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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF OREGON**

**DIANE ROARK**

Case No.: 6:12-CV-01354-MC

Plaintiff,

v.

**CROSS-MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT**

**UNITED STATES OF AMERICA**

**ORAL ARGUMENT REQUESTED**

Defendant.

Plaintiff Diane Roark, pro se, submits the following cross-motion for partial summary judgment. This motion includes a memorandum in support and the attachments thereto, plus the separately filed affidavit of Martin Peck. Pursuant to Local Rule 7-1, the parties made a good faith effort to resolve this dispute and have been unable to do so.

DATED this 26<sup>th</sup> day of November 2014.

Respectfully submitted,



Diane Roark, pro se

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## I. INTRODUCTION

Plaintiff respectfully requests that after examining Plaintiff and Defendant arguments in this Rule 41(g) return of property case, the Court rule as follows:

- Reaffirm in part the Maryland District Court decision in the related Rule 41(g) case of *J.K. Wiebe et al. v. National Security Agency et al.* CA No. RDB-11-3245, 2012 WL 1670046 (D.Md. Sept. 14, 2012), by confirming that the National Security Agency (NSA) may not refuse to return all of a person's personal property or computer and its contents on the grounds that one allegedly classified or unclassified but "protected" document has been found among those possessions.
- Overturn NSA's interpretation of the National Security Agency Act of 1959 (NSA Act) by forbidding invocation of this Act a) to withhold unclassified material for reasons other than securing sensitive information about current employees according to NSA's evolving standards, or b) to block appeal, at the Interagency Security and Classification Appeals Panel or other appropriate venue, of NSA's use of the FOR OFFICIAL USE ONLY designation to withhold unclassified information from the writer or the public.
- Mandate that for documents that NSA seeks to withhold or redact, there should be a more fulsome description with title, date and brief content notation, as in the HPSCI submission.
- Require that the FBI and NSA account for all of Plaintiff's seized material, including but not limited to distinctive papers cited in the warrant, following the FBI's chain of custody as needed.

- Require that the FBI and any other agency that retains some or all of Plaintiff's personal property after resolution of this case confirm to the court that they have destroyed it. ( Only NSA has pledged to do so.)
- Confirm the courts' right to examine government claims that material is properly classified or protected and does not violate restrictions on classification. This can be facilitated by NSA use of a free downloadable system based on Natural Language Processing that can rapidly compare unclassified writings with the allegedly classified or protected material, to determine whether the information is publicly available. It can also automatically redact the last names of current NSA employees (protected material) or other text that is deemed classified. Thus long waits that frustrated the Maryland District Court in a companion case may be reduced. Classification and declassification processes that are shown in this case to be badly broken may be reviewed more objectively and with minimal intrusiveness.
- Require that any materials that the Court agrees should be classified or protected must be minimally redacted and the remainder of the document returned to the owner.
- Find that classified material or unclassified material marked "For Official Use Only" and similar designations will be considered neither classified nor protected if classification of that material is prohibited under section 1.7(a) of Executive Order 13526.
- Rule that withholding of unclassified "protected" material from citizens by any government body may be appealed to the Interagency Security Classification Appeals Panel, just as withholding of classified material may be appealed, notwithstanding whether the NSA Act or pre-publication agreements are invoked to block an appeal.

The Court may find that most or all of the above issues can be properly decided within the context of summary judgment requested by the Defendant. In this case, Plaintiff moves for cross-summary judgment in her favor.

There are additional and highly significant Fourth Amendment issues that require further exploration at trial because they potentially involve multiple illegal searches of a person never indicted. The facts are not yet fully established and thus require the discovery process. As Rule 41(g) establishes, notwithstanding guilt or innocence, material seized pursuant to illegal search should be returned. Plaintiff does not seek damages but rather, in addition to her property, factual revelations opening these search policies to public debate as required in a constitutional republic governed by rule of law.

## **II. HISTORY OF THE PROPERTY SEIZURE CASE**

A more complete summary of Plaintiff's case and her interactions with the National Security Agency is at Attachment 1. Key points to note here are:

- For the last 5 of her 17 years as professional staff at the House Permanent Select Committee on Intelligence (HPSCI), Plaintiff oversaw for majority House Republicans NSA's budget, as well as the legality and effectiveness of its operations and NSA's expensive and failed efforts to modernize for the digital age.
- Plaintiff's relations with NSA were contentious. They became more so in February 2002, when she discovered its massive collection against US citizens - the President's Surveillance Program (PSP) - and attempted to modify or stop it through contacts with cleared persons in all three branches of government. After retirement, she also joined with four associates to request an audit of NSA modernization programs, a fact that improperly was revealed to the FBI when the 2005-06 leak of part of the



domestic surveillance program was being investigated.

- Because of her vocal opposition to domestic surveillance and almost certainly because of NSA animus against her, Plaintiff and ultimately four of her associates became primary suspects in a leak investigation spanning over 5 years that sought the source(s) of a series of publications by *New York Times* reporters that revealed part of NSA's post-9/11 domestic surveillance program.
- Despite the prolonged investigation, the attempt to secure plea bargains from Plaintiff and associate Thomas Drake, and indictment of Drake with charges totaling 35 years in prison, the government had no evidence against any of them. NSA improperly classified a document included in this case as a pretext to secure a warrant.
- NSA also classified or re-classified documents found in Thomas Drake's house to support charges against him for a potential 35 years in prison.
- These improper classifications, a knowingly false DoJ allegation of perjury against Plaintiff, and the prolonged investigation and associated high legal fees were designed to extract plea bargains from Plaintiff and Drake, but failed. Pre-trial hearings found that none of the five documents in Drake's case were classified, and the government dropped all ten charges in exchange for a misdemeanor plea.
- At Drake's sentencing, Judge Bennett castigated the government for its handling of the case. He also extracted from the prosecutor an admission that there had been no evidence of motivation or fact to indict the other four, including under lenient evidentiary rules for conspiracy. After Plaintiff sued, the government finally said in January 2013 that it would not further pursue her case.
- The government refused to return seized property, citing the NSA Act of 1959, so the

five launched *pro se* Rule 41(g) lawsuits in Maryland (*J.K. Wiebe et al. v. NSA et al.*) and here.

### III. LEGAL ARGUMENT

In a 41(g) case, the burden of proof is on the government to justify retaining private property. It must prove that proposed redactions are properly classified rather than public knowledge, and that redactions do not violate restrictions in E.O. 13526, Section 1.7(a) that prevent classification :

Sec. 1.7. Classification Prohibitions and Limitations.

(a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:

- (1) conceal violations of law, inefficiency, or administrative error;
- (2) prevent embarrassment to a person, organization, or agency;
- (3) restrain competition; or
- (4) prevent or delay the release of information that does not require protection in the interest of the national security.

The past case histories of Plaintiff, her Maryland associates and the analysis of individual classifications below indicate that there is serious dysfunction in NSA's classification and declassification performance. Decisions by different authorities vary wildly. There appears to be no system to track or retrieve specific information that NSA itself has declassified, even in a related case.

This has been true since 1982, when James Bamford refuted NSA claims that his first book on the Agency, *The Puzzle Palace*, was rife with classified material. It was true during 2011 pre-trial hearings, in which Bamford helped prove that NSA had already officially released all of the allegedly classified information used to indict Thomas Drake and threaten him with 35 years in prison.

NSA cases like this one involve relatively current information, e.g. for the courts

or for notoriously backlogged Freedom of Information Act requests. These are distinguished from the growing millions of NSA records that are supposed to be declassified after a specified time, normally 25 years, but are reviewed to ensure none of the information remains classified. As of 2007,<sup>1</sup> NSA had declassified but not publicly released 38 million pages, using either a “pass/fail” system that resulted in fewer releases or a preferable line redaction system. There had also been some mistaken releases. As of 2007 there were limited resources available for this work; declassification reviews were at the bottom of the list for resources despite multiplication of the Agency’s budget after 9/11.

It is evident that NSA requires a better long-term means of classification review that is inexpensive, accurate and minimizes manpower needs, as do other agencies. President Obama’s E.O. 13526 in 2009 established a National Declassification Center (Section 3.7) to streamline declassification and improve quality and standardization. It mandated “the development of effective, transparent and standard declassification work processes” and of “solutions to declassification challenges posed by electronic records, special media, and emerging technologies.”

Mr. Martin Peck’s free classification review system could be a step in the right direction, and Plaintiff is willing to serve as a test case.<sup>2</sup> The system is composed of advanced software, a corpus of written public information in the field being reviewed,

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<sup>1</sup> Public Interest Declassification Board, Meeting Minutes Friday, December 15, 2006, NSA presentation by Mr. Louis F. Giles, Associate Director of Policy and Records at NSA.  
<http://www.archives.gov/declassification/pidb/meetings/nsa-12-15-07>  
<http://www.archives.gov/declassification/pidb/meetings/nsa-12-15-07.ppt> - 86.5KB -  
*Archives.gov Website*

<sup>2</sup> Mr. Peck is submitting an Affidavit as an expert witness in this case.

and annotations. An open system that can be freely downloaded by users such as NSA, its code can be examined and the public corpus updated by multiple contributors. It can also automatically redact classified phrases or protected last names throughout the material being examined. If this test case appears successful, NSA could routinely load its declassified documents into the corpora used for internal classification and declassification purposes.

It is apparent that in this case the Court also would benefit from access to independent data, improved timeliness and greater transparency. The Maryland court experienced long delays because NSA will not assign more than one or two Computer Forensic Examiners to these and other investigations. According to the declaration of Charles E., the current methods require an average of one week of work by him (not including subsequent review work by the Original Classification Authority) per digital medium.

Prior government statements in the Maryland case, including explanation of the recent delays in completing review of Thomas Drake's 11 hard drives, indicate that NSA maintains a large backlog of current case forensics work, not just of documents facing automatic declassification. It has taken over two years since the court decision to review and return the four Maryland petitioners' electronic papers, and even this required several court interventions. NSA still must review for classification more than 10,000 of Plaintiff's emails, most of which involve discussion with her four colleagues about NSA.

Besides lightening NSA's burden, using an electronic comparison and filtering system could provide an agreed, unobtrusive means for the Court to obtain objective information, facilitating evaluation and discussion of NSA's findings *in camera*. In a

FOIA case wherein the Second Circuit felt the NSA record search and evidence for withholding documents under the NSA Act was insufficient, it overturned summary judgment in NSA's favor and remanded the case, instructing the District Court to reveal as much as possible on the public record and to entertain *in camera* proceedings determining whether NSA met its burden of proof.<sup>3</sup>

**A. The government continues to retain the great majority of Plaintiff's personal property.** The government's contrary assertions are misleading. At page 8 of the government's memorandum and elsewhere, it is said that "the government has returned all property that does not contain classified or protected information." In reality, the government has returned none of the requested electronic documents from her personal account on her computer hard drive. These include her Word documents that were reviewed, any photos, and over 10,000 emails that have undergone a key word searches but may not yet have been reviewed.<sup>4</sup>

Some paper documents also are known to be missing. The search warrant listed "classified documents missing headers and footers." (Attachment 8) Plaintiff found soon after the FBI arrived that these unclassified emails and many file folders immediately had

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<sup>3</sup> *The Founding Church of Scientology of Washington, D.C. Inc., Appellant, v. National Security Agency* 35 al.610 F.2d 824, (Second Cir.)1979, pp. 5 and 8.

<sup>4</sup> The computer was seized in July 2007 and Plaintiff first sued for its return in November 2011. Until July, 2014, the government insisted that there were no emails while Plaintiff insisted that these comprised by far the largest part of her personal account and that they were stored on her computer, not in the service provider's "cloud." The National Security Agency is considered along with the UK's GCHQ to be the premier world expert in attacking computers and recovering data from them. The Declaration of Charles E., an NSA Computer Forensic Examiner, reveals that he searched only "C: Documents and Settings/Diane Roark" and no other directories. In mediation it was revealed that NSA looked for only one newer AOL email protocol, although the serial number as well as documents on the computer revealed that it was purchased in early 2002 when an older protocol was used. It is alleged that no emails were discovered until the House Intelligence Committee (HPSCI) asked NSA to search for emails sent between Plaintiff's home and work email addresses, whence the AOL account was found.

been removed from her office bookshelves. However, the stack of emails with headers and footers removed have not been returned or included among lists of papers NSA has retained. This also leads Plaintiff to fear that other papers may be missing. She has repeatedly pointed this out, but is merely told that all paper documents have been returned or listed to be retained. Plaintiff requests that the Court direct the Federal Bureau of Investigation, which by law must maintain a chain of custody, to ascertain what happened to these emails and to determine whether any other paper documents are missing.

**B. As previously stated to the government, Plaintiff wishes to return two executive branch documents stamped Confidential (HC 2) and Secret (HC 4) that were unintentionally packed among her many unclassified papers**

**C. Plaintiff also voluntarily returns Unclassified *executive branch* paper documents and a CD, all *marked For Official Use Only* (part of HC 5, HC 6, HC 7, HC 9, HC 21).** Plaintiff does not recall knowing that these were among her other Unclassified papers and has no interest in them. Since they were Unclassified, they were more easily mixed in with her many unclassified papers. Plaintiff contests government retention of all other unclassified documents, including those claimed by HPSCI and those claimed by NSA under the NSA Act. Particularly egregious is the government's withholding of HC 14 comments justifying redactions to Plaintiff's OpEd.

All of the disputed documents in this case, including in 10,000 emails still to be considered, are allegedly or presumably FOUO, except two allegedly TS/SCI documents and copies thereof that are considered in detail below, and the one Confidential and one Secret document that were unintentionally packed with Plaintiff's possessions and are being voluntarily returned.

As Plaintiff establishes below, under NSA policy at the time of her retirement she is entitled to retain these documents so long as she does not publicly reveal their contents. Nor did oral or written instructions to HPSCI staff discuss FOUO. The government appears to be attempting to hold Plaintiff responsible for adhering to regulations that were promulgated long after her retirement, or to an obscure Director of Central Intelligence regulation that was never specifically presented to or discussed with staff.

Lack of guidance was probably due to the fact that until recently, there were no regulations restricting imposition of the FOUO designation and apparently few rules controlling its handling or destruction. A 2004 Congressional Research Service publication<sup>5</sup> cited growing concern because “a uniform legal definition or set of *procedures* applicable to all Federal government agencies does not now exist”(emphasis added). In 2007, staff at CIA’s prepublication review office admitted to Plaintiff that there were no controls on use of FOUO or counterpart designations by various agencies. Hence, a lot of information could be withheld for no good reason or to hide embarrassing facts such as those in Plaintiff’s OpEd that CIA was handling. In 2009, E.O. 13526 1.2(c) again made clear that FOUO is not to be considered classified. NSA falls under the Department of Defense; it was not until February 2012 that the Defense Department published a four-volume manual, DODM 5200.01, that consolidated the marking, access *and protection rules* of all such information designations within DoD (emphasis added).

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<sup>5</sup> Federal Research Division, Library of Congress, Laws and Regulations Governing the Protection of Sensitive But Unclassified Information,” September 2004, <http://www.loc.gov/rr/frd/pdf-files/sbu.pdf>. The document discusses handling of then-existing DoD types of SBU, none of which concern NSA. Some specialized categories of the now-obsolete designation of “Sensitive But Unclassified,” that was used as an umbrella term for a proliferation of agency designations, had handling instructions, but they did not cover NSA, according to this document.

Plaintiff asks that the Court bear in mind throughout this case the lack of controls or procedures governing FOUO when she retired in 2002, meaning that such information may not have been truly sensitive even a dozen years ago, and its handling rules were decentralized and often ad hoc. NSA's claims that the NSA Act gave the Agency unique freedom to designate as FOUO anything it did not wish to release only further muddies this lack of pre-2012 standards and guidelines.

**D. None of Plaintiff's own paper or electronic documents are properly classified and Plaintiff seeks return of all of them, as well as her computer stack and hardware.** Individual documents and categories of documents at issue are considered below in turn. Plaintiff submits that government credibility regarding the two allegedly classified papers at issue is very low, and again points out that the burden of proof is on the government to establish its right to them. Under E.O. 13526 Section 1.2(c), "if there is significant doubt about the appropriate level of classification, it shall be classified at the lower level."

**1. Last version of a 14-page description of the THINTHREAD system, alleged to be TOP SECRET/SCI.** (Declaration of Miriam P., p. 8) There were also two prior drafts that apparently had been deleted but found on the hard drive ("temporary files"). This paper was reviewed for classification numerous times by three former senior NSA employees (Plaintiff's Maryland associates Binney, Loomis and Wiebe) who designed the system and worked on it. Therefore it was on their hard drives, and it was also sent to Thomas Drake.

The last time it was reviewed for classification, in early 2006, one word, a subsystem name, was removed as classified because, unknown to Plaintiff, the name was



still being used at NSA and therefore was considered classified when used with a description, albeit outdated, of subsystem content. Plaintiff deleted prior drafts and reminded her associates to do the same. As of now this subsystem name is widely publicized and no longer properly classified. However, Plaintiff seeks return of only the final version of the document.

The tortured classification trail of this paper and its technical content reveals a lot about this case. The paper or its technical content was:

- declassified (by an NSA lawyer),
- then reclassified (by NSA to justify a warrant for FBI raids on four homes),
- then treated as declassified (by the FBI and later the prosecutors pursuing Thomas Drake and Plaintiff,
- then treated again as classified (when the FBI demanded that Plaintiff's son provide it from his computer in June 2010 and subpoenaed him to testify before a grand jury),
- then treated again as unclassified (when the Maryland Assistant U.S. Attorney (AUSA) in the Rule 41(g) case also expressed disinterest in retrieving another copy),
- then declassified, and also returned to Kirk Wiebe (during hard drive reviews in the Rule 41(g) case of four Maryland associates), and
- now reclassified at a very high level (TS/SCI) in Plaintiff's Rule 41(g) case.

Clearly this history calls into question the competence and/or motives of NSA classification authorities. It also portrays knowing complicity in abuse of the classification process by the FBI and Department of Justice.

Under E.O. 13526, Section 1.7 (c), information may not be reclassified after declassification and release to the public unless the Director of NSA personally meets

three criteria: 1) he shows that otherwise there would be “significant and demonstrable damage to the national security;” 2) the information can be recovered without undue attention to it; and 3) the reclassification is reported promptly to the President’s National Security Advisor and the Director of the Information Security Oversight Office. The government has not presented evidence that these standards were met and these procedures were followed for the THINTHREAD paper.

The Opinion Editorial was also reclassified under a much higher designation, after 7 years that included many pertinent public revelations that went far beyond anything discussed in the paper; however, the OpEd had not been declassified.

**a) After NSA cancelled THINTHREAD and before their retirement from the Agency in October/early November 2001, Binney and Loomis sought and received permission to develop the system commercially.** This permission has never been revoked. In normal Agency procedure, the attorney verified that the system had been cancelled in August 2001, looked at the technology, asked Binney and Loomis to do some further research, then reviewed the research and approved their request.

**b) After retiring in April 2002, Plaintiff immediately wrote the high-level summary paper to help Loomis, Binney and Wiebe outline and explain the technology approach.** This 14-page paper was a very high-level, generic description of a multi-faceted system. For example, THINTHREAD addressed processing, filtering and selection, encryption, databasing, data relationships, retrieval, automated tracking of accesses to the database, automated alerts, reporting, distribution, and management metrics, all of which were covered in a short paper. The paper was not detailed and was deliberately written with insufficient information to allow anyone to reverse-engineer the

system, since it was not patented. Thus it also protected any US and NSA equities by denying the associated technology to hostile intelligence agencies. It underwent numerous classification reviews by Loomis, Binney and Wiebe (who had developed the technology and knew more about it than anyone else) in spring 2002, and another in early 2006, at Plaintiff's requests.

**c) The THINTHREAD paper was improperly classified for use as “probable cause” in an affidavit to secure a warrant to raid the homes of Plaintiff and associates, because the government had no other evidence against them.<sup>6</sup>** The paper was freely given to the FBI by Bill Binney. The government has said in court that our possession of this paper was its primary evidence of probable cause of crime. The affidavit was sealed for years to cover up this false accusation as well as other illegalities.<sup>7</sup>

**d) The Narus 6400 processor (and more capable NarusInsight) fielded by NSA is described publicly<sup>8</sup> in far greater detail than is the cancelled THINTHREAD processor within the disputed paper.** The 6400 is based on principles similar to those

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<sup>6</sup>The government stated in Plaintiff's constitutional case that the allegedly classified paper was the main justification for the warrant, which was issued shortly after Binney provided the paper. Under questioning by Judge Bennett at Drake's sentencing for a misdemeanor, the prosecutor admitted that the government had no evidence of either fact or motivation, even under lenient evidential requirements for conspiracy, to indict Drake's associates. See the history of this case at Attachment 1.

<sup>7</sup> Maryland litigants petitioned the Court and the affidavit was released in 2012. It redacted obviously unclassified material in an apparent attempt to justify its sealing.

<sup>8</sup> Bewert, “All About NSA's and AT&T's Big Brother Machine, the Narus 6400,” Apr. 7, 2006, <http://www.dailykos.com/story/2006/04/08/200431/-All-About-NSA-s-and-AT-T-s-Big-Brother-Machine-the-Narus-6400>.

Robert Poe, “The Ultimate Net Monitoring Tool,” *Wired*, May 17, 2006. <http://archive.wired.com/science/discoveries/news/2006/05/70914>

Narus advertising is discussed at “Narus Lawful Intercept,” *Light Reading*, “Narus Shows Off at RSA 2005,” Feb. 15, 2005, <http://www.lightreading.com/ethernet-ip/narus-shows-off-at-rsa-2005/d/d-id/610405>. Wikipedia, [http://en.wikipedia.org/wiki/Narus\\_\(company\)](http://en.wikipedia.org/wiki/Narus_(company)).

of THINTHREAD,<sup>9</sup> was developed later and was somewhat more advanced. As revealed in detail in early 2006 by former AT&T employee Mark Klein, NSA was using the Narus 6400 for domestic and foreign collection at the San Francisco AT&T switch. NSA has never denied this. Mr. William Crowell, retired Deputy Director of NSA, served on the Narus board.

**e) In the Maryland case, this document was found on the computers of four litigants. It was deemed Unclassified both then and previously. Two copies were returned to J. Kirk Wiebe. (Attachment 2)** After the warrant was executed, the document had in effect been treated as unclassified. The FBI and the Maryland AUSA were not interested in retrieving it from another computer to which it had been emailed, or in wiping the computer as they have insisted on proceeding herein. This allegedly TS/SCI document was *not* used (as were the two Confidential and Secret documents also at issue herein) as an accusation in the attempt to secure a plea bargain from Plaintiff, nor was it listed among the allegedly classified documents supporting Drake's indictment.

**f) Edward Loomis, another Maryland plaintiff, wrote an ebook that contained considerable information about THINTHREAD and was pre-approved for publication by NSA.<sup>10</sup>**

**g) Thomas Drake had the THINTHREAD paper in his possession but the**

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<sup>9</sup> THINTHREAD plans were given to the Israelis without permission and it is possible but unproven that this served as the basis for Narus development by Israelis. See "Senator Church's Prophetic Warning," *Washington Blog*, Apr. 22, 2012.

<sup>10</sup> NSA's Transformation: An Executive Branch Black Eye. [http://www.amazon.com/NSAs-Transformation-Executive-Branch-Black-ebook/dp/B00N9BP6PG/ref=sr\\_1\\_1\\_twj\\_1?s=books&ie=UTF8&qid=1416282651&sr=1-1&keywords=edward+loomis+ebook](http://www.amazon.com/NSAs-Transformation-Executive-Branch-Black-ebook/dp/B00N9BP6PG/ref=sr_1_1_twj_1?s=books&ie=UTF8&qid=1416282651&sr=1-1&keywords=edward+loomis+ebook)

**government never cited it when basing their indictment on claims that he had classified material at home.** Instead, NSA retroactively classified five papers that were proven in pre-trial hearings to be properly unclassified, forcing the government to drop charges. Like three other colleagues, Drake was not charged with having classified on his hard drive although it contained this material.

