a period of gestation. I think that the people will increasingly insist upon knowing what their government is doing and that, because this knowledge is vital to govern-

ment by the people, the "right to know" will grow. I am not yet ready to foreclose any inquiry into whether or not secrecy classifications are reasonable. To protect those that are does not require that we also protect the frivolous and the absurd.

Other than my doubt about the insulation of a classification system from judicial review, I fully concur in the opinion of the court.


**Harold HARRIS, Plaintiff-Appellee,**
**v.**
**John TURNER, Warden of the Utah State Prison, Defendant-Appellant.**
**No. 72-1300.**

United States Court of Appeals, Tenth Circuit.
Sept. 21, 1972.

Petition for federal habeas corpus by state prisoner. The United States District Court for the District of Utah, Central Division, Willis W. Ritter, Chief Judge, granted petition, and warden of state prison appealed. The Court of Appeals, Orie L. Phillips, Circuit Judge, held that fact that state prisoner did not have counsel present at time lineup was conducted by state authorities was not violative of any constitutional right for which he could obtain relief by way of federal habeas corpus, where, at time of lineup, prisoner had not been charged by information, complaint, or any other formal accusation, and was required only to exhibit his physical characteristics, and was not required to disclose any knowledge that he might have or provide state with evidence of a testimonial or communicative character.

Remanded with instructions.

**1. Criminal Law ⇐339**

Where evidence clearly established that clothes state prisoner wore in lineup, held very shortly after he was arrested, were same clothes he was wearing when he was with person who testified for state as to events earlier in evening, and that he wore such clothes continuously thereafter until he retired at a late hour at a motel, which, if true, meant that prisoner was wearing such clothes when alleged offense was committed at motel, and victim gave testimony in nature of comparisons that jacket and shirt worn by prisoner at lineup was same as jacket and shirt she saw on man who allegedly committed offense, it was not error to require prisoner to wear same clothes in lineup that he was wearing when alleged offense was committed.

**2. Habeas Corpus ⇐45.2(4)**

Fact that state prisoner did not have counsel present at time lineup was conducted by state authorities was not violative of any constitutional right for which he could obtain relief by way of federal habeas corpus, where, at time of lineup, prisoner had not been charged by information, complaint, or any other formal accusation, and was required only to exhibit his physical characteristics, and was not required to disclose any knowledge that he might have or provide state with evidence of a testimonial or communicative character. U.S.C.A. Const. Amends. 6, 14.

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H. Don Sharp, Ogden, Utah, for plaintiff-appellee.

David R. Irvine, Asst. Atty. Gen., State of Utah (Vernon B. Romney, Atty. Gen., and David S. Young, Chief Asst. Atty. Gen., State of Utah, on the brief), for defendant-appellant.

Before PHILLIPS, SETH and McWILLIAMS, Circuit Judges.

ORIE L. PHILLIPS, Circuit Judge.

Harris was charged with and tried and found guilty of the offenses of rape, robbery, and second degree kidnapping

No. 72–5515. HARMON *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 1229.

No. 72–5517. ROONEY ET UX. *v.* FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–5518. KASEY ET UX. *v.* MOLYBDENUM CORPORATION OF AMERICA. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 1284.

No. 72–482. MARCHETTI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART would grant certiorari. Reported below: 466 F. 2d 1309.

No. 72–501. TERMINAL FREIGHT COOPERATIVE ASSN. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 447 F. 2d 1099.

No. 72–515. SANTORO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 1202.

No. 72–541. VON SLEICHTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 153 U. S. App. D. C. 169, 472 F. 2d 1244.

No. 72–559. WESTERN & SOUTHERN LIFE INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 8.

No. 72–592. CITIES SERVICE OIL CO., FORMERLY COLUMBIAN FUEL CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 1134.

IAO 0115 87

21 September 1987

JUDGE:

RE: Your Speech for the
Illinois State Bar and
Judges Associations
13 November 1987

You have accepted an invitation to address the joint convention of the Illinois State Bar Association and the Illinois Judges Association on 13 November (see opposite). The audience of 500-1000 will be mostly attorneys and judges. I propose that your topic be essentially the same as that of the Aspen speech ("Central Intelligence: Its Role in a Free Society"). Given the nature of the audience, the only change I would suggest is that a discussion of the Agency's legal activities be substituted for the section covering relations with the academic community. If you agree, I will proceed with the modification of the text.

STAT

Bill Baker

STAT
DCI/PAO/ 21Sep87

Distribution:
Orig - Addressee
1 - DDCI
STAT 1 - ER
1 - D/ExStaff -
1 - PAO 87-0115
STAT 1 -
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1 - TP (Subject)
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P-309-1R

# EXECUTIVE SECRETARIAT
## ROUTING SLIP

| TO: | | ACTION | INFO | DATE | INITIAL |
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| 1 | DCI | | X | | |
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Date

Remarks

STAT

for Executive Secretary
20 Jul '87
Date

3637 (10-81)

# Illinois Judges Association

5600 Old Orchard Road
Skokie, Illinois 60077
312/470-7200

Philip B. Benefiel
Convention Chairman
P. O. Box 556
Lawrenceville, Illinois 62439
(618)943-5000

July 15, 1987



The Honorable William H. Webster
Director
Central Intelligence Agency
Washington, D.C. 20505

Dear Judge Webster:

We are delighted to have you accept our invitation to address the joint meeting and convention of the Illinois State Bar Association and Illinois Judges Association this year.

Your staff may contact me at any time at 618/943-5000 concerning any information and arrangements you desire or, when more convenient, Mrs. Maureen McClelland, IJA Executive Secretary, may be contacted at 312/470-7200 (in Skokie). Mr. Robert E. Craghead, ISBA Director of Membership Services (800/252-8908), will be in charge of planning for the State Bar Association. The person in charge of security for the Holiday Inn Mart Plaza Hotel is Maryann Galvan (312/836-5000).

We are highly honored and pleased that you will take time from your great responsibilities to share this experience with Illinois' lawyers and judges. We shall give every effort to assure that this will be a most pleasant and meaningful occasion for you as it will be for all of us.

Sincerely yours,

PBB-MEK

Donald C. Schiller, President
Illinois State Bar Association

Philip B. Benefiel
Convention Chairman, IJA

Justice Tobias Barry, President
Illinois Judges Association

David J. Shields, Vice Chairman

Norman N. Eiger, Chairman Emeritus



P-309-1R

# ROUTING AND RECORD SHEET

SUBJECT: (Optional) Invitation to Speak at the Illinois State Bar Assn. and the Illinois Judges Assn., Chicago, Illinois, 13 November 1987

STAT

FROM: William M. Baker
Director, Public Affairs

EXTENSION

NO. PAO 87-0032

DATE 30 June 1987

| TO: (Officer designation, room number, and building) | DATE RECEIVED | DATE FORWARDED | OFFICER'S INITIALS | COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.) |
|---|---|---|---|---|
| 1. ER | | 02 JUL 1987 | | |
| 2. | | | | |
| 3. D/ExStaff | | | | |
| 4. | | | | |
| 5. ExDir | | 6 JUL 1987 | | |
| 6. | | | | |
| 7. DDCI | 6 July | | ✓ | |
| 8. | | | | |
| 9. DCI | 7 July | | | |
| 10. | | | | |
| 11. D/PAO | | | | |
| 12. | | | | |
| 13. PAO MED - (Ames) | | | | |
| 14. | | | | |
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P-309-1R

EL 2-5[illegible] 2-17

30 June 1987

JUDGE:

RE: Invitation to Speak at the Illinois State Bar Association
and the Illinois Judges Association
Chicago, Illinois
13 November 1987