**2. The draft Opinion Editorial (OpEd) submitted for prepublication review that NSA now claims is TS/SCI.** Before submission, this paper was emailed as an attachment to be reviewed for classification by Binney, Loomis and Wiebe, who developed or worked on aspects of the THINTHREAD technology that it referenced.

In the article, Plaintiff objected to domestic surveillance, and insisted that at minimum civil liberties protections, including encryption and automated tracking of anyone viewing or handling information in the database(s), be re-activated. Neither protection has since been restored. Plaintiff's interactions with HPSCI Chairman Porter Goss and Ranking Democrat Nancy Pelosi about these issues were referenced briefly. The article objected to domestic surveillance but argued that the technology should be used for much-needed NSA foreign intelligence modernization (TRAILBLAZER had recently been cancelled publicly), on condition that counterproductive changes to the original technology be reversed.

NSA reviewers blacked out many allegedly classified as well as some admittedly unclassified passages. This left the article without coherent themes and factual detail, rendering it unpublishable. It clearly appeared to be an unwarranted "political" classification violating classification restrictions (p. 5). She immediately objected, and ultimately requested formally that the classification be reconsidered by the CIA

classification appeals board. She was never contacted about this again.

There are many obvious reasons why this document is properly unclassified.

**a) No documents on the hard drives of Binney, Loomis, Wiebe and Drake were deemed classified, this one included.** This document was on the hard drives of at least the first three. Like the THINTHREAD paper, this is another case of grossly inconsistent NSA classification practices in which some “Original Classification Authorities” deem the paper UNCLASSIFIED and others treat it as TOP SECRET/SCI. It is also prima facie evidence of prohibited classification for domestic political reasons.

**b) NSA appears to have retroactively increased the alleged classification to TS/SCI.** Plaintiff’s recollection is that the highest classification alleged 8 years ago in 2006, well before an avalanche of widespread public revelations about domestic surveillance and NSA’s capabilities, was SECRET. It is not possible for Plaintiff to check this, because NSA has refused to return the seized “interim” response that CIA mailed to this author (document no. HC-14) presumably to obscure the fact that the OpEd was inappropriately re-classified. HC-14 provided alleged classification levels by redacted line and paragraph, which would be essential as guidance for any author attempting to edit a paper to meet publication requirements. The motivation for re-classifying it at a higher level is unclear, unless it is to tarnish Plaintiff’s case and/or prevent HPSCI embarrassment.

**c) Plaintiff’s operative pre-publication agreement did not provide for withholding of unclassified information contained in this OpEd, which also contains no executive session material.** The original NSA redaction document admitted that material concerning Plaintiff’s memos and interactions with Chairman Goss and Ranking

Democrat Pelosi through their staff directors, as well as a conversation with Mr. Goss, were Unclassified, but NSA redacted them anyway, perhaps in deference to HPSCI wishes.

The HPSCI claim that this paper contains executive session material cannot be supported. See pp. 32ff. As is well known, the larger membership of both the House and Senate Intelligence Committees were not informed about the program (in executive session) until 2006, after the *New York Times* revelations. Briefings for House and Senate leadership before that were private and normally took place at the White House. The first executive session on the issue was convened more than 4-½ years after Plaintiff retired. Obviously, Plaintiff could not possibly have acquired the information from executive session or participated in an executive session on that topic. Again, this merely demonstrates HPSCI's unsupportable interpretation of prepublication agreements and HPSCI rules.

Both Mr. Goss and Ms. Pelosi admitted publicly in early 2006 that they had approved the domestic surveillance program and Mr. Goss publicly has acknowledged Plaintiff's work on the issue as well as his continued support for the program. Ms. Pelosi denies that she had sufficient information to oppose the system and her staff director claimed that he never forwarded Plaintiff's memos to her (contrary to assurances he repeatedly provided Plaintiff). Although Ms. Pelosi continues quietly to support the surveillance program, it is not popular in her high-tech district.

In short, HPSCI arguments for classification of this article and withholding of supposed executive session material are an attempt to shield members from political responsibility for past positions and from embarrassing the Committee for knowingly

failing over 12 years to insist on available protections for civil liberties.

**d) In August 2006, NSA classified Plaintiff's objections within the OpEd to deactivation of the civil liberties protections built into the domestic surveillance technology. But in a sealed affidavit in July 2007, it admitted that a May 2006 *Baltimore Sun* article containing the same information was unclassified. Despite this sealed admission, the government swore to the court in the Drake indictment of April 2010 that the *Sun* article was classified, and it had until late 2009 informally indicated the same in Plaintiff's case.**

In reviewing this OpEd of August 2006, NSA classified the revelations that it had deliberately deactivated automatic encryption of any US identities pending a warrant and had also disabled the automated tracking of database use that would have revealed improper access to US citizens' communications and other data.

Sealing of the affidavit appears to have been partially to hide the government's admission that the *Sun* article was unclassified, as the government had pressured both Drake and Plaintiff, who had been a source for the article, by claiming otherwise. Plaintiff was surprised that neither the *Sun* article nor the THINTHREAD piece was mentioned when the government formally asked her to plea bargain at the end of 2009, though the two Secret and Confidential documents herein that were inadvertently packed in her stored boxes of unclassified were cited.

Nonetheless, the *Sun* article was included in April 2010 as one of the 5 supposedly classified documents found in Drake's home, for which he was indicted. In 2011 pre-trial hearings, Judge Bennett likewise ruled that the *Sun* article was unclassified, along with the other four items.



**e) The NSA Director had also given Plaintiff permission to air her objections once the program leaked.** In July 2002, General Michael Hayden, then Director of NSA, told Plaintiff she could “yell and scream and wave your arms all you want” once the program became public. The TSP part of the program became public in December 2005; Plaintiff discussed her objections to TSP on background for a *Baltimore Sun* article published in May 2006.<sup>11</sup>

In August 2006, when the administration said it would try to block further court consideration of the constitutionality of TSP, Plaintiff wrote her OpEd and submitted it to CIA for pre-publication review. By the time of the pre-publication review, Hayden was Director of CIA. Plaintiff objected to redactions, including on the civil liberties issues, and asked that CIA staff consult Hayden about his promise. Staff later refused to answer when Plaintiff repeatedly asked whether they had consulted Hayden.

**f) The book published by Edward Loomis, cited above, has far more information about technology used for domestic surveillance than does general discussion in this OpEd or in a brief paragraph within it.**

**g) A short paragraph listing the ill-conceived technical changes that degraded NSA’s surveillance system is not classified.** One change altered operational practices by chaining the phone and email contacts of US persons beyond “two hops” or “two degrees,” although prior research had shown this to be counterproductive. When former Deputy Director of NSA Chris Inglis revealed the three-hop practice before a congressional committee, it instantly received widespread publicity. The practice not

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<sup>11</sup> Siobhan Gorman, “NSA rejected system that sifted phone data legally: Dropping of privacy safeguards after 9/11, turf battles blamed,” *Baltimore Sun*, May 18, 2006. See Attachment 3 for the full article.

only threatens the civil liberties of vastly more people but also clogs databases with low-utility information.

Another technology change was switching the database from a half-century-old structure that facilitated quick retrieval to a more recent and widely known type that is more familiar to NSA and its contractors. Both these database types are definitely unclassified.<sup>12</sup>

Rising above those details, however, the main point of the government's objection to this short paragraph is that it does not want U.S. taxpayers to know that the system, which admittedly has been ineffective in finding domestic terrorist plots, is underperforming because of NSA's own technical and operational errors. NSA would not be claiming the brief paragraph is classified if its core message were not all too true. If recently published documents are correct, NSA's budget has roughly tripled since 9/11, but the Agency apparently believes there should be no accountability for the massive funds expended, including in part on ill-considered alterations to this system, even when civil liberties have been gravely undermined and the results are ineffective against domestic terrorists.<sup>13</sup>

It is not appropriate to classify innocuous and widely used technical approaches. Equally important, this is yet another example of using classification to withhold

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<sup>12</sup> Plaintiff recalls that perhaps two other technical changes were cited that degraded the system. Binney assured Plaintiff that they were not classified. In the ensuing 7-½ years since the raid, however, Plaintiff has forgotten what they were. The proposed software for reviewing unclassified writings should establish whether the techniques in question are common knowledge.

<sup>13</sup> NSA maintains it must collect an ever bigger "haystack" to find tiny domestic terrorist "needles," an obviously counterintuitive proposition. The real use and great danger of this "haystack" is its enormous volume of electronically filed personal information about US persons, whose information and contacts can be looked up through any number of identifiers - name, telephone numbers, computer I.P., SSN, email etc.

information that is embarrassing and reveals the wasteful expenditure of public money. This is forbidden under Section 1.7(a) of the Executive Order on classification (p. 5). It also endangers national security by continuing to rely on a much less capable system than the original design. The revised technology has endangered the civil liberties of every American while admittedly failing to provide critical tips on a single case of planned or perpetrated domestic terrorist violence.

This OpEd was not properly classified in 2006, when only the admitted TSP activities were known publicly. It most certainly cannot be considered classified now, much less classified at a higher level. Since June 2013, there have been many very detailed revelations about the President's Surveillance Program (PSP) beyond the TSP, as well as about operational methodology and advanced technology being used. NSA repeatedly has admitted that these so-called "Snowden documents" are indeed genuine and originate at NSA.

**E. The National Security Agency Act of 1959 does not empower NSA to withhold any and all unclassified documents.** The stated intention of the Act was to allow NSA to manage its civil service employees separately from the Civil Service Commission, for security reasons.

NSA now claims sweeping authorities derive from the word "activities" included in section 6(a):

Sec. 6. (a). Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654) (repealed by Pub. L. 86-626, title I, Sec. 101, July 12, 1960, 74 Stat. 427)) shall be construed to require the disclosure of the **organization** or any **function** of the National Security Agency, or any information with respect to the **activities** thereof, or of the **names, titles, salaries, or number of the persons**

**employed** by such agency. (Emphasis added.)

However, the record makes clear that Congress did not intend to provide NSA broad, unique power to withhold any and all unclassified information. It reveals the problems Congress sought to address and explains the purpose of Section 6(a). The courts frequently refer to legislative history for background on Congressional objectives and historical context.<sup>14</sup> *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968); *Shell Oil v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 515 (1990) (reference to a Senate report for evidence of “the primary objective“ of the Boren amendment to the Medicaid law).

**1. The original Congressional documents** and further discussion about their historical context and their content are **at Attachment 4. According to both House and Senate committee reports, the purpose of the proposed bill was to avoid public Civil Service Commission (CSC) handling of information about NSA personnel by transferring this authority to NSA.** Courts naturally look to the broad and stated purposes of legislation to resolve ambiguities in the more specific language of operative sections.<sup>15</sup> *U.S. v. Turkette*, 452 U.S. 572, 588090 (1981);<sup>16</sup> *Knebel v. Hein*, 429 U.S. 288, 292 n.9 (1977)<sup>17</sup> Personnel information could reveal then-secret organization,

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<sup>14</sup> Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service, updated August 31, 2008, <http://fas.org/sgp/crs/misc/97-589.pdf>, p. CRS-42.

<sup>15</sup> *Ibid.*, CRS-32.

<sup>16</sup> RICO's statement of findings and purpose to eradicate organized crime in the U.S. is used to conclude that “enterprise” includes criminal conspiracies for illegitimate purposes, not just legitimate businesses infiltrated by organized crime.

<sup>17</sup> Rejects broad discretion of Secretary of Agriculture to administer the Food Stamp Program in view of the Act's purpose to “increase [households'] food purchasing power,” making it invalid for the Secretary to determine that commuting expenses to attend training counted as household “income” in determining food stamp eligibility.

functions and activities of NSA. Revealing an employee's name, rank, title and position in the organization could provide such information, and it could also expose potential recruitment targets for foreign intelligence agencies.

The bill was referred to the House and Senate Post Office and Civil Service Committees that dealt with personnel administration, not to the Armed Services Committees and Defense Appropriations Subcommittees that then oversaw NSA operations. Their reports, as well as statements by administration officials, presented the legislation to the full House and Senate as an administrative bill transferring authority for managing NSA employees from the Civil Service Commission (CSC) to NSA.

Section 6(a) gave the Agency the ability, if it so desired, to keep secret the number of people employed by NSA as well as the name, title and salary of an employee. This allowed withholding information about their positions that might reveal the secretive Agency's organization, structure and activities. *All of this information, including the last three categories, was data that the CSC had demanded* in order to perform its unclassified auditing responsibilities, and that NSA over the seven years since its 1952 founding had refused to provide.

- The Senate committee reported that **Section 6(a) is in the nature of a “savings clause.”** Savings clauses are designed to preserve remedies under existing law. They have a very limited function and serve merely to counter an inference that the statute is intended to be the exclusive remedy for harms caused by violations of the statute, so typically they do not create a cause of action. If there is a conflict with pre-existing remedies, the savings clause gives way, and even if there is no conflict, courts may construe a savings clause narrowly. The legislative history of the

provision may reveal its purpose or the court may reason from the scope and purpose of the new statute.<sup>18</sup> A saving clause is an *exception* to the general things mentioned in a statute, and normally is intended to save rights pending future proceedings if the statute or portion thereof were subject to unrestricted repeal or annihilation.<sup>19</sup>

Therefore, if the NSA Act were repealed, NSA presumably would *temporarily* be given overriding authority to refuse to reveal employee information, so it could not be forced to compromise NSA's structure, organization and activities. Hence the Section 6(a) language "nothing in this Act or in any other law," could be interpreted as temporarily protecting NSA in the event of repeal; otherwise, this clause usually means simply that Congress is serious, it seldom aids interpretation, and is not always construed literally to disregard other applicable laws, even in the few cases where it is construed literally.<sup>20</sup> Senate clarification that this is a savings clause also helps explain the broad language of the "structure, organization and activities" clause. No other meaning for Section 6(a) was discussed in the report language or administration submissions. Even if there is no conflict with other language, courts may construe a savings clause narrowly *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 (2005).

- **The most controversial issues** before the Committees were preserving the Secretary of Defense's authorities over NSA and ensuring that NSA did not use its authorities

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<sup>18</sup> Yule, CRS, *op.cit.*, pp. CRS 33-34. See *Cooper Industries v. Aviall Servs.*, 543 U.S. 157, 165-68 (2004) clarifying and limiting the "sole function" of a saving clause in the Superfund law that "does nothing to 'diminish' any cause(s) of action...that may exist independently."

<sup>19</sup> The Law Dictionary, <http://thelawdictionary.org/saving-clause/>.

<sup>20</sup> Yule, CRS, *op. cit.*, pp. CRS 35-36.

to hire additional high-ranking personnel or raise their pay beyond Civil Service standards. Any intended authority to withhold all unclassified information would have been much more far-reaching and controversial.

- **Both Committees said the bill gave NSA no more powers than were available to other intelligence agencies**, which could then also protect their employees' identities and activities. Other agencies did not have legislated blanket authority to withhold any and all unclassified information;
- **The House and Senate handled the bill as routine and uncontroversial.** The Committee reports were the only information available to Representatives and Senators for an "administrative" bill that passed both houses with no debate and no recorded vote.

**Four NSA employees hired 30 to 40 years ago who retired in the late 1990s and early 2000s were presented only the more limited interpretation of the NSA Act.** In the 1960s, they were told that the Act meant they need not and should not reveal to anyone - including the Bureau of the Census and even the courts - their employer, their title, their salary, their job description or location in the organization, etc. Though these restrictions loosened in the 1980s, they were never told that the Act covered information other than administrative personnel issues. A person hired in 2001 who had previously been an NSA contractor, Thomas Drake, received no briefing on NSA Act requirements.

The documentation herein makes clear that NSA later misinterpreted its authorities and that there is no basis in the congressional record for the current interpretation. If there is no evidence for an expansive interpretation of congressional intent, a limited interpretation must prevail. Courts are guided by the basic principle that

a statute should be read as a harmonious whole, with its separate parts being interpreted within their broader statutory context. Presumptions are overridden only by a “clear statement” of congressional intent.<sup>21</sup> The Rule of Lenity might also apply.<sup>22</sup>

NSA is in effect seizing the opportunity to search Plaintiff’s property yet again and to keep as much property as possible that is now in its possession. The Agency would never have had access to this property were it not for NSA’s trumped-up “probable cause” that secretly re-classified a properly declassified technology. Its punitive actions against Plaintiff are longstanding and apparently motivated by historical resentments concerning her five years of congressional oversight of NSA, her request for an IG audit of NSA after retiring, and her vigorous opposition within the government to NSA’s massive domestic surveillance program.<sup>23</sup>

**2. NSA secrecy policy has evolved over 55 years to the point that it now withholds only the last names beyond the first initial, and sometimes the location in the organization, of current employees who are not publicly associated with NSA.**

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<sup>21</sup> Yule, CRS, *op. cit.*, Summary, p. ii.

<sup>22</sup> Under the Rule of Lenity, Plaintiff cannot be punished as a criminal unless her case is plainly and unmistakably within the provisions of some statute. *U.S. v. Gradwell*, 243 U.S. 476, 485 (1917). Rule 41(g) is a civil proceeding to resolve property seizure to justify a criminal case under the Espionage Act. Both proceedings are based on an identical issue (possession of the allegedly classified THINTHREAD paper) said to establish probable cause of crime, with other classification issues added later. Prosecutors sought a criminal guilty plea based in part on Plaintiff’s possession of a Confidential and a Secret paper on diverse topics that obviously were packed inadvertently among her unclassified papers and that also were included in the Rule 41(g) case by the government. Any ambiguity in criminal statutes must be resolved in favor of the defendant. *Hughes v. U.S.*, 495 U.S. 411, 422 (1990); *U.S. v/ Granderson*. 511 U.S. 39, 54 (1994); *Cleveland v. U.S.*, 531 U.S. 12, 25 (2000). Plaintiff’s property was seized as part of a criminal investigation and is to be retained through creative interpretation of a law that is *at best* ambiguous. Ambiguities must be resolved in favor of the defendant so that plain and fair warning is given as to what the statutory language intends.

<sup>23</sup> See the history of this case at Attachment 1.



**Retiree names are less protected.** The first practice is exemplified in the signed declarations attached to the government's motion for summary judgment. Therefore, this is also the maximum information that could be redacted from Plaintiff's personal records, even if she were not allowed to retain and protect FOUO..

Most of the names in Plaintiff's appointment and message books and in her emails probably refer to persons by now retired. NSA allows the full names and NSA association of former positions of retirees to be published outside the Agency.

### **3. NSA's requirements for protecting FOUO allow Plaintiff to retain it.**

**Retiree names are not FOUO.** NSA guidance and NSA security guards who check outgoing briefcases etc. have allowed employees to remove FOUO documents. They are also mailed to employees detailed to educational programs etc. The NSA Newsletter, sent to employees and allowed at their residence, contains information on the names, titles, organizational unit and occupational specialties of current and retired employees. It publicizes awards given to individual employees.<sup>24</sup>

The Phoenix Society, an independent social and mutual support organization for NSA retirees,<sup>25</sup> provides past and current information on former employees, including an address directory both alphabetically and by city, email addresses and news about retirees such as their former positions, family events, health crises and deaths. To these and other ends it sends out the POST CRYPT, a monthly Newsletter. News publishers in the Maryland NSA headquarters region may carry information about persons identified as

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<sup>24</sup> To review typical contents of the Newsletter, see three 1999 examples released pursuant to FOIA request, at the NSA website, [https://www.nsa.gov/public\\_info/declass/newsletters.shtml](https://www.nsa.gov/public_info/declass/newsletters.shtml).

<sup>25</sup> <http://www.thephoenixsociety.org/index.html>.

former and even current employees.<sup>26</sup>

FOUO need not be returned to the office and had no destruction requirements. However, it is to be kept private and out of the public domain. For over twelve years, Plaintiff, a retired intelligence official, has a record of having observed these requirements.

**4. Unlike E.O. 13526 Section 1.7(a) restrictions on classification, the FOUO designation before Plaintiff's 2002 retirement lacked centralized Intelligence Community guidance and control. It has been widely abused.** There was no established Director of National Intelligence policy governing the 17 intelligence agencies' invocation and handling of FOUO or many similar designations. Different designations to withhold unclassified documents were freely imposed for different reasons in different agencies so as to withhold from the public rightfully unclassified material, often without good reason. CIA employees admitted this lamentable state of affairs when Plaintiff questioned them in 2006 about the rationale for redactions in her OpEd. HPSCI's argument about the sacrosanct and protected status of that FOUO is without foundation.

Official studies have long decried massive over-classification, to the extent that recent studies stated that almost all currently Confidential documents should be Unclassified. Even more so is FOUO designation widely abused, notably by NSA with

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<sup>26</sup> *Baltimore Sun* article on the death of Lorraine Willis, NSA employee, Jul. 9, 2013, [http://articles.baltimoresun.com/2013-07-09/news/bs-md-ob-lorraine-willis-20130709\\_1\\_nsa-employee-national-security-agency-barranco](http://articles.baltimoresun.com/2013-07-09/news/bs-md-ob-lorraine-willis-20130709_1_nsa-employee-national-security-agency-barranco); and *Baltimore* magazine on job satisfaction of industrial hygienist Mathew Cosgrove for whom NSA is financing a Master's Degree and Jennifer Muller, who works in counterterrorism, January 2012, <http://www.baltimoremagazine.net/2012/1/2012-best-places-to-work?p=features/2012/02/2012-best-places-to-work>.

its interpretation of the NSA Act, to withhold information that should be unclassified and available to the public. General Michael Hayden observed when he was Director of NSA that the Agency has a strong cultural predisposition to over-classification.

Everything's secret. I mean, I got an e-mail saying, "Merry Christmas." It carried a Top Secret NSA classification marking. The easy option is to classify everything.<sup>27</sup>

Repeated attempts to reduce massive-over classification have been unsuccessful, especially at NSA. Not only does NSA regularly invoke a supposed ability to withhold unclassified at will, in 2012 it also refused to loosen its classification guidelines when all agencies were required to review and rationalize them as directed in the 2009 E.O. 35126:

The NSA/CSS fundamental classification guide review did not reveal any documents, topics or categories that were downgraded as a result. Further, there were no cases in which the duration of classification was modified nor were there any cases in the course of the fundamental classification guide review where exemptions from declassification were removed.<sup>28</sup>

The genesis of this NSA culture of extreme secrecy is discussed at Attachment 5.

Perhaps it is not surprising that NSA sought to re-interpret the NSA Act to allow it to withhold most everything unclassified, not just personnel information that might assist hostile intelligence services.

The case of the DoD IG's mostly unclassified report on two long-since-cancelled NSA programs, TRAILBLAZER and THINTHREAD is a glaring example of incorrectly invoking the NSA Act to ignore explicit restrictions in E.O. 25126 Section 1.7(a) on

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<sup>27</sup> "An Interview With NSA Director Lt. Gen. Michael V. Hayden," *Studies in Intelligence*, Vol. 44, No. 1, 2000, declassified and redacted, at [cryptome.org/2014/11/cia-nsa-hayden-00-0105.pdf](http://cryptome.org/2014/11/cia-nsa-hayden-00-0105.pdf).

<sup>28</sup> Elizabeth R. Brooks, NSA Associate Director, Policy and Records, *Memorandum for the Information Security Oversight Office*, 25 June 2012, <http://www.archives.gov/isoo/fcgr/nsa.pdf>.

classification (p. 5); it should be made available to the Court. Almost all of Plaintiff's emails and documents concerning NSA are about material restricted from classification under Section 1.7(a).

**5. There is nothing in the NSA Act that allows NSA to withhold entire documents containing hardly any personnel information, rather than simply redacting sensitive personnel information according to evolved and extant NSA practices.** It must be emphasized that the material at issue was written by Plaintiff, not by the government. It is her personal property, not the government's and this lawsuit is not a FOIA request. *Plaintiff's governing pre-publication agreement does not permit withholding of unclassified material.* It must also be reiterated that NSA practices from her retirement and thereafter permit Plaintiff to retain FOUO at home, including that covered by the NSA Act. If this latter standard is for some reason rejected by the Court, any redactions may cover only the last name (minus its first initial) of someone currently employed and not publicly associated with NSA.

NSA's actions smack of vendetta (see Attachment 1). It wrongfully classified material its own lawyer had declassified, as a flimsy excuse for raiding Plaintiff and seizing her property. It refused to return *any* property until successfully sued by Plaintiff's associates. And now it falsely claims that two documents are highly classified although four times it already declared one of these unclassified when searching the hard drives of Plaintiff's four associates. It refuses to return a raft of other admittedly unclassified documents that discuss its misconduct - including fraud, waste, abuse and unconstitutional domestic surveillance - that are unclassified, that specifically may not be classified under E.O. 13526 Section 1.7(a), but that are deeply embarrassing.

**6. Because there is no classified on Plaintiff's computer, it must also be returned.** Plaintiff has presented information above that the two documents and copies thereof labeled TOP SECRET/SCI actually are not classified. Over 10,000 emails still have not been reviewed. However, emails dealing with NSA were circulated exclusively with the four Plaintiffs in the Maryland case. All of their emails have been found to be unclassified, so all of Plaintiff's emails also should be found unclassified.

**7. There should not be any email redaction because Agency policy allows retention of FOUO at the residence of employees and retirees so long as it is not publicized.** Given that the two files from Plaintiff's documents folder - the THINTHREAD piece and the OpEd draft - are not classified, and no emails are classified either, the only issue remaining is application of the NSA Act to Plaintiff's emails. As Plaintiff has pointed out, the NSA Act does not empower NSA to redact any unclassified material except information about existing employees that currently is protected by the Agency as a matter of general policy. However, Plaintiff has also pointed out that while NSA protects the last name and some other information from public exposure, as a matter of general policy it also allows both employees and retirees to keep such information so long as it is not publicized. Plaintiff has adhered to this rule. Therefore, there should be no redactions whatsoever from Plaintiff's emails.

#### IV. HPSCI SEARCHES

HPSCI's legal argument is based on incorrect prepublication forms and a faulty, impractical and unenforceable interpretation of Committee rules. It does not cite a specific statute, order or DCI directive with handling requirements of FOUO in 2002, and none apparently existed.

The declaration of Mr. Darren Dick, Staff Director of the HPSCI since 2013 and Deputy Staff Director for 1-½ years prior, presents sweeping and unrealistic interpretations of HPSCI staff obligations and rules. Further, the documents referenced are not the correct ones.

Plaintiff must be governed by the last pre-publication agreement she signed and by the HPSCI rules of the last Congress in which she worked, because staff no longer employed at HPSCI are not notified of subsequent changes in rules. Plaintiff signed a pre-publication agreement *after* 2009 that was quite different from those provided to the Court and that did not restrict publication of unclassified information. The Committee refused both in 2007 and presently to provide Plaintiff, and now the Court, a copy of that prepublication agreement. In addition, the last Congress in which Plaintiff worked, when she signed her last prepublication agreement, was the 107<sup>th</sup>, convening in 2001-2002, not the 106<sup>th</sup>

**A. Legislative Privilege.** Plaintiff agrees that staff may be covered by legislative privilege only if it is invoked by a Member of Congress.

Out of great concern to protect Congressional oversight capabilities, in 2007 Plaintiff asked HPSCI to invoke legislative privilege to protect her sources, whose anonymity she had pledged to protect, on the supremely important issue of congressional oversight over the executive branch's vast domestic surveillance program. Later in 2007, the executive branch seized from Plaintiff paper documents and computer records directly pertaining to congressional oversight, including possible sources of congressional information on many issues over a long period. These included, e.g. Plaintiff's yearly meeting agenda books and HPSCI telephone logs for the entire 5 years she had the NSA

account.

In October 2013, Plaintiff wrote HPSCI and House General Counsel asking the House to invoke legislative privilege to support this Rule 41(g) lawsuit for return of the oversight-related documents seized in 2007. She also wrote to Speaker of the House Boehner, informing him of the legislative privilege request; she also asked that he support her effort to expose a likely unnotified secret search of her home, given that the Department of Justice had assured his predecessor, Speaker Hastert, that the PATRIOT Act would not be interpreted to allow such “sneak and peak” searches.<sup>29</sup>

In all cases, Plaintiff received not even the courtesy of a reply. Instead, HPSCI recently joined NSA in demanding that Plaintiff’s documents that should fall under legislative privilege be seized and retained by the *executive branch*. It is quite apparent, therefore, that the House of Representatives has little concern for legislative privilege to protect the integrity of congressional oversight and separation of powers. Therefore, legislative privilege cannot be invoked in this case.

Given HPSCI’s unconcern for its staff and for its own oversight responsibilities over the long course of this case, it is also unsurprising that last year the CIA believed it could with impunity repeatedly spy on the computers of staff from the Senate Select Committee on Intelligence and remove incriminating documents about CIA’s use of torture.

**B. HPSCI’s right to search Plaintiff’s papers and computer and to seize her personal documents.** Plaintiff refutes HPSCI’s right to search her computer on the basis

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<sup>29</sup> The October 2013 letters are at Attachment 6 and the Hastert letter is at Attachment 9.

of constitutional and evidentiary grounds as well as flawed interpretation of HPSCI rules for executive sessions, and contests HPSCI's right to any of these materials..

### **1. Computer search.**

Plaintiff has been retired from HPSCI for over 12 years, and after a 5-year investigation was found innocent of any wrongdoing. Yet while HPSCI claims no legislative privilege equities regarding her former congressional sources, it claims the right to examine and censor her speech/communications during the last three months of her employment and over more than five years of her retirement. This is a violation of Plaintiff's Fourth Amendment rights.

In addition, the First Amendment protects even *public* speech, most notably on these political matters that involved alleged fraud, waste and abuse in NSAs acquisition process plus lawless and unconstitutional executive behavior in its domestic surveillance program. HPSCI asserts that it will not protect Plaintiff's communications with whistleblowers who entrusted their safety to the Committee, yet it claims the right to monitor the *private* speech of a *former* employee now retired for 12 years, to ensure that nothing unclassified but embarrassing is revealed about the Committee. All this was provoked by one email from Plaintiff that NSA found on Drake's computer and referred to HPSCI, that "may" have contained executive session material; no other suspect emails were found.

HPSCI already read selected paper and Word computer documents as well as emails between Plaintiff's home and office computers before retirement without notifying Plaintiff. The Committee expects to review searches of Plaintiff's more than 10,000 emails that the NSA conducted using lists of its own and HPSCI key words. The latter



operation was halted when Plaintiff objected after being told by Thomas Drake that a HPSCI search of his and my computers was planned. The government now refuses to confirm the status of the review.

To reiterate, all these emails already are known to be unclassified because the hard drives of her four communicants on relevant issues have been searched by NSA and found to contain no classified emails - assuming classification consistency by NSA. As discussed below, HPSCI's expansive interpretation of the "executive session" clause is unworkable and contrary to Plaintiff's understanding during 17 years of employment.

Plaintiff argues that past and proposed HPSCI and NSA searches are an illegitimate violation of her First Amendment rights as well as a violation of Fourth Amendment prohibitions on illegal search and seizure without probable cause of crime.

**2. Paper documents labeled FOR OFFICIAL USE ONLY (FOUO),**

As discussed above, Plaintiff has no interest in government documents marked FOUO and is willing to return them, although she was permitted to have them so long as she did not make them public. Notably, neither the government nor Mr. Dick have cited a specific "statute, executive order or [DCI]" directive with 2002 handling instructions for FOUO.

**3. Executive session material.** Mr. Dick also presents an unusual interpretation of executive session secrecy requirements. According to his declaration, any general subject that has ever been considered in executive session may not in any way be discussed outside that session, including with properly cleared persons. This prominently includes, as a rationale for seizing Plaintiff's property, any unclassified mention of the intelligence budget.

As discussed in Attachment 7, this interpretation is inconsistent with the established budget process in particular, and would make it unworkable. Classified information is protected by separate rules that permit discussion with properly cleared persons, as is normally necessary for executive session preparation and follow-up, and most especially when forming and promulgating a budget.

Plaintiff was told from the outset of her 17-year career at HPSCI that the executive session provision is meant to encourage free discussion in closed hearings, especially by HPSCI members but also by witnesses.<sup>30</sup>

Mr. Dick also gives no indication that he actually reviewed records of the relevant executive session to determine whether the subject in question even arose during executive session or was commented upon by members -- this is true of few budget items, for instance. He merely states (p. 2 of his declaration) that he is “familiar with the subject matter of testimony and evidence” in HPSCI executive sessions.

The email from Plaintiff to Drake that provoked this search was found by NSA and provided to HPSCI on alleged grounds that the Committee is an “Other Government Agency” to which it can refer potentially classified or protected material found in a search. However, the U.S. Congress is a branch of government separate from executive agencies.<sup>31</sup>

As discussed in the cited attachment, there are a multitude of ways in which

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<sup>30</sup> Unless specially compartmented and very closely-held programs are being considered, there are normally present many executive branch personnel, including from other agencies; so in practice, witness confidentiality would apply mainly to any whistleblower or other vulnerable witnesses, who were rare to nonexistent.

<sup>31</sup> See, e.g., Title 5, Part 1, Chapter 8 of the US Code governing Congressional Review of Agency Rulemaking. <http://www.law.cornell.edu/uscode/text/5/551>.

Plaintiff may have received information other than from executive session, and it was her job to know most of the information that would be presented before the session occurred.<sup>32</sup> Further, Thomas Drake was a whistleblower who provided budget and other information, and the software engineering office where he worked received small annual sums from Congress. Plaintiff had legitimate reason to discuss budget issues with him.<sup>33</sup>

On the basis of a total of one allegedly suspicious email found thus far under Mr. Dick's unreasonable standards for executive session material, HPSCI reviewed two searches of Tom Drake's hard drive(s), intends to review two searches of Plaintiff's emails, and has already reviewed her paper and electronic Word documents plus emails between her home and office. This violation of Plaintiff's privacy is not justified by the evidence, HPSCI rules or probable cause of crime, and it violates her First and Fourth Amendment rights.

#### **V. ILLEGAL SEARCHES AND RULE 41(g)**

Under Rule 41(g), "a person aggrieved by an unlawful search and seizure of property" may move for the property's return. Plaintiff presents below indications of multiple illegal searches over the past 7-½ years. It is likely that, even apart from the

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<sup>32</sup> Plaintiff asked to see the email because she might remember where she got the information in question, but the government has refused to provide her the evidence for its accusation and its past and intended searches and seizures.

<sup>33</sup> It is well known that Drake unofficially provided valuable information to the Committee. He should be treated as a legally protected whistleblower. It is disgraceful and yet another indication of HPSCI's disregard for oversight and legislative privilege that he is being treated as an adversary whose computer should be searched. Plaintiff advocated funding for the NSA office where he worked in order to improve NSA's software engineering so it could modernize more effectively. The results of HPSCI budget deliberations were delivered to NSA and (in part) to his office (see Attachment 7). Regardless, Plaintiff does not recall that these small plus-ups for Drake's Jackpot office ever rose to a level that elicited member discussion or opinion, or even a mention in executive session, and he would have been notified of them by NSA in the regular course of his work.

classification and warrant problems described above, the government does not come into this case with “clean hands.” If all of Plaintiff’s property is not returned through summary judgment, the remainder should be returned because of illegal search.

**1. An unnotified surreptitious search prior to the July 26, 2007 overt raid of her home.** The night of the overt raid, Plaintiff realized that physically distinctive and allegedly classified papers cited in the warrant<sup>34</sup> plus other clues<sup>35</sup> indicated that almost certainly there had been a prior surreptitious entry into her home, but did not realize there was a notification requirement until 2012, whence the government ignored her queries.

Speaker Hastert and the Congress were assured that Section 213 of the PATRIOT Act would not be used to justify unnotified searches.<sup>36</sup> There have been large increases in “delayed notice” searches.<sup>37</sup> The courts have long banned unnotified searches, including e.g., the Ninth Circuit’s *U.S. v. Freitas*, 800F.2d 1451 (9<sup>th</sup> Cir. 1986).

**2. Search of a separate apartment on the lower floor of Plaintiff’s house during the July 26, 2007 raid and seizure of two computers,** despite the tenant’s repeated refusal of permission consent and lack of proper warrant..

**3. NSA domestic surveillance without a warrant,** under the STELLAR WIND

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<sup>34</sup> See Attachment 8.

<sup>35</sup> The whisking away of those and other NSA-related papers within minutes of entry, odd telephone rings and severe, near-disabling computer problems before the raid.

<sup>36</sup> See Attachment 9.

<sup>37</sup> Report of the Director of the Administrative Office of the United States Courts on Applications for Delayed-Notice Search Warrants and Extensions. <https://www.eff.org/document/2013-delayed-notice-sneak-and-peek-report>. By fiscal year 2013, these rose from 47 warrant requests over the 3-½ years ending in April 2003 to 6,480 warrant requests in federal courts alone, of which only 9 were denied. They are being used for criminal investigations, with less than 1% used for counter-terrorism. See p. 1 for the warrant numbers and Table 2 on p. 7 for the crime statistics. Some argue that the rise is inflated by more recent applications for cell phone locations, email content, GPS tracking, etc.; see Orin Kerr, “Why the EFF - and then others - probably misunderstood the numbers on “sneak and peek” warrants, Washington Post, Oct. 31, 2014, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/31/why-the-eff-and-then-others-probably-misunderstood-the-numbers-on-sneak-and-peek-warrants/>.

program and possibly its precursor activity before 9/11, to monitor the metadata and content of Plaintiff communications.<sup>38</sup>

**4. Surveillance of Plaintiff's home from the curtilage of her property one night in 2010.** This was apparently meant to intimidate, because two identical brightly colored objects were left in the front and back yards and no break-in or theft subsequently occurred.

**5. Monitoring of Plaintiff's telephone and computer** for many years without probable cause.<sup>39</sup>

**6. Possible disruption of Plaintiff's email operations before two court deadlines during her constitutional lawsuit.** The Snowden documents discuss an NSA program that describe what Plaintiff experienced.

**7. NSA re-search of Plaintiff's paper and electronic documents,** allegedly for classification rather than criminal investigative purposes, claiming non-existent powers under the NSA Act of 1959.

**8. HPSCI searches of Plaintiff's papers and hard drive.**

Plaintiff realizes that the apartment search, while seeking evidence against Plaintiff, could be protested legally only by tenants. It is included, however, to show the number, intensity, breadth and length of the searches mounted against her.

All these apparent searches occurred despite the prosecutor's admission in court

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<sup>38</sup>The warrant affidavit for July 26, 2007 searches of four homes was finally unsealed in 2012, and it contained the content of a May 2006 telephone conversation between Bill Binney and Plaintiff. Binney said he did not tell the FBI about it, contrary to their claims.

<sup>39</sup> This has often been quite obvious, including regular single phone rings with 15-20 seconds of silence before clicking off, computer freezes for 15-20 minutes during downloads, occasional failure to restore the computer to operation over the weekend, and caching of non-junk emails that do not go to the delete file.

in July 2011 that there was no evidence of motivation or fact against Plaintiff. The only “evidence” temporarily claimed was NSA’s false assertion that the THINTHREAD paper was classified.

Finally, in a very unusual journalistic move, James Risen, the *New York Times* reporter to whom Plaintiff and her associates were accused of leaking the Terrorist Surveillance Program, stated publicly this year that he neither knew nor got his information from any of the five, whom he termed “collateral damage.”<sup>40</sup>

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<sup>40</sup> See the interview of Risen in the second hour of CBS Frontline, “United States of Secrets,” May 13, 2014, [http://www.pbs.org/wgbh/pages/frontline/united-states-of-secrets/#united-states-of-secrets-\(part-one\)](http://www.pbs.org/wgbh/pages/frontline/united-states-of-secrets/#united-states-of-secrets-(part-one)). Risen made other similar statements.

## Plaintiff Attachment 1

### HISTORY OF THE PROPERTY SEIZURE CASE

Plaintiff herein adds important details and context about this case for return of property.

In her last five years before retiring from government service in April, 2002, Plaintiff served as the HPSCI Republican/majority staffer responsible for overseeing NSA's budget and the legality and effectiveness of its operations. She predicted from its outset that NSA's ill-conceived modernization plan would fail, and in 2006 it did - after wasting billions of dollars and with no tangible result to show for it. Plaintiff had learned about and funded a far cheaper, more advanced and more effective technology that NSA impeded and then dismantled.

After the 9/11 attacks, however, part of that alternate THINTHREAD program was revived and became essential to NSA's spying on US citizens and ordinary foreign persons. Plaintiff discovered the program and vigorously opposed it through contacts or attempted contacts with cleared persons in HPSCI and in the Bush Administration and with high-ranking judges, but without success.

After retiring in April 2004, Plaintiff joined three associates -- Kirk Wiebe, William Binney and Ed Loomis - to submit a Hotline complaint to the Department of Defense Inspector General about fraud, waste and abuse at NSA in connection with its modernization program, TRAILBLAZER, and its policy on THINTHREAD. Another associate, Thomas Drake, facilitated the 2-½ year IG investigation from inside NSA.

Over 3 years later, a portion of the illegal NSA program was revealed by *New*

*York Times* reporters in a series of December 2005 stories and a January 2006 book . The leaked part was hastily named the “Terrorist Surveillance Program” (TSP). Even after Edward Snowden gave reporters documentation of the breathtaking expanse of the program in 2013, and NSA admitted the authenticity of the Snowden trove, the government -- as in this court case -- likes to refer only to the TSP. However, it has been officially revealed, since publication in July 2009 of an unclassified report by five Intelligence Community Inspectors General, that the “Terrorist Surveillance Program” is only a small part of a much larger “President’s Surveillance Program” (PSP) that has been ineffective in countering domestic terrorism but is a threat to US civil liberties.<sup>1</sup>

Immediately after the *New York Times* revelations about TSP, a large investigation was initiated under considerable pressure from the White House to find the leaker(s). Early in this investigation, the FBI demanded that the DoD IG reveal the names of those who had requested the IG audit of NSA. The IG improperly provided the protected identities of Plaintiff and her associates.

FBI interviews of the relatively few people in Congress and the Executive who had been briefed into the closely held program also revealed that Plaintiff had approached some of them seeking to stop the program or, at minimum, to restore the civil liberties protections that had been deliberately deactivated. These protections are encryption of information identifying US citizens pending a warrant and automated tracking of database

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<sup>1</sup> *Unclassified Report on the President’s Surveillance Program*, 10 July 2009, prepared by the Offices of Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, Office of the Director of National Intelligence, at [https://www.eff.org/files/unclassified\\_psp\\_report.pdf](https://www.eff.org/files/unclassified_psp_report.pdf)



users. To this day, they have not been restored.

In 2002, NSA Director Michael Hayden had told Plaintiff that after “The Program” leaked, she could “yell and scream and wave your hands all you want” about her objections to it. About 4 years after her retirement and 4 months after the *Times* revelations, without revealing more details about the program, she voiced, to a *Baltimore Sun* reporter who had contacted her, her objections to removal of the protections. She asked that her name be withheld, while stating that NSA would suspect that she was the source and asking the reporter not to publish any classified information she might acquire from other sources. The article containing this information was published in the *Baltimore Sun* in April 2006, as the Senate was confirming Michael Hayden to become the Director of Central Intelligence.

Plaintiff had assumed that the courts would easily declare the program unconstitutional once it inevitably leaked. However, the government made false and misleading statements about the program’s breadth. It also foiled lawsuits by exploiting the court-developed doctrine requiring Plaintiff “standing” and invoking “state secrets” to refuse to reveal information that could establish standing or to release additional information about the program.

The government stance and pending legislation on Capitol Hill impelled Plaintiff in August 2006 to draft an Opinion Editorial (OpEd) about her objections to the TSP. It was submitted to CIA for pre-publication review, and CIA referred it to NSA. NSA did not respond for a prolonged period and ultimately blacked out most of the text, claiming that some of it was classified but admitting that some of the redactions were not. This

rendered the piece unpublishable.<sup>2</sup> Sen. Ron Wyden of the Senate Select Committee on Intelligence challenged the admittedly unclassified redactions on Plaintiff's behalf. NSA claimed that Plaintiff's nondisclosure agreement permitted withholding of unclassified information, and HPSCI ignored requests for a copy of the agreement.

Within a week of submitting the OpEd for review, in late August 2006, Plaintiff was contacted and asked to cooperate with the FBI leak investigation. She agreed to meet voluntarily with them, but from the beginning said she would not reveal her sources of information about the NSA program, citing protection of legislative privilege under the Constitution's separation of powers. With great reluctance, she accepted advice to hire an attorney, after the House of Representatives' General Counsel, who had attended FBI meetings with HPSCI members and staff, refused to do the same for her.

Plaintiff asked HPSCI repeatedly and fruitlessly for a copy of her last prepublication agreement and for the Committee's support in invoking legislative privilege to protect House and Committee sources of information and oversight capabilities. Plaintiff was told by two people that the Committee did "not want to be seen as protecting a leaker." She sent HPSCI an affidavit, that also was presented to the FBI, affirming that she had not provided information about the NSA program to the *New York Times*, but nothing changed.

In February 2007, while Plaintiff was in Washington, D.C. on other business, she and her attorney met with the FBI. There ensued a 3-hour hostile interrogation in which

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<sup>2</sup> See Attachment 2 for the redacted OpEd and NSA's final rationale for the redactions. The earlier rationale, which also revealed the alleged classification of various redactions, was seized by the FBI and is among documents being withheld by NSA, as discussed later under "Legal Argument."

Plaintiff recounted her recollections about her activities opposing the program, denied leaking to the *New York Times* or knowing who had done so, and repeatedly refused to reveal her sources of information about the NSA program. The *Baltimore Sun* article was placed on the table but was stated to be of secondary interest and there were no questions about it. At the end of the interview the FBI and US Attorney appeared placated and even friendly.

No further word was received about the investigation. At 6 a.m. on July 26, 2007, FBI agents raided Plaintiff's home and searched it for 5 hours, simultaneous with searches of her associates J. Kirk Wiebe, William Binney and Edward Loomis in Maryland. Thomas Drake was raided four months later. Plaintiff's warrant cited both the *New York Times* and *Baltimore Sun* articles. Plaintiff's request for the affidavit supporting the warrant was refused on grounds that it was classified. The FBI also searched a separate lower-floor apartment after a tenant repeatedly refused permission, seizing two computers.

Several years after the raid, Plaintiff was asked via her attorney to plead guilty to felony perjury because she had allegedly said in her February 2007 interview that she had no idea who had been a source for the *Baltimore Sun*. Plaintiff told her attorney that she remembered the question and answer very clearly: the question had been about the *Times* articles and not about the *Sun*, about which there had been no discussion at all. She was also asked to plead guilty to possessing the Confidential and Secret documents inadvertently included among her boxes of unclassified by herself or Committee staff who packed part of her belongings; these have also been raised in this Rule 41(g) case. Plaintiff refused to plead guilty to something she had not done, despite threat of

indictment and jail, and further stated that she could not testify against Thomas Drake as required because she did not know of any wrongs he had committed.