The Convention Chairmen of the Illinois State Bar Association (ISBA) and the Illinois Judges Association (IJA) Conference Judge Philip Benefiel, Judge David Shields, Judge Norman Eiger, Richard Thies, Esq. and Justice Tobias Barry have invited you to be the keynote speaker at the banquet luncheon Friday, November 13th and, if your schedule permits, to attend a reception in your honor on Thursday evening, November 12th from 5:00 to 6:30 p.m. The event will be held at the Holiday Inn Mart Plaza Hotel in Chicago. You are asked to speak on whatever subject that you believe is appropriate as Director of Central Intelligence. In December 1981 you spoke to this group on "Sensitive Investigative Techniques." The suggested format is 30 minutes of remarks and if you wish, a Question and Answer period can be included in this time frame. You could expect an audience of approximately 500 - 1000 Illinois State lawyers and judges. Both the print and electronic media usually cover the event.

Members of the ISBA and the IJA wish to recognize your significant contribution to the quality of the Illinois Court system. Judge Benefiel said that the Conference members continue to be interested in the Greylord operation and the uncovering of corruption in the Cook County Court System.

The ISBA is a voluntary professional association of Illinois lawyers. With almost 30,000 active members, it is one of the largest state bar associations in the country. The elected officers and Board of Governors run the Association. Membership is open to all members of the Illinois bar and out-of-state lawyers with professional ties to the state. The ISBA sponsors numerous educational and professional programs, and holds two general meetings a year. The IJA is a also voluntary professional association with a membership of approximately 800 Illinois State Judges. The ISBA and the IJA probably for the first and only time are combining their meetings in special recognition of the Bicentennial of the Constitution. Previous speakers have been Archibald Cox, Louis Nizer, Fred Friendly of CBS, Richard Threlkeld of ABC News, F. Lee Bailey, President of ABA Eugene C. Thomas, Watergate prosecutor Jame F. Neal, and former Supreme Court Justice Arthur Goldberg.

RE: Invitation to Speak at the Illinois State Bar Association and the Illinois Judges Association, Chicago, Illinois, 13 November 1987

Certain select law enforcement and legal conventions will remain appropriate to be addressed by you in your role as Director of Central Intelligence. I see a need to cut back on some of these invitations and add speeches from the area of world affair councils, academic institutions, and meetings that include industrial and financial leaders. With the above statement in mind, I would normally not recommend approval for this request. However, considering that this is a Bicentennial celebration, the interest in the Greylord conviction and its impact on the judical system in Illinois, and your favorable reception in 1981, I would recommend that you accept. If you agree, I have attached a letter of acceptance to Judge Benefiel for your signature.

STAT

[redacted]

Bill Baker

PAO 0032 87

Central Intelligence Agency

Washington, D.C. 20505

7 JUL 1987

The Honorable Philip B. Benefiel
Convention Chairman
P.O. Box 556
Lawrenceville, Illinois 62439

Dear Judge Benefiel:

Thank you for your kind invitation to address the Illinois Judges Association and the Illinois State Bar Association banquet luncheon on Friday, November 13th in Chicago. I enjoyed speaking to the ISBA in 1981 and will be honored to do so again at this joint session of your two organizations. As for the reception on the 12th, I will have to see what my schedule is closer to the time of the event.

Members of my staff will be in touch with you to work out the details of the occasion.

Sincerely yours,

/s/ William H. Webster

William H. Webster
Director of Central Intelligence

cc: The Honorable Norman N. Eiger
The Honorable David J. Shields
STAT The Honorable Richard L. Thies
The Honorable Tobias Barry

DCI/PAO/WMB/ [redacted]

Distribution:
Orig - Addressee
1 - Eiger
1 - Shields
1 - Thies
1 - Barry
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STAT 1 - [redacted]
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1 - PAO [redacted] STAT
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ER 2459X 87

# Illinois Judges Association

5600 Old Orchard Road
Skokie, Illinois 60077
312/470-7200

Philip B. Benefiel
Convention Chairman
P. O. Box 556
Lawrenceville, Illinois 62439
(618)943-5000