Prosecutors also sought a plea bargain from Drake and testimony against Plaintiff, but he refused it on the same grounds. Drake was indicted in April 2010 for allegedly possessing unmarked but supposedly classified documents at his home and for allegedly attempting to cover up evidence of his wrongdoing. Using the Espionage Act, prosecutors sought 35 years in prison -- likely the remainder of his life. Drake's indictment provided sufficient information for reporters quickly to identify Plaintiff. It made false claims and insinuations that sullied her reputation.

After Drake's indictment, prosecutors approached Plaintiff's former college roommate, seeking evidence that Plaintiff had spoken to her about one of the *New York Times* reporters, James Risen. They also presented her older son with a subpoena to testify against Plaintiff before a grand jury. The testimony was repeatedly postponed and ultimately never occurred. Apparent surveillance on the curtilage of her property occurred one night, with identical bright-colored items left at two sites in the front and rear of the house, presumably intentionally; no theft or criminal activity followed.

After the rejected plea bargain proffer, there was no further communication from the government. A prior draft indictment, allegedly mistakenly released by the government with other papers, had also proposed to indict Plaintiff, Binney, Loomis and Wiebe as co-conspirators.

Drake's trial was scheduled for June 2011. During closed pre-trial hearings, Drake's public defenders and expert witnesses proved that the government was seeking retroactively to classify all five unmarked documents found in Drake's house, that these

were in fact properly unclassified and that the information in them had even been released by NSA. However the NSA Original Classification Authority had sworn to the court under penalty of perjury that they were all properly classified.

Nonetheless, additional intense pressure was placed on Drake to plea bargain. He refused until the government finally abandoned all ten felony charges in return for a misdemeanor plea of inappropriate use of a government computer, because he had downloaded two unclassified documents for purposes other than official NSA use. Drake accepted the deal although he had been unaware that the downloading was contrary to regulations, because it put a definitive end to the 4-½ year ordeal. He had also become deeply indebted and forced to seek public defenders.

At Drake's sentencing in July 2011, Maryland District Court Judge Richard Bennett repeatedly excoriated the government for its conduct in drawing out the case so long and then dropping all charges four days before the trial, saying he had never experienced or heard of a similar case and that it did not "meet the smell test." Judge Bennett asked the prosecutor why others in the case had not been indicted, even under the very lenient evidentiary requirements for a conspiracy. The prosecutor responded that there was no evidence of either fact or motivation to support any indictment of Drake's associates.<sup>3</sup>

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<sup>3</sup> The Transcript of Drake's Sentencing for giving unclassified information from the NSANet to a reporter is at **Attachment 1**, from <http://fas.org/sgp/jud/drake/071511-transcript.pdf>. Judge Bennett repeatedly denounced the prolonged case and last-minute dropping of charges, saying it "doesn't pass the smell test," e.g. at p. 21, pp. 28-9, 42-3, 45-6, and sentenced Drake to a \$25 mandatory fine and one year of probation including 240 hours of community service on a project Bennett had selected. He questioned the government until it admitted that it had no evidence even of conspiracy against Drake's associates, including Plaintiff, pp. 14-16.

Nonetheless, both Drake and Plaintiff continued to be monitored. Drake was tracked until early November. Plaintiff communications and/or electronics also appeared to be tapped and bugged from at least July 2007 until early November 2011, the last time she witnessed an apparent computer download. Perhaps not coincidentally, activity appeared to cease shortly after they filed suit for return of property in Maryland.

Their three associates had in 2010 and 2011 been provided letters of immunity on condition that they provide any incriminating information against others that they might possess. After Drake's plea bargain, only Plaintiff's status was uncertain. Maryland prosecutors refused to provide this in writing, so her subsequent Oregon lawsuit of July 2012 asked for her status. In court papers filed in January 2013, the government stated that it did not intend to pursue her case. Judge Bennett had chastised the government for waiting 2-½ years after raiding Drake to indict him. Plaintiff had waited 4-½ years after being raided and 3 years after rejecting pressure to plea bargain.

Edward Loomis had for some years and on many occasions sought return of his property, but received no response. After Drake's charges were dropped, Kirk Wiebe and William Binney twice asked the government to return their property, but also received no response. In early November 2011, Wiebe initiated a Maryland Rule 41(g) lawsuit that soon involved all five of the group, until Plaintiff was removed and then on July 26, 2012 filed separately in Oregon, as the 5-year statute of limitations was about to expire.

All five of the group had lost their clearances when the FBI searched their homes. These were never restored, even after all ten felony charges against Drake were dropped and the prosecutor admitted that there was no evidence against the rest.

Loomis, Drake, Binney and Wiebe each lost between \$150,000 and \$300,000 in annual income when their clearances were revoked. After Drake's trial, Loomis pursued the issue, repeatedly asking for his personnel file to see why his clearances had been removed. When Mr. Loomis finally got the file, it made no reference to the issue and contained no derogatory information.

Roark v. U.S.

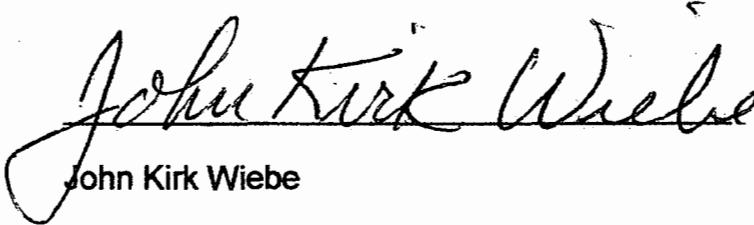
Plaintiff Attachment 2

I, John Kirk Wiebe, do hereby certify that in the matter of the 26 July 2007 seizure by the FBI and subsequent return of personal information that had been stored on computer hard drives belonging to me, the Government did in fact return to my possession a document entitled Thin Thread on two separate occasions.

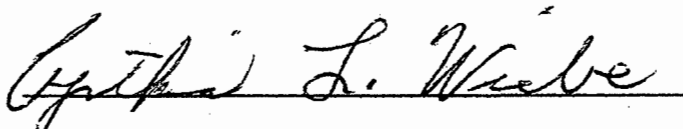
The first occasion occurred in 2009 when the FBI returned to me an external hard drive I used as a backup storage disc.

The second occurred in 2013 when the FBI returned personal information that had been stored on the hard drives retained by the FBI. Return of the information was carried out subsequent to the ruling of Judge Richard D. Bennett in the case *John Wiebe, et al. v. National Security Agency* heard in the Maryland District Court, Baltimore, MD.

Signed by me, this 24<sup>th</sup> day of November, 2014,

  
John Kirk Wiebe

Witnessed this 24<sup>th</sup> day of November, 2014,

  
Cynthia L. Wiebe





TheScuSpeaks

Posted 17 May 2006 -09:57 PM

[http://www.baltimore...-home-headlines\(http://www.baltimoresun.com/news/nationworld/bal-nsa517.0.5970724.story?page=1&coll=bal-home-headlines\)](http://www.baltimore...-home-headlines(http://www.baltimoresun.com/news/nationworld/bal-nsa517.0.5970724.story?page=1&coll=bal-home-headlines))

NSA killed system that sifted phone data legally

Sources say project was shelved in part because of bureaucratic infighting

By Siobhan Gorman

Sun Reporter

Originally published May 17, 2006, 10:27 PM EDT

WASHINGTON // The National Security Agency developed a pilot program in the late 1990s that would have enabled it to gather and analyze massive amounts of communications data without running afoul of privacy laws. But after the Sept. 11 attacks, it shelved the project -- not because it failed to work -- but because of bureaucratic infighting and a sudden White House expansion of the agency's surveillance powers, according to several intelligence officials.

The agency opted instead to adopt only one component of the program, which produced a far less capable and rigorous program. It remains the backbone of the NSA's warrantless surveillance efforts, tracking domestic and overseas communications from a vast databank of information, and monitoring selected calls.

#### Advertisement

Four intelligence officials knowledgeable about the program agreed to discuss it with The Sun only if granted anonymity because of the sensitivity of the subject.

The program the NSA rejected, called ThinThread, was developed to handle greater volumes of information, partly in expectation of threats surrounding the millennium celebrations. Sources say it bundled together four cutting-edge surveillance tools. ThinThread would have:

- \* Used more sophisticated methods of sorting through massive phone and e-mail data to identify suspect communications.
- \* Identified U.S. phone numbers and other communications data and encrypted them to ensure caller privacy.
- \* Employed an automated auditing system to monitor how analysts handled the information, in order to prevent misuse and improve efficiency.
- \* Analyzed the data to identify relationships between callers and chronicle their contacts. Only when evidence of a potential threat had been developed would analysts be able to request decryption of the records.

An agency spokesman declined to discuss NSA operations.

"Given the nature of the work we do, it would be irresponsible to discuss actual or alleged operational issues as it would give those wishing to do harm to the U.S. insight and potentially place Americans in danger," said NSA spokesman Don Weber in a statement to The Sun

"However, it is important to note that NSA takes its legal responsibilities very seriously and operates within the law."

In what intelligence experts describe as rigorous testing of ThinThread in 1998, the project succeeded at each task with high marks. For example, its ability to sort through massive amounts of data to find threat-related communications far surpassed the existing system, sources said. It also was able to rapidly separate and encrypt U.S.-related communications to ensure privacy.

Roark v. U.S.

Plaintiff Attachment 3

But the NSA, then headed by Air Force Gen. Michael V. Hayden, opted against both of those tools, as well as the feature that monitored potential abuse of the records. Only the data analysis facet of the program survived and became the basis for the warrantless surveillance program.

The decision, which one official attributed to "turf protection and empire building," has undermined the agency's ability to zero in on potential threats, sources say. In the wake of revelations about the agency's wide gathering of U.S. phone records, they add, ThinThread could have provided a simple solution to privacy concerns.

A number of independent studies, including a classified 2004 report from the Pentagon's inspector-general, in addition to the successful pilot tests, found that the program provided "superior processing, filtering and protection of U.S. citizens, and discovery of important and previously unknown targets," said an intelligence official familiar with the program who described the reports to The Sun. The Pentagon report concluded that ThinThread's ability to sort through data in 2001 was far superior to that of another NSA system in place in 2004, and that the program should be launched and enhanced.

Hayden, the president's nominee to lead the CIA, is to appear Thursday before the Senate Select Committee on Intelligence and is expected to face tough questioning about the warrantless surveillance program, the collection of domestic phone records and other NSA programs.

While the furor over warrantless surveillance, particularly collection of domestic phone records, has raised questions about the legality of the program, there has been little or no discussion about how it might be altered to eliminate such concerns.

ThinThread was designed to address two key challenges: The NSA had more information than it could digest, and, increasingly, its targets were in contact with people in the United States whose calls the agency was prohibited from monitoring.

With the explosion of digital communications, especially phone calls over the Internet and the use of devices such as BlackBerries, the NSA was struggling to sort key nuggets of information from the huge volume of data it took in.

By 1999, as some NSA officials grew increasingly concerned about millennium-related security, ThinThread seemed in position to become an important tool with which the NSA could prevent terrorist attacks. But it was never launched. Neither was it put into effect after the attacks in 2001. Despite its success in tests, ThinThread's information-sorting system was viewed by some in the agency as a competitor to Trailblazer, a \$1.2 billion program that was being developed with similar goals. The NSA was committed to Trailblazer, which later ran into trouble and has been essentially abandoned.

Both programs aimed to better sort through the sea of data to find key tips to the next terrorist attack, but Trailblazer had more political support internally because it was initiated by Hayden when he first arrived at the NSA, sources said.

NSA managers did not want to adopt the data-sifting component of ThinThread out of fear that the Trailblazer program would be outperformed and "humiliated," an intelligence official said.

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Without ThinThread's data-sifting assets, the warrantless surveillance program was left with a sub-par tool for sniffing out information, and that has diminished the quality of its analysis, according to intelligence officials.

Sources say the NSA's existing system for data-sorting has produced a database clogged with corrupted and useless information.

The mass collection of relatively unsorted data, combined with system flaws that sources say erroneously flag people as suspect, has produced numerous false leads, draining analyst resources, according to two intelligence officials. FBI agents have complained in published reports in The New York Times that NSA leads have resulted in numerous dead ends.

The privacy protections offered by ThinThread were also abandoned in the post-Sept. 11 push by the president for a faster response to terrorism.

Once President Bush gave the go-ahead for the NSA to secretly gather and analyze domestic phone records -- an authorization that carried no stipulations about identity protection -- agency officials regarded the encryption as an unnecessary step and rejected it, according to two intelligence officials knowledgeable about ThinThread and the warrantless surveillance programs.

"They basically just disabled the [privacy] safeguards," said one intelligence official.

Another, a former top intelligence official, said that without a privacy requirement, "there was no reason to go back to

something that was perhaps more difficult to implement."

However two officials familiar with the program said the encryption feature would have been simple to implement. One said the time required would have involved minutes, not hours.

Encryption would have required analysts to be more disciplined in their investigations, however, by forcing them to gather what a court would consider sufficient information to indicate possible terrorist activity before decryption could be authorized.

While it is unclear why the agency dropped the component that monitored for abuse of records, one intelligence official noted that the feature was not popular with analysts. It not only tracked the use of the database, but hunted for the most effective analysis techniques, and some analysts thought it would be used to judge their performance.

Within the NSA, the primary advocate for the ThinThread program was Richard Taylor, who headed the agency's operations division. Taylor who has retired from the NSA, did not return calls seeking comment.

Officials say that after the successful tests of ThinThread in 1998, Taylor argued that the NSA should implement the full program. He later told the 9/11 Commission that ThinThread could have identified the hijackers had it been in place before the attacks, according to an intelligence expert close to the commission.

But at the time, NSA lawyers viewed the program as too aggressive. At that point, the NSA's authority was limited strictly to overseas communications, with the FBI responsible for analyzing domestic calls. The lawyers feared that expanding NSA data collection to include communications in the United States could violate civil liberties, even with the encryption function.

Taylor had an intense meeting with Hayden and NSA lawyers. "It was a very emotional debate," recalled a former intelligence official. "Eventually it was rejected by [NSA] lawyers."

After the 2001 attacks, the NSA lawyers who had blocked the program reversed their position and approved the use of the program without the enhanced technology to sift out terrorist communications and without the encryption protections.

The NSA's new legal analysis was based on the commander in chief's powers during war, said former officials familiar with the program. The Bush administration's defense has rested largely on that argument since the warrantless surveillance program became public in December.

The strength of ThinThread's approach is that by encrypting information on Americans, it is legal regardless of whether the country is at war, according to one intelligence official.

Officials familiar with Thin Thread say some within NSA were stunned by the legal flip-flop. ThinThread "was designed very carefully from a legal point of view, so that even in non-wartime, you could have done it legitimately," the official said.

In a speech in January, Hayden said the warrantless surveillance program was not only limited to al-Qaida communications, but carefully implemented with an eye toward preserving the Constitution and rights of Americans.

"As the director, I was the one responsible to ensure that this program was limited in its scope and disciplined in its application," he said.

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4579-4612

## HOUSE BILLS

- H.R. 4579—Continued  
coverage for employees of large enterprises engaged in retail trade or service and of other employers engaged in activities affecting commerce, to increase the minimum wage under the Act to \$1.25 an hour, and for other purposes.  
Mr. Dent; Committee on Education and Labor, 2557.
- H.R. 4580—To amend chapter 223 of title 18, United States Code, to provide for the admission of certain evidence so as to safeguard individual rights without hampering effective and intelligent law enforcement.  
Mr. Devine; Committee on the Judiciary, 2557.
- H.R. 4581—To repeal the excise tax on amounts paid for communication services or facilities.  
Mr. Dorn of South Carolina; Committee on Ways and Means, 2557.
- H.R. 4582—To amend sections 1701 and 1712 of title 38, United States Code, to provide educational assistance thereunder to the children of veterans who are permanently and totally disabled from wartime service-connected disability, and for other purposes.  
Mr. Dorn of South Carolina; Committee on Veterans' Affairs, 2557.
- H.R. 4583—For the relief of the county of Cuyahoga, Ohio.  
Mr. Feighan; Committee on the Judiciary, 2557.
- H.R. 4584—To amend the Internal Revenue Code of 1954 so as to provide for scheduled personal and corporate income tax reductions, and for other purposes.  
Mr. Fisher; Committee on Ways and Means, 2557.
- H.R. 4585—To amend the Code of Law for the District of Columbia by modifying the provisions relating to the attachment and garnishment of wages, salaries, and commissions of judgment debtors, and for other purposes.  
Mr. Foley; Committee on the District of Columbia, 2557.
- H.R. 4586—To amend section 4921 of the Internal Revenue Code of 1954.  
Mr. Forand; Committee on Ways and Means, 2557.—Reported (H. Rept. 821), 15397.—Passed House, 16202.—Referred to Senate Committee on Finance, 16352.
- H.R. 4587—To amend section 21 of the Second Liberty Bond Act to provide for the retirement of the public debt.  
Mr. Ikard; Committee on Ways and Means, 2557.
- H.R. 4588—To amend section 21 of the Second Liberty Bond Act to provide for the retirement of the public debt.  
Mr. Wright; Committee on Ways and Means, 2557.
- H.R. 4589—To permit withholding on the compensation of Federal employees for purposes of income taxes imposed by certain cities.  
Mr. Karsten; Committee on Ways and Means, 2557.
- H.R. 4590—To amend section 24 of the Federal Reserve Act to provide that the existing restrictions on the amount and maturity of real estate loans made by national banks shall not apply to certain loans which are guaranteed or insured by a State or a State authority.  
Mr. McIntire; Committee on Banking and Currency, 2557.
- H.R. 4591—To amend Public Law 398, 76th Congress, to establish criteria for utilization by the Secretary of the Interior in determining the feasibility of constructing or modifying any reclamation project, and for other purposes.
- H.R. 4591—Continued  
Mr. Mills; Committee on Interior and Insular Affairs, 2557.
- H.R. 4592—To equalize the pay of retired members of the uniformed services.  
Mr. Mills; Committee on Armed Services, 2557.
- H.R. 4593—To promote and to establish policy and procedure for the development of water resources of lakes, rivers, and streams.  
Mr. Mills; Committee on Public Works, 2257.
- H.R. 4594—To encourage and stimulate the production and conservation of coal in the United States through research and development by creating a Coal Research and Development Commission, and for other purposes.  
Mr. Morgan; Committee on Interior and Insular Affairs, 2557.
- H.R. 4595—To clarify and make uniform certain provisions of law relating to special postage rates for educational, cultural, and library materials, and for other purposes.  
Mr. Murray; Committee on Post Office and Civil Service, 2557.—Reported with amendment (H. Rept. 252), 5117.—Amended and passed House, 5542.—Referred to Senate Committee on Post Office and Civil Service, 5584.
- H.R. 4596—To clarify and make uniform certain provisions of law relating to special postage rates for educational, cultural, and library materials, and for other purposes.  
Mr. Rees of Kansas; Committee on Post Office and Civil Service, 2557.
- H.R. 4597—To provide for the training of postmasters under the Government Employees Training Act.  
Mr. Murray; Committee on Post Office and Civil Service, 2557.—Reported (H. Rept. 230), 4695.—Passed House, 5539.—Referred to Senate Committee on Post Office and Civil Service, 5584.—Reported (S. Rept. 283), 7970.—Passed Senate, 8537.—Examined and signed, 8723, 8361.—Presented to the President, 8361.—Approved [Public Law 33], 10163.
- H.R. 4598—To provide for the training of postmasters under the Government Employees Training Act.  
Mr. Rees of Kansas; Committee on Post Office and Civil Service, 2557.
- H.R. 4599—To provide certain administrative authorities for the National Security Agency, and for other purposes.  
Mr. Murray; Committee on Post Office and Civil Service, 2557.—Reported with amendment (H. Rept. 231), 4696.—Amended and passed House, title amended, 5539.—Referred to Senate Committee on Post Office and Civil Service, 5584.—Reported (S. Rept. 284), 7970.—Passed Senate, 8537.—Examined and signed, 8729, 8861.—Presented to the President, 8561.—Approved [Public Law 36], 10163.
- H.R. 4600—To provide certain administrative authorities for the National Agency, and for other purposes.  
Mr. Rees of Kansas; Committee on Post Office and Civil Service, 2557.
- H.R. 4601—To amend the act of September 1, 1954, in order to limit to cases involving the national security the prohibition on payment of annuities and retired pay to officers and employees of the United States, to clarify the application and operation of such act, and for other purposes.  
Mr. Murray; Committee on Post Office and Civil Service, 2557.—Reported with amendments (H. Rept. 258), 5374.—Made special order (H. Res. 238), 5530.—
- H.R. 4601—Continued  
Amended and passed House, 5830.—In Senate, ordered placed on the calendar, 5878.—Passed over, 6975, 8570, 19099, 19364.
- H.R. 4602—To amend the act of September 1, 1954, in order to limit to cases involving the national security the prohibition on payment of annuities and retired pay to officers and employees of the United States, to clarify the application and operation of such act, and for other purposes.  
Mr. Rees of Kansas; Committee on Post Office and Civil Service, 2557.
- H.R. 4603—To amend the Organic Act of Guam for the purpose of permitting the government of Guam, with the consent of the legislature thereof, to be sued.  
Mr. O'Brien of New York; Committee on Interior and Insular Affairs, 2557.—Reported with amendment (H. Rept. 214), 4386.—Amended and passed House, 5538.—Referred to Senate Committee on Interior and Insular Affairs, 5584.—Reported with amendment (S. Rept. 969), 18436.—Amended and passed Senate, 18914.—House concurs in Senate amendment, 19122.—Examined and signed, 18581, 19747.—Presented to the President, 19750.—Approved [Public Law 316], 19732.
- H.R. 4604—To provide that withdrawals or reservations of public lands shall not affect certain water rights.  
Mrs. Post; Committee on Interior and Insular Affairs, 2557.
- H.R. 4605—To provide for the recognition of the Polish Legion of American Veterans by the Secretary of Defense and the Administrator of Veterans' Affairs.  
Mr. Pucinski; Committee on Veterans' Affairs, 2557.
- H.R. 4606—To provide for the construction of the Cheney division, Wichita Federal reclamation project, Kansas, and for other purposes.  
Mr. Rees of Kansas; Committee on Interior and Insular Affairs, 2558.
- H.R. 4607—To provide that withdrawals or reservations of public lands shall not affect certain water rights.  
Mr. Saylor; Committee on Interior and Insular Affairs, 2558.
- H.R. 4608—To repeal the excise tax on amounts paid for communication services or facilities.  
Mr. Teague of California; Committee on Ways and Means, 2558.
- H.R. 4609—To provide for the representation of indigent defendants in criminal cases in the district courts of the United States.  
Mr. Udall; Committee on the Judiciary, 2558.
- H.R. 4610—To provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers, to prevent abuses in the administration of trusteeships by labor organizations, to provide standards with respect to the election of officers of labor organizations, and for other purposes.  
Mr. Udall; Committee on Education and Labor, 2558.
- H.R. 4611—To provide that for the purpose of disapproval by the President each provision of an appropriation bill shall be considered a separate bill.  
Mrs. Weis; Committee on the Judiciary, 2558.
- H.R. 4612—To provide that certain lands shall be held in trust for the Oglala Sioux Tribe in South Dakota.  
Mr. Berry; Committee on Interior and Insular Affairs, 2558.

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Roark v. U.S. Plaintiff Attachment 4

Wednesday, April 8, 1959

1959

America in Congress assembled, That (a) the Secretary of Defense is hereby authorized, under such regulations as he may prescribe, to lend to the Boy Scouts of America, a corporation created under the Act of June 15, 1916, for the use and accommodation of the approximately fifty thousand Scouts and officials who are to attend the Fifth National Jamboree of the Boy Scouts of America to be held as a part of the celebration of their fiftieth anniversary of service to the youth of the Nation during the period beginning in June 1960, and ending August 1960 at Colorado Springs, Colorado, such tents, cots, blankets, commissary equipment, flags, refrigerators, vehicles, and other equipment and services as may be necessary or useful to the extent that items are in stock and available and their issue will not jeopardize the national defense program.

(b) Such equipment is authorized to be delivered at such time prior to the holding of such jamboree, and to be returned at such time after the close of such jamboree, as may be agreed upon by the Secretary of Defense and the National Council, Boy Scouts of America. No expense shall be incurred by the United States Government for the delivery, return, rehabilitation, or replacement of such equipment.

(c) The Secretary of Defense, before delivering such property, shall take from the Boy Scouts of America a good and sufficient bond for the safe return of such property in good order and condition, and the whole, without expense to the United States.

Sec. 2. The Secretary of Defense is hereby authorized, under such regulations as he may provide, to permit, without expense to the United States Government, the Boy Scouts of America to use such portions of the undeveloped lands of the United States Air Force Academy adjacent to such encampment as may be necessary, or useful, to the extent that their use will not interfere with the activities of such Academy, and will not jeopardize the national defense program.

Sec. 3. Be it further enacted that the various and several departments of the Federal Government are hereby authorized under such regulations as may be prescribed by their Secretaries to assist the Boy Scouts of America in the carrying out and the fulfillment of the plans for the celebration of their fiftieth anniversary and the Fifth National Jamboree.

With the following committee amendment:

Page 2, line 24, strike the last four words and on line 25 strike "lands" and insert "services and portions of the lands and buildings".

The committee amendment was agreed to.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

#### AMENDMENT OF LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

The Clerk called the bill (H.R. 451) to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

Mr. FORD. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

#### TRAINING OF POSTMASTERS UNDER GOVERNMENT EMPLOYEES TRAINING ACT

The Clerk called the bill (H.R. 4597) to provide for the training of postmasters under the Government Employees Training Act.

There being no objection, the Clerk read the bill, as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 4(a) (5) of the Government Employees Training Act (72 Stat. 329; 5 U.S.C. 2303(a) (5)) is amended by inserting "(other than a postmaster)" immediately following the word "Senate".

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

#### ADMINISTRATIVE AUTHORITIES FOR NATIONAL SECURITY AGENCY

The Clerk called the bill (H.R. 4599) to provide certain administrative authorities for the national agency, and for other purposes.

There being no objection, the Clerk read the bill, as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 202 of the Classification Act of 1949, as amended (5 U.S.C. 1082), is amended by changing the period at the end thereof to a semicolon and adding the following new paragraph:

"(32) the National Security Agency."

Sec. 2. The Director of the National Security Agency is authorized to establish such positions and to appoint such officers and employees as may be necessary to carry out the functions of such Agency. The rates of basic compensation for such positions shall be fixed by the Director in relation to the rates of basic compensation contained in the General Schedule of the Classification Act of 1949, as amended, for positions subject to such Act which have corresponding levels of duties and responsibilities. Except as provided in section 4 of this Act, no officer or employee of the National Security Agency shall be paid basic compensation at a rate in excess of the highest rate of basic compensation contained in such General Schedule. Not more than fifty such officers and employees shall be paid basic compensation at rates equal to rates of basic compensation contained in grades GS-16, GS-17, and GS-18 of such General Schedule.

Sec. 3. Section 1581(a) of title 10, United States Code, as modified by section 12(a) of the Federal Employees Salary Increase Act of 1958 (72 Stat. 213), is amended by striking out ", and not more than fifty civilian positions in the National Security Agency," and the words "and the National Security Agency, respectively,".

Sec. 4. The Director of the National Security Agency may establish not more than fifty civilian positions in such Agency involving research and development functions, which require the services of specially qualified scientific or professional personnel, and fix the rates of basic compensation for such positions at rates not in excess of the maximum rate of compensation authorized by section 1581(b) of title 10, United States Code, as amended by paragraph (34)(B) of the first section of the Act of September 2, 1958 (72 Stat. 1456; Public Law 85-861).

Sec. 5. Officers and employees of the National Security Agency who are citizens or nationals of the United States may be granted additional compensation, in accordance with regulations which shall be prescribed by the Secretary of Defense, not in excess of additional compensation authorized by section 207 of the Independent Offices Appropriation Act, 1949, as amended (5 U.S.C. 118h), for employees whose rates of basic compensation are fixed by statute.

Sec. 6. (a) Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 29, 1935 (5 U.S.C. 654)) shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such Agency.

(b) The reporting requirements of section 1582 of title 10, United States Code, shall apply to positions, established in the National Security Agency in the manner provided by section 4 of this Act.

Sec. 7. The total number of positions authorized by section 505(b) of the Classification Act of 1949, as amended (5 U.S.C. 1105(b)), to be placed in grades 16, 17, and 18 of the General Schedule of such Act at any time shall be deemed to have been reduced by the number of positions in such grades allocated to the National Security Agency immediately prior to the effective date of this Act.

Sec. 8. The foregoing provisions of this Act shall take effect on the first day of the first pay period which begins later than the thirtieth day following the date of enactment of this Act.

With the following committee amendments:

Page 1, lines 8 to 11, inclusive, strike out "The Director of the National Security Agency is authorized to establish such positions and to appoint such officers and employees as may be necessary to carry out the functions of such Agency." and insert in lieu thereof "The Secretary of Defense (or his designee for the purpose) is authorized to establish such positions, and to appoint thereto such officers and employees, in the National Security Agency, as may be necessary to carry out the functions of such Agency".

Page 2, line 1, strike out "by the Director" and insert in lieu thereof "by the Secretary of Defense (or his designee for the purpose)".

Page 2, lines 11 and 12, strike out "grades GS-16, GS-17, and GS-18" and insert in lieu thereof "grades 16, 17, and 18".

Page 2, lines 19 and 20, strike out "The Director of the National Security Agency may establish" and insert in lieu thereof "The Secretary of Defense (or his designee for the purpose) is authorized to establish in the National Security Agency".

Page 2, lines 20 and 21, strike out "in such agency".

Page 4, line 5, strike out "Act" and insert in lieu thereof "section".

The committee amendments were agreed to.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed.

The title was amended so as to read: "A bill to provide certain administrative authorities for the National Security Agency, and for other purposes."

A motion to reconsider was laid on the table.

Rogak v. US

Plaintiff Attachment 4

May 20,

1959

## CONGRESSIONAL RECORD — SENATE

8587

referred to shall be held and considered to refer to such lock and dam by the name of "George Ewing lock and dam."

#### UTILIZATION OF STORAGE SPACE IN TABLE ROCK RESERVOIR

The Senate proceeded to consider the bill (S. 42) to authorize the utilization of a limited amount of storage space in Table Rock Reservoir for the purpose of water supply for a fish hatchery, which had been reported from the Committee on Public Works, with amendments, on page 1, line 7, after the word "of", to strike out "twenty" and insert "twenty-seven", and in line 9, after the word "exceed", to strike out "twenty-five" and insert "twenty-two", so as to make the bill read:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Table Rock Reservoir project, White River, Missouri, approved by the Flood Control Act approved August 18, 1941, be hereby modified to authorize the Secretary of the Army, acting through the Chief of Engineers, to make available a maximum of twenty-seven thousand acre-feet of storage space in the reservoir to provide a regulated flow not to exceed twenty-two cubic feet per second for operation by the State of Missouri of a fish hatchery without reimbursement on such terms and conditions as the Secretary of the Army may deem reasonable: Provided, That nothing herein contained shall affect water rights under State law.*

Mr. HENNINGS. Mr. President, the pending bill is one authorizing the utilization, by the State of Missouri, of a limited amount of water to be taken from the Table Rock Reservoir, located near Branson, Mo. The State would be allowed to use the water for supplying a State fish hatchery.

The bill could be explained in highly technical terms involving acre-feet and cubic feet per second of flow, but I do not think such an explanation is necessary.

What is involved is the need of the State of Missouri and the willingness of the Department of the Army, the agency controlling water use in the reservoir, to fulfill that need.

The Department of the Army has agreed to allow Missouri use of the Department's water. Missouri is appreciative and, on behalf of my home State, I urge the Senate to approve the bill.

The PRESIDING OFFICER. The question is on agreeing to the amendments of the committee.

The amendments were agreed to.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

#### CONSTRUCTION WORK ON HIGHWAY RIGHTS-OF-WAY

The bill (H.R. 4695) to amend section 108(a) of title 23 of the United States Code to increase the period in which actual construction shall commence on rights-of-way acquired in anticipation of such construction from 5 years to 7 years, and for other purposes, was considered, ordered to a third reading, read the third time, and passed.

#### ACQUISITION OF ADDITIONAL LAND ALONG THE MOUNT VERNON MEMORIAL HIGHWAY

The bill (H.R. 2228) to provide for the acquisition of additional land along the Mount Vernon Memorial Highway in exchange for certain dredging privileges, and for other purposes was announced as next in order.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. ENGLE. Mr. President, there is an amendment at the desk.

The PRESIDING OFFICER. The amendment will be stated.

The LEGISLATIVE CLERK. It is proposed, on page 4, line 3, after "D", to change the period to a colon and add the following:

*Provided, That nothing contained in this act or any contract entered into pursuant to this act, between the United States of America and the Smoot Sand and Gravel Corporation shall be construed as interfering with the uninterrupted right of the Smoot Sand and Gravel Corporation to dredge in areas "C" and "D" for the periods specified.*

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from California.

Mr. FROUTY. Mr. President, may I ask for an explanation of the amendment?

Mr. ENGLE. Mr. President, this is a perfecting amendment to clarify and facilitate making the exchange of property between the United States and the Smoot Sand & Gravel Corp.

The amendment, incidentally, has been furnished to me by the Senator from New Mexico [Mr. CHAVEZ], from the Committee on Public Works. It would remove possible restrictions on the sand and gravel company performing dredging operations at only certain seasons of the year, and permit them to dredge sand and gravel at any time. Since most of their dredging will be done in open water areas of the Potomac River, there should be no adverse effect on wildlife from a proper scheduling of their operations.

The amendment has the approval of the sponsors of the bill, the National Park Service, and the conservationists who are interested in protecting the fish and wildlife potentialities of the area.

The PRESIDING OFFICER. Is there objection to the amendment?

Mr. PROUTY. I have no objection.

The PRESIDING OFFICER. Without objection, the amendment is agreed to.

The amendment was ordered to be engrossed, and the bill to be read a third time.

The bill was read the third time and passed.

#### ALICE V. TENLY

The bill (S. 1887) for the relief of Alice V. Tenly was considered, ordered to be

engrossed for a third reading, read the third time, and passed, as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the election made under section 9(h) of the Civil Service Retirement Act by Charles E. Alden to receive a reduced annuity with an annuity payable after his death to his sister-in-law, Alice V. Tenly, shall be valid.*

(b) Notwithstanding any other provision of law, benefits payable under this Act shall be paid from the civil service retirement and disability fund.

#### TRAINING OF POSTMASTERS

The bill (H.R. 4597) to provide for the training of postmasters under the Government Employees Training Act was considered, ordered to a third reading, read the third time, and passed.

#### ADMINISTRATIVE AUTHORITIES FOR THE NATIONAL SECURITY AGENCY

The bill (H.R. 4599) to provide certain administrative authorities for the National Security Agency, and for other purposes, was considered, ordered to a third reading, read the third time, and passed.

#### EXEMPTION FROM TAXATION OF CERTAIN PROPERTY FOR CHILDHOOD EDUCATION INTERNATIONAL OF THE DISTRICT OF COLUMBIA

The bill (S. 685) to exempt from all taxation certain property of the Association for Childhood Education International in the District of Columbia was considered, ordered to be engrossed for a third reading, read the third time, and passed, as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the real property situated in square 1003 in the city of Washington, District of Columbia, described as lots 11, 801, 806, and 807, owned by the Association for Childhood Education International, a District of Columbia corporation, and all personal property located thereon, is hereby exempt from all taxation so long as the same is owned, occupied, and used by the Association for Childhood Education International for its educational and other corporate purposes and is not used for commercial or income producing purposes, subject to the provisions of sections 2, 3, and 5 of the Act entitled "An Act to define the real property exempt from taxation in the District of Columbia", approved December 24, 1942 (56 Stat. 1386; D.C. Code, secs. 47-801b, 47-801c and 47-801e).*

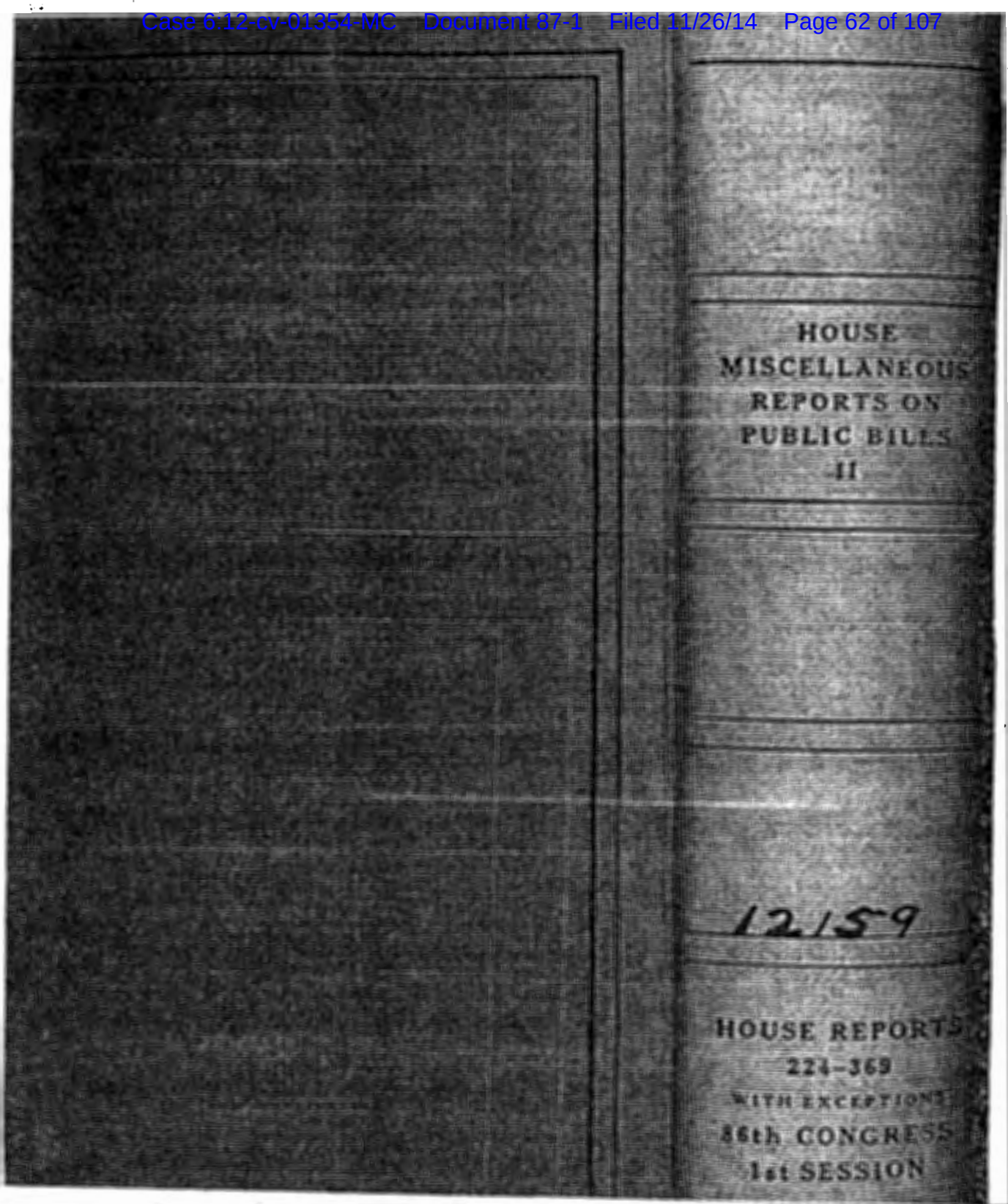
#### AMENDMENT OF DISTRICT OF COLUMBIA REDEVELOPMENT ACT OF 1945

The bill (S. 1370) to amend section 13 of the District of Columbia Redevelopment Act of 1945, as amended, was announced as next in order.

The PRESIDING OFFICER. Is there objection to the consideration of the bill?

Mr. PROUTY. Mr. President, I wonder if we may have an explanation of the

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*Roark v. U.S.*

*Plaintiff Attachment 4*

86TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT  
 1st Session } { No. 231

ADMINISTRATIVE AUTHORITIES FOR NATIONAL  
 SECURITY AGENCY

MARCH 19, 1959.—Committed to the Committee of the Whole House on the  
 State of the Union and ordered to be printed.

Mr. DAVIS of Georgia, from the Committee on Post Office and Civil  
 Service, submitted the following

R E P O R T

[To accompany H.R. 4599]

The Committee on Post Office and Civil Service, to whom was  
 referred the bill (H.R. 4599) to provide certain administrative author-  
 ities for the National Security Agency, and for other purposes, having  
 considered the same, report favorably thereon with amendments and  
 recommend that the bill as amended do pass.

AMENDMENTS

The committee proposes amendments to the text, and an amend-  
 ment to the title, of the bill, as reported.

AMENDMENTS TO THE TEXT

The proposed amendments to the text are as follows:

- (1) Page 1, lines 8 to 11, inclusive, strike out "The Director of the  
 National Security Agency is authorized to establish such positions  
 and to appoint such officers and employees as may be necessary to  
 carry out the functions of such Agency." and insert in lieu thereof  
 "The Secretary of Defense (or his designee for the purpose) is author-  
 ized to establish such positions, and to appoint thereto such officers  
 and employees, in the National Security Agency, as may be necessary  
 to carry out the functions of such agency."
- (2) Page 2, line 1, strike out "by the Director" and insert in lieu  
 thereof "by the Secretary of Defense (or his designee for the purpose)".
- (3) Page 2, lines 11 and 12, strike out "grades GS-16, GS-17, and  
 GS-18" and insert in lieu thereof "grades 16, 17, and 18".
- (4) Page 2, lines 19 and 20, strike out "The Director of the National  
 Security Agency may establish" and insert in lieu thereof "The Sec-



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retary of Defense (or his designee for the purpose) is authorized to establish in the National Security Agency”.

(5) Page 2, lines 20 and 21, strike out “in such agency”.

(6) Page 4, line 5, strike out “Act” and insert in lieu thereof “section”.

The proposed amendments Nos. (1), (2), (4), and (5) all have the same purpose: To make it clear that the authority for the establishment in the National Security Agency of the positions covered by the bill, the making of appointments to such positions, and the fixing of the rates of compensation for such positions is vested in the Secretary of Defense, who may delegate, in his discretion, this authority to an officer or employee under his jurisdiction. Because the bill, as introduced, provided for the exercise of this authority by the Director of the National Security Agency, an officer under the Department of Defense and subordinate to the Secretary of Defense, the question existed as to whether the general authority of the Secretary of Defense was paramount to the special authority vested by the introduced bill in the Director of the National Security Agency. These proposed amendments remove any ambiguity which may have been created by the introduced bill with respect to the authority of the Secretary of Defense over the Department of Defense by vesting in the Secretary of Defense the authority contained in the bill relating to positions in the National Security Agency.

The proposed amendment No. (3) conforms the references in section 2 of the introduced bill to grades 16, 17, and 18 of the General Schedule of the Classification Act of 1949, as amended, to the references to such grades in section 7 of the bill.

The proposed amendment No. (6) corrects the reference, in section 7 of the introduced bill, to the effective date (incorrectly stated as “the effective date of this Act”) by restating the effective date for the purposes of section 7 as “the effective date of this section”.

### AMENDMENT TO THE TITLE

The proposed amendment to the title is as follows:  
Amend the title so as to read:

A bill to provide certain administrative authorities for the National Security Agency, and for other purposes.

The purpose of the proposed amendment to the title is to set forth correctly in the title the name of the National Security Agency which was stated incorrectly as “National Agency” in the title of the bill, as introduced.

### STATEMENT

#### PURPOSE OF LEGISLATION

The purpose of this legislation is to eliminate an operational conflict that has developed between the performance of the National Security Agency of its lawful functions and the performance by the U.S. Civil Service Commission of its responsibilities under the Classification Act of 1949, as amended. The legislation will accomplish this purpose by exempting the National Security Agency from such act.

## ADMINISTRATIVE AUTHORITIES FOR NATIONAL SECURITY AGENCY 3

## EXPLANATION OF NEED FOR LEGISLATION

The National Security Agency was established in and under the Department of Defense to perform certain highly classified national security functions prescribed by the National Security Council. The nature of these functions and their relationship to the national security are such as to preclude the National Security Agency from disclosing—to the U.S. Civil Service Commission or any other Government agency, as well as to the public or any individual—personnel data and information which normally is required by the Civil Service Commission to perform its audit, review, and other duties under the Classification Act of 1949. The National Security Agency thus is in the position, by reason of security limitations in its organic authority, of being prohibited from providing information needed by the Civil Service Commission in connection with the duties of the Commission under the Classification Act of 1949. The Commission, in turn, is in the position of being required to perform its normal functions with respect to National Security Agency personnel matters without being able to obtain much of the information it must have to do its job.

For example, the Civil Service Commission is required, among other responsibilities imposed on it by the Classification Act of 1949, to prescribe standards for various categories of positions subject to the act, and to audit the classifications and salary grades of such positions in the departments and agencies. To do this, of course, the Commission must have full information on the need for such positions and the duties involved. The National Security Agency, on the other hand, may not legally permit access by the Commission to such information. This makes any standards prescribed, or audit action taken, by the Commission a mere formality which serves no useful purpose. In fact, the situation is such as well may tend to obstruct maximum efficiency and economy in the operations of both the National Security Agency and the Civil Service Commission.

## HEARINGS

The Director of the National Security Agency, accompanied by the Director of Manpower and Personnel, Deputy Director of Manpower and Personnel, and legal adviser of the Agency staff, testified at subcommittee hearings in executive session with respect to the need for this legislation and with respect to the existing position classification and compensation policies of the National Security Agency. The Chairman and the Executive Director of the U.S. Civil Service Commission also testified in support of the legislation.

In the light of the overriding security considerations involved in this legislation, it is not deemed appropriate to set forth in detail the matters presented by witnesses at the hearing. Members present at the hearing questioned the National Security Agency witnesses at length and in detail regarding existing employment, classification, and compensation policies as well as related policies which would be in effect upon enactment of H.R. 4599. The questions were answered fully and, in the judgment of the members, the information developed at the hearing completely justifies the request for this legislation. Moreover, the past record of personnel administration by the National

#### 4 ADMINISTRATIVE AUTHORITIES FOR NATIONAL SECURITY AGENCY

Security Agency with respect to the creation of positions in the Agency and the salaries paid warrants reliance on the assurance, given by the Director of the National Security Agency, that the Agency's conservative existing policy will be continued under this legislation and that particular care will be exercised to prevent any undue increase in the number of high-salaried positions.

##### LEGISLATIVE EFFECT OF H.R. 4599

In summary, H.R. 4599 will exempt the National Security Agency from the Classification Act of 1949, and, in lieu of the provisions of that act, will place comparable authority and responsibility in the Secretary of Defense to provide such civilian positions, and the rates of basic compensation therefor, as are necessary to carry out the mission of the National Security Agency. Except as noted below with respect to certain scientific and professional positions, salary rates for such positions will be fixed in relation to the salary rates for positions under the Classification Act of 1949 which have comparable levels of difficulty and responsibility.