May 27, 1987



The Honorable William H. Webster
Director
Central Intelligence Agency
Washington, D.C. 20505

Dear Judge Webster:

The Illinois State Bar Association (ISBA) and the Illinois Judges Association (IJA) are pleased to invite you to be the principal speaker at the joint Convention of the two Associations on Friday, November 13, 1987. The Convention will be held at the Holiday Inn Mart Plaza Hotel, 350 North Orleans Street, Chicago (by the Merchandise Mart), and the banquet luncheon (the "main event" as when you addressed the Illinois Judges Association in 1981) will begin at 12:00 noon.

It is my pleasure as IJA Convention Chairman to extend this invitation on behalf of both the ISBA and IJA. A majority of Illinois' more than 50,000 lawyers and nearly all of Illinois' 800 judges, including the Supreme Court, are members of the respective organizations.

Both associations of lawyers and judges are vitally concerned with the integrity, independence and quality of the judiciary. Their members are profoundly indebted to you, the FBI and Justice Department for the successful investigation and prosecution of corruption in the Illinois court system. The exposure and removal of this malignancy on our system deserves the gratitude of every honest lawyer and judge.

With our congratulations and best wishes on your new responsibilities at CIA, we also wish to recognize and express our appreciation for your very significant contribution to the quality of our system of justice. The Presidents of ISBA and IJA join in hoping you can honor us in highlighting a memorable and historic occasion for the Illinois bench and bar. If your schedule permits, the associations would also like for you to attend a reception in your honor on Thursday evening (Nov. 12), from 5:00 to 6:30.

PBB-MEK

Sincerely yours,

Philip B. Benefiel
Convention Chairman, IJA

Richard L. Thies, President
Illinois State Bar Association

Justice Tobias Barry, President
Illinois Judges Association

David J. Shields, Vice Chairman

Norman N. Eiger, Chairman Emeritus

ER 2459X/1 87

# Illinois Judges Association

5600 Old Orchard Road
Skokie, Illinois 60077
312/470-7200

Philip B. Benefiel
Convention Chairman
P. O. Box 556
Lawrenceville, Illinois 62439
(618)943-5000

June 25, 1987



The Honorable William H. Webster
Director
Central Intelligence Agency
Washington, D.C. 20505

Dear Judge Webster:

Supplementing the information I gave Ms. Dean of your office yesterday, I failed to mention among our former speakers at the Illinois Judges Association Annual Conventions former U. N. Ambassador Arthur Goldberg and Attorney James F. Neal, and at our only other joint Convention with the ISBA, last year, A.B.A. President Eugene C. Thomas.

It is generally agreed between the two Associations (ISBA and IJA) that our combined Conventions will not be repeated except this year, after which we will revert to separate Conventions and meetings for each organization.

One purpose of meeting jointly this year is in recognition of the bi-centennial of the U.S. Constitution, so if we succeed in having you as our principal speaker, you may wish to make some reference to that in your remarks. As for your topic, we would like to leave that entirely to your judgment, but of course the lawyers and judges of Illinois will be very much interested in your experience and observations regarding the Greylord operation, as well as anything you might wish to tell us about the CIA.

Our format will be similar to the 1981 IJA Convention which you addressed. Nearly all in attendance will be lawyers, except for some spouses. We will invite the federal judiciary of our area, some public officials, Mayor, Governor, Attorney General, law school deans and panelists. We will expect TV and newspaper coverage, and considerable media attention if you are our speaker.

Both Associations are very hopeful you can honor us as our speaker.

Sincerely yours,

Philip B. Benefiel
Convention Chairman, IJA

PBB-MEK

Richard L. Thies, President
Illinois State Bar Association

Justice Tobias Barry, President
Illinois Judges Association

David J. Shields, Vice Chairman

Norman N. Eiger, Chairman Emeritus