The salary rates of not more than 50 such positions in the National Security Agency may be fixed at levels equal to the salaries for grades GS-16, GS-17, and GS-18 (the so-called supergrade positions) under the Classification Act of 1949. Presently the Civil Service Commission has allocated 39 such supergrade positions to the National Security Agency. These 39 positions will be relinquished and the total number of supergrade positions available to the Civil Service Commission for allocation to departments and agencies will be reduced by an equal number.

H.R. 4599 also authorizes the Secretary of Defense to establish not more than 50 scientific and professional positions in the National Security Agency, at rates of compensation not in excess of the maximum rate (\$19,000) prescribed for similar positions in certain departments and agencies by section 1581(b) of title 10, United States Code (originally enacted as Public Law 313, 80th Cong.). These 50 positions represent replacements for 50 similar positions now authorized for the National Security Agency under the statute referred to above. The 50 similar positions are withdrawn from the National Security Agency by the amendment made by section 3 of H.R. 4599. The positions so withdrawn will not be available to any other department or agency and will cease to exist.

Section 5 of the bill authorizes additional compensation for National Security Agency officers and employees who are citizens or nationals of the United States assigned to overseas duty, not in excess of additional compensation for overseas duty authorized for Federal employees generally by section 207 of the Independent Offices Appropriation Act, 1949 (5 U.S.C. 118h).

Section 6 of the bill, which is in the nature of a savings clause, provides that nothing in the bill will require the disclosure of the organization or any function of the National Security Agency, except as presently provided in the reporting requirements contained in 10 U.S.C. 1582.

Section 8 provides that the foregoing provision of the bill shall take effect at the beginning of the 1st pay period which commences not later than the 30th day following the date of enactment.

## ADMINISTRATIVE AUTHORITIES FOR NATIONAL SECURITY AGENCY 5

## COST

The enactment of this legislation will result in no additional cost to the Government.

## ADMINISTRATIVE RECOMMENDATIONS

This legislation is based upon an executive communication submitted by the Acting Secretary of Defense on January 2, 1959. This committee is advised by the Director of the National Security Agency that the Secretary of Defense recommends enactment of H.R. 4599, with the committee amendments, in lieu of the executive proposal. The Bureau of the Budget and the U.S. Civil Service Commission also have submitted letters with respect to this legislation. The executive proposal of the Acting Secretary of Defense and the letters from the Bureau of the Budget and the U.S. Civil Service Commission follow.

THE SECRETARY OF DEFENSE,  
*Washington, January 2, 1959.*

Hon. SAM RAYBURN,  
*Speaker of the House of Representatives.*

DEAR MR. SPEAKER: There is forwarded herewith a draft of legislation, to provide certain administrative authorities for the National Security Agency, and for other purposes.

This proposal is part of the Department of Defense legislative program for 1959. The Bureau of the Budget has advised that there would be no objection to the submission of this proposal for the consideration of the Congress. It is strongly recommended that this proposal be enacted by the Congress.

## PURPOSE OF THE LEGISLATION

The National Security Agency was established over 5 years ago by a Presidential directive to provide centralized coordination and direction for certain very highly classified functions vital to the national security. The Agency was organized as an element of the Department of Defense and its operations are subject to the direction and control of the Secretary of Defense under a special committee of the National Security Council.

The proposed legislation would indirectly implement recommendations of the task force on intelligence activities of the Commission on Organization of the Executive Branch of the Government, and is designed to overcome difficulties which the Commission found had seriously handicapped the Agency in the accomplishment of its mission. As stated in the preface to the Commission's report to Congress on intelligence activities, dated June 29, 1955, the task force prepared a supplemental, highly classified report which was not considered by the Commission, but was sent directly to the President because of its extremely sensitive content. The recommendations with respect to the National Security Agency were contained in this classified report.

The civilian personnel administration of the Agency is presently subject to general supervision and control by the Civil Service Commission. However, detailed review of Agency actions by the Commission has not been practicable because of security considerations.

## 6 ADMINISTRATIVE AUTHORITIES FOR NATIONAL SECURITY AGENCY

This creates an undesirable situation in which the Commission has a limited responsibility for supervising National Security Agency personnel actions but an even more limited opportunity for discharging that responsibility. The Commission concurs in the view that the Agency should be exempted from the Classification Act, subject to the limitations stated in the bill. Such exemption would be consistent with the treatment presently accorded other agencies engaged in specialized or highly classified defense activities.

The unique and highly sensitive activities of the Agency require extreme security measures. The bill, therefore, includes provisions exempting the Agency from statutory requirements involving disclosures of organizational and functional matters which should be protected in the interest of national defense.

## COST AND BUDGET DATA

The enactment of the proposed bill would not result in increased costs to the Government.

Sincerely yours,

DONALD A. QUARLES, *Acting.*

EXECUTIVE OFFICE OF THE PRESIDENT,  
BUREAU OF THE BUDGET,  
Washington, D.C., March 12, 1959.

HON. TOM MURRAY,  
*Chairman, Committee on Post Office and Civil Service,  
House of Representatives, Washington, D.C.*

MY DEAR MR. CHAIRMAN: This will refer to H.R. 4599 and H.R. 4600, identical bills respecting the National Security Agency, which will be the subject of committee hearings on Friday, March 13, 1959.

The subject bills are substantially the same as the proposal forwarded to the Congress by the Department of Defense on January 2, 1959. However, we would like to call to your attention certain differences which appear to have an effect not intended.

The first sentence of section 2 of the bills (lines 8-11 on p. 1) would authorize the Director of the National Security Agency to appoint such officers and employees as may be necessary. This authority is now vested in the Secretary of Defense. To vest a statutory appointing authority in the Director, a subordinate official, could well be interpreted as a limitation upon the Secretary's authority with respect to personnel of the National Security Agency. Such limitation would be highly improper, and should not be included.

The second sentence of section 2 (line 11 on p. 1, lines 1-5 on p. 2) directs that compensation of employees be fixed "in relation to" Classification Act rates for general schedule positions of corresponding levels of duties and responsibilities. While this language appears to be similar in intent to that proposed by the Department of Defense, we prefer the Department's language, since it clearly limits the NSA salary rates to the rates authorized under the Classification Act.

With modification in the light of the above comments, the Bureau of the Budget would have no objection to enactment of the bills.

Sincerely yours,

PHILLIP S. HUGHES,  
*Assistant Director for Legislative Reference.*

## ADMINISTRATIVE AUTHORITIES FOR NATIONAL SECURITY AGENCY 7

U.S. CIVIL SERVICE COMMISSION,  
Washington, D.C., March 12, 1959.

HON. TOM MURRAY,  
Chairman, Committee on Post Office and Civil Service,  
U.S. House of Representatives, Washington, D.C.

DEAR MR. MURRAY: This is in further reply to your letters of February 21, 1959, requesting the Commission's comments on H.R. 4599 and H.R. 4600, identical bills to provide certain administrative authorities for the National [Security] Agency, and for other purposes.

The bills would exclude the National Security Agency from the Classification Act of 1949, as amended, and would authorize the Director of the Agency to establish positions and fix rates of compensation in relation to rates of the Classification Act for positions subject to that act which have corresponding levels of duties and responsibilities. Not more than 50 employees may be paid at the rates of GS-16, 17, and 18.

Except for 50 civilian employees engaged in research and development functions, which require the services of specially qualified scientific or professional personnel, and who may be paid not to exceed the maximum rate (\$19,000 per annum) provided for Public Law 313 type positions, no employee may be paid basic compensation in excess of the highest rate of the general schedule of the Classification Act. The authorization for 50 research and development positions is in lieu of provisions in existing law for 50 such positions. However, that law also requires prior Commission approval of qualifications and pay of appointees.

The National Security Agency performs highly specialized technical and coordinating functions pertaining to the national security. Because of the extreme security measures deemed necessary by the Agency it is not possible for the Commission to carry out its statutory mandate to determine whether positions in the National Security Agency have been placed in classes and grades in conformance with or consistently with standards published under the Classification Act.

Difficulties of the same type are encountered in connection with prior approval of positions in GS-16, 17, and 18 and in connection with the approval of qualifications and pay of employees engaged in research and development functions.

Since present statutes impose requirements on the Agency and the Commission which in the interests of national security cannot be properly exercised, the Commission favors the exclusion from the Classification Act and the revision in the methods for handling the research and development positions. However, we do believe that the standards prescribed under and the salary schedules of the Classification Act can and should be applied by the Agency to the optimum extent practicable.

The Commission has no objection to other provisions of the bills. For these reasons enactment of H.R. 4599 or H.R. 4600 is recommended.

We are advised that the Bureau of the Budget has no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,

ROGER W. JONES, *Chairman.*

## 8 ADMINISTRATIVE AUTHORITIES FOR NATIONAL SECURITY AGENCY

## CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 202 OF THE CLASSIFICATION ACT OF 1949, AS AMENDED  
(5 U.S.C. 1082)

## TITLE II—COVERAGE AND EXEMPTIONS

- \* \* \* \* \*
- SEC. 202. This Act (except title XII) shall not apply to—
- (1) the field service of the Post Office Department, for which the salary rates are fixed by Public Law 134, Seventy-ninth Congress, approved July 6, 1945, as amended and supplemented;
  - (2) the Foreign Service of the United States under the Department of State, for which the salary rates are fixed by the Foreign Service Act of 1946, as supplemented by Public Law 160, Eighty-first Congress, approved July 6, 1949; and positions in or under the Department of State which are (A) connected with the representation of the United States to international organizations; or (B) specifically exempted by law from the Classification Act of 1923, as amended, or any other classification or compensation law;
  - (3) physicians, dentists, nurses, and other employees in the Department of Medicine and Surgery in the Veterans' Administration, whose compensation is fixed under chapter 73 of title 38, United States Code;
  - (4) teachers, school officers, and employees of the Board of Education of the District of Columbia, whose compensation is fixed under the District of Columbia Teachers' Salary Act of 1947, as supplemented by Public Law 151, Eighty-first Congress, approved June 30, 1949; and the chief judge and the associate judges of the Municipal Court of Appeals for the District of Columbia, and of the Municipal Court for the District of Columbia;
  - (5) officers and members of the Metropolitan Police, the Fire Department of the District of Columbia, the United States Park Police, and the White House Police;
  - (6) lighthouse keepers and civilian employees on lightships and vessels of the Coast Guard, whose compensation is fixed under authority of section 432 (f) and (g) of title 14 of the United States Code;
  - (7) employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual-labor occupations, and other employees including foremen and supervisors in positions having trade, craft, or laboring experience and knowledge as the paramount requirement, and employees in the Bureau of Engraving and Printing the duties of whom are to perform or to direct manual or machine operations requiring special skill or experience, or to perform or direct the counting, examining, sorting, or other verification of the product of manual

## ADMINISTRATIVE AUTHORITIES FOR NATIONAL SECURITY AGENCY 9

or machine operations: *Provided*, That the compensation of such employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates: *Provided further*, That whenever the Civil Service Commission concurs in the opinion of the employing agency that in any given area the number of such employees is so few as to make prevailing rate determinations impracticable, such employee or employees shall be subject to the provisions of this Act which are applicable to positions of equivalent difficulty or responsibility.

(8) officers and members of crews of vessels, whose compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry;

(9) employees of the Government Printing Office whose compensation is fixed under Public, Numbered 276, Sixty-eighth Congress, approved June 7, 1924;

(10) civilian professors, lecturers, and instructors at the Naval War College and the Naval Academy whose compensation is fixed under Public Law 604, Seventy-ninth Congress, approved August 2, 1946, senior professors, professors, associate and assistant professors, and instructors at the Naval Postgraduate School whose compensation is fixed under Public Law 303, Eightieth Congress, approved July 31, 1947; and the Academic Dean of the Postgraduate School of the Naval Academy whose compensation is fixed under Public Law 402, Seventy-ninth Congress, approved June 10, 1946;

(11) aliens or persons not citizens of the United States who occupy positions outside the several States and the District of Columbia;

(12) the Tennessee Valley Authority;

(13) the Inland Waterways Corporation;

(14) the Alaska Railroad;

(15) the Virgin Islands Corporation;

(16) the Central Intelligence Agency;

(17) the Atomic Energy Commission;

(18) Production Credit Corporations;

(19) Federal Intermediate Credit Banks;

(20) the Panama Canal Company;

(21) (A) employees of any department who are stationed in the Canal Zone and (B) upon approval by the Civil Service Commission of the request of any department which has employees stationed in both the Republic of Panama and the Canal Zone, employees of such department who are stationed in the Republic of Panama;

(22) employees who serve without compensation or at nominal rates of compensation;

(23) employees none or only part of whose compensation is paid from appropriated funds of the United States: *Provided*, That with respect to the Veterans' Canteen Service in the Veterans' Administration, the provisions of this paragraph shall be applicable only to those positions which are exempt from the Classification Act of 1949, pursuant to section 4202 of title 38, United States Code;



## 10 ADMINISTRATIVE AUTHORITIES FOR NATIONAL SECURITY AGENCY

(24) employees whose compensation is fixed under a cooperative agreement between the United States and (A) a State, Territory, or possession of the United States, or political subdivision thereof, or (B) a person or organization outside the service of the Federal Government;

(25) student nurses, medical or dental interns, residents-in-training, student dietitians, student physical therapists, student occupational therapists, and other student employees, assigned or attached to a hospital, clinic, or laboratory primarily for training purposes, whose compensation is fixed under Public Law 330, Eightieth Congress, approved August 4, 1947, or section 4114(b) of title 38, United States Code;

(26) inmates, patients, or beneficiaries receiving care or treatment or living in Government agencies or institutions;

(27) experts or consultants, when employed temporarily or intermittently in accordance with section 15 of Public Law 600, Seventy-ninth Congress, approved August 2, 1946;

(28) emergency or seasonal employees whose employment is of uncertain or purely temporary duration, or who are employed for brief periods at intervals;

(29) persons employed on a fee, contract, or piece work basis;

(30) persons who may lawfully perform their duties concurrently with their private profession, business, or other employment, and whose duties require only a portion of their time, where it is impracticable to ascertain or anticipate the proportion of time devoted to the service of the Federal Government;

(31) positions for which rates of basic compensation are individually fixed, or expressly authorized to be fixed, by any other law, at or in excess of the maximum scheduled rate of the highest grade established by this Act [1];

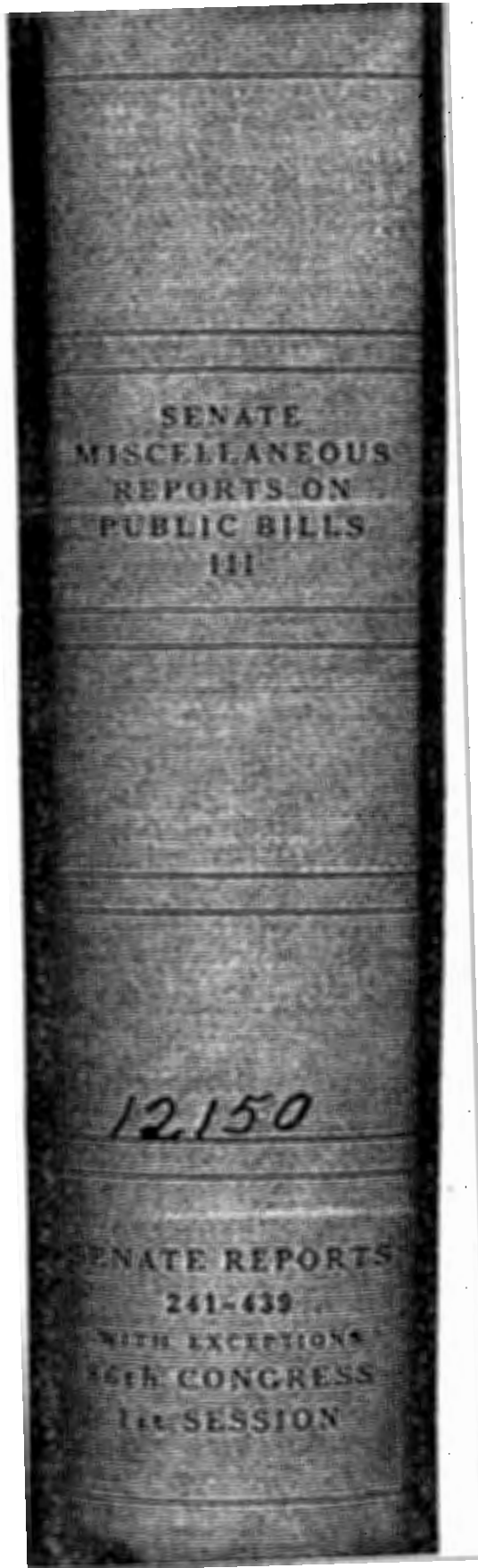
(32) *the National Security Agency.*

## SECTION 1581(a) OF TITLE 10, UNITED STATES CODE

## § 1581. Appointment: professional and scientific services

(a) The Secretary of Defense may establish not more than 120<sup>1</sup> civilian positions in the Department of Defense [1], and not more than 25<sup>1</sup> civilian positions in the National Security Agency, [1] to carry out research and development relating to the national defense, military medicine, and other activities of the Department of Defense [and the National Security Agency, respectively,] that require the services of specially qualified scientists or professional personnel.

<sup>1</sup> Sec. 12(a) of Public Law 85-462 operated to increase from 120 to 202 the number of positions which the Secretary of Defense may establish in the Department of Defense and from 25 to 50 the number of positions which the Secretary may establish in the National Security Agency and which require the services of specially qualified scientists or professional personnel.



*Frank v. U.S., Plaintiff  
Attachment 4*

# SENATE REPORTS

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VOL. 3

MISCELLANEOUS REPORTS ON  
PUBLIC BILLS, III

## Calendar No. 272

86TH CONGRESS }  
1st Session }

SENATE }

REPORT  
No. 284PROVIDING CERTAIN ADMINISTRATIVE AUTHORITIES  
FOR THE NATIONAL SECURITY AGENCY, AND FOR  
OTHER PURPOSES

MAY 12, 1959.—Ordered to be printed

MR. JOHNSTON of South Carolina, from the Committee on Post  
Office and Civil Service, submitted the following

## REPORT

[To accompany H.R. 4599]

The Committee on Post Office and Civil Service, to whom was referred the bill (H.R. 4599) to provide certain administrative authorities for the National Security Agency, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

## STATEMENT

The purpose of this legislation is to eliminate an administrative dilemma in which the National Security Agency and the Civil Service Commission find themselves by exempting the former from the provisions of the Classification Act of 1949, as amended.

## EXPLANATION

The National Security Agency was established as an element of the Department of Defense to perform certain very highly classified functions vital to the national security. The nature of these functions and their relationship to the national security are such as to preclude the National Security Agency from disclosing to the Civil Service Commission personnel data and other information normally required by the Civil Service Commission to perform its audit, review, and other duties under the Classification Act. The National Security Agency thus is in the position, by reason of security limitations in its organic authority, of being prohibited from providing information required by the Civil Service Commission to fulfill its duties under the Classification Act. The Commission, in turn, is required under

## 2 PROVIDING ADMINISTRATIVE AUTHORITIES FOR THE NSA

the Classification Act to insist that it have full and accurate descriptions of each position in the Agency.

## FINDINGS

By direction of the Civil Service Subcommittee, the staff met with the Director of the National Security Agency, accompanied by the Director of Manpower and Personnel, Deputy Director of Manpower and Personnel, and legal adviser to obtain a better understanding of the problems involved and the need for this legislation.

In the light of the security considerations involved, it is not deemed appropriate to outline in detail the issues discussed or the facts presented by the representatives of the National Security Agency.

It may be stated, however, that the legislation creates no new positions, will not result in the payment of higher salaries than currently authorized, and seems fully justified. The Civil Service Commission concurs in the view that the Agency should be exempted from the Classification Act as proposed by the bill. Such exemption would be consistent with legislation in effect with respect to other agencies similarly engaged in highly classified defense activities.

## COST

The Department of Defense states that enactment of the measure will not result in increased costs to the Government.

## LETTER OF REQUEST

Following is the letter from the Department of Defense requesting enactment of the measure:

SECRETARY OF DEFENSE,  
*Washington, January 2, 1959.*

HON. RICHARD M. NIXON,  
*President of the Senate.*

DEAR MR. PRESIDENT: There is forwarded herewith a draft of legislation, "To provide certain administrative authorities for the National Security Agency, and for other purposes."

This proposal is part of the Department of Defense legislative program for 1959. The Bureau of the Budget has advised that there would be no objection to the submission of this proposal for the consideration of the Congress. It is strongly recommended that this proposal be enacted by the Congress.

## PURPOSE OF THE LEGISLATION

The National Security Agency was established over 5 years ago by a Presidential directive to provide centralized coordination and direction for certain very highly classified functions vital to the national security. The Agency was organized as an element of the Department of Defense and its operations are subject to the direction and control of the Secretary of Defense under a special committee of the National Security Council.

The proposed legislation would indirectly implement recommendations of the Task Force on Intelligence Activities of the Commission

on Organization of the Executive Branch of the Government, and is designed to overcome difficulties which the Commission found had seriously handicapped the Agency in the accomplishment of its mission. As stated in the preface to the Commission's report to Congress on intelligence activities, dated June 29, 1955, the task force prepared a supplemental, highly classified report which was not considered by the Commission, but was sent directly to the President because of its extremely sensitive content. The recommendations with respect to the National Security Agency were contained in this classified report.

The civilian personnel administration of the Agency is presently subject to general supervision and control by the Civil Service Commission. However, detailed review of Agency actions by the Commission has not been practicable because of security considerations. This creates an undesirable situation in which the Commission has a limited responsibility for supervising National Security Agency personnel actions but an even more limited opportunity for discharging that responsibility. The Commission concurs in the view that the Agency should be exempted from the Classification Act, subject to the limitations stated in the bill. Such exemption would be consistent with the treatment presently accorded other agencies engaged in specialized or highly classified defense activities.

The unique and highly sensitive activities of the Agency require extreme security measures. The bill, therefore, includes provisions exempting the Agency from statutory requirements involving disclosures of organizational and functional matters which should be protected in the interest of national defense.

#### COST AND BUDGET DATA

The enactment of the proposed bill would not result in increased costs to the Government.

Sincerely yours,

DONALD A. QUARLES, *Acting.*

#### CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

#### SECTION 202 OF THE CLASSIFICATION ACT OF 1949, AS AMENDED (5 U.S.C. 1082)

#### TITLE II—COVERAGE AND EXEMPTIONS

\* \* \* \* \*  
Sec. 202. This Act (except title XII) shall not apply to—

- (1) the field service of the Post Office Department, for which the salary rates are fixed by Public Law 134, Seventy-ninth Congress, approved July 6, 1945, as amended and supplemented;
- (2) the Foreign Service of the United States under the Department of State, for which the salary rates are fixed by the Foreign Service Act of 1946, as supplemented by Public Law 160,

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Eighty-first Congress, approved July 6, 1949; and positions in or under the Department of State which are (A) connected with the representation of the United States to international organizations; or (B) specifically exempted by law from the Classification Act of 1923, as amended, or any other classification or compensation law;

(3) physicians, dentists, nurses, and other employees in the Department of Medicine and Surgery in the Veterans' Administration, whose compensation is fixed under chapter 73 of title 38, United States Code;

(4) teachers, school officers, and employees of the Board of Education of the District of Columbia, whose compensation is fixed under the District of Columbia Teachers' Salary Act of 1947, as supplemented by Public Law 151, Eighty-first Congress, approved June 30, 1949; and the chief judge and the associate judges of the Municipal Court of Appeals for the District of Columbia, and of the Municipal Court for the District of Columbia;

(5) officers and members of the Metropolitan Police, the Fire Department of the District of Columbia, the United States Park Police, and the White House Police;

(6) lighthouse keepers and civilian employees on lightships and vessels of the Coast Guard, whose compensation is fixed under authority of section 432 (f) and (g) of title 14 of the United States Code;

(7) employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual-labor occupations, and other employees including foremen and supervisors in positions having trade, craft, or laboring experience and knowledge as the paramount requirement, and employees in the Bureau of Engraving and Printing the duties of whom are to perform or to direct manual or machine operations requiring special skill or experience, or to perform or direct the counting, examining, sorting, or other verification of the product of manual or machine operations: *Provided*, That the compensation of such employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates: *Provided further*, That whenever the Civil Service Commission concurs in the opinion of the employing agency that in any given area the number of such employees is so few as to make prevailing rate determinations impracticable, such employee or employees shall be subject to the provisions of this Act which are applicable to positions of equivalent difficulty or responsibility.

(8) officers and members of crews of vessels, whose compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry;

(9) employees of the Government Printing Office whose compensation is fixed under Public, Numbered 276, Sixty-eighth Congress, approved June 7, 1924;

(10) civilian professors, lecturers, and instructors at the Naval War College and the Naval Academy whose compensation is fixed under Public Law 604, Seventy-ninth Congress, approved August

## PROVIDING ADMINISTRATIVE AUTHORITIES FOR THE NSA 5

2, 1946, senior professors, professors, associate and assistant professors, and instructors at the Naval Postgraduate School whose compensation is fixed under Public Law 303, Eightieth Congress, approved July 31, 1947; and the Academic Dean of the Postgraduate School of the Naval Academy whose compensation is fixed under Public Law 402, Seventy-ninth Congress, approved June 10, 1946;

(11) aliens or persons not citizens of the United States who occupy positions outside the several States and the District of Columbia;

(12) the Tennessee Valley Authority;

(13) the Inland Waterways Corporation;

(14) the Alaska Railroad;

(15) the Virgin Islands Corporation;

(16) the Central Intelligence Agency;

(17) the Atomic Energy Commission;

(18) Production Credit Corporations;

(19) Federal Intermediate Credit Banks;

(20) the Panama Canal Company;

(21) (A) employees of any department who are stationed in the Canal Zone and (B) upon approval by the Civil Service Commission of the request of any department which has employees stationed in both the Republic of Panama and the Canal Zone, employees of such department who are stationed in the Republic of Panama;

(22) employees who serve without compensation or at nominal rates of compensation;

(23) employees none or only part of whose compensation is paid from appropriated funds of the United States: *Provided*, That with respect to the Veterans' Canteen Service in the Veterans' Administration, the provisions of this paragraph shall be applicable only to those positions which are exempt from the Classification Act of 1949, pursuant to section 4202 of title 38, United States Code;

(24) employees whose compensation is fixed under a cooperative agreement between the United States and (A) a State, Territory, or possession of the United States, or political subdivision thereof, or (B) a person or organization outside the service of the Federal Government;

(25) student nurses, medical or dental interns, residents-in-training, student dietitians, student physical therapists, student occupational therapists, and other student employees, assigned or attached to a hospital, clinic, or laboratory primarily for training purposes, whose compensation is fixed under Public Law 330, Eightieth Congress, approved August 4, 1947, or section 4114(b) of title 38, United States Code;

(26) inmates, patients, or beneficiaries receiving care or treatment or living in Government agencies or institutions;

(27) experts or consultants, when employed temporarily or intermittently in accordance with section 15 of Public Law 600, Seventy-ninth Congress, approved August 2, 1946;

(28) emergency or seasonal employees whose employment is of uncertain or purely temporary duration, or who are employed for brief periods at intervals;



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- (29) persons employed on a fee, contract, or piece work basis;
- (30) persons who may lawfully perform their duties concurrently with their private profession, business, or other employment, and whose duties require only a portion of their time, where it is impracticable to ascertain or anticipate the proportion of time devoted to the service of the Federal Government;
- (31) positions for which rates of basic compensation are individually fixed, or expressly authorized to be fixed, by any other law, at or in excess of the maximum scheduled rate of the highest grade established by this Act [ ];
- (32) *the National Security Agency.*

SECTION 1581(a) OF TITLE 10, UNITED STATES CODE

§ 1581. Appointment: professional and scientific services

(a) The Secretary of Defense may establish not more than 120<sup>1</sup> civilian positions in the Department of Defense [ , and not more than 25<sup>1</sup> civilian positions in the National Security Agency, ] to carry out research and development relating to the national defense, military medicine, and other activities of the Department of Defense [ and the National Security Agency, respectively, ] that require the services of specially qualified scientists or professional personnel.

<sup>1</sup> Sec. 12(a) of Public Law 85-462 operated to increase from 120 to 292 the number of positions which the Secretary of Defense may establish in the Department of Defense and from 25 to 56 the number of positions which the Secretary may establish in the National Security Agency and which require the services of specially qualified scientists or professional personnel.



## **Plaintiff Attachment 5**

### **NSA's History of Secrecy**

The 1959 NSA Act itself and the accompanying papers sent to Congress do not identify NSA's purpose or functions, only referencing the organization's need for great secrecy. The Agency was created by Executive Order, not by legislation.

A persisting culture of extreme secrecy originated in World War II, when Signals Intelligence (SIGINT) code-breaking made major contributions to victory in both the Pacific and European theaters. The longevity and usefulness of these breakthroughs were sustained only because of strict secrecy. Sometimes the Allies sacrificed lives by not using decoded information, so the Axis would not suspect their codes had been broken and change them.

Victory was quickly followed by a Cold War with the USSR and after 1949 with China. The Soviets had since the 1930s focused on penetrating the US. In the 1940s, they were especially interested in the Manhattan Project to build a nuclear weapon. By the late 1940s the FBI was investigating these activities, leading to execution of Julius and Ethel Rosenberg in 1951, followed by other spy scandals in the US and allied countries. When the Soviets detonated an atomic bomb in 1949, there was intense concern; some of the necessary information was gleaned from the Manhattan Project. NSA employees' names were protected at least in part to foil foreign espionage and recruitment attempts. Today, targeting of employees by terrorists is another potential security issue.

However, by the time the NSA Act was passed in 1959, the Agency's purpose was

## **Plaintiff Attachment 4**

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pretty obvious. In 1957, it had moved into a huge new building and campus right off both Route 32 and the new parkway connecting Washington, D.C. and Baltimore. Almost all of NSA's employees from the war and its aftermath commuted or moved from Virginia to Maryland,<sup>1</sup> doubtless bringing their culture of secrecy with them. The Soviets likely knew the building's intended occupant and purpose from the outset, but intense secrecy persisted for several decades, earning NSA the widely used epithets "No Such Agency" and "Never Say Anything."

James Bamford, a former employee at an NSA facility, became a ranking outside expert on NSA and cracked its secrecy with his first book, *The Puzzle Palace*, published in 1982. The Agency claimed immediately that many properly classified revelations were contained in the book, but backed off after Bamford pointed out that his work was fully sourced with footnotes from open literature. About 25 years later, Bamford helped prove that documents taken from Thomas Drake's house were not properly classified.

After a time, the extreme secrecy yielded somewhat to realism and practicality. In the early 1960s, employees could not reveal where they worked, their salaries and their specialty. They were not to answer such questions from the courts, the Civil Service Commission, census takers or private parties. They could not tell even their spouses what

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<sup>1</sup> Thomas R. Johnson, "The Move, or How NSA Came to Fort Meade," *Cryptologic Quarterly* (no date), [https://www.nsa.gov/public\\_info/\\_files/cryptologic\\_quarterly/The\\_Move\\_or\\_How\\_NSA\\_Came\\_to\\_Ft\\_Meade.pdf](https://www.nsa.gov/public_info/_files/cryptologic_quarterly/The_Move_or_How_NSA_Came_to_Ft_Meade.pdf), pp. 94-99. In this example of NSA's use of the NSA Act, the article is termed "Statutorily Exempt" and the FOUO markings are crossed out. It was released 52 years after the move to Ft. Meade, on December 1, 2011, as a "Transparency Case."

they did, including spouses also employed at NSA. This created practical, everyday problems. For instance, the need to verify employment, position and salary made it difficult to qualify for mortgages and other credit.

Eventually, perhaps assisted by Bamford, the secrecy abated somewhat. By the 1990s, specific job descriptions and recruitment advertising were allowed (e.g. senior intelligence analyst, traffic analyst, Russian linguist), spouses were more knowledgeable, and some employees now admit that they work for NSA rather than citing the government or the Department of Defense.

Nonetheless, the Agency's close-mouthed reputation and suspicion of a self-serving motive for its secrecy persisted. NSA was deeply involved in the intelligence scandals publicly uncovered in the early 1970s, including mass collection of Americans' overseas telexes during the entire postwar period -- then as now with U.S. industry cooperation -- and domestic surveillance of those opposing the Viet-Nam war. These activities were facilitated by NSA's extraordinary secrecy and scarce congressional oversight. The response to Church and Pike Committee investigations in the Senate and House of Representatives was creation of dedicated intelligence committees, in both chambers. Plaintiff worked on the House side for 17 years, from 1985 to 2002.

NSA's secrecy has made it attractive fodder within popular culture as a sometimes fanciful adversarial foil.<sup>2</sup> For instance, the 1998 movie *Enemy of the State* depicted

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<sup>2</sup> Wikipedia, "NSA in Popular Culture,"

[http://en.wikipedia.org/wiki/NSA\\_in\\_popular\\_culture](http://en.wikipedia.org/wiki/NSA_in_popular_culture).

rogue NSA agents in relentless and lethal pursuit of a U.S. citizen, using advanced microphones and real-time video from spy satellites.

Seeing this film and witnessing the audience's disgusted reactions shortly before becoming Director of NSA, General Michael Hayden decided that greater openness was required. He entered into an unprecedented and internally controversial availability to the media early in his 1999-2005 term. After the 9/11 attacks, however, he agreed to and carried out extra-legal programs directed by the White House that targeted the U.S. populace and engaged in dragnet collection worldwide. Following partial revelation, it was claimed that this "President's Surveillance Program" was permitted under the President's constitutional powers as commander in chief during war. Legislation liberally interpreted by presidents and their lawyers accommodated considerable expansion over the years under a secret court. In sum, however, after the 2001 attacks on the World Trade Center and Pentagon, NSA leadership had again become tight-lipped. The Agency had largely gone dark under Hayden and his successors.

*New York Times* reporters revealed in December 2005 and January 2006 a small part of the domestic collection program. Hayden took charge of much of the Agency's defense, first as the Deputy Director of National Intelligence, a post to which he had moved in 2006, and recently as a private citizen after having left his subsequent position as Director of Central Intelligence. General Keith Alexander, who succeeded Hayden as NSA Director, also mounted a public defense late in his term and after his retirement, following revelation of the "Snowden documents" beginning in June 2013, .

Distrust of NSA had again flourished after the *New York Times* revelations. It metastasized in 2013-14, fed by a long series of media revelations based on a large trove

of information taken from NSA by Edward Snowden. These documented massive and indiscriminate domestic and worldwide collection of every sort of electronics, and repeatedly revealed that many official reassurances had been and continued to be false or misleading.

Roark v. U.S.

Plaintiff Attachment 6

Ms. Diane Roark  
2000 N. Scenic View Dr.  
Stayton, OR 97383  
503-767-2490  
[gardenofeden@wvi.com](mailto:gardenofeden@wvi.com)

October 28, 2013

Kerry W. Kircher, Esq.  
General Counsel  
219 Cannon House Office Building  
U.S. House of Representatives  
Washington, D.C. 20515-3902

Dear Mr. Kircher:

I seek your legal help in upholding Congressional oversight privileges under the Constitutional Separation of Powers doctrine, as embodied in the Speech or Debate Clause. The case involves return of seized documents, some of which were related to my prior congressional staff duties at the House Permanent Select Committee on Intelligence (HPSCI). These were seized from my home six years ago and have been retained by the executive branch.

The National Security Agency (NSA) intends to keep an unknown number of these electronic and paper documents even though, to date with two alleged exceptions, they are not classified. I did not sign a prepublication agreement permitting the withholding of unclassified information, although NSA claimed, after I submitted an OpEd for review in 2006, that I had done so. The agency cites its alleged authority to seize unclassified, private communications or documents under section 6a of the National Security Agency Act of 1959, although this law was meant to exempt the agency from certain Civil Service rules.

The investigation of me is officially closed and I was not indicted. An associate, Thomas A. Drake, eventually was indicted in Maryland but the government dropped the charges four days before trial. Drake faced a possible 35 years in prison, partly under the Espionage Act, and had repeatedly refused intense pressure for a plea bargain. Closed pretrial hearings established that none of the five unmarked documents found in his home, that formed the basis for charges were actually classified, as NSA had alleged. For Judge Bennett's comments, see: **Error! Hyperlink reference not valid.**

NSA then claimed that it did not have to give back our property. I am suing the government, *pro se*, for return of most of my belongings. We are negotiating a mediation agreement for return of some material partially along the lines of my colleagues' U.S. District Court of Maryland decision in *John K. Wiebe et al. v. National Security Agency et al.*, Civil No. RDB-11-3245. However, the unresolved property issues are to be litigated in the U.S. District Court of Oregon, Eugene Division, *Roark v. United States*,



6:12-cv-01354-MC (MC was formerly AA).

I worked for 17 years as Republican professional staff on the House Permanent Select Committee on Intelligence (HPSCI). I retired in April 2002. During my last five years at HPSCI, my primary duty was oversight of the National Security Agency's budget and operations. In the winter of 2002, confidential sources informed me about the so-called "warrantless wiretaps" program begun in October, 2001. Part of that program was revealed by *New York Times* reporters in December 2005 and January 2006. There were many fragmentary official government statements about the program in subsequent years, but most of its detailed and documented content has been revealed by former NSA contractor Edward Snowden since June 2013.

In August 2006, one of your predecessors, Geraldine Gennet, contacted me in Oregon by telephone. She asked if I would voluntarily cooperate with an FBI investigation into the 2005-06 *New York Times* leak of classified information about the program. I said that I would do so, but added in an email immediately following the conversation that I would not reveal my sources of information about the program, citing Separation of Powers. During the telephone conversation, I made clear to Ms. Gennet that I had vigorously opposed the program, particularly the needless deactivation of civil liberties protections that were built into its original software. I told her I had urged numerous officials who were cleared for the program to insist either that those protections be restored or that the program be ended. She advised me to employ a lawyer. I objected that I had only carried out my oversight responsibilities and had done nothing wrong. I asked that she accompany me to the interview, as she had accompanied then-current HPSCI staff and members. She still insisted that I needed a personal attorney. Therefore, reluctantly, I enlisted the services of Nina Ginsberg, whose offices are in Alexandria, VA, during the course of the protracted investigation.

In February 2007, while I was in the Washington area for a meeting of the Graybeards advisory board that reported to the Associate Director of National Intelligence for Collection, I met for three hours with two FBI agents and the U.S. Attorney assigned to the leak investigation, accompanied by Ms. Ginsberg. I denied any contact with the *New York Times* and said I had no idea who might have leaked the warrantless wiretap information, but I was confident my sources of information did not do so. The FBI repeatedly asked me to identify my sources. Each time I declined to do so, citing legislative privilege.

At one point we had a more extended discussion about this, and I told them that if congressional sources of independent information were not protected, Congress would be unable to provide effective oversight of executive branch expenditures and of the efficiency and legality of its operations -- a particularly important capability in the secretive world of intelligence, where public access to information is very limited. Further, I pointed out that I could conceive of no oversight issue more important than the program in question, and therefore it was particularly imperative to uphold the principle in this case and not to provide a precedent legitimizing executive encroachment on legislative privilege. I said I had talked to some HPSCI members and staff about the

issue and had written numerous memos to some of them on the subject, but did not tell DoJ the specific content of the exchanges or my sources for the content. I also informed them that I had not revealed the identity of my sources to the committee.

For their part, the Department of Justice representatives expressed their contempt for Congress, which they dismissed as a worthless bunch of leakers. I was shocked to hear these seemingly heartfelt opinions from the agency assigned to defend the Constitution. DoJ should be able to provide you the FBI's FD-302 notes on this interview.

I heard nothing more until I was raided by the FBI at 6 a.m. in July 2007, at the same time as some of my congressional sources in Maryland. My computer, printer and many other papers were seized. There was also strong evidence in the warrant that my home had been entered surreptitiously before the raid. I have never been notified of such a search and my repeated requests that the government confirm or deny it have been ignored. The DoJ had formally assured Speaker of the House Hastert, in a letter after passage of the PATRIOT Act, that the law would not be used to justify or employ unnotified surreptitious searches, and the FBI also continued to claim this on its website.

While the DoJ made clear during my interview that the identity of one of my sources on the warrantless wiretaps program was suspected (and as I found out years later, he was subsequently interviewed three times), it is very doubtful that they would have strongly suspected all the other sources and associates who were raided, without the information on my computer. The hard drive of my computer appears to have been bugged and copied before the raid, during a surreptitious entry or remotely, partly because for a time prior, it suddenly malfunctioned strangely.

In addition to emails with my sources obliquely referring to the NSA program and to other NSA oversight issues from January 2002 through July 2007, there were additional documents on my hard drive pertaining to the program and my efforts to modify it. For instance, there was a cryptic diary summarizing when I found new information on the program or tried within HPSCI and elsewhere to encourage opposition to it. Those efforts continued after my official retirement in April, to August 2002.

In September 2002, having reached a dead end on attempts to motivate action on the warrantless wiretap program, I and three former NSA employees submitted to the DoD Inspector General hotline a request for an investigation of NSA regarding other issues. A few aspects of these issues were partially and indirectly related to the warrantless wiretaps activities, but we did not reveal that program to the IG. In October 2003 I moved to Oregon.

After the sealed affidavits for the 2007 search warrants finally were released during the Maryland and Oregon lawsuits, it became apparent that the government had successfully sought to coerce me into not exercising my First Amendment right to unclassified speech regarding my objections to the warrantless wiretap program. In this matter, it also appears that the government may have deliberately and falsely led HPSCI

(as it misled me and Tom Drake) to believe that a *Baltimore Sun* article for which I had been a source contained classified information. This may have led HPSCI and possibly the House General Counsel to withhold support for me. The affidavit revealed that the government judged from the outset that the article was unclassified.

The extensive background of my case may be found in my December 16, 2012 submission to the District Court of Oregon regarding the constitutional aspect of my lawsuit, that was dismissed without prejudice.

My research has indicated that Speech or Debate Clause protections extend to congressional staff as well as members, and specifically they relate to oversight issues. In my case, part of my oversight information was kept at home in a cryptic, unclassified manner. My sources generally did not wish to sign in at HPSCI. I also maintained congressional and executive branch contacts regarding the matter even after retiring, and continued contact with key congressional sources for years afterward. Of course even after I left the committee, I was obliged to protect the identity of committee sources.

More importantly, I would argue that it is strongly in the House of Representatives' interest to maintain the independence of its oversight activities. This includes but is not limited to the right to nondisclosure of congressional sources and the right to withhold and protect congressional papers pertaining to oversight. There is also precedent to force the return of improperly searched and seized congressional papers, perhaps including as a penalty the return of all seized documents if congressional prerogatives were violated.

I look forward to a response as soon as you are able to consider this issue. My case will proceed to litigation after the mediation is concluded this month and the government returns some of the property as agreed in the mediation. I have raised legislative privilege as an issue, but the local Assistant U.S. Attorney representing the government orally dismissed it as irrelevant.

Thank you very much for your consideration.

Sincerely,

Diane Roark

Cc: Chairman Rogers, HPSCI  
Ranking Member Ruppertsberger, HPSCI  
Rep. Boehner, Speaker of the House

Ms. Diane Roark  
2000 N. Scenic View Dr.  
Stayton OR 97383

October 28, 2013

Hon. John Boehner, Speaker  
U.S. House of Representatives  
H-232 U.S. Capitol  
Washington, D.C. 20515

Dear Speaker Boehner:

I have attached a copy of my letter to the House General Counsel because of the Department of Justice's apparent violation of its assurances to former Speaker Hastert. DoJ pledged that it would not engage in secret unnotified searches of private premises after passage of the PATRIOT Act.

Sincerely,

Diane Roark  
(former HPSCI staff)

***Roark v. U.S., Plaintiff Attachment 7***

**HPSCI EXECUTIVE SESSION RULES**

Almost all HPSCI witnesses in executive session were from government agencies, nearly always intelligence agencies. This is uniformly true regarding the budget in particular. Witnesses normally arrive with a large retinue of persons from the agency or agencies testifying, as well as interested representatives from some of the other intelligence agencies (there are 17), many of whom take notes that they remove from HPSCI on departure or that are pouched and returned to them.

Further, draft transcripts of hearings, including both witness and member comments, routinely are sent to the agencies of the witnesses so they may propose corrections to any alleged transcription errors. Therefore, excepting extremely compartmented programs or rare non-government testimony, most of this information is distributed elsewhere. It is highly unlikely that almost any government witnesses will be able to present maverick positions in opposition to their agency or Intelligence Community (IC) policies that remain unknown to others, most often many others.

Executive session rules were adopted in response to the 1970s scandals involving domestic surveillance by NSA, CIA, FBI and military intelligence components, that led to creation of the Intelligence Committees. The rules were meant to protect whistleblowers and other potentially controversial or vulnerable witnesses by severely restricting dissemination of such material and identities. Unfortunately, HPSCI rarely solicits such witnesses. Plaintiff was informed that the rules were mainly meant to allow members to

ask provocative questions, make statements or take positions that even if unclassified would not be aired publicly, thus promoting free discussion and exchange of ideas.

Of course, classified information is always to be protected under other standing rules. Excepting the sensitive situations above involving member positions or vulnerable witnesses, classified normally may be discussed with properly cleared persons having a “need to know.” Indeed, classified budget discussions routinely take place before and after budget executive sessions and are critical to the entire budget process. Unclassified budget reports also accompany the House bill and the final conferenced House/Senate bill that normally becomes law.

Mr. Dick’s allegation that the budget may not be discussed outside HPSCI on grounds that the budget is annually discussed in Committee closed/executive hearings is simply unworkable and could not be adhered to. Nor would it be feasible for most other oversight topics.

With the budget in particular, as well as all other subjects on which the Committee convenes an executive session for briefings or hearings, it is the relevant staffers’ responsibility to be well informed on the topic beforehand and to provide a hearing or briefing package for the members with summaries and suggested questions or areas they might wish to explore with witnesses or briefers.

Because the budget and accompanying “classified annex” and unclassified report are the primary means by which the Committee influences agency behavior, priorities and expenditures, almost every briefing at the Committee or at executive agencies throughout the year is attuned or potentially related to budget and oversight issues that might be addressed in the Intelligence Authorization bill.

The process becomes more focused and intense beginning in early February, when proposed agency intelligence budgets are released to Congress. Many days of intensive staff briefings follow, involving presentations, questions from staff and considerable exchange of information and views between staff and the agency. After executive session hearings in the spring, staff, supervised by staff managers knowledgeable about member views, assemble a proposed mark (additions or subtractions to various budget lines) and proposed classified and unclassified report language. In executive session Committee “mark up,” members will discuss only the most prominent or potentially controversial of these recommended line items and possibly selected report language.

The Committee’s decisions must take into account discussions by staff with the House Armed Services Committee and Defense Appropriations Committee staff, because those committees include intelligence funding within their bills. When the House and Senate Intelligence Committees later conference to reconcile any differences in their two bills, the discussion must widen accordingly to include at least four committees.

In addition, each agency and usually all the offices affected by line item marks or report language, receive all or portions of these budget mark-ups and associated report language. The agencies and their affected offices usually follow up by discussing with staff and members the motivation, intent and meaning of both the House bill and the final law, also giving them an opportunity to express their agreement, reservations or disagreement.

For all these reasons, by definition it is impossible to confine budget discussion or outcome to Executive Session. Indeed, this would be highly undesirable. Further, the

unclassified reports for the Committee mark up and for the final conferenced bill are printed and released to the public.

In practice, the real application of the executive session rule is that member discussion during executive session, especially during budget mark up, when there are no agency representatives present, must be protected, the rare whistleblower or vulnerable witness must be protected, and classified discussion must be properly controlled and restricted to those with a “need to know,” as per the norm.

When Plaintiff was presented with her last pre-publication agreement, it contained a restriction worded similarly to Mr. Dick’s interpretation, that confined budget discussion to executive session. Plaintiff immediately went to the drafter and politely pointed out that it was impossible to conduct normal committee business without violating the restriction as written. This observation was received explosively, such that another staffer standing nearby with the agreement in hand simply went ahead and signed it. Having no other option, Plaintiff reluctantly also later signed it, knowing full well that she could not do her job whilst observing the letter of the agreement.



Search Warrant Information

attached to Affidavit

Attachment E

Items to be Seized

Any items which constitute evidence, instrumentalities, or fruits of violation of Title 18, United States Code, Sections 371 (Conspiracy To Commit An Offense Against The United States), 793 (Unlawful Disclosure of Classified National Defense Information), and 798 (Unlawful Disclosure of Classified Information), including specifically:

1. U.S. government documents, classified documents (including classified documents missing headers and footers), national defense intelligence documents and papers, and other documents relating to the National Security Agency (NSA). }
2. Papers or documents relating to the transmittal of U.S. government documents, national defense and classified intelligence to representatives of the news media, or individuals not authorized to receive the information;
3. Computer hardware, meaning any and all computer equipment, including any electronic devices that are capable of collecting, analyzing, creating, displaying, converting, storing, concealing, or transmitting electronic, magnetic, optical, or similar computer impulses or data. Included within the definition of computer hardware is any data processing hardware (such as central processing units and self-contained laptop or notebook computers); internal and peripheral storage devices (such as floppy disks, compact disks/CD-roms, hard disk drives, flash drives, tapes, or similar data storage devices/media); peripheral input/output devices (such as keyboards, printers, scanners, plotters, video display monitors, and optical readers); related communications devices (such as modems, cables and connections); and any devices, mechanisms, or parts that can be used to restrict access to computer hardware (such as "dongles," keycards, physical keys, and locks).
4. Computer software, meaning any and all information, instructions, programs, or program codes, stored in the form of electronic, magnetic, optical, or other media, which is capable of being interpreted by a computer or its related components. Computer software may also include data, data fragments, or control characters integral to the operation of computer software, such as operating systems software, applications software, utility programs, compilers, interpreters, communications software, and other programming used or intended to be used to communicate with computer components.
5. Computer-related documentation, meaning, any written, recorded, printed, or electronically-stored material that explains or illustrates the configuration or use of any seized computer hardware, software, or related items.
6. Computer passwords and data security devices, meaning any devices, programs, or data – whether themselves in the nature of hardware or software – that can be used or are designed to be used to restrict access to, or to facilitate concealment of, any

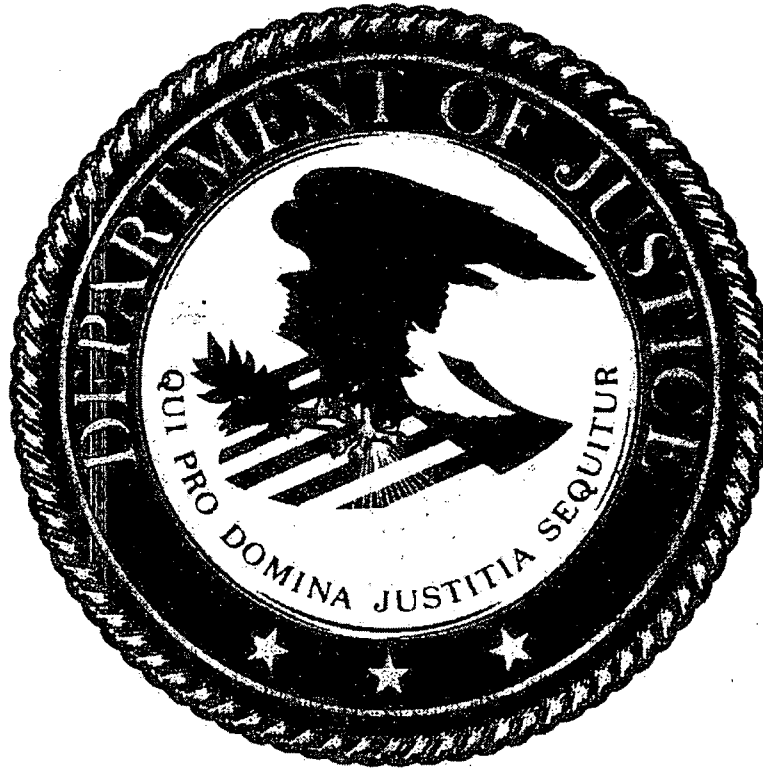
Roark v. U.S.

Attachment 8

**U.S. Department of Justice**

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**DELAYED NOTICE SEARCH WARRANTS:  
A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME**



**SEPTEMBER 2004**



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 22 2004

The Honorable J. Dennis Hastert  
Speaker  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Speaker:

On July 13, 2004, the Department provided you with a copy of a recent report entitled "Report From The Field: The USA PATRIOT Act at Work." We are pleased to provide you with the enclosed supplemental report, "Delayed Notice Search Warrants: A Vital and Time-Honored Tool for Fighting Crime." This report highlights the importance and successful use of delayed notice search warrants. The report also addresses unwarranted concerns that have been raised regarding the constitutionality of this law enforcement technique that has been recognized and upheld by the courts for more than three decades.

The USA PATRIOT Act has been invaluable to the Department of Justice's efforts to prevent terrorism and make America safer while at the same time preserving civil liberties. By passing the USA PATRIOT Act, Congress provided law enforcement and intelligence authorities with important new tools needed to combat the serious terrorist threat faced by the United States. Specifically, the Act enhanced the federal government's ability to share intelligence, strengthened the criminal laws against terrorism, removed obstacles to investigating terrorists, and updated the law to reflect new technologies used by terrorists.

During the early stages of criminal investigations, including terrorism investigations, keeping the existence of an investigation confidential can be critical to its success. To keep from tipping off suspects, in appropriate circumstances the government can petition a court to approve a delayed-notice search warrant, and thus avoid tipping off the suspect to the existence of a criminal or terrorist investigation. A delayed-notice warrant is exactly like an ordinary search warrant in every respect except that law enforcement agents are authorized by a judge to temporarily delay giving notice that the search has been conducted. The USA PATRIOT Act established a uniform nationwide standard for use of delayed-notice search warrants to ensure an even handed application of Constitutional safeguards to all Americans. Unfortunately, the public debate about how delayed-notice warrants work and why investigators need them has featured a great deal of misinformation.

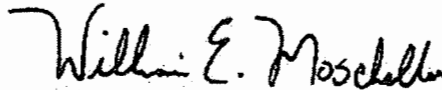
The Honorable J. Dennis Hastert  
Page Two

Along with the other materials the Department has provided to Congress, we hope this report will serve to be informative to you and your constituents about the truth regarding our efforts in the war on terror, and our ever present battle against violent crime and drugs. It is vital that Congress act on the basis of facts rather than fictions. To that end, the Department is fully committed to providing Congress with the information it needs to inform its deliberations.

The progress made by the Department to date in the war against terrorism would not have been possible without the tools and resources provided by Congress. The Department is grateful for the strong support it has received from Congress and looks forward to working closely with Congress to ensure that the key tools contained in the USA PATRIOT Act do not expire at the end of 2005.

If we can be of further assistance regarding this or any other matter, please do not hesitate to contact this office.

Sincerely,

  
William E. Moschella  
Assistant Attorney General

Enclosure

**Delayed-Notice Search Warrants:**  
**A Vital and Time-Honored Tool for Fighting Crime**

*Introduction*

During the early stages of criminal investigations, including terrorism investigations, keeping the existence of an investigation confidential can be critical to its success. Tipping off suspects to the fact that they are under investigation could cause them to flee prosecution, destroy evidence, intimidate or kill witnesses or, in terrorism cases, even accelerate a plot to carry out an attack.

One vital tool for avoiding the harms caused by premature disclosure is the delayed-notice search warrant. A delayed-notice warrant is exactly like an ordinary search warrant in every respect except that law enforcement agents are authorized by a judge to temporarily delay giving notice that the search has been conducted.

Although delayed-notice warrants are a decades-old law enforcement tool, they have received increased attention since the USA PATRIOT Act established a uniform nationwide standard for their use. Unfortunately, the public debate about how delayed-notice warrants work and why investigators need them has featured a great deal of misinformation.

This paper explains how delayed-notice warrants actually work, why they are critical to the success of criminal investigations of all kinds, and what setbacks law enforcement would suffer if this well-established and important authority were limited or eliminated. It also details the time-honored judicial doctrine authorizing delayed notice in certain circumstances, as well as the USA PATRIOT Act's role in harmonizing standards for using delayed-notice warrants. Finally, to demonstrate the importance of delayed-notice warrants in real-world law enforcement, this paper highlights some post-USA PATRIOT Act investigations in which delayed-notice warrants were vital to the investigations' success.

*The Need for Delayed-Notice Search Warrants*

In the vast majority of cases, law enforcement agents provide immediate notice of a search warrant's execution. However, if immediate notice were required in *every* case, agents would find themselves in a quandary in certain sensitive investigations: how to accommodate both the urgent need to conduct a search and the equally pressing need to keep the ongoing investigation confidential. Consider, for example, a case in which law enforcement received a tip that a large shipment of heroin was about to be distributed and obtained a warrant to seize the drugs. To preserve the investigation's confidentiality and yet prevent the drugs' distribution, investigators would prefer to make the seizure appear to be a theft by rival drug traffickers. Should investigators be forced to let the drugs hit the streets because notice of a seizure would disclose the investigation and destroy any

chance of identifying the drug ring's leaders and dismantling the operation — or to make the alternative choice to sacrifice the investigation to keep dangerous drugs out of the community? What if immediate notice would disclose the identity of a cooperating witness, putting that witness in grave danger?

This dilemma is especially acute in terrorism investigations, where the slightest indication of government interest can lead a loosely connected cell to dissolve, only to re-form at some other time and place in pursuit of some other plot. Should investigators who receive a tip of an imminent attack decline to search the suspected terrorist's residence for evidence of when and where the attack will occur because notice of the search would prevent law enforcement agents from learning the identities of the remainder of the terrorist's cell, leaving it free to plan future attacks?

Fortunately, because delayed-notice search warrants are available in situations such as these, investigators do not have to choose between pursuing terrorists and criminals and protecting the public safety. Like any other search warrant, and as required by the Fourth Amendment, a delayed-notice search warrant is issued by a federal judge upon a showing of probable cause that the property to be searched for or seized constitutes evidence of a criminal offense. A delayed-notice warrant differs from an ordinary search warrant only in that the judge specifically authorizes the law enforcement officers executing the warrant to wait for a limited period of time before notifying the subject of the search that the warrant has been executed.

#### *Delayed-Notice Search Warrants: A Longstanding Law Enforcement Tool*

Delayed-notice search warrants are nothing new. Judges around the country have been issuing them for decades in circumstances where there are important reasons not to provide immediate notice that a search has been conducted. Such warrants have been squarely upheld by courts nationwide in a variety of contexts — from drug trafficking investigations to child pornography cases.

Long before enactment of the USA PATRIOT Act, the Supreme Court expressly held in *United States v. Dalia* that covert entry pursuant to a judicial warrant does not violate the Fourth Amendment, rejecting the argument that it was unconstitutional as “frivolous.”<sup>1</sup> Since *Dalia*, three federal courts of appeals have considered the constitutionality of delayed-notice search warrants, and all three have upheld them.<sup>2</sup> In 1986, in *United States v. Freitas*, the Ninth Circuit considered the constitutionality of a search warrant allowing surreptitious entry to ascertain the status of a methamphetamine laboratory without revealing the existence of the investigation. While the court ruled that the covert search was permissible, it further held that the warrant's failure to specify when notice must be given was impermissible. The court set as a standard that notice

<sup>1</sup> See *Dalia v. United States*, 441 U.S. 238 (1979); see also *Katz v. United States*, 389 U.S. 347 (1967).

<sup>2</sup> See *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

must be given within “a reasonable, but short, time” and ruled that that period could not exceed seven days absent “a strong showing of necessity.”

Four years later, the Second Circuit reached a similar conclusion but articulated a different standard. In *United States v. Villegas*, the court considered the permissibility of a search warrant authorizing delayed notice of the search of a cocaine factory because the primary suspect’s coconspirators had yet to be identified. The court held that delay is permissible if investigators show there is “good reason” for the delay. The Second Circuit agreed with the Ninth Circuit that the initial delay should not exceed seven days but allowed for further delays if each is justified by “a fresh showing of the need for further delay.”

In 2000, in *United States v. Simon*, a decision that stemmed from a warrant to seize evidence of child pornography, the Fourth Circuit also ruled that delayed notification was constitutionally permissible. In that decision, though, the court ruled that a 45-day initial delay was constitutional.

In short, it was clear long before the USA PATRIOT Act that judges have the authority to authorize some delay in giving the notice of a search warrant’s execution that is required by Rule 41 of the Federal Rules of Criminal Procedure — but the law governing issuance of delayed-noticed warrants was a mix of inconsistent rules, practices and court decisions varying from jurisdiction to jurisdiction.

### *Section 213 of the USA PATRIOT Act*

In enacting the USA PATRIOT Act, Congress recognized that delayed-notice search warrants are a vital aspect of the Justice Department’s strategy of prevention — detecting and incapacitating terrorists, drug dealers and other criminals before they can harm our nation. Section 213 of the Act, codified at 18 U.S.C. § 3103a, created an explicit statutory authority for investigators and prosecutors to ask a court for permission to delay temporarily notice that a warrant has been executed.

As discussed above, section 213 did not create delayed-notice search warrants, which have been issued by judges on their own authority for years. In fact, in a Texas drug-trafficking investigation, a court that had authorized a delayed-notice search warrant before enactment of the USA PATRIOT Act authorized a further delay of notification after enactment of the USA PATRIOT Act without modifying the procedure or justification for doing so.

Nor did section 213, as some critics have claimed, expand the government’s ability to use delayed-notice warrants or authorize law enforcement to search private property without any notice to the owner. Rather, section 213 merely codified the authority that law enforcement had already possessed for decades and clarified the standard for its application. By doing so, the USA PATRIOT Act simply established a uniform national standard for the use of this vital crime-fighting tool.

Under section 213, delayed-notice warrants can be used only upon the issuance of an order from an Article III court, and only in extremely narrow circumstances. A court may allow law enforcement to delay notification only if the judge has reasonable cause to believe that immediate notification would result in danger to the life or physical safety of an individual, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or other serious jeopardy to an investigation or undue delay of a trial.<sup>3</sup> As such, section 213 provides greater safeguards for Americans' civil liberties than did the hodgepodge of pre-USA PATRIOT Act standards for delaying notice, which did not uniformly constrain judges' discretion as to what situations justified delays.

In no case does section 213 allow law enforcement to conduct searches or seizures without giving notice that the property has been searched or seized. Rather, section 213 expressly *requires* notice to be given, and merely allows agents, with a judge's approval, to delay notice temporarily for a "reasonable period" of time specified in the warrant. No delay beyond this specified time is allowed without further court authorization.

Section 213 also prohibits delayed-notice seizures where searches will suffice. The provision expressly requires that any warrant issued under its authority must prohibit the seizure of any tangible property or communication unless the court finds there is "reasonable necessity" for the seizure.

#### *Important Real-World Benefits of Delayed-Notice Warrants*

Delayed-notice warrants issued under section 213 over the course of the last three years have been invaluable in actual law enforcement investigations of crimes ranging from drug trafficking and money laundering to international terrorism. Although some of its uses cannot be discussed publicly because they have occurred in ongoing investigations or involve classified information, this section provides a number of examples of section 213's use that demonstrate just how vital the authority codified there is to effective law enforcement.

##### I. Terrorism Investigations

Delayed-notice warrants have played critical roles in a number of investigations of the activities of terrorists and their supporters in the United States.

##### Examples:

- In *United States v. Odeh*, a narco-terrorism case, a court issued a section 213 warrant to search an envelope mailed to a target of the investigation. The search confirmed that the target was operating an

<sup>3</sup> See 18 U.S.C. § 2705(a)(2).



illegal money exchange to funnel money to the Middle East, including to an associate of an apparent Islamic Jihad operative in Israel. The delayed-notice provision allowed investigators to conduct the search without compromising an ongoing wiretap on the target and several confederates. In May 2003, the target was notified of the search warrant's execution and charged.

- In a Chicago-area investigation in the spring of 2003, a court-authorized delayed-notice search warrant allowed investigators to gain evidence of a plan to ship unmanned aerial vehicle (UAV) components to Pakistan, but to gain that evidence without prompting the suspects to flee. The UAVs at issue would have been capable of carrying up to 200 pounds of cargo, potentially explosives, while guided out of line of sight by a laptop computer. Delayed notice of a search of email communications provided investigators information that allowed them to defer arresting the main suspect, who has since pleaded guilty, until all the shipments of UAV components had been located and were known to be in Chicago.

## II. Drug Investigations

The usefulness of delayed-notice search warrants is not limited to terrorism investigations. In fact, they have been particularly useful in the investigation of drug conspiracies because drug-trafficking operations often involve tenuous connections among participants that dissolve at the slightest hint of an investigation, as well as evidence that is quickly and easily destroyed and cooperating witnesses who are placed at great risk if the existence of an investigation is disclosed.

### Examples:

- A delayed-notice warrant issued under section 213 was of tremendous value in Operation Candy Box, a multi-jurisdictional Organized Crime and Drug Enforcement Task Force (OCDETF) investigation targeting a Canadian-based ecstasy and marijuana trafficking organization. In 2004, investigators learned that an automobile loaded with a large quantity of ecstasy would be crossing the U.S.-Canadian border en route to Florida. On March 5, 2004, after the suspect vehicle crossed into the United States near Buffalo, DEA agents followed the vehicle until the driver stopped at a restaurant just off the highway. Thereafter, one agent used a duplicate key to enter the vehicle and drive away while other agents spread broken glass in the parking space to create the impression that the vehicle had been stolen. A search of the vehicle revealed a hidden compartment containing 30,000 ecstasy tablets and ten pounds of high-potency marijuana. Because investigators were able to obtain a delayed notification search warrant, the drugs were seized, the investigation was not jeopardized, and over 130 individuals were later arrested on March 31, 2004 in a two-nation crackdown. Without the delayed-notification search

warrant, agents would have been forced to reveal the existence of the investigation prematurely, which almost certainly would have resulted in the flight of many of the targets of the investigation.

- In 2002, as part of a massive multi-state investigation of methamphetamine trafficking, the DEA learned that suspects were preparing to distribute a large quantity of methamphetamine in Indianapolis. Openly seizing the drugs would have compromised an investigation reaching as far as Alabama, Arizona, California and Hawaii; not seizing the drugs would have resulted in their distribution. With a court's approval, DEA agents searched the stash location and seized 8.5 pounds of methamphetamine without providing immediate notice of the seizure. In the wake of the drugs' disappearance, two main suspects had a telephone conversation about the disappearance that provided investigators further leads, eventually resulting in the seizure of fifteen more pounds of methamphetamine and the identification of the other members of the criminal organization. More than 100 individuals have been charged with drug trafficking as a part of this investigation, and a number have already been convicted.
- During an investigation into a nationwide organization that distributed cocaine, methamphetamine, and marijuana, the court issued a delayed notice warrant to search a residence in which agents seized more than 225 kilograms of drugs. The organization relied heavily on the irregular use of cell phones and usually discontinued use of particular cell phones after a seizure of drugs or drug proceeds, hampering continued telephone interception. Here, however, interceptions after the delayed-notice seizure indicated that the suspects believed that other drug dealers had stolen their drugs. None of the telephones intercepted was disposed of, and no one in the organization discontinued use of telephones. The delayed-notice seizure enabled the government to prevent sale of the seized drugs without disrupting the larger investigation.
- In 2002, DEA agents in California were intercepting wire communications of an OCDETF target who was distributing heroin and discovered that a load of heroin was to be delivered to a particular residence. Using a delayed notification search warrant, agents entered the residence. While they were able to seize a quantity of heroin, the load for which they were searching had not yet arrived. Had agents left notice at that point that law enforcement had entered the residence, the load would not have been delivered and the principals involved in the drug conspiracy would have scattered. A delayed-notice warrant, however, permitted the investigation to continue until the following week, when agents were able to seize 54 pounds of heroin and arrest the main targets of the investigation.

- In California, investigators successfully utilized a delayed-notification search warrant in a case involving methamphetamine. In that case, the perpetrators had ordered a 22-liter flask and heating mantle for their methamphetamine lab, and investigators wanted to intercept the shipment and place a beeper inside to track the items. The tracker worked, and investigators eventually took down a lab in the process of cooking about 12 pounds of methamphetamine. Had agents given notice at the time the beeper was installed, the investigation would have ended immediately.

### III. Investigations of Other Serious Crimes

Delayed-notice warrants have also played critical roles in investigations of a variety of other serious criminal activities.

#### Examples:

- During the investigative phase of what became a major drug prosecution in Pennsylvania, investigators using a wiretap learned of a counterfeit credit card operation. At prosecutors' request, the court issued a delayed-notice search warrant for a package of counterfeit cards scheduled for delivery to the business of one of the drug suspects. This successful search enabled investigators to secure evidence of the credit card fraud and to notify banks that certain accounts had been compromised — but to do so without immediately disclosing to the suspects either the existence of the wiretap or the investigation itself. Delaying notification of the warrant's execution allowed for immediate action to prevent possible imminent harm from the credit card counterfeiting scheme while maintaining the temporary confidentiality of the drug investigation, which was not yet ripe for disclosure. As a result, prosecutors were able to secure multiple convictions in both the drug prosecution and the credit card prosecution.
- A delayed-notice search warrant allowed agents investigating an international money laundering operation to secure evidence of the conspiracy without jeopardizing their investigation. An extensive network of perpetrators was laundering more than \$20 million per year in proceeds from a black market peso exchange operating in New York, Miami and Colombia, Israeli drug trafficking, and California-based tax evasion. Before the investigation was made public, investigators learned that the main suspect was shipping a large volume of cash from Miami to New York. The court approved a delayed-notice warrant, which allowed agents to photograph the money — memorializing its existence for use in prosecuting the conspiracy — without compromising the confidentiality of the ongoing investigation.

*Conclusion*

Both before and after the enactment of section 213 of the USA PATRIOT Act, immediate notice that a search warrant has been executed has been standard procedure. As has always been the case, delayed-notice warrants are used infrequently and judiciously — only in appropriate situations where immediate notice likely would harm individuals or compromise investigations, and even then only with a judge's express approval. As demonstrated by the examples above, however, the ability to delay notice that a search or seizure has taken place is invaluable when those rare situations arise. The investigators and prosecutors on the front lines of fighting crime and terrorism should not be forced to choose between preventing immediate harm — such as a terrorist attack or an influx of illegal drugs — and completing a sensitive investigation that might shut down the entire terror cell or drug trafficking operation. Thanks to the long-standing availability of delayed-notice warrants in these circumstances, they do not have to make that choice.